Democratic Accountability and the Use of Force in International Law

Edited by
CHARLOTTE KU
AND HAROLD K. JACOBSON

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The spread of democracy to a majority of the world's states and the legitimization of the use of force by multilateral institutions such as NATO and the UN have been two key developments since the Second World War. In the last decade these developments have become intertwined, as multilateral forces moved from traditional peacekeeping to peace enforcement among warring parties. This book explores the experiences of nine countries (Canada, France, Germany, India, Japan, Norway, Russia, the United Kingdom, and the United States) in the deployment of armed forces under the UN and NATO, asking who has been and should be accountable to the citizens of these nations, and to the citizens of states who are the object of deployments, for the decisions made in such military actions. The authors conclude that national-level mechanisms have been most important in ensuring democratic accountability of national and international decision-makers.

CHARLOTTE KU is executive vice president and executive director of the American Society of International Law. Her recent publications include *Global Governance and the Changing Face of International Law* (2001), "Using Military Forces under International Auspices and Democratic Accountability" (2001), and "American Lawyers and International Competence" (with Christopher J. Borgen, 2000). She is also coeditor with Paul Diehl of the widely used collection, *International Law: Classic and Contemporary Readings* (1998).

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To Jake's family and students, that his humanity and scholarship may live on.

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and Service-providing NGOs (edited by Thomas G. Weiss) (1998); "The United Nations and NATO: The Limits on Cooperation between International Organizations" in *Trilateral Perspectives on International Legal Issues: Relevance of Domestic Law and Policy* (edited by Michael K. Young and Yuji Iwasawa) (1996); "Collective Security and Collective Defense: Changing Conceptions and Institutions" in *The United Nations in a New World Order* (Claremont McKenna College Monograph Series 6, 1993).

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Preface

Harold Jacobson died unexpectedly as we neared completion of this book, but Jake and I had finished final drafts of the opening and closing chapters and we had received all the other chapters and worked through them together. So the work remains as it began, a joint effort, codirected and coedited by the two of us.

This project had its origins in an on-going conversation that Jake and I began in late 1995 about the role of international institutions after the end of the Cold War. We both observed that the world had been unprepared for the post-Cold War world, and that this lack of preparation had handicapped the important institutions and powers in handling the problems that emerged after 1991. Since there had been no concept of or opportunity for post-war planning, as there had been during the First and Second World Wars, there was no coherent vision of what the post-Cold War world, including its international institutions, should look like.

We considered what questions demanded an answer, and concluded that an important but not well-understood issue was how democracies maintained accountability to their citizens when they acted under the auspices of international institutions. As Americans, we thought of the rallying cry of the American colonists against Westminster, "No taxation without representation," as capturing the right of citizens of democratic countries to understand and to shape their country's international obligations. The question seemed simple, but we soon discovered the complexity of undertaking research in this area because of the academic tradition of exploring international and national political and societal issues separately. Nevertheless, we knew that we had to attempt the analysis because the world's democracies have the military power and responsibility to use force under international auspices. They also have an obligation to their citizens to make transparent decisions that conform to tenets of democratic accountability. We needed to understand how domestic politics might be used to ensure the effective implementation of decisions made by international institutions by strengthening national commitment to those institutions and popular support for their decisions.

We began our discussion with an open and congenial international team of authors in September 1998 at Airlie House in Warrenton, Virginia. Our colleagues listened, considered, and brought their wisdom and experience to refining and probing the questions that Jake and I posed to them. We met again in Glen Cove (New York), Bermuda, and Bergen (Norway). With each meeting, the project gained definition and depth. Our colleagues whose disciplinary home is in international law complemented our international relations and political science orientations; our non-law colleagues added valuable insight into the political and societal context in which law operates. We are grateful to all of them.

We are grateful to the many individuals who took the time to talk with us. They included officials at the headquarters of the North Atlantic Treaty Organization (NATO) in Brussels, with whom we spoke soon after the 1998 Activation Order that led to Operation Allied Force; the Secretariat and delegation members at the United Nations headquarters in New York; and academics, legislators, military officials, and policy makers in many of the countries included in this study. We benefited greatly from their insights and perspectives. Since we agreed that all information generated from the interviews would be used without attribution, we do not list these individuals here by name.

We were fortunate to have a team of informal advisers who reviewed materials as they developed and offered helpful suggestions and refinements throughout the project. These included James Sutterlin (Yale University), Oscar Schachter (Columbia University), José Alvarez (Columbia University), Anne Julie Semb (Norwegian Institute of International Studies), William Durch (Henry L. Stimson Center), Maurice Copithorne (University of British Columbia), and Edwina Campbell (Industrial College of the Armed Forces, National Defense University). Special thanks are owed to Dr. Campbell, who provided invaluable comments on various drafts of the book.

We are grateful to the American Society of International Law for its sponsorship of this project, the latest in a long line of studies produced under ASIL auspices that brought together a multinational and multidisciplinary team to examine an issue of contemporary significance. From Dayton to September 11, 2001, the course of this project seemed to span the entire spectrum of modern conflict, from peacekeeping to war. This gave the study an immediacy that reinforced the relevancy of its issues, but also made their assessment somewhat harder. As editors, we were cognizant that our discussion needed to stand the test of time, even though we were studying a highly contemporary set of questions. The bulk of the research and analysis was completed prior to September 11, 2001,

but few changes were made as the premises and conclusions of the study remain relevant to the post-September 11 world.

We wish to thank the staff of the American Society of International Law, who provided research and administrative support, especially the contributions of Jill Watson, Kuldip Singh Dosanjh, Sandra Liebel, Edra London, and Trish Thomas. We also thank the Center for Political Studies at the University of Michigan for research and administrative support, especially Laurie Pierson for her careful preparation of the manuscript. The help of the Center's director, William Zimmerman, and Barbara Opal made it possible for me to finish the work that Jake and I began, and I am grateful to both of them.

This project was an amiable and enriching intellectual experience, thanks to our contributors, the Ford Foundation, which made our work possible, and Cambridge University Press, especially its law senior commissioning editor, Finola O'Sullivan.

The project started as a conversation between two people and grew to include scores who contributed to our understanding of accountability, democracy, and international institutions. We hope that our collective efforts offer a new approach to the complex interaction of national and international institutions in providing accountability to citizens for actions their countries take under international auspices. Jake and I concluded on an optimistic and hopeful note that democracy, accountability, and international institutions are not incompatible concepts, that a "mixed system" of national and international accountability is in the process of being crafted.

In Jake's memory, my project colleagues and I dedicate this work to his family and to his many students, in the hope and expectation that his humanity and scholarship will live on.

Washington, DC CHARLOTTE KU

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Abbreviations

CESDP	Common European Security and Defense Policy
CFSP	Common Foreign and Security Policy
CIS	Commonwealth of Independent States
CPSU	Communist Party of the Soviet Union
CSCE	Conference on Security and Cooperation in Europe
DOMREP	Mission of the Representative of the Secretary-General in the Dominican Republic
DPKO	United Nations Department of Peacekeeping Operations
ECOWAS	Economic Community of West African States
EDC	European Defense Community
ESDI	European Security and Defense Identity/Initiative
ESDP	European Security and Defense Policy
EU	European Union
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFOR	NATO-led Implementation Force
INTERFET	International Force in East Timor
KDOM/KVM	Kosovo Diplomatic Observer Mission/Verification Mission
KFOR	Kosovo Force
KLA	Kosovo Liberation Army
MFO	Multinational Force and Observers, Sinai
MIF	Maritime Interdiction Force
MINUGUA	United Nations Verification Mission in Guatemala
MINURCA	United Nations Mission in the Central African Republic
MINURSO	United Nations Mission for the Referendum in Western Sahara

MIPONUH	United Nations Civilian Police Mission in Haiti
MISAB	Mission to Monitor the Implementation of the Bangui Agreements
MNF	Multinational Force
MONUA	United Nations Observer Mission in Angola
MONUC	United Nations Organization Mission in the Democratic Republic of Congo
MPF	Multinational Protection Force
NAC	North Atlantic Council
NAM	Non-Aligned Movement
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organization
OAS	Organization of American States
OAU	Organization of African Unity (now the African Union)
ONUC	United Nations Operation in the Congo
ONUCA	United Nations Observer Group in Central America
ONUMOZ	United Nations Operation in Mozambique
ONUSAL	United Nations Observer Mission in El Salvador
ONUVEH	United Nations Observer Group for the Verification of the Elections in Haiti
OSCE	Organization for Security and Cooperation in Europe
OSGAP	Office of the Secretary-General in Afghanistan and Pakistan
P-5	Five permanent members of the UN Security Council
PDD-25	Presidential Decision Directive 25
RECAMP	Reforcement des Capacités Africaines de Maintien de la Paix
ROE	Rules of engagement
RPF	Rwandan Patriotic Front
SACEUR	Supreme Allied Commander, Europe
SEATO	Southeast Asian Treaty Organization
SFOR	Stabilization Force (NATO)
SOFA	Status-of-forces Agreement
UNAMET	United Nations Mission in East Timor
UNAMIC	United Nations Advance Mission in Cambodia
UNAMIR	United Nations Assistance Mission for Rwanda
UNAMSIL	United Nations Observer Mission in Sierra Leone
UNASOG	United Nations Aouzou Strip Observer Mission
UNAVEM I	United Nations Angola Verification Mission I

UNAVEM II	United Nations Angola Verification Mission II
UNAVEM III	United Nations Angola Verification Mission III
UNCRO	United Nations Confidence Restoration Operation
UNDOF	United Nations Disengagement Observer Force
UNEF I	United Nations Emergency Force I
UNEF II	United Nations Emergency Force II
UNESCO	United Nations Education, Scientific, and Cultural Organization
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNGA	United Nations General Assembly
UNGOMAP	United Nations Good Offices Mission in Afghanistan and Pakistan
UNHCR	United Nations High Commissioner for Refugees
UNIFIL	United Nations Interim Force in Lebanon
UNIIMOG	United Nations Iran–Iraq Military Observer Group
UNIKOM	United Nations Iraq–Kuwait Observation Mission
UN-IPTF	United Nations International Police Task Force
UNIPOM	United Nations India–Pakistan Observation Mission
UNITAF	Unified Task Force (Operation Restore Hope)
UNMACC	United Nations Mine Action Coordination Centre in Kosovo
UNMEE	United Nations Mission in Ethiopia and Eritrea
UNMIBH	United Nations Mission in Bosnia and Herzegovina
UNMIH	United Nations Mission in Haiti
UNMIK	United Nations Interim Administration Mission in Kosovo
UNMO	United Nations Military Observer
UNMOGIP	United Nations Military Observer Group in India and Pakistan
UNMOP	United Nations Mission of Observers in Prevlaka
UNMOT	United Nations Mission of Observers in Tajikistan
UNOGIL	United Nations Observation Group in Lebanon
UNOMIG	United Nations Observer Mission in Georgia
UNOMIL	United Nations Observer Mission in Liberia
UNOMSIL	United Nations Observer Mission in Sierra Leone
UNOMUR	United Nations Observer Mission in Uganda–Rwanda
UNOSOM I	United Nations Operation in Somalia I
UNOSOM II	United Nations Operation in Somalia II
UNPA	United Nations Participation Act
UNPREDEP	United Nations Preventive Deployment Force
UNPROFOR	United Nations Protection Force

UNPSG	United Nations Civilian Police Support Group
UNSC	United Nations Security Council
UNSCOB	United Nations Commission for the Balkans
UNSCOM	United Nations Special Commission
UNSF	United Nations Security Force in West New Guinea
UNSMIH	United Nations Support Mission in Haiti
UNTAC	United Nations Transitional Authority in Cambodia
UNTAES	United Nations Transitional Administration for Eastern Slavonia, Baranja, and Western Sirmium
UNTAET	United Nations Transitional Administration in East Timor
UNTAG	United Nations Transition Assistance Group
UNTCOK	United Nations Temporary Commission on Korea
UNTMIH	United Nations Transition Mission in Haiti
UNTSO	United Nations Truce Supervision Organization
UNV	United Nations Volunteers
UNYOM	United Nations Yemen Observation Mission
WEU	Western European Union

Part I

Introduction

1 Broaching the issues

Charlotte Ku and Harold K. Jacobson

The attacks on the World Trade Center in New York and the Pentagon in the Washington, DC area on September 11, 2001 were a sobering reminder that the use of force to destroy is still very much a part of life. The instruments of war may have changed and the field of battle been redefined, but the use of force to change the existing political order cannot yet be relegated to history. For the United States, September 11 was a further reminder of one of the principal functions of government – protection of its citizens. For the world, this event added the dimension of states waging war against a non-state enemy. Applying traditional methods and means to fighting a global but non-state threat and attack will engage lawyers, analysts, and policy makers for some time.

International responses to September 11 showed how the world had changed since 1941, the last time the United States was attacked from abroad on its territory. In 2001, the United Nations Security Council invoked Chapter VII and the North Atlantic Council took action under Article 5 to authorize US measures to counter a threat to the peace and restore stability to the North Atlantic area. The US government paid close attention to the reactions, not only of its own citizens, but of a diverse global public opinion, to the attacks and its response to them. Almost immediately, officials around the world began to think about how the United Nations could contribute to nation-building and post-conflict reconstruction. All of these elements – non-state actors, global public opinion, international institutions – will play major roles in the political order of the early twenty-first century.

Since the end of the Second World War, states have sought to limit their right to use military force unilaterally and to establish ways in which military forces could be used for collective purposes under the auspices of international institutions. This book is about both of these trends, but especially about a question that has largely been ignored in the literature on using military forces under the auspices of international institutions: how to ensure democratic accountability. The gap in the literature is striking, because establishing and maintaining democratic accountability in the

use of military forces has been a major aspect of the historical development of modern democratic governments. When democracies unilaterally used their military forces in the twentieth century, for example, when French forces were embroiled in Algeria and US forces were enmeshed in Vietnam, accountability was an issue.

Establishing the monopoly of coercion was a crucial feature of the creation of modern states. Ensuring that there would be accountability to citizens for the use of military forces was a central component of the struggle to establish democratic forms of government. But now decisions about the uses of military forces are made in international institutions far from the representative structures that democratic governments have relied upon to provide accountability. Giving international institutions authority to deploy military forces is a matter that has historically provoked heated debate in the United States and other democracies. How is democratic accountability maintained in these cases?

The failure to examine issues of democratic accountability when military forces are used under the auspices of international institutions may stem from several sources. When plans to give international institutions the authority to use military forces were first conceived, their advocates thought that the threat to use force would deter potential aggressors, or that peaceful settlement or sanctions would cause an aggressor to pull back. They did not focus on issues arising out of the actual use of military forces.

Traditionally, political theorists regarded democracy as a system of governance within a state's territorial limits, while international law assumed that international problems were fundamentally different from domestic ones and not susceptible to the same democratic processes and institutions of governance. However, experience with the uses of military forces under the auspices of international institutions since the Second World War shows otherwise. Enhancing democratic accountability will ultimately be crucial for the effective operation of international institutions, because democracies are the major military powers of the early twenty-first century.

The North Atlantic Treaty Organization (NATO)'s Operation Allied Force in Kosovo in 1999 brought into sharp relief several fundamental issues. What justifies intervention in an intra-state conflict? Is authorization by the United Nations Security Council (UNSC) essential for general acceptance of the legitimacy of the use of military forces? Is the authorization of a body such as the North Atlantic Council (NAC) sufficient for those countries taking part in the operation? How do non-NATO members see such actions? When do national legislatures have to take specific action to authorize participation of their country's military forces

in international operations? To whom are military commanders responsible? What laws govern the conduct of military personnel participating in such operations? What is the individual responsibility of officials who make decisions about using military forces under the auspices of international institutions, and of military personnel who take part in international operations? Practice in these areas has outpaced scholarly analysis and understanding of the issues involved, especially with the prospect of establishing an International Criminal Court following adoption of its Statute in 1998. With the Statute's entry into force in July 2002, the ICC is expected to become operational in 2003.[1]

This book is a step toward filling this gap in the literature. It first specifies the problem, concentrating on the experience of nine democracies – Canada, France, Germany, India, Japan, Norway, Russia, the United Kingdom, and the United States. Each has some form of democratic government, though all fall short of fully meeting abstract criteria for democracy. The historic route taken by each country to establish democratic institutions has varied, and this is a factor in understanding the requirements and operation of democratic accountability in each of the nine cases. Russia is the most recent democracy of the nine.

All nine countries have contributed military forces to operations conducted under the auspices of international institutions, although Germany and Japan joined the ranks of contributing countries only in the 1990s, and Japan's contribution has been restricted. The participation of most or all of them is essential to any large-scale military operation in the opening decades of the twenty-first century.

This chapter first explores the concept of democratic accountability, and next examines how the founders of contemporary international institutions thought they would be involved in using military forces. Drawing on the history of how international institutions actually have been involved, a typology of uses of military forces is created. The issues of democratic accountability that have arisen when military forces have been used under the auspices of international institutions are discussed, and these issues are grouped under broad headings. Using the typology of military forces and the list of democratic accountability issues, a matrix that provides a framework for analyzing the experiences of the nine countries is created, and it is demonstrated why these nine countries provide a good sample for analyzing the issues. Finally, the detailed analyses that follow are introduced.

[1] See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF. 183/10 (1998).

Tenets of democracy: participation in decision-making and accountability

Democracy is a term used to describe both a set of ideals and historical and contemporary political systems. As an ideal, democracy involves two basic principles, the rule of law and majority rule. The rule of law means that political authority is exercised according to predetermined law.[2] In the sense in which this term is used in this book, it is sometimes referred to as constitutionalism, a principle designed to prevent the arbitrary and capricious exercise of authority. Concern for the rule of law is especially acute with respect to the use of coercive power. Majority rule is a principle for decision-making. When there is disagreement about policy or a course of action, the disagreement is settled by voting, and the votes of the majority prevail.[3] Majority rule respects human equality. It may be preferred as a principle for settling disagreements for this reason, or simply because of the difficulty of gaining widespread acceptance for any other principle.

Conflicts arise in the application of the two basic principles of democracy. Rigid adherence to an unchanging rule of law can frustrate majority rule. Ensuring that there are modalities for changing the basic constitutional law is essential to successful democratic systems. At the same time, because majority rule can conflict with the rule of law, democratic ideals generally involve some limits on it – for instance, the protection of basic human rights and minority views.

Starting with Aristotle, political theorists elaborated democratic ideals and designed institutions to promote them. For 200 years, states have developed and tried to perfect such institutions. The modern movement to achieve democratic ideals in governance dates at least from Magna Carta (1215), and includes the Petition of Rights (1628), the United States Bill of Rights (1789), and the French National Assembly's Declaration of the Rights of Man and Citizen (1789).

The movement to realize democratic ideals gained strength and momentum in the second half of the twentieth century, beginning with the UN General Assembly's adoption of the Universal Declaration of Human Rights on December 10, 1948. The Declaration proclaims human equality and forbids discrimination. It includes the rights of freedom of information, association, assembly, participation, speech, and movement. It calls for periodic elections. It specifies civil rights that are to be protected.

[2] Vernon Bogdanor (ed.), *The Blackwell Encyclopaedia of Political Science* (Oxford, Basil Blackwell, 1991), pp. 547–8.
[3] *Ibid.*, pp. 350–1.

The broad provisions of the Declaration were subsequently incorporated into the legally binding International Covenants on Civil and Political Rights and Economic and Social Rights, to which more than 140 states were parties in 2001.

Beyond these UN instruments, democratic ideals were embodied in a number of other important international documents after the Second World War. They included the European Convention on Human Rights and its Protocols, the 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe (CSCE), the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights. The Charter of Paris for a New Europe, adopted by the CSCE in 1990, was an important step in the movement toward the realization of democratic ideals. It contained an almost textbook-like definition of democracy: "Democratic Government is based on the will of the people, expressed regularly through free and fair elections. Democracy has as its foundation respect for the human person and the rule of law."[4]

Modern states embody a number of institutional variations that have been developed to achieve democratic ideals. The institutions and practices of democracy are an evolving phenomenon, and all states fall short of fully meeting democratic ideals. Only in the twentieth century did they begin to allow all adults, regardless of gender, race, or financial means, to participate in political life. Most modern polities involve large numbers of individuals, and democratic participation is only possible through representation. To ensure that representatives are responsive to public wishes, they are chosen in periodic elections based on universal adult suffrage. Elections are an important means to ensure democratic accountability.

Although some states had some democratic characteristics for centuries, the development of democratic governments is a product of the twentieth century. The trend accelerated sharply with the fall of the Berlin Wall in 1989 and the collapse of communism in the Soviet Union in 1991. In 1987, there were fewer than 70 democratic states; by 2000, 120 states had governments that by broad criteria could be called democratic.[5] In 2000, democracies constituted almost 60 percent of the states in the world, and included more than 60 percent of the world's population. The trend toward democracy was one of the most prominent developments of the late twentieth century.

[4] Cited in American Society of International Law (1991) 30 *International Legal Materials* 190.

[5] Roger Kaplan (ed.), "The Comparative Survey of Freedom: 2000, Freedom around the World" (2001) 28 *Freedom Review* 1.

In June 2000, the foreign ministers of more than 100 democratic states participated in the World Forum on Democracy, in Warsaw, Poland, a non-governmental conference convened by Freedom House. In the Warsaw Declaration, "Toward a Community of Democracies," they agreed to respect and uphold two core democratic principles of particular relevance to this study:

- that the legislature be duly elected and transparent and accountable to the people;
- that civilian, democratic control over the military be established and preserved.[6]

The researchers of this study expect that the increase in the number of democracies will broaden the use of domestic democratic procedures in decisions to deploy and use military forces. This will, in turn, have an effect on the way in which international institutions meet the demands placed upon them to deal with threats to the peace, but also lead to demands that they themselves become democratically accountable.

In all democratic states, elected representatives make policies that affect individual lives. Formal arrangements for making these decisions broadly divide into two types, parliamentary and presidential systems. In the former, executive and legislative authority is fused, and while parliamentary assent is necessary for the adoption of laws, this frequently is assured through disciplined political parties comprising the government majority or coalition. In the latter, legislative assent is much more problematic. In both types of systems, however, ultimate accountability is assured through regular elections. Voters choose individuals or parties on the basis of expectations about the decisions that they will make in office, and they can remove from office those with whose decisions they do not agree.

Efforts to realize democratic ideals have taken place primarily within the context of territorially defined states and smaller political units, such as municipalities. Political theorists have given relatively little thought to the impact on democratic accountability when important state functions are shared with international institutions. But ensuring that their decision-making accords with democratic tenets becomes increasingly important as international institutions gain authority. The legitimacy of international decisions and their acceptance by the citizens of democratic (and to some degree all) states depend on it.

The principle of the rule of law exists in international law, created through treaties and custom, as domestic law is created through legislation

[6] "Final Warsaw Declaration: Toward a Community of Democracies," Warsaw, Poland (June 27, 2000) at the US Department of State's website, www.state.gov/www/global.

and practice. Determining whether individual, institutional, and state behavior is in accord with international law is no more problematic than determining whether individual and collective behavior is in accord with domestic law. In both systems, laws are not always followed, but violations of the law do not imply that it does not exist.

Majority rule was, however, not a principle of classical international law. Intergovernmental international institutions are associations of states. Because of the doctrine of sovereign equality of states, decisions in such international institutions historically required unanimity. Gradually, some organizations, such as the European Union (EU), have introduced majority voting for some decisions, but they remain the exception to the rule. Most international institutions are still comprised of states, a sizeable number of which are not democracies.

The historically undemocratic character of international relations and international law exacerbates the task of realizing the tenet of majority rule in international institutions. International law assumes that: (1) the executive undertakes and manages a state's international commitments; (2) decisions that emerge from domestic democratic processes are not acceptable reasons for failure to comply with international obligations; and (3) the powers of a government "to bind a state for the future seem to be virtually unlimited."[7] When international institutions and the law they generated were geared to coordinating state actions, with limited direct effect on individual citizens, democratic accountability concerns were minimal. As international law and institutions have broadened and deepened their spheres of competence, and substantial member state resources have been required to carry out their decisions, this has changed.

To become democratic, international institutions will most likely require new concepts and experience with the implementation of those concepts. As the research team explore the application of majority rule to international institutions, we should not think only in terms of analogies with political systems currently existing within states. Lessons drawn from states' experience may not be directly applicable to international institutions.

The work of Robert A. Dahl may be particularly helpful in conceptualizing the issues facing international institutions. According to Dahl, "a key characteristic of democracy is the continuing responsiveness of the government to the preferences of its citizens, considered as political

[7] James Crawford, "Democracy and International Law" (1994) 64 *The British Yearbook of International Law* 118.

equals."[8] He identified five criteria[9] of a democratic polity:

Effective participation: All members must have equal and effective opportunities for making their views known before a policy is adopted.
Voting equality: Every member must have an equal and effective opportunity to vote, and all votes must be counted as equal.
Enlightened understanding: Each member must have equal and effective opportunities for learning about relevant alternative policies and their likely consequences.
Control of the agenda: Members must have the exclusive opportunity to decide how and, if they choose, what matters are to be placed on the agenda; policies are always open to change.
Inclusion of adults: Adult permanent residents exercise fully the rights implied by the first four criteria.

It is relatively easy to apply Dahl's criteria to decision-making within small groups of people. Applying them to large populous states is more complicated, because representative, rather than direct, democracy becomes involved and raises issues about the relationship between representatives and constituents. Applying them to international institutions is even more difficult. The criteria nevertheless provide guidelines for evaluating the democratic accountability of institutions at all levels. The task of this book is to see if these criteria are met when military forces are used under the auspices of international institutions and, if so, how well.

Dahl was pessimistic that international institutions can provide citizens with opportunities for "political participation, influence, and control roughly equivalent in effectiveness to those already existing in democratic countries." He was also skeptical that citizens could become as concerned and informed about decisions taken in international institutions as they are about those made by their own government. He doubted that an appropriate scheme for representation could be created that would give equal weight to each individual without creating a situation in which smaller democracies with particular interests and problems would be constantly outvoted by more populous countries. In international institutions, "bargaining, hierarchy, and markets determine the outcomes. Except to ratify the results, democratic processes hardly play a role."[10]

[8] Robert A. Dahl, *Polyarchy: Participation and Opposition* (New Haven, CT, Yale University Press, 1971), p. 1.
[9] Robert A. Dahl, *On Democracy* (New Haven, CT, Yale University Press, 1998), pp. 37–8.
[10] *Ibid.*, p. 115; also Robert A. Dahl, "Can International Organizations be Democratic? A Skeptic's View," in Ian Shapiro and Casiano Hacker-Cordón (eds.), *Democracy's Edges* (Cambridge, Cambridge University Press, 1999), pp. 19–36.

Not all democratic theorists are as pessimistic as Dahl. Some argue that the growth and increasing influence of non-governmental organizations (NGOs) and transnational associations and movements have infused elements of democracy into international negotiations and institutions. They suggest that the role of NGOs should be enhanced to make international institutions more democratic.

David Held is one democratic theorist who acknowledges that existing international institutions fall short of meeting democratic criteria, but he is hopeful that "cosmopolitan democracy" can be established through the transformation of these institutions.[11] Held would: "Seek the creation of an effective transnational legislative and executive, at regional and global levels, bound by and operating within the terms of the basic democratic law."[12] He would make international institutions more transparent, extensively use referenda, and create an assembly of democratic nations as an adjunct to the UN General Assembly. Held's is a program of reform, however, not a description of existing institutions.

Most analysts agree with Robert O. Keohane's assessment that a "democratic deficit" exists in many important contemporary international institutions.[13] A significant literature has developed about the "democratic deficit" in the European Union and how to deal with it.[14] Since the EU may become a federal state, suggested reforms often resemble institutions and procedures within such states as the Federal Republic of Germany.

Global and regional intergovernmental institutions are significantly different from the EU. Universal-membership international institutions such as the UN include important states that do not have democratic governments, but whose cooperation is essential to solving global problems. The world has not yet discovered how to ensure that decisions made under international auspices incorporate tenets of accountability applied within democratic states.

[11] See Daniele Archibugi and David Held (eds.), *Cosmopolitan Democracy: An Agenda for a New World Order* (Cambridge, MA, Polity Press, 1995); David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford, Stanford University Press, 1995); and David Held, "The Transformation of Political Community: Rethinking Democracy in the Context of Globalization" in Shapiro and Hacker-Cordón (eds.), *Democracy's Edges*, pp. 113–26.

[12] Held, *Democracy and the Global Order*, p. 272.

[13] Robert O. Keohane, "International Institutions: Can Interdependence Work?" (1998) 110 *Foreign Policy* 82–96.

[14] See Eric Stein, "International Integration and Democracy: No Love at First Sight" (2001) 95(3) *American Journal of International Law* 489–534 and Joseph Weiler, *The Constitution of Europe: Do the New Clothes have an Emperor? And Other Essays on European Integration* (Cambridge, Cambridge University Press, 1999).

The case studies in this book explore the experiences of nine democracies that have used military forces to implement the decisions of international institutions. The analyses focus on democratic accountability, domestically and internationally. Have existing practices been modified? Are new practices being developed? Do changes and developments in practices weaken or strengthen democratic accountability measured as "continuing responsiveness" to the preferences of citizens? What steps are needed to enhance democratic accountability? Answers to these questions require a three-fold analysis of decision-making: in international institutions, in national institutions, and at the nexus of the two.

Effectiveness and decision-making are closely related. Unless there is popular support for the use of military forces under the auspices of international institutions, democracies are unlikely to provide adequate resources for a sufficient length of time to accomplish collective goals. Such support in democracies is linked to citizens' belief that decisions have been taken in ways that accord with democratic accountability. This need not imply that the UN establish a directly elected assembly. It does imply the dissemination of clear information about the purposes of a proposed action, ample opportunity for debate, and procedures that make officials who participate in decision-making on the use of force and its implementation accountable.

In all political systems, decisions to deploy and use military forces are among the most important that can be taken. Democracies have gone to great lengths to ensure democratic accountability in such decisions. National constitutions frequently contain special provisions specifying how and by whom they are to be made.

In the closing decades of the twentieth century, there was a general trend "toward subordinating war powers to constitutional control," including "greater parliamentary control over the decision to introduce troops into situations of actual or potential hostilities."[15] But constitutional provisions provide only a framework for establishing democratic accountability. Each political culture has its own issues affecting democratic accountability with respect to the use of military forces. Citizens of democracies want to understand and approve the purposes for which *their* military forces are being used.[16]

How do trends toward democratization within states, basic constitutional understandings about the use of military forces, and national

[15] Lori Fisler Damrosch, "Is There a General Trend in Constitutional Democracies toward Parliamentary Control over War-and-peace Decisions?" (1996) *American Society of International Law, Proceedings of the 90th Annual Meeting* 36–40.

[16] See John Mueller, *Retreat from Doomsday: The Obsolescence of Major War* (New York, Basic Books, 1989).

political debates and developments affect efforts to use military forces under international auspices? The book's answer begins with the history of efforts to limit (or prohibit) states' unilateral use of force, and to shift the monopoly of coercion to international institutions.

Using military forces under the auspices of international institutions: from proposals to practices

Twentieth-century statesmen sought to establish an international institutional framework that would centralize decision-making about the use of force, create a system for the pacific settlement of disputes, and establish a pool of military forces available to thwart actions that violated an agreed status quo. From the Covenant of the League of Nations (1919) through the Kellogg-Briand Pact (1928) and the United Nations Charter (1945), states worked to fashion an international legal and institutional system to achieve these goals.

These efforts were shaped by the doctrine of collective security, intended to replace the classical balance of power's unilateral state action and ad hoc alliances. States would instead find security in their membership in a universal organization. Woodrow Wilson argued that: "There must now be, not a balance of power, not one powerful group of nations set off against another, but a single overwhelming group of nations who shall be the trustee of the peace of the world."[17]

The doctrine of collective security drew on peace plans advocated since the formation of the Westphalian state system in the seventeenth century,[18] for the combined force of all states to thwart the unlawful use of force. Wilson and other advocates of collective security were chiefly concerned with preventing cross-border attacks on the political independence and territorial integrity of states. More recently, states have begun to expand the bases for using combined force to address other violations of international law, such as those against human rights.

A collective security system assumes that states that have committed themselves to use military forces will do so automatically in specific situations without further domestic debate. The executive of the state will participate in the international collective decision-making process, but

[17] Woodrow Wilson, *War and Peace* (ed. by Ray Stanard Baker and William E. Dodd), (8 vols., New York, Harper and Brothers, 1927), vol. I, p. 343.

[18] Such peace plans included those of Jeremy Bentham, *A Plan for an Universal and Perpetual Peace*, 1789; Immanuel Kant, *Eternal Peace and Other International Essays* (trans. by W. Hastie) (Boston, MA, The World Peace Foundation, 1914); and Jean-Jacques Rousseau, *A Lasting Peace through the Federation of Europe and the State of War* (trans. by C. E. Vaughan) (London, Constable, 1917).

the basic decision will be the determination by an international institution that a state's action constituted aggression or a threat to the peace, warranting a collective response.

There is thus an inherent tension between the expectations of collective security and the demand for democratic accountability with respect to decisions to deploy and use military forces. It was reflected in the domestic political debates required in the United States to gain legislative and public support for the security systems provided for in the League of Nations Covenant and UN Charter. The tension has been evident whenever international institutions have been called upon to take action involving military forces.

The League of Nations

While neither the UN Charter nor the League of Nations Covenant embodied a pure collective security system, both were steps in that direction. The essential provision in the League of Nations Covenant was Article 10, which stated:

> The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

Wilson and other proponents hoped that the threat of concerted action in Article 10 would provide the necessary protection for small powers against the ambitions of the large ones.

The US president had wanted a stronger, automatic commitment, but other major powers, including the United Kingdom and France, were opposed. British Prime Minister David Lloyd George realized that:

> The probable effect of including in the constitution of the League of Nations obligations to go to war in certain stated conditions will be to make it impossible for any nation to join the League, for no nation will commit itself in such a vital manner except by the free decision of its own Government and of its own Parliament, and no Government and no Parliament can come to such a decision except after an examination of the facts at the time when the decision has to be made. The attempt to impose obligations of this kind . . . will either end in their being nugatory or in the destruction of the League itself. The thing that really matters is that the nations should remain in continuous consultation under a system which enables them to come to prompt decisions on world problems as they arise from day to day.[19]

[19] Cited in Kalevi J. Holsti, *Peace and War: Armed Conflicts and International Order 1648–1989* (Cambridge, Cambridge University Press, 1991), p. 195.

As Secretary of State Robert Lansing had warned it might, even the commitment in Article 10 proved to be too strong for many in the US Senate. Led by Henry Cabot Lodge, the Senate sought to add a reservation to the United States' ratification of the Versailles Treaty (containing the Covenant) that required prior congressional approval for the deployment of US military forces. Wilson adamantly opposed any reservation to the Covenant, and asked his supporters in the Senate not to compromise. As a result, the Senate failed to give its advice and consent to the Versailles Treaty and the United States did not join the League of Nations.[20]

The tension between trying to provide a virtually automatic use of military forces for collective purposes and maintaining democratic accountability within states was evident even at this early stage. The United States objected to any obligation to commit US forces without an opportunity for congressional debate. There is a continuing question whether any US president can delegate powers entrusted to him through a constitutional grant of authority,[21] as Michael Glennon discusses in chapter 14.

To deter military aggression, collective security postulated that the use of military forces under international auspices would be automatic and swift. If governments and legislatures insisted on the right to authorize (or deny), case by case, the use of their forces, then the commitment would be neither swift nor automatic. In fact, the League's failure to react effectively to the invasions of Manchuria and Ethiopia discredited it, and after the Second World War, it was replaced by a new security system.[22]

The United Nations

The United Nations Charter went further than the Covenant in establishing a system of collective security. It was designed to correct perceived weaknesses of the League system and did so in two ways. First, the Charter concentrated decision-making on action to counter threats to the peace in the Security Council. Secondly, it provided the means to carry out the Council's decisions.

Article 2(4) of the Charter requires members to "refrain . . . from the threat or use of force against the territorial integrity or political independence of any state." To support this requirement, the Charter provided

[20] The treaty failed to win the necessary two-thirds majority, with forty-nine senators for approval and thirty-five against. Wilson's supporters who refused to accept any reservations cast twenty-three of the thirty-five votes. F. P. Walters, *A History of the League of Nations* (London, Oxford University Press, 1952), p. 71.

[21] Thomas M. Franck, *The Tethered Presidency: Congressional Restraints on Executive Power* (New York, New York University Press, 1981).

[22] Townsend Hoopes and Douglas Brinkley, *FDR and the Creation of the UN* (New Haven, CT, Yale University Press, 1997) and Walters, *History of the League of Nations*.

in Chapter VI for the peaceful settlement of disputes, and in Chapter VII a system for taking collective action in the event that disputes were not settled peacefully. A finding by the Security Council under Article 39, Chapter VII, that there was a "threat to the peace, breach of the peace, or act of aggression" would trigger this system. Upon such a finding, the Council "shall make recommendations or decide what measures shall be taken." If it decides to use military force, Article 42 authorizes it to "Take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

Article 43 provided for special agreements between member states and the Security Council, by which members would make available "armed forces, assistance, and facilities, including rights of passage." These agreements were to have the advantage of defining, from the point of view of member states, the limits of their obligation to provide such assistance, and, from the point of view of the Council, the forces and facilities at its disposal for discharging its "primary responsibility," under Article 24, "for the maintenance of international peace and security."

The UN Charter in Article 23 designated five states – China, France, the Soviet Union, the United Kingdom, and the United States – as permanent members of the Security Council, giving them special status and responsibility within the organ charged with maintaining peace and security. A Military Staff Committee (Article 47), consisting of the chiefs of staff of the permanent members, or their representatives, was to advise the Council "on all questions relating to [its] military requirements for the maintenance of international peace and security," and "be responsible under the [UNSC] for the strategic direction of any armed forces placed at [its] disposal."

Had the United States ratified an Article 43 agreement "in accordance with [its] constitutional processes," as Article 43 specified, it would have satisfied tenets of democratic accountability with respect to the use of military forces made available under that agreement. The United Nations Participation Act (UNPA) of 1945 explicitly accepted this interpretation for the United States. Article 6 stated:

> The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under Article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein: Provided, that nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed

forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements.

Over the years, the Charter's relatively clear vision of how military forces would be used by the UN has been substantially modified. Article 43 agreements were never completed. The Security Council has never had military forces at its call. The result has been that member states decide on a case-by-case basis whether to contribute their military forces to particular operations and what forces to contribute.[23] Nevertheless, from 1946 to 2000, military forces were used seventy-six times for a broad range of purposes under UN authorization. (The analysis below includes these seventy-six UN-authorized missions, plus the NATO-authorized Operation Allied Force.)

In addition to thwarting cross-border aggression in Korea and Kuwait, the case for which the doctrine of collective security was designed, these UN missions included several purposes that were not envisaged when the League Covenant and UN Charter were signed. Among these were maintaining cease-fire agreements, preventing genocide and serious violations of human rights, and restoring a democratically elected government. Many of the instances in which the UN deployed military forces involved intra-state rather than inter-state conflicts.

In fifty-four of the seventy-six cases, military forces were under UN command. The force commander was appointed by and reported to the Secretary-General. In the other twenty-two cases, the UN authorized individual states or coalitions of states to use military forces to achieve goals specified in resolutions adopted by the Security Council.[24] In these cases, the state or states conducting the operation used their own command structures. The authorizing resolutions requested that they keep the Security Council informed.

Of the seventy-six cases, military forces were used twenty times under the auspices of the UN from 1946 to 1990, and fifty-six times from January 1, 1990 through 2000. The end of the Cold War brought a dramatic increase in UN involvement in conflicts because of a renewed interest in using international institutions by those who were previously reluctant or unable to do so. Appendix A lists the cases in which military forces were used under UN and NATO auspices. It gives the name and

[23] Jules Lobel and Michael Ratner, "Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime" (1999) 93(1) *American Journal of International Law* 124–54.

[24] Danesh 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).

acronym for the operation, the operation's location, the resolution providing the initial authorization, whether or not the resolution referred to Chapter VII as a basis for its authority, and the command arrangements.

The North Atlantic Treaty

The North Atlantic Treaty Organization (NATO) is an international organization that embodies a traditional military alliance. Its founding treaty, signed in Washington, DC in 1949, claims legitimacy under Article 51 of the UN Charter, rather than Chapter VIII, which deals with regional arrangements. Article 51 allows states individually or collectively to act in self-defense "until the Security Council has taken measures necessary to maintain international peace and security." Invoking Chapter VIII would have created a closer link with the Security Council.

Unlike collective security, which is designed to counter any threat, NATO was designed to counter a very specific threat external to the organization. The key commitment in the North Atlantic Treaty is Article 5, by which:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and . . . each of them . . . will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force . . .

The phrasing of this article was deliberately different from the wording that had been used two years earlier in the Rio Pact, which committed the parties to assist each other in the event of an attack. In the 1940s, there was a greater likelihood of war in Europe than there was in the Americas, and Congress insisted on its prerogative to declare war.

There were originally no plans under the North Atlantic Treaty to base US armed forces in Europe. But with no West German armed forces and the deployment of French and British troops on colonial duty, the outbreak of the Korean War in 1950 led President Truman to appoint General Eisenhower as NATO's first Supreme Allied Commander, Europe (SACEUR), and to deploy US forces to Europe. The Cold War scenario postulated an attack by the USSR and its Warsaw Pact allies on West Germany. It was expected that US troops stationed in Europe would be immediately engaged, and Congress would be unlikely to object to their use of force to defend themselves and repel a Soviet invasion.

As NATO developed its integrated military structure in the 1950s, it also sought to develop ways of ensuring democratic accountability. A chain of command was put in place, including mechanisms for ensuring

civilian control through the NATO Secretary General and the North Atlantic Council. Military exercises inculcated NATO personnel with the importance of adhering to norms regarding the conduct of war.

In the 1990s, NATO began to contemplate using its military forces outside the NATO area, as defined by Article 6 of the North Atlantic Treaty, and then did deploy its forces in eight "out of area" operations. (These are also listed in Appendix A.) As a result, issues of accountability with respect to the deployment and use of NATO's forces became more complex. Seven of these NATO-led operations were undertaken with the authorization of the UN Security Council. One – Operation Allied Force, the 1999 NATO air war in Kosovo – was authorized by the North Atlantic Council, with no explicit authorization by the UN.

Beyond the UN and NATO, other international institutions have authorized the deployment of military forces. They include the Organization of American States (OAS), the Organization of African Unity (OAU, now the African Union), the Organization for Security and Cooperation in Europe (OSCE, formerly CSCE), and the Economic Community of West African States (ECOWAS).

This study is limited to the use of military forces under the auspices of the UN and NATO because:

- the United Nations is universal in membership and central to issues of international peace and security; it has authorized the use of military forces on many occasions;
- NATO has an integrated military command structure and forces equipped and trained to carry out the full range of military operations; and
- NATO throughout its history has been principally composed of democracies, and in the 1990s was composed exclusively of democracies.

Uses of military forces under international auspices

Figure 1.1 shows the use of military forces authorized by the UN and NATO by the year of authorization. The substantial increase in number starting in 1988 is striking. As Edwin Smith describes in chapter 4, Mikhail Gorbachev in 1987 announced a change in Soviet policy toward using military forces under UN auspices, and this facilitated the authorization of such missions by the UNSC. In the following section, the years since the Second World War are divided into two periods, 1946–89 and 1990–2000, because of the way in which the end of the Cold War transformed world politics.

Because a single conflict often involves several different uses of forces authorizations, the number of authorizations exaggerates the number of

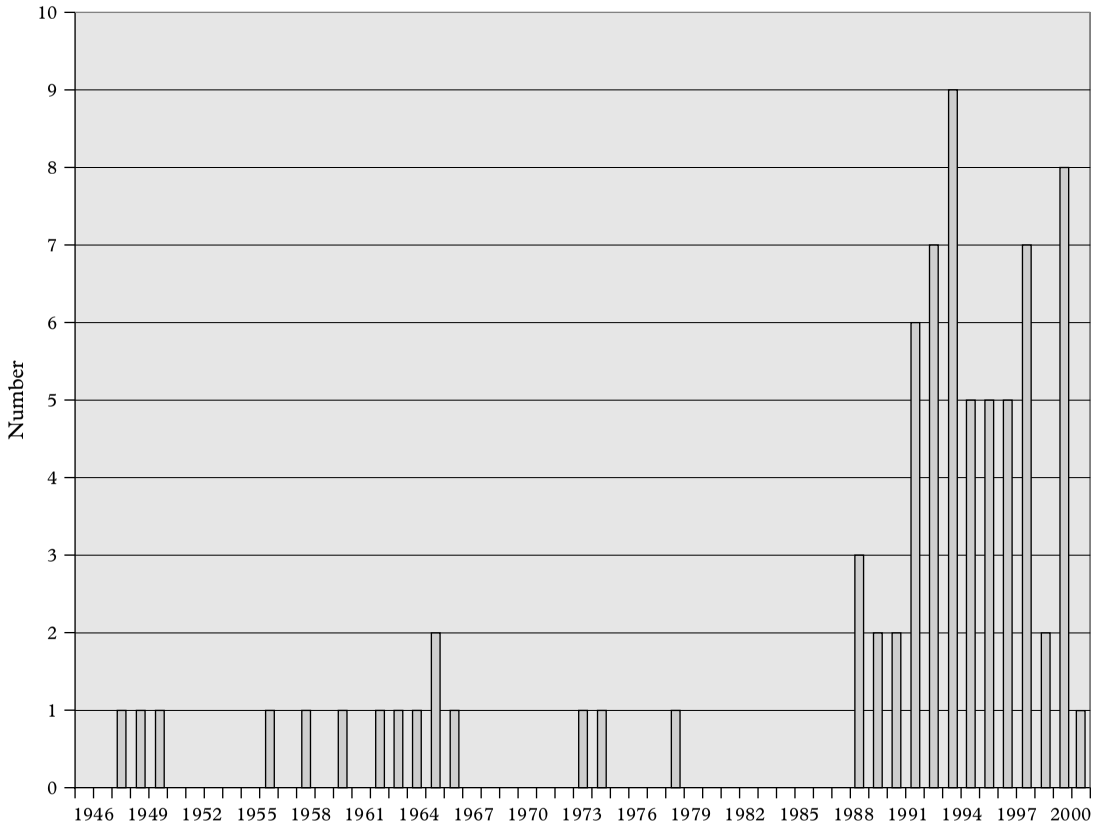

Figure 1.1 Number of uses of military forces by year of authorization (1945–2000).

conflicts in which the UN and NATO have been involved. The seventy-seven authorizations from 1946 to 2000 concern thirty-two conflicts. Nine of the conflicts were clear inter-state conflicts; twenty-three were either exclusively or primarily intra-state, and their proportion increased over time. Depending on how one counts, the UN and NATO authorized the deployment of military forces in about half of the inter-state conflicts and a third of the intra-state conflicts from 1946 to 2000.[25] Table A.2 of Appendix A groups the conflicts by their nature and locale.

The uses of military forces under international auspices since the Second World War can be placed in five broad categories, based on: the mandate of the operation, the rules of engagement given to the military forces, whether or not they enter the territory of the state where they operate with the consent of that state, and the number and types of military personnel involved.[26] The missions cover a range of uses of military forces from monitoring to full-scale war. The five categories are:

- monitoring and observation;
- traditional peacekeeping;
- peacekeeping plus state-building;
- force to ensure compliance with international mandates; and
- enforcement.

Monitoring and observation involves the positioning of troops, military observers, and related personnel on one or both sides of a line between entities that are or have been engaged in, or where there is a threat of, armed conflict, with the primary objective of preventing (renewed) hostilities. The observers are stationed with the consent of the host country and are impartial. They carry no arms.

The first deployment of military forces under the auspices of the UN, the 1948 United Nations Truce Supervision Organization (UNTSO),

[25] See Meredith Reid Sarkees, "The Correlates of War Data on War: An Update to 1997" (2000) 18(1) *Conflict Management and Peace Science* 123–44. Sometimes the UN took several actions with respect to what compilers of lists of conflicts have classified as one conflict. Conversely, sometimes a single UN-authorized mission remained in an area through several conflicts. Our effort to fit the two lists together in table A.2 provides at best a rough approximation.

[26] This categorization draws heavily on the concepts developed in Gareth Evans, *Cooperating for Peace: The Global Agenda for the 1990s and Beyond* (St. Leonards, Allen & Unwin, 1993). It is related to but different from the categorization developed by Boutros Boutros-Ghali in his *An Agenda for Peace* (New York, United Nations, 1992). More broadly, it draws on the wide literature concerning peacekeeping, including: Paul F. Diehl, *International Peacekeeping* (Baltimore, MD, The Johns Hopkins University Press, 1993); William J. Durch (ed.), *UN Peacekeeping, American Policy, and the Uncivil Wars of the 1990s* (New York, St. Martin's Press, 1996); Ramesh Thakur and Carlyle A. Thayer (eds.), *A Crisis in Expectations: UN Peacekeeping in the 1990s* (Boulder, CO, Westview, 1995); and James S. Sutterlin, *The United Nations and the Maintenance of International Security: A Challenge to be Met* (Westport, CT, Praeger, 1995).

was a monitoring and observation mission to supervise the truce in Palestine. When Israel, Egypt, Jordan, Lebanon, and Syria concluded General Armistice Agreements in 1949, UNTSO's main responsibility became that of assisting the parties in supervising the application and observance of these agreements. UNTSO was still in existence in 2001. In the 1990s, it averaged 160 personnel, and cooperated with other UN missions in the Golan Heights, the Israel–Syria sector, and the Israel–Lebanon sector.

Eighteen of the seventy-six deployments of military forces under UN auspices from 1946 to 2000 were for the purpose of monitoring and observation. Nine of these missions began before January 1, 1990, and nine after that date. Monitoring and observation missions thus constituted 45 percent of the UN's twenty deployments before 1990, but only 15.8 percent of the fifty-six deployments from 1990 to 2000.

Traditional peacekeeping involves unarmed or lightly armed military contingents in the monitoring, supervision, and verification of cease-fire, withdrawal, buffer-zone, and related agreements, with the consent of the parties. It requires consent of the host country and impartiality; the use of military force, other than in personal or small unit self-defense, is incompatible with the concept.

The United Nations Emergency Force I (UNEF I), authorized in the 1956 Suez crisis, is the classic example of traditional peacekeeping. It was established to supervise the cessation of hostilities, including the withdrawal from Egyptian territory of the armed forces of France, Israel, and the United Kingdom, and after their withdrawal to serve as a buffer between Egyptian and Israeli forces. UNEF I was deployed with the consent of Egypt, was lightly armed, and authorized to fire only in self-defense. It differed from UNTSO and other monitoring and observation missions in that it was a much larger force, around 6,000, and entered a more volatile situation on the ground.

From 1946 to 2000, there were seven traditional peacekeeping forces, UNEF I and II, the United Nations Force in Cyprus (UNFICYP), the United Nations Disengagement Observer Force (UNDOF), the United Nations Interim Force in Lebanon (UNIFIL), the United Nations Iraq–Kuwait Observation Mission (UNIKOM), and the United Nations Preventive Deployment Force (UNPREDEP). The first five of these forces were originally deployed prior to 1990.

Peacekeeping plus state-building supplements traditional peacekeeping with activities such as election monitoring or organization, human rights protection, and civil administration functions or assistance during transition to independence or democracy.

The exemplar case of peacekeeping plus state-building was the United Nations Transitional Authority in Cambodia (UNTAC), authorized in

1992. UNTAC involved more than 20,000 personnel in clearing land mines and training Cambodians to clear land mines, civil administration, restoration of essential infrastructure, repatriation and resettlement of refugees and displaced persons, maintenance of law and order, and the organization and conduct of free and fair elections.

There were twenty-six peacekeeping plus state-building missions from 1946 to 2000, three of them before 1990, and twenty-three of them from 1990 to 2000.[27]

Force to ensure compliance with international mandates involves the use of force to ensure the safety of peacekeepers, enable them to carry out a mandate that is being frustrated, and protect international legal principles. Military forces engaged in such operations usually also perform state-building tasks.

The United Nations Operation in the Congo (ONUC) was the first instance in which military forces deployed under UN command used force to ensure compliance with an international mandate. ONUC was established in 1960 to ensure the withdrawal of Belgian military forces from the newly independent Congo. Its mandate was later modified to include maintaining the territorial integrity and political independence of the Congo by preventing the secession of Katanga province. ONUC, which also assumed many state-building functions, had about 20,000 personnel.

Of the twenty-four compliance operations from 1946 to 2000, only four were under UN command. Individual states or coalitions of states conducted the other twenty, and they used their own command structures. An early example was the 1966 request of the UNSC to the United Kingdom to use force, if necessary, to prevent oil from reaching Rhodesia in violation of the UN embargo. Delegations like this occurred frequently in the 1990s, in connection with peace operations in the former Yugoslavia.

In addition to ONUC, the compliance operations under UN command were the United Nations Protection Force (UNPROFOR), deployed in Croatia, Bosnia, and Macedonia, starting in 1992; the United Nations Operation in Somalia II (UNOSOM II), deployed in 1993; and the United Nations Transitional Administration in East Timor (UNTAET), in 1999. All eight NATO operations were in this category. The largest, the 1996 Implementation Force (IFOR) in Bosnia, included more than 60,000 personnel. Only one compliance operation, ONUC, occurred before 1990.

Enforcement involves the use of military forces to maintain or restore peace in a conflict or major security crisis. The classic enforcement operation responds to an attack on the territorial integrity of a state. By

[27] See also Steven R. Ratner, *The New UN Peacekeeping: Building Peace in Lands of Conflict After the Cold War* (New York, St. Martin's Press, 1996).

Table 1.1. *Uses of military forces under the auspices of the UN and NATO*

	Period	
Forms of use of military forces	1946–89	1990–2000
Monitoring and observation	9 (45%)	9 (15.8%)
Traditional peacekeeping	5 (25%)	2 (3.5%)
Peacekeeping plus state-building	3 (15%)	23 (40.3%)
Force to ensure compliance	2 (10%)	22 (38.6%)
Enforcement	1 (5%)	1 (1.8%)
Total	20 (100%)	57 (100%)

definition, enforcement does not require the consent of the state deemed to be a threat to the peace.

In Korea (1950–3) and Kuwait (1990–1), the two enforcement actions, the Security Council authorized member states to use all necessary means to restore international peace and security. In Korea, the UNSC created a UN command, requested that states place their forces under it, and asked the United States to provide the unified commander. In Kuwait, the US-led coalition operated under coequal US and Saudi theater commanders. The Korean operation involved close to a million personnel, and the Kuwait operation almost 800,000 on the coalition side. UN forces suffered 95,000 fatalities in the Korean War, but only 240 coalition personnel were killed in the Gulf War.

In popular and scholarly discourse "peacekeeping" is often used as a generic term to cover all of the categories except enforcement. In UN parlance, the first two categories are described as "peacekeeping," and the third and fourth as "complex peace operations," involving both peacekeeping and peace-building. Because of the lack of Article 43 agreements, the UN itself has not engaged in enforcement actions, and it has only rarely commanded operations to ensure compliance with international mandates. The five categories are used here because they allow sharper analytical distinctions.

Table 1.1 displays by category and period (1946 to 1989 and 1990 to 2000) the seventy-seven instances in which military forces were used under the auspices of the UN and NATO. Missions such as ONUC, which started in one category but had a change in mandate, are classified according to their ultimate purpose.

As Table 1.1 shows, military forces were used under UN and NATO auspices much more frequently in the decade starting in 1990 than in the preceding four decades, when they were usually deployed either

unilaterally or within the regional frameworks of the Organization of American States or the Warsaw Pact. From 1946 to 1989, the UN was called on to undertake actions where neither the USSR nor the US could hope to do more than contain each other's influence, with the exception of the Middle East, where its role emerged out of the Palestine mandate. UN-commanded operations were deployed nineteen times from 1945 to 1989 and thirty-five times from 1990 to 2000.

Table 1.1 also shows clearly that the nature of UN missions using military forces was quite different in the two periods. Monitoring and observation missions, as noted above, constituted 45 percent of deployments in the first period and only 15.8 percent in the second. In sharp contrast to the Cold War period, when missions in the first four categories were deployed only with the consent of the host state, many operations in the 1990s did not have the consent of the host state, were more intrusive in its affairs, and were involved in intra-state conflicts.

One can conclude several things from this review of UN and NATO experience:

- The international community has become more sophisticated about the use of force than it was when Woodrow Wilson and others first sought to give effect to a system of collective security in the early years of the twentieth century.
- The absence of means directly available to the UN to carry out collective actions leaves it to the contributing states to determine what will be done to give effect to UN mandates.
- The emphasis on human rights abuses in intra-state conflicts has lowered the barriers that exist in the UN Charter against interference in a state's internal affairs; a universal consensus on appropriate international action, however, does not yet exist.
- The frequency with which military forces have been used under UN and NATO auspices, and the increasing emphasis on compliance operations in the 1990s, make issues of democratic accountability a more pressing matter than in the "classical" peacekeeping years of 1946 to 1989.

Issues of democratic accountability

The increased use of military forces in UN- and NATO-mandated peace operations, particularly to ensure compliance, has raised new questions of democratic accountability. These concern authority and responsibility for decisions to deploy military forces, select objectives, incur risk, and implement mandates in the field. Five sets of issues concerning the basic tenets of democratic accountability – the rule of law and majority rule – arise when military forces are used under the auspices of international

institutions. These issues are the core concern of this book:

- international authorization to use military forces;
- national authorization to use military forces;
- democratic civilian control of military personnel and operations;
- civilian responsibility to the military for the safety of deployed personnel; and
- responsibility to comply with norms governing the conduct of military and other international personnel in the field.

Democratic governments through law and practice have developed domestic procedures to deal with the last four sets of issues. These procedures are embedded in constitutions, laws and regulations, and political and military traditions. There are also moral traditions that address these issues. The just war doctrine is such an example.

The first set of issues is much newer, and is a consequence of the successful twentieth-century effort to shift the legitimate use of force from states acting alone to states acting under the auspices of international institutions. International authorization issues are made more difficult by the increasing emphasis on intra-state conflict, because international law concerning humanitarian intervention is much less clear than the prohibition against cross-border aggression. There are bodies of doctrine with respect to the last four sets of issues, but it is not clear how these should be applied when forces are used under the auspices of an international institution. Still, dealing with the question of international authorization is essential to the rule of law.

The first four sets of issues deeply engage both the rule of law and majority rule. The last set of issues is primarily concerned with the rule of law.

International authorization to use military forces

Under the just war doctrine, the first condition for a war to be legitimate is that the authority deciding to engage in war is legitimate. Politically, within a state, its written or unwritten constitution specifies legitimate authority. With the move away from the unilateral state use of force, what constitutes legitimate international authority to decide on its use? Which institutions can authorize the use of force, and what legal and political implications flow from this authorization?

As discussed above, the intent of the UN Charter was to centralize this authority in the Security Council, acting under Article 39 and Article 42. Article 51 (to which the North Atlantic Treaty referred) permitted states to act in individual or collective self-defense, until the Security Council responded to a threat to the peace. Under Chapter VIII of the Charter,

regional organizations could deploy military forces, but only with the authorization of the UNSC. Voting arrangements in the Council were intended to ensure that military action would have broad international support, and not be taken against the wishes of one of the permanent members.

In practice, the Security Council, the General Assembly, and the North Atlantic Council have all authorized the use of military forces, invoking legal grounds ranging from threats to the peace under Chapter VII of the Charter, to the necessity of preventing genocide and violations of humanitarian law. In the 1990s, the Security Council frequently declared an intra-state conflict to be a threat to international peace and security.

National authorization to use military forces

Democratic governments have established procedures for authorizing the use of military forces. Some are embedded in constitutional provisions and legislation, others in tradition. There are differences between presidential and parliamentary systems, but in all cases popular support is crucial if a democratic government is to persevere in a military operation over time. An elected government must periodically face voters, in the ultimate test of democratic accountability.

Moreover, as Lori Damrosch discusses in chapter 2, democratically elected legislatures are increasingly unwilling to leave use-of-force decisions to the executive alone. There is thus a tension between commitments the executive has made to international institutions and its own domestic accountability procedures. As military forces have been used under the auspices of international institutions, democratic governments have struggled to adapt established procedures to new situations.

Democratic civilian control of military personnel and operations

Only elected civilian officials are accountable to voters. Civilian control of military personnel and operations is a firmly established principle in all democracies, and one that many non-democratic governments also seek to enforce. As noted above, it was included as a core principle of democracy in the June 2000 Warsaw Declaration, "Toward a Community of Democracies." The United States Constitution embodies this principle by making the president commander-in-chief of the armed forces.

Established lines of civilian control when military forces are used nationally become complicated when force is used under the auspices of international institutions. To which civilians is a commander of UN or NATO forces responsible? To whom does a subordinate commander

report when his superior is of a different nationality? To whom is he responsible? When (appointed) international and (elected) national civilian officials disagree, to which authority do military personnel deployed on an international mission respond?

Civilian responsibility to the military for the safety of deployed personnel

Civilian officials at the national level have long made decisions that affect the safety of military personnel in the field, when they define the purposes and objectives of a mission, establish the availability of intelligence, determine how and with what weapons the forces should be deployed, and set down the rules of engagement. Elected officials in democratic countries who put military forces unnecessarily at risk face both political and legal consequences.

But the situation is far less clear when military forces are deployed under the auspices of the UN or NATO. How is accountability established, and who is accountable for a mandate that cannot be carried out because of insufficient personnel or inadequate equipment? Is there enough transparency to establish responsibility? When officials need not face voters, what are the political and legal constraints on their actions? Establishing responsibility at the international level in the way that it is established in democratic states often proves impossible.

Responsibility to comply with norms governing the conduct of military and other international personnel in the field

The international law of war established by the Geneva and Hague Conventions contains clear directives about the conduct of military personnel in the discharge of their missions and their responsibility towards the population and property in their area of operations. The provisions of these laws are included in the codes of military conduct of national military establishments. How do these norms apply to personnel deployed under UN or NATO auspices? Who is responsible for ensuring that the norms are upheld?

The structure of the study

The framework for the analyses

Table 1.2 combines the five categories of the international use of military forces and the forms of authorization and responsibility. This matrix

Table 1.2. *Uses of force and forms of authorization and responsibility: the framework for analysis*

Forms of uses of military force	Forms of authorization and responsibility				
	International authorization	National authorization	Civilian control	Civilian responsibility to military	Responsibility to comply with norms
Monitoring and observation					
Traditional peacekeeping					
Peacekeeping plus state-building					
Force to ensure compliance					
Enforcement					

provides a framework for the nine country analyses in this study. It is based on the assumption that different uses of military forces raise issues of democratic accountability in different ways.

A basic hypothesis undergirding the analysis is that the greater the risk to the lives of military personnel, the longer the duration of the operation, and the less certain its outcome, the greater will be the demand for democratic accountability. Thus, enforcement operations will raise the most acute issues of democratic accountability, while monitoring and observation missions are least likely to be challenged, politically or legally.

The nine countries

The authors in this book examine the experience of nine countries with democratic accountability issues: Canada, France, Germany, India, Japan, Norway, Russia, the United Kingdom, and the United States. These countries were chosen for several reasons. In 2002, all are democracies. All are members of the United Nations, and France, Russia, the United Kingdom, and the United States are permanent members of the Security Council, with special responsibilities for the maintenance of international peace and security. Germany, Japan, and India aspire to permanent membership on the UNSC. Canada, France, Germany, Norway, the United Kingdom, and the United States are members of NATO.

The nine differ in important ways. Six have parliamentary systems, Russia and the United States have presidential systems, and France is

Table 1.3. *The nine states and their characteristics*

State	Characteristics							
	Member of the United Nations	Permanent member of the Security Council	Assessed contribution to UN peacekeeping budget through 2001 (% of total)	Member of NATO	Military expenditures, 1999 (US$m)	Numbers in armed forces 1999 (1,000s)	Type of political system	Used military forces unilaterally, 1945–2000
Canada	Yes	No	2.6	Yes	7,504	60.6	Parliamentary	No
France	Yes	Yes	8.1	Yes	37,893	317.3	Mixed	Yes
Germany	Yes	Aspirant	9.7	Yes	31,117	332.8	Parliamentary	No
India	Yes	Aspirant	0.0686	No	14,991	1,173.0	Parliamentary	Yes
Japan	Yes	Aspirant	19.5	No	40,383	242.6	Parliamentary	No
Norway	Yes	No	0.65	Yes	3,149	30.7	Parliamentary	No
Russia	Yes	Yes	1.4	No	56,800	1,004.1	Presidential	Yes
United Kingdom	Yes	Yes	6.9	Yes	36,876	212.4	Parliamentary	Yes
United States	Yes	Yes	29.2	Yes	283,096	1,371.5	Presidential	Yes
Total for nine			78.026		511,809	4,745		
World total			100.00		808,546	21,875.9		
nine as percent of world total			78.026		63.2	21.6		

Source: International Institute for Strategic Studies, *The Military Balance, 2000–2001* (Oxford, Oxford University Press, 2001), pp. 297–302.

a mixed presidential–parliamentary system. France, India, Russia, the United Kingdom, and the United States have used their military forces unilaterally since the Second World War. Canada, Germany, Japan, and Norway have only used their military forces under the auspices of international institutions since 1945.

All nine have contributed military forces to operations under the auspices of international institutions. Canada and Norway have contributed forces to nearly all UN missions. India has contributed more military forces to UN operations than any other state. Together, these nine states accounted for more than 60 percent of the world's military expenditures in 1998, and had almost a quarter of the world's military personnel. Their combined assessments for UN peacekeeping operations under the system used through 2000 constituted more than 70 percent of the total.

Table 1.3 summarizes characteristics of the nine countries that are salient to this study. We do not suggest that they are a representative sample of UN members or of all countries that have contributed military forces to UN operations, but because of their permanent membership on the Security Council, four of the nine are always involved in UNSC decisions about military operations. The participation of most or all nine would be essential to any large-scale compliance or enforcement operation.

The position of the United States stands out among the nine. US military expenditures are larger than those of the other eight countries combined, and US military personnel account for a third of the total personnel of the nine. Only the United States has significant air- and sea-lift capacity and, therefore, global military reach. Its military technology vastly exceeds that of any other state, qualitatively and quantitatively. US military research and development led the Revolution in Military Affairs in the 1990s, introducing high technology, especially new forms of sensors and information technology, into battlefield situations.

The outline of the study

The four chapters that comprise Part II of this study provide a context for analyses of the experiences of the nine countries. Two chapters deal with the national context and two with the international context.

In chapter 2, Lori Damrosch addresses the evolution of constitutional structures and procedures within states for achieving democratic control of military forces. She shows how establishing democratic accountability for the uses of military force was a crucial aspect of the development of democracy within states, and describes the twentieth-century trend toward the increasing involvement of legislatures in decisions about the

uses of military forces. Karen Mingst deals in chapter 3 with the motivations that lead countries to allow their military forces to be used under international auspices. She analyzes the role that political culture, political relationships, and societal influences play. She shows how informal mechanisms, including public opinion, contribute to maintaining democratic control. The interaction of the formal procedures described by Lori Damrosch and the informal procedures described by Karen Mingst when military forces are used under the auspices of the UN and NATO is one of the major themes of this study.

Chapter 4, by Edwin Smith, analyzes the doctrine of collective security, the efforts to embed this doctrine in the League of Nations and the United Nations, and the evolution since the Second World War of the practice of using military forces under the auspices of international institutions. He examines the democratic accountability issues that have arisen, particularly in the 1990s, as military forces have been used under the auspices of the UN and NATO. Chapter 5, by Robert Siekmann, deals with the legal status and responsibility of military forces serving under international auspices. He particularly analyzes democratic accountability issues relating to the responsibility of military personnel to comply with norms of conduct.

Part III of the study covers three countries that have made substantial contributions to United Nations peacekeeping operations since the founding of the UN: Canada, Norway, and India.

During the 1956 Suez Crisis, Canadian Foreign Minister Lester Pearson played a major role in the development of the concept of traditional peacekeeping missions. Fen Osler Hampson describes this in chapter 6, and shows how a commitment to participation in UN peacekeeping activities became a part of Canadian political culture. He also detects a pulling back from this commitment in the 1990s, provoked in part by budgetary pressures and in part by the complexities and problems of new missions.

Norway's experience, as analyzed in chapter 7 by Knut Nustad and Henrik Thune, resembles Canada's in many ways. Norway developed a domestic consensus on participation in UN peacekeeping operations, nested in a broader commitment to the UN and NATO. NATO's Operation Allied Force, which took place without explicit authorization by the UN Security Council, tested the consensus, and Norway's participation in the operation raised issues of its political elites' accountability to their constituents.

India, as Ramesh Thakur and Dipankar Banerjee show in chapter 8, has contributed more military forces to UN operations than any other country. It is the only developing country among the nine, the only one

to have experienced colonial rule in the twentieth century, and the only one of the nine to host a UN peacekeeping operation. India has been particularly attentive to whether or not decisions about the uses of military forces accord with its concepts of the rule of law, and insistent on maintaining the central position of the United Nations in authorizing uses of military forces. It has developed very efficient domestic procedures for deciding on and deploying its military forces to UN operations.

Part IV of the study deals with Japan and Germany, which only began in the 1990s to participate in military operations conducted under the auspices of international institutions. Both countries' attitudes toward the use of force were deeply affected by the Second World War. Both aspire to be permanent members of the UN Security Council and, like India, assume that the ability to contribute to peace operations is a precondition for becoming a permanent member. Unlike the countries discussed in the preceding section, Japan and Germany had to respond rapidly to expectations of their fellow UN (and in Germany's case, NATO) members in the rapidly changing climate of peace operations of the 1990s. Both had to deal with constitutional limitations on the uses of their military forces. As Akiho Shibata discusses in chapter 9, Japan has the most restrictive constitutional limits on the use of its military forces. In chapter 10, Georg Nolte shows how conflicts in the former Yugoslavia led Germany to participate in military operations conducted under UN and NATO auspices. A decision of the Federal Constitutional Court was a crucial element in defining the role of the government and legislature in implementing this basic political decision.

Part V is comprised of four chapters dealing with four permanent members of the Security Council, Russia, France, the United Kingdom, and the United States. They are placed in this order here deliberately, for several reasons.

As Bahktiyar Tuzmukhamedov shows in chapter 11, the experience of Russia parallels in some ways that of Japan and Germany. After the collapse of the USSR, Russia had to create new constitutional and political institutions and procedures. These included arrangements for participation in military operations conducted under the auspices of international institutions. As in Germany, legislative involvement is a crucial question. Yves Boyer, Serge Sur, and Olivier Fleurence analyze the experience of France in chapter 12. Both Russia and France have been insistent on maintaining the authority of the UN Security Council. The United Kingdom, on the other hand, as Nigel White describes in chapter 13, and the United States, discussed by Michael Glennon in chapter 14, have maintained at various times that there are other legitimate sources of international authorization to use military forces.

The executive in both France and the United Kingdom has considerable authority and freedom of action in decisions to use military forces, whether unilaterally or under UN or NATO auspices. This may be changing in the United Kingdom, however, where NATO's Operation Allied Force was the subject of a parliamentary investigatory report in 2000.

Because of the constitutional separation of powers, there has long been a struggle in the United States between the executive and the legislative branches over the use of US military forces. This struggle has made the US system for maintaining democratic accountability perhaps the most complicated of those discussed in this study. Because of that, and because of the United States' unique military capabilities, the chapter on the United States concludes the country case studies.

Future prospects

The success of efforts in the twentieth century to regulate the use of force and to build international institutions has led democratic countries to grapple with important issues of democratic accountability that did not exist before 1945. Since, domestically, they regard as legitimate only decisions grounded in democratic procedures, they face special challenges when constrained or bound by decisions of international institutions that are not democratic. This raises questions of effective participation in international decision-making. Their common concern with protecting human rights is challenged by the realization that lowering the barriers of non-intervention in the internal affairs of states will effect major changes in the state system on which all intergovernmental organizations are based.

These developments combined in the 1990s to place democracies in the difficult position of trying to ensure accountability when decisions are made in international institutions beyond the reach of domestic electorates, but with the goal of implementing the rights and freedoms of individuals that are the foundations of democratic government.

Historically, there are strong reasons to concur with Dahl that decision-making in international institutions cannot meet democratic criteria about majority rule and popular participation in decision-making. Yet the nine country studies in this book show that democratic governments have been innovative and flexible in finding ways to be responsive to their citizens while maintaining institutional effectiveness. Democratic accountability can be achieved through the combined effect of international and national institutions and procedures.

Much remains to be done. States now have more than fifty years' experience with limits on the unilateral use of force and cooperation with each other in deploying forces under international auspices. In the coming decades, they will need to further develop mechanisms that provide democratic legitimacy at both national and international levels. How well the two fit together and whether the fit supports or weakens democratic accountability will be crucial.

Part II

The domestic and international context

2 The interface of national constitutional systems with international law and institutions on using military forces: changing trends in executive and legislative powers

Lori Fisler Damrosch

The perplexities of the twenty-first century over national decision-making in support of international security are an outgrowth of centuries-long trends concerning subordination of military power to constitutional control. Civilian control over the military has been inextricably connected with the strengthening of domestic constitutionalism and safeguards for citizens' liberties in many different democracies.

Along with the establishment of constitutional structures for regulating national military power, national constitutions have contributed to the evolution of contemporary international law prohibiting the use or threat of force in international relations. Milestones along this path begin with the French Constitution of 1791[1] – the first national constitution to renounce wars of conquest – and include the renunciation of war in the post-Second World War constitutions of Germany and Japan and other countries.[2] Such constitutional provisions have helped consolidate the norm of international law against the use of force embodied in Article 2(4) of the UN Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." National constitutional law in

[1] "Constitution du 3 septembre 1791, Titre VI" in Jacques Godechot, *Les Constitutions de la France depuis 1789* (Paris, Garnier-Flammarion, 1970), p. 65 ("La Nation française renonce à entreprendre aucune guerre dans la vue de faire des conquêtes, et n'emploiera jamais ses forces contre la liberté d'aucun peuple").

[2] On Germany and Japan, see country chapters. See also Italian Constitution, Article 11, in A. Blaustein and G. Flanz (eds.), *Constitutions of the Countries of the World* (Dobbs Ferry, NY, Oceana Publishers, 1971) ("Italy repudiates [*ripudia*] war as an instrument of aggression against the liberties of other peoples and as a means for settling international controversies . . .").

various countries likewise manifests commitments to collective security made within the framework of international organizations.

National constitutional law may have a constraining effect on the external behavior of states, both by restricting the circumstances in which military force may lawfully be deployed and by establishing the procedural framework for taking decisions to use force. Yet constitutional processes are not merely restrictive or negative: they can serve an important affirmative function by signaling support for certain legitimate uses of international force, as in the case of commitments to collective self-defense or collective security. Thus constitutional procedures can form part of the means to build political support for international commitments and to ensure that they will be carried out. In particular, parliamentary deliberations can provide a forum for mobilizing public opinion behind a proposed international engagement.[3] The processes of legislative debate in full transparency and publicity can help prepare the polity to accept the risks and burdens of military involvement.

Concerning uses of force under the auspices of international institutions, it is important to clarify concepts that may have different significance for national law than in international discourse. The categories in the editors' introduction differentiate between military activities along a spectrum from monitoring and observation to strong forms of forcible enforcement, but these do not necessarily correspond to categories relevant for national constitutional purposes. Distinctions under national constitutional law may turn on whether the contemplated use of force would qualify as collective self-defense (of an alliance partner who has been attacked), or whether the operation is undertaken with the authorization of the UN Security Council (in enforcement under Chapter VII of the UN Charter or otherwise), or whether a regional organization is involved. Some countries have constitutional prohibitions (or weighty traditions) precluding participation in military alliances but are under no such disability for UN collective security; some have constitutional provisions to enable participation in regional organizations, and so on. Thus, debates over constitutional issues for certain countries concerning the Gulf War of 1990–1 or the conflicts in the former Yugoslavia have included discussion of whether an engagement has been characterized as "collective self-defense" or "collective security," or whether a regional organization

[3] Cf. Louis Henkin, *How Nations Behave* (2nd edn., New York, Council on Foreign Relations Press, 1979), p. 65 ("That important congressional leaders initiated, sponsored, and fought for N.A.T.O. or the United Nations will help to assure their continued support for the obligations undertaken at least for some years") and p. 85 (NATO and similar arrangements "are in the form of a treaty to underscore the solemnity of the undertaking and to assure the parties as well as the potential enemy that the undertaking will be carried out").

(such as NATO) might be called upon to act "out of area," and other distinctions not captured by the categories proposed in the introductory chapter.

Developments in some national constitutional systems have focused attention on the correspondence between an international institution's own mandate as understood at the time of parliamentary approval for that country's participation, and subsequent evolution of the practice of the institution to embrace activities not necessarily foreseen or foreseeable by the parliament when approval was originally given. This issue is a general one concerning the interface between international institutions and national constitutions, not just in the military sphere but especially as regards the evolution of institutions of regional integration. It has received the most elaborate judicial attention in national constitutional decisions concerning participation in the Maastricht Treaty on European Union, rather than on international military deployments.[4] Yet international security organizations have evolved since 1991 in ways not anticipated at their establishment: for example, the United Nations has devised peace-enforcement mechanisms for quelling ethnic conflicts (rather than repelling transborder aggression, which had been of foremost concern in 1945), and NATO has metamorphosed from a defense alliance to an activist instrument. In light of these transformations, constitutional questions for particular state participants take on heightened significance.

The Kosovo crisis of 1999 points up such questions vividly. NATO member states agreed to initiate military action in Yugoslavia, without benefit of an explicit Security Council authorization and, indeed, despite the objections of two permanent members (Russia and China). Legal arguments grounded on claims of implicit Security Council authorization or a general license for humanitarian intervention have been hotly contested.[5] These controversies on the plane of international law will continue, but so will the corresponding debates over national constitutional authority to participate in the Kosovo operation. In a variety of national

[4] See Manfred H. Wiegandt, "Germany's International Integration: The Rulings of the German Federal Constitutional Court on the Maastricht Treaty and the Out-of-area Deployment of German Troops" (1995) 10 *American University Journal of International Law and Policy* 889–916.

[5] See Albrecht Schnabel and Ramesh Thakur (eds.), *Kosovo and the Challenge of Humanitarian Intervention* (Tokyo, United Nations University Press, 2000); "Editorial Comments: NATO's Kosovo Intervention" (1999) 93 *American Journal of International Law* 824–62 (comments by Louis Henkin, Ruth Wedgwood, Jonathan Charney, Christine Chinkin, Richard Falk, Thomas Franck, and W. M. Reisman); Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects" (1999) 10 *European Journal of International Law* 1; Antonio Cassese, "Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" (1999) 10 *European Journal of International Law* 23.

parliaments, ministers could expect uncomfortable questions about how the launching of air strikes into Yugoslav territory comports with what parliaments thought they were doing when they approved the UN Charter or the North Atlantic Treaty a half-century earlier. (Although NATO parliaments had approved within the last year the extension of the defense alliance to the Czech Republic, Hungary, and Poland, the occasion had not included a revision of the organization's terms of reference to include humanitarian intervention.) In some countries, such as Germany, the legislature has taken the affirmative steps required by national constitutional law to grant contemporaneous authority for that state's military forces to participate in the NATO action. Elsewhere, as in the United States, legislation to embody specific authorization was introduced but not passed; the parliamentary situation is murky. Members of the US Congress initiated a suit alleging that the Kosovo air strikes were not constitutionally authorized, but the federal district court disposed of the case without reaching the merits of the constitutional questions.[6]

For better understanding of recent developments, it may be helpful to trace broad trends, spanning four centuries, by which constitutional theories of separation of powers have come to shape the structures for responding to the challenges of international security. The first section of this chapter surveys general trends in constitutional control over the use of force from the seventeenth to the twentieth centuries, with particular attention to the role of legislative organs in authorizations for military activities. The second section then looks briefly at some of the issues that have arisen for the United States in the post-Second World War period, in relation to decisions whether to take part in multilaterally authorized uses of force. (Since another chapter addresses US practice, the second section of this chapter only highlights certain aspects to illustrate cross-national themes.) The third section examines corresponding issues in the practice of a wider range of countries, including some not otherwise covered in this volume. The fourth section asserts provisional conclusions supportive of parliamentary participation in national decision-making concerning the use of force under international auspices.

Trends in constitutional control over the use of force in the seventeenth to twentieth centuries

Trends to bring military power under civilian constitutional control were fully evident in the seventeenth and eighteenth centuries and found

[6] *Campbell* v. *Clinton*, 52 F Supp 2d 34 (DDC 1999), aff'd, 203 F 3d 19 (DC Cir. 2000) (holding that congressional plaintiffs did not meet the Supreme Court's test for standing to sue).

expression in such fundamental constitutional landmarks as the 1688 settlement in Britain, the US Constitution of 1787, and the French Constitution of 1791. Relevant developments include:

- the rise of national parliaments and consolidation of their authority in relation to royal power, as evidenced in the writings of the Enlightenment on separation of powers and the centuries-long, European-wide trend toward establishment of constitutional monarchies;
- the assertion of the role of parliaments as a check on the monarch's military powers, at least in relation to the funding and manning of military forces;
- the evolution of competing models for military service (professional/voluntary service as contrasted to universal conscription);
- the establishment (at the latest by the twentieth century) of constitutional practices under which certain categories of international agreements – notably treaties of alliance or other external obligations entailing potential military commitments – would be subject to parliamentary debate and/or approval;
- attention in national constitutional systems to issues arising out of participation in the international institutions created in the twentieth century.

Although a full book would be required to trace these trends, a few highlights will show general themes, with illustrations from selected countries.

The seventeenth-century struggles between the British parliament and the Crown fundamentally concerned allocation of constitutional authority over military power. With the Glorious Revolution and the vindication of parliamentary supremacy came the securing of certain basic constitutional principles in the 1688 settlement, including:

- no standing armies in peacetime without parliament's consent;
- no conscription without parliament's consent; and
- no taxation without parliament's consent.[7]

Once an army was authorized, manned, and funded, however, Enlightenment political theories[8] and British constitutional theory[9] maintained that decisions to use it fell within the royal prerogative.

[7] See *Halsbury's Laws of England*, 4th edn. reissue, ed. Lord Hailsham of St. Marylebone (56 vols., London, Butterworths, 1996), vol. VIII (2) *Constitutional Law and Human Rights*, paras. 809–19; vol. XVIII (2), *Foreign Relations Law*, paras. 606–7; vol. XLIX (1), *War and Armed Conflict*, paras. 506–8.

[8] See, for example, Montesquieu, *L'Esprit des lois* (London, G. Bell and Sons, 1902), bk. XI, ch. 6, para. 1 (legislature should regularly scrutinize military appropriations, but "once an army is established, it ought not to depend immediately on the legislative, but on the executive power; and this from the very nature of the thing; its business consisting more in action than in deliberation"); see also John Locke, *The Second Treatise on Civil Government* (Buffalo, NY, Prometheus Books, 1986 [1690]), ch. XII, para. 143.

[9] W. Blackstone, *Commentaries on the Law of England* (4 vols., London, S. Sweet, R. Pheney, A. Maxwell, and Stevens & Sons, 1829), vol. I, p. 254.

By the late eighteenth century, James Madison and other American constitutionalists had expounded the idea that republics under constitutional control would be less likely than kings to take their countries to war. Madison wrote that the Constitution "supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl."[10] That view found juridical expression in Article I, section 8, clauses 11–16 of the 1787 Constitution, but disputes over the roles of Congress and the president in war-and-peace decisions began early and remain unsettled.[11]

In 1795 Immanuel Kant published "To Perpetual Peace," envisioning an ever-expanding league of republics that would lead to a peaceful international society.[12] The modern articulation of the Kantian hypothesis (framed in terms somewhat different from Kant's emphasis on *Rechtstaat*, a state based on the rule of law) is that republics organized on liberal-democratic principles do not fight each other. An impressive body of empirical data now supports that hypothesis, though there remains debate about how to account for arguable discrepancies and to explain the theory underlying the phenomenon.[13] Among the issues considered in the vast literature on the Kantian insight are the relevance of internal structural constraints (such as legislative controls over executive power) to the initiation of external conflict, as well as the policy implications of the theory that the spread of democratic institutions could mitigate or prevent international conflict.[14] Recent proponents of the Kantian theory have likewise addressed the appropriate role for international institutions in facilitating political transitions in the interests of promoting international security.[15]

[10] Letter from James Madison to Thomas Jefferson (April 2, 1798), in Gaillard Hunt (ed.), *Writings of James Madison* (9 vols., New York, G. P. Putnam's Sons, 1906), vol. VI, p. 312.

[11] See Abraham Sofaer, *War, Foreign Affairs and Constitutional Power: The Origins* (Cambridge, MA, Ballinger Publishing Company, 1976); W. Taylor Reveley III, *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?* (Charlottesville, VA, University Press of Virginia, 1981); John C. Yoo, "The Continuation of Politics by Other Means: The Original Understanding of War Powers" (1996) 84 *California Law Review* 167–305.

[12] Immanuel Kant, "To Perpetual Peace: A Philosophical Sketch" in *Perpetual Peace and Other Essays on Politics, History and Morals* (trans. by Ted Humphrey) (Indianapolis, Hachett Pub. Co., 1983), pp. 107–39.

[13] See Spencer R. Weart, *Never at War: Why Democracies Will Not Fight One Another* (Yale University Press, New Haven, CT, 1998); Michael E. Brown et al. (eds.), *Debating the Democratic Peace* (Cambridge, MA, MIT Press, 1996).

[14] See Bruce Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (Princeton, Princeton University Press, 1993), pp. 38–42 and 135–8.

[15] *Ibid.*, p. 136 (cautioning that military intervention is a flawed model for building democracy and that only rarely should international bodies consider such intervention).

Also in the late eighteenth and nineteenth centuries, continental Europe generated new models of civil–military relations. As noted, the 1791 French Constitution renounced wars of conquest; it also articulated in detail the respective roles for the king and the National Assembly in external affairs.[16] The Belgian Constitution of 1831 provided a model for constitutional monarchy (later emulated elsewhere on the continent), under which the king could conclude treaties of alliance but parliament would be required to consent to treaties entailing financial burdens.[17]

In contrast to Anglo-American skepticism about standing armies and conscription, France and other countries implemented universal military service in the nineteenth century. Whether conscripted troops could be used solely for home defense, or also for external interventions, depended upon the constitutional rules and circumstances of given countries. For example, a prohibition on the use of Dutch conscripts for overseas duty was in force from 1830 until the outbreak of the Second World War. In countries where conscripts were limited to defensive service, a monarch might have had a professional army and/or navy for conquest and control of overseas territories. Thus King Leopold's purposes in the Belgian Congo were carried out through voluntary forces rather than conscripted troops.[18] Issues of legal restriction on permissible deployments of conscripted troops (or of who should decide on their use) have persisted to the present day, though the trend toward abolition of conscription and reliance on professional, voluntary armed services has put a different cast on them.

Another development in nineteenth-century Europe was the establishment of a legal model of permanent neutrality, with the objective (among others) of restraining international conflict. Switzerland, the first state to adopt such a model (with political roots as far back as the seventeenth century), had its neutral status internationally recognized by the Congress of Vienna and the Treaty of Paris of 1815.[19] In Swiss constitutional provisions developed from 1832 forward, neutrality has received

[16] See 1791 Constitution, Title III, ch. I (on the National Assembly); Title III, ch. IV, sec. III, art. 2 (on declarations of war by the king in the name of the nation); Title IV on the public forces; Title VI on foreign relations.

[17] On the Belgian model's influence in Italy after 1848, specifically on treaties of alliance, see Giovanni Bognetti, "The Role of Italian Parliament in the Treaty-making Process" in Stefan A. Riesenfeld and Frederick M. Abbott (eds.), *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study* (Dordrecht, Martinus Nijhoff, 1994), pp. 89, 90, and 93.

[18] See Paul de Visscher, "La Constitution belge et le droit international" (1986) 19(1) *Revue belge de droit international* 5 at 11–12.

[19] Edgar Bonjour, *Swiss Neutrality: Its History and Meaning* (London, George Allen & Unwin Ltd., 1946).

either implicit or explicit constitutional status.[20] Other states have fashioned their own versions of permanent neutrality, with or without international guarantees or specific provisions of national constitutional law.[21] In perhaps the most dramatic instance, Costa Rica permanently abolished its military by Article 12 of its Constitution of November 8, 1949.[22]

The global, total wars of the twentieth century shook up national as well as international law, and led to the design of new but imperfect structures for collective security (the League of Nations and the United Nations) and collective self-defense (NATO and other regional alliances, and networks of bilateral security treaties). Even during the world wars each allied constitutional democracy had to decide in its own way how to support collective endeavors.[23] The fact that entire nations became embroiled in the First World War by virtue of secret treaties of alliance concluded by their monarchs gave rise not only to Woodrow Wilson's famous slogan calling for "open covenants, openly arrived at,"[24] but also in due course to concrete constitutional reforms.[25] It is now a regular feature of many systems of national constitutional law to require public parliamentary deliberation and approval of treaties of alliance entailing potential military commitments.[26]

The League of Nations came into being as the first international institution charged with preservation of peace through collective security – yet it foundered, partly because of national constitutional requirements. The US Senate, which under Article II of the Constitution had to give advice and consent to ratification of the Versailles Treaty, which included the Covenant of the League, would not agree to a system under which the United States would be committed to resist aggression against another

[20] J. F. L. Ross, *Neutrality and International Sanctions* (New York, Praeger, 1989), p. 41.

[21] See A. Verdross, *The Permanent Neutrality of Austria* (Vienna, Verl. F. Geschichte u. Politik, 1978).

[22] Gisbert H. Flanz (ed.), *Constitutions of the World* (20 vols., Dobbs Ferry, NY, Oceana Publications, May 1995), vol. V, release 95–3, p. 79.

[23] Australia – the first English-speaking country to introduce peacetime compulsory service (in 1908, limited to home defense) – held two bitterly contested referenda that resulted in narrow defeats (in October 1916 and December 1917) of proposals to extend conscription to overseas service.

[24] Woodrow Wilson, Address to Congress, "The Fourteen Points," January 8, 1918. Wilson's speech actually referred to "open covenants *of peace*," but the idea of public treaties is at least equally important for international commitments that could lead a country into war.

[25] See, for example, Bognetti, "The Role of Italian Parliament," pp. 90 and 93 (treaties that brought Italy into the First World War were not revealed to the Italian parliament until after the end of the war; later reforms sought to end the practice of secret alliance treaties).

[26] See Riesenfeld and Abbott, *Parliamentary Participation*.

state. Isolationist senators especially objected to Article 10 of the League Covenant, with the undertaking "to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."[27] Senator Henry Cabot Lodge introduced a reservation to specify that no military action could be taken under this article without explicit authorization of Congress; President Wilson was neither able to overcome the opposition nor willing to compromise, and the Covenant was defeated.[28]

The designers of the UN Charter attempted to establish a more realistic system than the defective League of Nations, notably through the recognition of a special role for the major powers as permanent members of the Security Council. At the same time, Article 43 of the Charter affirms the relevance of national constitutional requirements, by providing that agreements to place national military contingents at the disposal of the Security Council are subject to ratification by member states, "in accordance with their respective constitutional processes." This affirmation undermines the view (espoused by a few writers in the 1990s) that resolutions of the Security Council could create obligations on states to use military force without their consent or could affect the requirements of internal constitutional law.[29] The better view is that the UN Charter confers no power on the Security Council to compel states to contribute militarily to UN collective security, apart from the implementation of agreements under Article 43 of the Charter duly ratified in accordance with constitutional processes.[30]

[27] Under Article 10, the League Council was to "*advise* upon the means by which this obligation shall be fulfilled." Cf. Article 16(2): it "shall be the duty of the Council [in case of resort to war in disregard of covenants] to *recommend* to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League" (emphasis added).

[28] See August Heckscher, *Woodrow Wilson: A Biography* (New York, Collier Books, 1991), pp. 588–19, 618–19, 629–31, and 665.

[29] See Thomas M. Franck and Faiza Patel, "UN Police Action in Lieu of War: 'The Old Order Changeth'" (1991) 85 *American Journal of International Law* 63.

[30] See Oscar Schachter, "Authorized Uses of Force by the United Nations and Regional Organizations" in Lori F. Damrosch and David J. Scheffer (eds.), *Law and Force in the New International Order* (Boulder, CO, Westview Press, 1991), pp. 65 and 69–71; Jochen Abr. Frowein, "Article 42" in Bruno Simma et al. (eds.), *Charter of the United Nations: A Commentary* (Oxford, Oxford University Press, 1994), p. 633 ("The fact that the Security Council cannot oblige member states to place armed forces at its disposal without agreements according to Article 43 is a result of the relationship between Articles 43 and 42"). For the drafting history and rejection of proposals to make military bases or rights of passage available without consent, see also *ibid.*, "Article 43." By contrast, when the Council decides on measures *not* involving the use of force under other provisions (notably Article 41), it has the power to make those measures compulsory without regard to national constitutional processes.

Similarly, post-war collective defense treaties acknowledge the significance of national constitutional requirements in approving and implementing alliance commitments. Article 11 of the North Atlantic Treaty provides that the treaty is to be ratified "and its provisions carried out by the Parties in accordance with their respective constitutional processes." In the case of the Organization of American States (with attributes both of a defense alliance and of a regional arrangement under the UN Charter[31]) the Organ of Consultation is authorized to decide on certain binding measures to respond to armed attacks or other situations endangering the peace of the Americas, subject to the "sole exception that no State shall be required to use armed force without its consent."[32]

Collective security and collective self-defense: issues for the United States

In the United States, constitutional questions have arisen at the point at which the Senate considers whether to approve treaty commitments in the military sphere, as well as in connection with the enactment of legislation relevant to carrying out obligations under such treaties, and also on each occasion when international commitments have been invoked in justification for presidential decisions to dispatch US troops to areas of conflict.[33] The issues are inextricably bound up with the long-running and fundamentally irresolvable controversy over the allocation of domestic authority to decide upon external uses of military force: the legislature has not wanted to write any "blank checks" for future executive authority, nor have presidents wished to give ground on their claim of a substantial domain of autonomous executive decision-making power in military matters. In specific conflicts – Korea, Indochina, the Persian Gulf, the former Yugoslavia, Somalia, Haiti, and others – presidents have insisted either that the Constitution itself gave them authority to commit US troops to a collective endeavor, or that an additional source of executive authority could be found in previously ratified treaties.

The War Powers Resolution of 1973 affirms Congress's constitutional prerogative to share in decisions to introduce US troops into hostilities, and asserts that no existing treaty authorizes the president to introduce armed forces into hostilities without specific and contemporaneous

[31] See Inter-American Treaty of Reciprocal Assistance, done at Rio de Janeiro, September 2, 1947, Treaties and Other International Acts Series 1838, Arts. 1–9; Charter of the Organization of American States, done at Bogota, April 30, 1948, reprinted as amended at (1986) 25 ILM 529, Arts. 1 and 27–8.

[32] Rio Treaty, Arts. 8 and 20.

[33] See Jane Stromseth, "Rethinking War Powers: Congress, the President, and the United Nations" (1993) 81 *Georgetown Law Journal* 597–673.

congressional approval.[34] Nothing in the ensuing decades has moved Congress to abandon this position of principle. The congressional attitude toward UN commitments has been at best skeptical and at worst hostile; instead of facilitating UN endeavors, Congress has undermined them by failing to appropriate funds for assessed obligations and has busied itself with proposals to restrict the president's flexibility in relation to UN military activities.[35]

Inter-branch tensions, and the ambivalence of the public at large, are evident in the UN-approved interventions of the 1990s in which the United States took the leadership role. In the Gulf War, although President Bush insisted that he did not need the approval of "some old goat in the United States Congress to kick Saddam Hussein out of Kuwait,"[36] he did request and receive congressional authorization under the War Powers Resolution,[37] thereby significantly enhancing the legitimacy of the military effort in the eyes of the public.[38] By contrast, President Bush did not meaningfully involve Congress in the Somalian initiative of December 1992;[39] and after the first US casualties were incurred in October 1993, Congress promptly asserted itself to cut off funding for the deployment in Somalia as of March 31, 1994.[40] When

[34] War Powers Resolution, Pub. L. 93–148, 87 Stat. 555 (1973), 50 USC §§1541–8, §§2 (policy statement) and 8(a)(2) ("Authority to introduce United States Armed Forces into hostilities shall not be inferred . . . from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction . . .").

[35] For example, in proposals to restrict the president from placing US troops under foreign or UN command, which have been called "highly questionable" on constitutional grounds. Louis Henkin, *Foreign Affairs and the U.S. Constitution* (2nd edn., Oxford, Oxford University Press, 1996), pp. 256–60.

[36] Quoted in Stromseth, "Rethinking War Powers," p. 597, n. 1.

[37] Authorization for Use of Military Force Against Iraq Resolution, Pub. L. 102–1, 105 Stat. 3 (1991).

[38] Professor Ely quotes a student who wrote about how the congressional decision shaped his own perceptions: "The congressional process that led to the authorization of 12 January 1991, had a significant bearing on my own attitude towards the war once it began . . . Had President Bush gone to war by fiat, without authority from Congress . . . I believe I would have marched against it. But the war was in fact duly authorized, and I therefore believed it best to reserve my own doubts and not actively oppose a war which was entered into in a constitutional manner." Quoted in John Hart Ely, *War and Responsibility* (Princeton, Princeton University Press, 1993), p. 8.

[39] An opinion of the Office of Legal Counsel in the Justice Department inferred tacit congressional approval from a sense-of-the-Congress measure supportive of efforts to assure delivery of food and other relief. See "Authority to Use United States Military Forces in Somalia" (December 4, 1992) 16 *Opinions of the Office of Legal Counsel* 8, citing Horn of Africa Recovery and Food Security Act, Pub. L. 102–274, 106 Stat. 115 (1992).

[40] Pub. L. 103–139, sec. 8151, 107 Stat. 1475 (1993). The limitation on funding past March 31, 1994 contained the proviso that "United States combat forces in Somalia shall be under the command and control of United States commanders under the ultimate direction of the President of the United States": *ibid.*, sec. 8151(b)(2)(B). See Jane E. Stromseth, "Collective Force and Constitutional Responsibility: War

the Clinton administration formulated guidelines for US participation in multilateral peace operations, one of the stated criteria was support from the US Congress;[41] but the administration did not want to risk a congressional vote on the Haitian intervention and deployed troops without congressional endorsement, even though Congress was poised to vote on the matter.[42]

In the case of Bosnia-Herzegovina, President Clinton maintained that congressional approval was not constitutionally required but added that he would "welcome" an expression of congressional support.[43] A sense-of-the-Senate resolution gave support to the troops while expressing "reservations" about the presidential decision to dispatch them; the House of Representatives supported the troops while registering "serious concerns and opposition to the President's policy."[44] Meanwhile, the president and congressional leaders negotiated a budgetary compromise with funds for the deployment, although they were at loggerheads on other issues.[45]

On Kosovo, Congress took several inconsistent and inconclusive votes. On March 24, 1999, the House passed (424–1) a measure supporting members of the US armed forces engaged in military operations,[46] but Congress never adopted specific statutory authorization that the War Powers Resolution requires for involvement in hostilities. In a series of votes taken on a single day in April (precipitated by Representative Tom Campbell's invocation of the procedural provisions of the War Powers Resolution), the House voted (249–180) to require the president to seek

Powers in the Post-Cold War Era" (1995) 50 *University of Miami Law Review* 145 at 168–72.

41 Presidential Decision Directive 25, (1994) 33 ILM 795 and 807–9.

42 On Haiti, see Lori Fisler Damrosch, "The Constitutional Responsibility of Congress for Military Engagements" (1995) 89 *American Journal of International Law* 58 and related pieces in the same issue.

43 On Clinton's exchanges with Congress concerning the Bosnian deployment, see Jane E. Stromseth, "Understanding Constitutional War Powers Today: Why Methodology Matters" (1996) 106 *Yale Law Journal* 845 at 904; see also Louis Fisher, "Congressional Abdication: War and Spending Powers" (1999) 43 *St. Louis University Law Journal* 931 at 972–6.

44 Compare this resolution, S.J.R. 44, 141 Cong. Rec. S 18552 (December 13, 1995), with H.R. 302, 141 Cong. Rec. H 14849 (December 13, 1995). The previous day, both chambers voted down proposals to restrict funds for the deployment. See Stromseth, "Understanding Constitutional War Powers," pp. 903–4.

45 President Clinton vetoed authorizing legislation for defense expenditures in December 1995. National Defense Authorization Act, H.R. 1530, 104th Cong., 1st Sess., 141 Cong. Rec. H 15573 (December 21, 1995). One of the reasons for the veto was a provision for a certification requirement to presidential decisions to place US armed forces under the operational or tactical control of the United Nations, which Clinton characterized as infringing his constitutional authority. The House failed to override the veto. 142 Cong. Rec. H 12, 22 (January 3, 1996).

46 H.R. Res. 130 (106th Cong., 1st Sess., 1999).

congressional approval for ground forces,[47] rejected (2–427) a call for a formal declaration of war, rejected (139–290) a call for immediate withdrawal of all US forces, and also split (213–213) on a resolution to provide symbolic support for the air campaign. As a White House spokesman wryly commented, "The House today voted 'no' on going forward, 'no' on going back and they tied on standing still."[48]

Developments in other countries

Outside the United States, many contributors to multinational military operations are constitutionally organized with variations on parliamentary democracy (rather than US-style presidentialism). In Westminster systems, the prime minister and cabinet can theoretically decide upon and implement most military policies, with accountability to parliament through general techniques of oversight (parliamentary questions and the like, as well as the ultimate control of bringing down a government by a vote of no confidence) and through budgetary control. As previously noted, conscription (and the use of conscripted troops other than for territorial defense) has been considered to require legislative authorization since the late seventeenth century.

Some continental parliamentary systems require – either by explicit constitutional provision or by judicially enunciated constitutional rule – that the legislature affirmatively participate in authorizing military commitments.[49] The degree of scrutiny depends on country-specific factors. A bill to amend Article 100 of the Dutch Constitution was introduced in 1997 to the effect that "the Government is to inform Parliament concerning the use or placing at the disposal [of an international force] of armed forces for the maintenance or advancement of the international legal order. This includes the possible deployment of the military for humanitarian tasks in case of an armed conflict."[50]

In the hybrid system created for the French Fifth Republic under the Constitution of 1958, military affairs generally fall within the reserved domain of the president of the Republic, with a lesser degree of parliamentary or other constitutional control than in some other systems.[51]

[47] The president had tendered assurances that he "would ask for Congressional support before introducing U.S. ground forces into Kosovo into a nonpermissive environment." "Letter to House Speaker Dennis Hastert," *New York Times*, April 29, 1999, p. A14.

[48] "House Challenges President Over Kosovo," *New York Times*, April 29, 1999.

[49] On German judicial decisions concerning military deployments and international organizations, see German country study.

[50] Neth. Parl. Docs. TK 1996–7, 25367 (R 1593). See Netherlands Constitution, Arts. 96–105, specifying legislative involvement in various decisions concerning the armed forces.

[51] See chapter on France in this study.

Though the details vary by country, it is possible to discern a trend since the Second World War of legislative involvement in decisions to authorize participation in UN military operations.

Illustrative conflicts: constitutional issues in multinational military operations

From the first test of the UN collective security framework in Korea to the latest events in the Balkans, democratic participants in multilaterally authorized military operations have undertaken their commitments in accordance with national constitutional processes. This survey begins with Korea, turns to the traditional model of UN peacekeeping, and concludes with some of the salient episodes of the 1990s – the Gulf War (1990–1) and the conflict in the former Yugoslavia (1991 to the present).

Korean War In the Korean War (1950–3), more than a dozen democratic countries (and several nondemocracies outside the scope of the present study) responded to the Security Council's call to assist South Korea in resisting North Korea's attack. As the system of collective security agreements contemplated by Article 43 of the UN Charter had not been formed, reliance was placed on an ad hoc coalition organized by the United States. British Commonwealth participants faced few constitutional difficulties about the initial governmental decisions to commit troops to serve under UN authority, but parliaments became involved as needed to authorize the dispatch of conscripted troops or to adjust budgets to meet the new demands.[52] In the United Kingdom, the cabinet took the decisions first to make naval assets available and then to commit ground troops; soon thereafter, parliament was recalled from its summer recess to enact necessary legislation to extend compulsory service to two years.[53] In Australia, the cabinet's decisions to send naval forces and an air-force fighter squadron were ratified with bipartisan support in a specially convened meeting of parliament.[54] (A Commonwealth division was created with ground troops from Britain, Australia, New Zealand, and Canada.) Domestic political support in the participating countries

[52] See, for example, Tim Carew, *Korea: The Commonwealth at War* (London, Cassell, 1967); Anthony Farrar-Hockley, *The British Part in the Korean War* (London, HMSO, 1990); Callum MacDonald, *Britain and the Korean War* (Cambridge, MA, B. Blackwell, 1990); John Melady, *Korea: Canada's Forgotten War* (Toronto, Macmillan of Canada, 1983); T. B. Millar, *Australia in Peace and War: External Relations 1788–1977* (Canberra, Australian National University Press, 1978).

[53] Farrar-Hockley, *The British Part in the Korean War*, pp. 113–15.

[54] Millar, *Australia in Peace and War*, pp. 178–9. Peacetime conscription was reinstated by legislative enactment in spring 1951, but for domestic Australian duty only.

was sustained partly because of the perception of linkage to prospective security relationships with the United States.[55]

Traditional UN Peacekeeping On the one hand, constitutional requirements can inhibit certain states from participating in UN peacekeeping. The Mexican foreign minister declared in 1999: "Mexico has never participated, nor will it participate in UN peacekeeping operations. This is due to constitutional reasons."[56] However, in connection with the successful quest by Mexico to be elected to a two-year term on the UN Security Council in fall 2001, President Vicente Fox indicated that Mexico could adopt a more flexible position with respect to potential contributions to UN peacekeeping.[57]

On the other hand, more typically, constitutional processes structure the manner in which states arrive at national decisions to contribute to collective peacekeeping. Various states have explained in response to UN inquiries that domestic constitutional action – usually parliamentary approval – is required in order for them to commit troops.[58] A number of the frequent troop-contributing countries have regulated their participation through standing legislation. For example, Scandinavian countries were among the first to respond favorably to Secretary-General Dag Hammarskjöld's request to consider providing peacekeeping contingents for UN use, but they made their reply conditional on enactment of necessary legislation. A further condition was that the government of each troop-contributing country would make an independent appraisal of the situation in question, rather than giving the United Nations an automatic right to draw on the standby force:

This may sound very restrictive and it does, in fact, imply a limitation . . . But it should be borne in mind that in the final analysis it is a question of asking 4,000

[55] Compare the then-incipient SEATO relationship (relevant to Australia's and New Zealand's security links to the United States) with the following recent comment of a Turkish veteran of the Korean War: "Public opinion was very much against it . . . But Turkey's role helped us join NATO in 1952 and qualify for American aid. Within a few years, public opinion had shifted": "Korean Vets of Turkey Find, Sadly, Glory Fades," *New York Times*, July 26, 1998.

[56] Quoted in Monica Serrano, "Latin America: The Dilemma of Intervention" in Schnabel and Thakur, *Kosovo*, p. 223 at p. 244, n. 46. It appears that the constitutional inhibition concerns the reference to "non-intervention" in Article 89, section X of the Mexican Constitution. See Flanz, *Constitutions of the Countries of the World* (June 1998), vol. XII, release 98–4, p. 45.

[57] See Ginger Thompson, "Mexico Wins U.N. Council Seat, Strengthening Fox's World Role," *New York Times*, October 4, 2001.

[58] See Robert C. R. Siekmann, *National Contingents in United Nations Peace-keeping Forces* (Dordrecht and Boston, Martinus Nijhoff, 1991), pp. 15–18, 20, 34–5, 48–50, 54–5, and 58 and references therein to constitutional and parliamentary practice of Canada, Ireland, the Nordic countries, Austria, and other states.

young men to risk their lives for a cause which, being an international issue, affects their own countries only indirectly. A democratic government must make sure that the people understand and support its actions. That is why we have found it necessary to make this reservation.[59]

The Scandinavian national laws to implement this plan were enacted between 1964 and 1967 and have provided the foundation for those countries' prominent roles in UN peacekeeping.[60]

Constitutional processes can include an expectation of active parliamentary consideration and approval of specific peacekeeping commitments. Standing legislation can regulate the conditions under which governments are required to obtain affirmative parliamentary approval for commitments above a certain scope or level of risk. For example, Ireland's frequent contributions to UN peacekeeping are governed by the Defence Act 1960 as amended in 1993: if an armed contingent consisting of more than twelve persons is involved, the Act requires approval of the Dail (the representative house of parliament).[61]

Gulf War In the Gulf War of 1990–1, some parliamentary governments had constitutional authority to make the necessary commitments through executive decision, without going through a process corresponding to the US Congress's debate and vote in January 1991. But even in the Westminster systems, one did see a kind of "parliamentarization" of the process, in the form of resolutions approving national support for the multinational coalition adopted, a few days before or after January 15, 1991, in London,[62] Ottawa,[63] Canberra,[64] and elsewhere.[65] In France, even though the president of the Republic has constitutional authority to take most military decisions on his own, the executive chose

[59] See Per Haekkerup, "Scandinavia's Peace-keeping Forces for U.N." (1964) 42 *Foreign Affairs* 675 at 678.

[60] Bills for Denmark, Finland, Norway and Sweden are reprinted in P. Frydenberg (ed.), *Peacekeeping. Experiences and Evaluations – the Oslo Papers* (Oslo, Norwegian Institute of International Affairs, 1964), pp. 313–32.

[61] Irish White Paper on Defence (1996), ch. 7, paras. 7.27 and 7.35.

[62] *Hansard*, HC, vol. 183, cols. 734–825, January 15, 1991; vol. 184. cols. 24–113, January 21, 1991.

[63] See Michael Rossignol, "International Conflicts: Parliament, the National Defence Act, and the Decision to Participate," Background Paper BP-303E (Ottawa, Research Branch, Political and Social Affairs Division, Library of Parliament, August 1992).

[64] See Murray Goot and Rodney Tiffen (eds.), *Australia's Gulf War* (Carlton, Vic., Melbourne University Press, 1992).

[65] For country references and dates, see Lori F. Damrosch, "Is There a General Trend in Constitutional Democracies Toward Parliamentary Control over War-and-peace Decisions?" (1996) *American Society of International Law, Proceedings of the 90th Annual Meeting* 36 at 37–8.

to place the matter before the parliament, which endorsed the government's policy.[66]

In Germany and Japan, the Gulf War precipitated a rethinking of the interpretation of apparent constitutional constraints on participation in collective military activities. Country studies in this volume explore these issues.

Former Yugoslavia Commitments on the part of various democratic states (including the United Kingdom, France, Germany, the Netherlands, and several Nordic countries) to successive stages of peacekeeping and enforcement activities in the former Yugoslavia have taken account of the nature of the undertaking and the expected level of risk. Several such states (for example, the United Kingdom and France) made initial commitments to the UN Protection Force on the basis of executive authority, without much involvement of national parliaments. In other countries, specific parliamentary decision is required for external deployments, including those in support of UN peace operations. In either event, national parliaments of virtually all participating countries were brought into the loop in approving national commitments to the NATO Implementation Force for Bosnia-Herzegovina.[67]

The participants in the 1999 NATO intervention in Kosovo took diverse approaches to the question of parliamentary involvement, as described in the country chapters on the United States, United Kingdom, France, Germany, Canada, and Norway. Interestingly, the newest NATO members and NATO aspirants had their first tests of constitutional control of war powers with the Kosovo crisis. Hungary, which borders Yugoslavia and has close ties to ethnic Hungarians in the Vojvodina region of Serbia, submitted certain crucial decisions – including overflight permission for NATO aircraft – for the authorization of the national parliament.[68] Bulgaria and Romania, not yet NATO members but eager to prove themselves suitable partners, also had parliamentary votes to approve opening their airspace to NATO planes.[69] In the endgame,

[66] See Elisabeth Zoller, *Droit des relations extérieures* (Paris, Presses universitaires de Paris, 1990), pp. 88, 105, 239–42, 250, 253–4, and 256.

[67] Damrosch, "Is There a General Trend," pp. 38–9.

[68] See Peter Tálas and László Valki, "The New Entrants: Hungary, Poland, and the Czech Republic" in Schnabel and Thakur, *Kosovo*, p. 201 at pp. 202–3 (the Hungarian parliament gave approval in October 1998 for use of Hungarian airspace by NATO aircraft; parliament met in extraordinary session on March 24, 1999 to approve the unrestricted use of airspace and facilities and later debated the term "unrestricted" as the situation evolved).

[69] See Andrew J. Pierre, "De-Balkanizing the Balkans: Security and Stability in Southeastern Europe," *U.S. Institute of Peace Special Report*, pp. 3 and 5 (September 20, 1999). (The Bulgarian parliament reluctantly approved permission for air rights but not ground

when Russia sought overflight rights over Bulgaria in June 1999 to supply the Russian contingent that had occupied Pristina airport before NATO troops got there, the Bulgarian authorities cited constitutional provisions requiring parliamentary approval for military transit in rejecting Russia's demand.[70]

Constitutional considerations for particular countries

Some post-Second World War constitutions have placed apparent constraints (though not necessarily insuperable obstacles) on full-fledged participation in multinational military operations. These difficulties have arisen in the cases of constitutions that renounce some or all uses of military force (notably Germany and Japan, whose post-war constitutions and attitudes react against their Second World War experiences), as well as in the cases of countries espousing a constitutionally grounded policy of neutrality.

Germany and Japan Both Germany and Japan made financial contributions in lieu of troop commitments to the Gulf War, because of unresolved questions about whether their constitutions would allow them to participate militarily. Before the 1990s, the German Constitution (as amended in 1954 and 1968) had been interpreted to allow German participation in defense of the NATO area.[71] Political leaders resisted an interpretation embracing UN peacekeeping or NATO out-of-area operations[72] (although the Federal Republic had made no reservation on the use of its armed forces when it acceded to the UN Charter in 1973). Hans-Dietrich Genscher (then foreign minister) insisted that Germany could not constitutionally deploy troops outside the NATO area.[73]

transit; the Romanian parliament voted air rights, with the principal opposition party abstaining.)

[70] This fascinating episode is recounted in Flora Lewis, "A Clash With Russia in Kosovo Came Too Close for Comfort," *International Herald Tribune*, October 1, 1999.

[71] The *Grundgesetz* (Basic Law) of 1949, as amended in 1954 and 1968, allows the Federal Republic to establish armed forces "for defense purposes," with the proviso that "[o]ther than for defense purposes the armed forces may be employed only to the extent explicitly permitted by this Basic Law": article 87a(1) and (2). Pursuant to article 24(1), the federation "may by legislation transfer sovereign powers to international organizations" and article 24(2) allows the federation to "become party to a system of collective security."

[72] See Daniel-Erasmus Khan and Markus Zockler, "Germans to the Front? or Le Malade Imaginaire" (1992) 3 *European Journal of International Law* 163; Jochen Abr. Frowein and Torsten Stein, *Rechtliche Aspekte einer Beteiligung der Bundesrepublik Deutschland an Friedenstruppen der Vereinten Nationen* (Berlin and New York, Springer-Verlag, 1990); and references in Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edn., Durham, NC, Duke University Press, 1997), pp. 162–3.

[73] See Kommers, *Constitutional Jurisprudence*, pp. 160–4.

Despite this view, German forces operated within the NATO area to carry out the UN Security Council mandate by helping to deploy US forces to the Gulf.

Article 9 of Japan's 1947 "peace Constitution" provides, under the heading "Renunciation of War":

> Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.
>
> In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

This provision was viewed as placing stringent limitations on Japan's role in the Gulf.

In Germany's case, the Federal Constitutional Court subsequently settled the constitutional issues in an important 1994 judgment clarifying the terms on which Germany could join in multinational peace operations.[74] Because Japan's courts would have treated the corresponding questions as nonjusticiable under the "political question" doctrine, a definitive judicial clarification was unavailable. The Japanese legislature did later adopt a Peace-Keeping Operations (PKO) Law setting restrictive conditions for Japanese participation in such operations. Small Japanese contingents have carried out noncombatant functions in Cambodia and elsewhere.[75] An affirmative decision by the Diet is necessary for units of Japan's Self-defense Forces to carry out peacekeeping missions.[76]

The German constitutional ruling, which disposed of objections to German involvement in peace enforcement in the former Yugoslavia and humanitarian operations in Somalia, enunciated principles governing Germany's participation in any collective military action. Beyond affirming that Germany's 1949 Basic Law does permit Germany to become a full partner in the kinds of operations under examination, the judgment is of special interest for its articulation of a constitutional requirement of parliamentary consent. Although that requirement is derived from Germany's particular experience, the proposition that certain fundamental decisions should be validated through affirmative legislative action could be generalizable to other countries.

Consistent with this interpretation of German constitutional requirements, the *Bundestag* had to act affirmatively to approve involvement in

[74] *International Military Deployments Case*, 90 BVerfGE 286 (1994). Excerpts in English appear at (1997) 106 *International Law Reports* 318–52.

[75] See Akiho Shibata, "Japanese Peacekeeping Legislation and Recent Developments in U.N. Operations" (1994) 19 *Yale Journal of International Law* 307.

[76] *Ibid.*, p. 324; see also Japan country study, below.

the Kosovo campaign. In an extraordinary session of October 16, 1998, the *Bundestag* voted in favor of participation by federal armed forces with NATO in Kosovo; votes were also held November 19, 1998 to approve participation in a NATO extraction force in Macedonia and on February 25, 1999 for use of troops in a post-crisis stabilization force.[77]

"Neutral" countries and UN operations The term "neutral" needs to be used with caution, because of a disjunction between political and legal meanings, as well as transformations in the legal import of the term in the UN Charter era. Switzerland is *sui generis* as a state whose permanent neutrality is internationally recognized, and a state that will join the UN for the first time in 2002. Austria and Ireland have long-standing traditions of neutrality with respect to formal military alliances,[78] and they have been active and frequent contributors to UN peacekeeping, as have the "neutral" Nordic countries (Sweden and Finland, which are not members of NATO).

Most of the "neutral" states were able to be supportive of the enforcement action against Iraq in 1991, including in some cases through tangible military contributions. However, since by definition no "neutral" state is a member of NATO, none joined in Operation Allied Force over Kosovo in March 1999. As has been reported, the lack of a UN mandate for the Kosovo operation was the stated reason for Austria's decision to close its airspace to NATO warplanes involved in the air strikes.[79]

Conclusion

A comparative study can help confirm or reject the following propositions, one descriptive and the other normative:

- first, that democratic parliaments do play active roles in determining the scope and terms of national commitments to multinational peace operations; and
- secondly, that parliamentary participation should not be an impediment to effective military action, but could even serve a constructive function in building public support for such engagements and signaling depth of commitment.

[77] See Simon Duke, Hans-Georg Ehrhart, and Matthias Karadi, "The Major European Allies: France, Germany, and the United Kingdom," in Schnabel and Thakur, *Kosovo*, p. 128 at p. 133; see also German country study.

[78] But see "Tie to NATO Forces Ireland to Reconsider Neutral Role," *New York Times*, December 16, 1998.

[79] "Europe's Governments Largely Favor Action," *The Washington Post*, March 25, 1999.

The country studies will provide additional evidence relevant to establishing these propositions.

Descriptively, it is possible to discern a variety of modalities of parliamentary involvement, exercised either before national military power has been committed to a collective endeavor or afterwards to control, curtail, or even terminate participation. The German model of insisting in principle on advance parliamentary approval lies at one end of a spectrum. Although the German approach is more emphatic than those of other democratic countries (with different historical experiences and constitutional traditions), there are signs that Germany's example may have influenced the practice of some of the newly democratizing states of Eastern Europe: the illustrations noted above of Hungary, Bulgaria, and Romania (for example, in granting or denying overflight permission during the Kosovo conflict, with reference to constitutional requirements for parliamentary consideration) may reflect the persuasive force of Germany's constitutional model.

Even where explicit prior parliamentary authorization is not constitutionally required, parliaments typically have to specify the level of funding for a national commitment to an international military operation of any significant duration, as was done when several of them were summoned back from summer recess to deliberate over the response to the Korean crisis of 1950, to appropriate funds for the Gulf War of 1991, or to approve the commitments in the former Yugoslavia. Parliaments have also "pulled the plug" on national commitments to collective military operations that have not succeeded in achieving the originally contemplated objectives, or that are perceived to have failed – as the US Congress did on the Somalia operation, by setting a cut-off date of March 31, 1994 for use of appropriated funds for the military deployment.[80] Apart from formal votes, parliaments provide the forum in which national policies are debated. Parliamentary committees are becoming increasingly assertive in demanding information and making recommendations. In the aftermath of several notorious episodes – Belgium and France in Rwanda; the Dutch at the Srebrenica massacre in Bosnia-Herzegovina – eventual parliamentary inquiries have laid bare the facts about traumas of the recent past and have thereby contributed significantly to setting directions for future policy.

The normative proposition – that democratic parliaments *should* be engaged with these questions – is more difficult to establish, but it is hoped that the present study sheds light on it. Some authors have expressed concern that constitutional requirements for parliamentary approval of

[80] See Pub. L. 103–139, sec. 8151, 107 Stat. 1418, 1475 (1993).

decisions to participate in collective military actions could undermine deterrence or impair the effectiveness of such operations.[81] In my opinion, however, the framers of the post-Second World War security institutions correctly apprehended the need for democratic parliaments to act through national constitutional processes to ensure support for international engagements. Circumventing those processes in the interest of putative efficiency would be short-sighted. Only when military policies are fully debated and understood through the constitutional processes of democratic societies will there be sufficient assurance of public support for them. Deliberative processes do entail some costs in terms of delay and uncertainty, but far more costly would be to gamble that democratic publics will tolerate risks that have not been adequately justified.

[81] See Bernard H. Oxman, "The Relevance of the International Order to the Internal Allocation of Powers to Use Force" (1995) 50 *University of Miami Law Review* 129 at 139–43: "Requiring case-by-case parliamentary approval would effectively convert the Security Council from a decision-making organ into a diplomatic conference authorized to propose agreements for formal approval by member governments and their parliaments . . . Either waiting for the development of a sufficiently compelling political environment to ensure decisive parliamentary action, or manipulating events to stimulate the development of such an environment, could prove to be very costly."

3 Domestic political factors and decisions to use military forces

Karen A. Mingst

There is little systematic information about why states choose to make substantial commitments to multilateral security activities. Much of the literature points to states as unitary actors acting according to national interests, yet the unitary actor approach does not provide an appropriate framework for analyzing decisions in democracies to have forces deployed under international institution auspices. Even in the case of established democracies, enabling or constraining domestic considerations are curiously missing from most of the literature. This book fills this gap.

This chapter examines factors relevant to the decision of democratic states to commit to using force under international auspices. Scholars need to break open the shell of the unitary state and probe multiple, often conflicting, interests of the political culture; domestic political relationships, including the military; and societal groups. This task is especially important in discussing democracies, since they provide key leadership for peacekeeping and enforcement actions.

This chapter focuses on cultural, political, and societal factors which are part of the calculus of a democratic state's decision to make and keep an international commitment to use force. Both formal constitutional provisions and informal practices developed over time make a difference. After all, democracy is a system in which elites are held accountable for their actions and decisions. To what extent do formal and informal domestic political and societal factors explain the commitments they make?

In focusing on domestic factors, the chapter builds on Lori Damrosch's chapter on state legal structures. While decisions to commit troops to fulfill international obligations are taken within the legal parameters of the structural relationship between the executive and legislative branch, political factors determine that law in the first place. Political actors interpret and reinterpret the legal provisions.

The legal provisions designed to insure accountability in democratic states provide a foundation, but how those provisions are utilized or not utilized, modified, or sometimes ignored is a result of domestic politics. Such decisions reflect characteristics of the political culture and of

political and societal relationships. Democratic accountability is more than legal accountability.

Political culture

Characteristics of the political culture, including overarching values and beliefs shared by the leadership and the population, provide the context for democratic states making an international commitment. A prevailing set of beliefs held by principal decision-makers will predispose them in the direction of certain policy choices. For democratic states considering making multilateral commitments to use armed forces, three dimensions of political culture are relevant.

First, for a small group of democratic states, the so-called middle powers, the state's national identity has frequently been tied to participation in monitoring and observation activities and traditional peacekeeping. They have a strong inclination to continue to commit military forces to multilateral activities, since their national identity is defined in terms of external behavior.

Ireland is such a case. Its involvement with the League of Nations gave Ireland "an international identity, purpose, and sense of place."[1] As for UN peacekeeping, the former defense minister said that:

> In many ways the participation of Irish troops in United Nations peacekeeping has become the mainstay of our involvement in the affairs of that organization. Without our peacekeeping commitment the UN could be said to have little real meaning for us as otherwise our voice would be lost among the voices of the superpowers.[2]

Similarly, "peacekeeping became Canada's metier."[3] Until the mid-1990s, Canadians pointed with pride to the fact that the country had participated in every UN peacekeeping operation. A national monument honors those who served and a national museum chronicles their story. During the Cold War, peacekeeping was the way for Canada to acquire international influence and differentiate itself from the United States. At the same time, it served to unite the country across cultural and regional divisions. However, the charges and subsequent investigation of misconduct of Canadian peacekeepers in Somalia and the changing nature

[1] Michael Kennedy, *Ireland and the League of Nations, 1919–1946: International Relations, Diplomacy and Politics* (Dublin, Irish Academic Press, 1996), p. 257.

[2] D. Andrews, Minister for Defense, Republic of Ireland, speaking in the Dail, June 29, 1993.

[3] J. L. Granatstein, "Peacekeeping: Did Canada Make a Difference? And What Difference Did Peacekeeping Make to Canada?" in John English and Norman Hillmer (eds.), *Making a Difference? Canada's Foreign Policy in a Changing World Order* (Toronto, Lester Publishing, 1992), p. 229.

of post-Cold War peacekeeping have caused a rethinking of Canada's commitment to it, as discussed by Fen Hampson in this book.

Secondly, for some middle powers, the political culture supports specific values that are compatible and congruent with support for monitoring/observation and traditional peacekeeping. Domestic values create a predisposition to make such international commitments.

In both Sweden and Norway, for example, political culture is grounded in the idea that conflict and violence can be prevented. Both cultures acknowledge the possibility of positive-sum games: all disputants can conceivably "win," given the correct compromise. As a result, both countries have been willing to provide monitoring troops while such compromises are negotiated. Both see themselves as effective mediators; their domestic political systems depend on it. As Ulrika Morth and Bengt Sundelius summarize Swedish UN involvement, it is: "[A] manifestation of a national aspiration to project globally the domestic experience of the Swedish version of the 'good society.'"[4]

Thirdly, the state's historical experience, particularly with colonialism and the world wars, will condition its predisposition to make commitments to use force under international auspices. As the Indian chapter in this study shows, after centuries of colonial humiliation, India desired international prestige. At the UN's founding conference, its delegation lobbied for a role in peace and security. Sending troops to UNEF and ONUC "satisfied India's desire for recognition in world affairs."[5] Traditional peacekeeping also permitted India to project its foreign policy as constructive, active, and non-aligned.

For another group of states, defeat in war has had a major impact on their willingness and capacity to make international commitments. In both Japan and Germany, the strong reaction to their ultranationalist past and wartime defeat made any use of force problematic. In both cases, world events since 1989 provided catalysts for change, but the process of modifying the political culture of constraint has been a lengthy one, as the chapters by Akiho Shihata and Georg Nolte in this book show. As the culture of antimilitarism weakened in the 1990s, both countries began to take part in multilateral peace operations. Decades before, each had made separate arrangements for its own defense – West Germany in 1954, with its accession to the North Atlantic Treaty, and Japan in 1951, with its bilateral security treaty with the United States.

[4] Ulrika Mörth and Bengt Sundelius, "Sweden and the United Nations" in Keith Krause and W. Andy Knight (eds.), *State, Society, and the UN System. Changing Perspectives on Multilateralism* (Tokyo, United Nations University Press, 1995), p. 108.

[5] T. Ramakrishna Reddy, *India's Policy in the United Nations* (Rutherford, NJ, Fairleigh Dickinson University Press, 1968), pp. 106–7.

In Japan's case, the Gulf War stimulated a national debate on finding a way to make international commitments without giving the impression that militaristic values had been revived. In Germany's case, the Gulf War and the Yugoslav crises brought to the fore the issue of whether the *Bundeswehr* could act outside the NATO area in multilateral peace operations. In both countries, change required overcoming a "culture of reticence" and committing to an active political-military, as well as economic, role in world affairs.

In both countries, the legal framework forged in the aftermath of the Second World War needed revision. In June 1992, the Japanese Diet approved the "Cooperation in UN Peacekeeping and Other Operations" law. In Germany, in 1994, the Federal Constitutional Court held that there was no constitutional ban on German participation in "tasks typically associated" with a collective security operation, as long as the legislature approved each armed operation. These legal changes did not single-handedly alter the political culture. Rather, they institutionalized changes already occurring in the political environment. As Thomas Berger suggests, "Cognitive beliefs about the world are constantly tested by actual events. While failures and surprises can be reinterpreted so that they do not contradict existing norms and beliefs, they also create pressures that can lead to a reevaluation and modification of the culture."[6]

For the United States in the 1990s, little formal change in its numerous bilateral and multilateral international commitments was necessary. While the United States since the 1950s had contributed military observers, aircraft, and sea-lift capacity for traditional UN peacekeeping missions, such operations did not include American ground troops. Indeed, during the Cold War, the five permanent members of the Security Council (P-5) were deliberately excluded from participation in traditional peacekeeping. That restriction, however, did not prevent the United States from contributing forces to ad hoc multilateral operations, such as the Multinational Force in Lebanon (1982–3) and the Multinational Force pursuant to the 1978 Camp David Accords.

With the end of the Cold War and the increasing demand for more troop-contributing states in more militarily complex peace operations, the restriction against P-5 participation ended. The United States, France, the United Kingdom, and Russia were called upon in new ways.

One of the first tests was the enforcement action in the 1990–1 Gulf War. An American-led coalition fought under a UNSC resolution

[6] Thomas U. Berger, "Norms, Identity, and National Security in Germany and Japan" in P. J. Katzenstein (ed.), *The Culture of National Security. Norms and Identity in World Politics* (New York, Columbia University Press, 1996), p. 326.

authorizing it to liberate Kuwait from Iraqi aggression. The success of that operation led to new-found American optimism regarding the UN's role in the post-Cold War world, but caused long-time Arab League representative at the UN, Clovis Maksoud, to ponder:

> U.S. domination of the proceedings, the precipitous rush to war, the open-ended language of some of the resolutions adopted – these and other aspects of the U.N.'s response to the Gulf crisis raise serious questions about the ability of the organization to serve the interests of the world community and not merely or primarily those of its most powerful states.[7]

Thus, the countries in this volume represent three cases. First, a group of states in which political culture facilitated, even demanded, commitment to multilateral peace operations – Canada, Norway, and India; a second group of previously constrained states that faced radically changed domestic and international expectations of their armed forces in the 1990s – Germany and Japan; and finally, four of the UNSC P-5. The United States, Russia, the United Kingdom, and France, previously constrained by the international system and the UN itself, were now expected to contribute forces to the full spectrum of peace operations described by Ku and Jacobson in the Introduction.

Political relationships

The decision to use force under international auspices is a political one. While formalized in democratic constitutions and legitimized through executive and legislative branch procedures, as Damrosch points out, such a decision is interpreted and implemented by individual and institutional political actors. Leaders, their political groups, budgetary restraints, and the military all play a role.

Leadership

In all polities, top political leaders make a difference, and democracies are no exception. Strong leaders supportive of making a commitment to use military forces under international auspices are often able to overcome domestic obstacles, breaking down barriers between political parties and pushing the agenda even under conditions of budgetary stringency. These leaders are held accountable for their decisions through elections.

In Canada, the leadership of Lester B. Pearson, one of the fathers of UN peacekeeping, was crucial in achieving widespread public support for

[7] Clovis Maksoud, "The Arab World's Quandary" (1993) 8 *World Policy Journal* 551.

it. Other prime ministers have also played very visible roles, among them Brian Mulroney, who recognized the impact of his country's peacekeeping activities on its identity.

In Ireland, Sweden, and India, influential political leaders also played a key role in mobilizing political parties and shaping public opinion to support an active peacekeeping role. Many of them had also held positions within the UN system, notably Ireland's Conor Cruise O'Brien, and Dag Hammarskjöld, Olaf Palme, and Carl Bildt of Sweden. Indian leaders who made careers in UN peacekeeping and subsequently played an important domestic role in support of it include General K. S. Thimayya, Raeshuar Dyal, and General Indar Rikhye.

In newly democratic states such as Russia, senior leaders may find that there are domestic political advantages in committing their country to multilateral peacekeeping. Former President Boris Yeltsin, by doing so, portrayed himself as a strong leader, sympathetic with the needs of Russians in the areas close by. He deflected attention from a crumbling economy, and at the same time enhanced Russia's international prestige.

National leaders are held accountable through the electoral process, yet empirical research suggests that if an unpopular or risky peace operation occurs early in a presidential electoral cycle, politicians can win back public confidence. If the operation is closely followed by an election, it may play a more direct role at the polls. Under parliamentary systems, leaders are always subject to votes of confidence. The more fragile the governing coalition, the greater the legislature's potential role in accountability; the stronger the coalition, or when one party has a large majority, the lower the chance that parliament will call the government to account.[8]

Contending political groups

Elected officials in democracies are leaders not only of parties, but of other political groupings. In the Scandinavian countries historically active in peacekeeping, there has been relatively little dissent among the political parties over that role, as the Norwegian chapter in this book discusses. A survey of Swedish parliamentarians in the early 1990s showed that all parties supported an increase in traditional UN peacekeeping.[9] Most

[8] David P. Auerswald, "Inward Bound: Domestic Institutions and Military Conflicts" (1999) 53(3) *International Organization* 459–504.

[9] Gunnar Jervas, "The View of the Political Parties on Peace Keeping and Peace Enforcing Efforts" in Gunnar Jervas and Rutger Lindahl (eds.), *Skall Sverige Tvinga fram fred?* [Should Sweden Force the Establishment of Peace?] (Research Report 19, The Swedish Institute of International Affairs, Stockholm, 1994).

also supported Swedish participation in both traditional peacekeeping and UN, NATO, or European (at the time, Western European Union) enforcement operations. All surveyed acknowledged, however, that public support would likely weaken if there were a significant loss of Swedish life. None believed that economic costs should be a significant limiting factor. But globally, this degree of consensus among contending political elites is the exception rather than the rule.

In other democracies, there have been sharp political divisions over the question of participation in multilateral peace operations. In Germany and Japan, among and within political parties, the issue has been especially contentious. As the Shihata and Nolte chapters in this book discuss, court decisions and new laws have been necessary, but not sufficient to change a political culture wary of any use of force. In Germany, political leaders arguing for a more "normal" German attitude toward *Bundeswehr* participation in multilateral peace operations have used arguments that reflect the issues important to their constituents. The Christian Democrats, notably former Defense Minister Volker Ruehe, argued in the early 1990s that such participation was necessary if Germany aspired to a seat on the UN Security Council. The Social Democrats and Greens, notably Foreign Minister Joschka Fischer, have sought to appeal to their supporters with arguments that thrust humanitarian intervention into the foreground, especially during the 1999 Kosovo War. Senior party leaders played an essential role in orchestrating change in German attitudes over the last decade.

In newly democratic states, when policies and parties are not well established, coalitions of elites may emerge within society. In Russia in the 1990s, at least three very different views on the country's role in international peace operations contended to become government policy. Liberal westernizers saw the demise of the Soviet Union as the opportunity to pursue political democracy and economic capitalism. This group preferred to refrain from international and regional obligations while concentrating on domestic problems. On the extreme right and left were groups that wanted to restore the empire through a "Russia first" policy. They believed that Russia should act boldly to protect Russian speakers, both within Russia and the areas close by. Eurasianists, finally, argued that Russia must find its own course between Europe and Asia and become the guarantor of stability throughout the territory of the former Soviet Union, including the newly independent states. Despite formal constitutional provisions on accountability for Russian participation in multilateral peace operations, the Federation Council and Russian courts have been left to make their way through uncharted political waters, as the Russian chapter in this book discusses.

Budgetary commitments

Making an international commitment can require financial resources. For most countries, the Swedish case notwithstanding, cost of participation in multilateral peace operations has been a divisive political issue. Within NATO, the issue has been a subset of the longstanding debate on burden-sharing between the United States and its European allies. In the UN, as more operations have been mounted, member states are frequently in arrears. In 1998 total arrears to the UN amounted to $2.5 billion, of which $1.8 billion was for peacekeeping. The United States alone owed between $1.6 billion or almost two-thirds of the total debt, and $1.04 billion for peacekeeping.

Historically, the United States was supportive of traditional UN peacekeeping, lending logistical support, financial resources, and equipment to most operations. In the early post-Cold War era, Washington publicly supported a rebirth of Chapter VII enforcement actions, but as Michael Glennon's chapter discusses, that proved short-lived. From 1994 to 1999, despite executive support, the US Congress refused to pay US dues and arrears if UN administrative and budgetary reforms were not made. In November 1999, a compromise on the funding issue was reached in the Helms-Biden UN Reform Act.[10] US payments to the United Nations would be released in three installments, if specific conditions were met. Despite this positive development, the political debate in the United States over contributions will continue, with direct implications for the survival of the UN.

Russian participation in UN peace operations in the 1990s was a financial burden. Each day that Russian peacekeepers were stationed in South Ossetia, Dniester, and Yugoslavia cost 2.2 million rubles, or $12,000. In 1994, when over 15,000 Russian troops were engaged in Georgia, Tajikistan, Moldova, the former Yugoslavia, and South Ossetia, the cost was between 9–20 billion rubles ($50–$100 million). Russia has sought international legitimacy through peacekeeping, but the budgetary crisis exacerbated by its participation has served to constrain future commitments.

Even the budgets of the UN's more ardent middle-power supporters have become strained. The budget situation dramatically affected Canada's participation in peacekeeping in the 1990s as peacekeeping operations increasingly turned into complex peacekeeping plus state-building operations, or enforcement actions. Despite budget cuts of 20 percent (Can$2.7 billion) to the Department of National Defense between 1993 and 1999 and a reduction in the size of the military from

[10] Title IX, Pub. L. 106–113, 113 Stat. 1501, 1536 (1999).

74,800 to 60,000 troops (most of the cuts coming from the army, the branch with the greatest peacekeeping responsibilities), Canada still tried to maintain its record of participating in all UN operations. Its soldiers often served several tours of duty, and eventually Canada was forced to redefine its peacekeeping role to one of carefully defined niches.

In many democracies, then, financing troop contributions to multilateral peace operations may constrain participation; at minimum, the costs may mean that the legislature demands fiscal accountability. As the French chapter in this book discusses, the more expensive the military establishment, the greater the difference between what the UN pays and the actual costs of deployment. This contrasts with the situation in many developing countries that volunteer for peacekeeping responsibilities. Their participation can actually result in a net financial gain, as Fiji, Nepal, Ghana, and even India have learned.

The military

Even in democracies with a long tradition of civilian control, the attitude of the military is key to the decision to participate in multilateral peace operations. A few militaries are highly supportive. In Ireland, the notion of an international commitment has been institutionalized in the professional Permanent Defence Forces. "Service on a UN mission is now almost a rite of passage. A soldier is not deemed to have soldiered unless he/she has done so . . . the culture of the Irish Defence Forces today is a culture of Peacekeeping."[11] The Indian military is similarly enthusiastic. Participation in peacekeeping provides troops with operational experience, and the Indian military is proud of its contributions since the founding of the UN, as discussed in the Indian chapter of this study.

The US military's enthusiasm for peace operations has waxed and waned. Immediately after the Gulf War, enthusiasm was widespread, as the military sought to redefine its mission in the post-Cold War environment. Strengthening the UN and the US role in it was consistent with the first Bush administration's "new world order" and the Clinton administration's "assertive multilateralism." Yet as the difficulties of complex peacekeeping operations became evident in state-building and compliance operations in Somalia and Iraq, American enthusiasm waned. By the late 1990s, the US military wanted specific objectives, clear-cut exit strategies and a risk-free operational environment before committing to a

[11] *The Irish Defence Forces, Peacekeepers and Custodians of the Peace*, Draft Memorandum, Public Relations Section, Irish Defence Forces Headquarters, Dublin (July 1993), p. 7.

peace operation. Such constraints limited US operational choices in the 1999 Kosovo War.

Perhaps only in Japan has the military been so insulated from public policy-making that it is not consulted about participation in peace operations. The Japanese Defense Agency does not have ministerial status; its function is to manage, not formulate policy. The public thinks of the Self-Defense Force in terms of emergency relief operations – an image the military itself once fostered. But while the military since the Second World War has not played the role it once did in Japanese politics, the SDF has the largest and most modern air and naval forces in the western Pacific. If Japan in fact assumes a greater regional peacekeeping role, it seems likely that the military's assessment of its own capabilities and needs will play a greater role in the decision-making process.

Societal influences

The willingness of democratic governments to threaten and use force is positively and strongly correlated with the degree of domestic support. Media, and the public opinion shaped by the media, play an especially key role in democratic accountability. Both individual and group support (or dissent) matters to democratic governments.

Mass media

The amount of media attention given to a crisis that may involve a multilateral use of military force and the attitude of the media can be critical. In Germany, for example, they were instrumental in publicizing the devastation in Croatia and shaping public reaction. The German media were captivated by the plight of Yugoslavia, given the large number of Croat guest workers who had settled in Germany and the familiarity of German tourists with the countryside. The Yugoslav crises were more immediate to Germans than, for example, the Gulf War and Cambodia to the Japanese, or Rwanda to much of the world.

Once a multilateral use-of-force commitment is made, positive media reports on the results of the actions taken may facilitate and reinforce a society's, and therefore a state's, willingness to participate, not only in that operation, but in future peace operations as well. Media coverage of Japan's first participation in UN peacekeeping in Cambodia was intense and highly favorable,[12] but it was short-lived. Press coverage

[12] Alex Morrison and James Kiras (eds.), *UN Peace Operations and the Role of Japan* (Toronto, The Canadian Peacekeeping Press, 1996), p. 89.

of the return of SDF troops from Mozambique in January 1995 was minimal.

Negative reports questioning the initial commitment, or actions taken during it, can cause the political elite and public to doubt the wisdom of participation. In Canada, for example, the 1993 death by beating of a Somali prisoner by members of the Canadian Airborne Regiment led not only to courts martial, resignations, cover-ups, and a full-blown government inquiry, but to a national soul-searching about Canadian participation in peacekeeping. Two years and several scandals later, Canada established the Commission of Inquiry to examine leadership, troop discipline, the regimental system, and the handling of the Somali issue by the Department of National Defence. The consequences are discussed in this study's Canada chapter.

Public opinion

Public opinion, even in democracies, is generally congruent with governmental policy, unless something happens to shake confidence in elected officials' decisions or military behavior. The Canadian case above was one such situation.

Japan throughout the Cold War was an example of public–government congruence. There was virtually no public discussion of (the lack) of Japanese involvement in multilateral peace operations. Legislative debates on the subject were highly abstract and hypothetical, neither the public nor the media paying much attention to them. Only after Japan was asked to pay the expenses of the Gulf War coalition did the public react; yet this was not followed by a surge of public support for Japanese participation in peace operations. As the chapter on Japan in this book shows, it was the government and bureaucracy that shaped changing Japanese policy, not the public or media.

German public opinion also changed as government policy changed, not the other way around. In 1990, public opinion was almost evenly divided between those who believed Germany should pursue a more active role internationally and those who preferred a "reserved" stance. By 1992, the activists comprised 62 percent of the population, fully 93 percent supporting humanitarian missions and 32 percent supporting German participation in UN peacekeeping. Support dropped to 20 percent for a German role in peace enforcement.[13] After the 1994 Federal Constitutional Court decision, discussed in the German chapter

[13] Ronald D. Asmus, *German Strategy and Opinion After the Wall 1990–1993* (Santa Monica, CA, Rand, 1994), pp. 61–7.

of this study, public support for humanitarian missions and peacekeeping remained high, but support for participation in enforcement actions also remained consistently low, between 12 and 26 percent of those polled.[14] This residual reluctance to get involved plagued the German government during the 1999 Kosovo War and the 2001 Macedonian deployment.

Public opinion can, however, push governments toward commitments they may be reluctant to undertake. In Canada, until the 1990s, the public was enthusiastic in its support of peacekeeping. One writer explained this in these terms: "Peacekeeping is a great morale builder. It is the only thing the public think the military are any good for."[15] Even after the Somali débâcle, Canadian public opinion wished to rehabilitate the image of the military, not abandon its peacekeeping role.

Norwegian public opinion has long supported participation in peacekeeping operations, but opposition can surface if the mission seems unmanageable. After the Israeli invasion of Lebanon and the failure of UNIFIL peacekeepers, including Norwegian units, to prevent the attack, public discussion was intense. The ensuing debate, played out in two Norwegian newspapers, focused on Norway's international obligation to continue to participate versus the need to placate an angry and confused public. In the long run, Norway did continue to participate in UNIFIL until November 1998.[16]

In Ireland, even when the cost of peacekeeping was high in terms of the loss of human life, the media and public reacted with a sense of pride. During ONUC operations in the early 1960s, for example, twenty-six Irish soldiers died. Their deaths were regarded as a "membership fee" paid by the Republic for its international role, and they galvanized public support for Irish participation in UN peacekeeping.[17] Given the largely negative images of violence in Northern Ireland, the Republic's UN role helped to present a different picture of Irish responsibility.

The United States offers an example of an ambiguous public, whose opinions toward peace operations can be shaped by government policy. In the early 1990s, American public opinion followed the Bush and Clinton administrations' enthusiasm for UN peace operations. When elite opinion began to shift after the failure of American efforts in Somalia, public enthusiasm wavered. It did not disintegrate, but Congressional support

[14] Hans-Georg Ehrhart, "Germany and the Peacekeeping Challenge" in H.-G. Ehrhart and D. G. Haglund (eds.), *The "New Peacekeeping" and European Security: German and Canadian Interests and Issues* (Baden-Baden, Nomos Verlagsgesellschaft, 1995), p. 281.

[15] Desmond Morton, "What Is To Be Done? Canada's Military Security in the 1990s" (1990) *Peace and Security* 5.

[16] Marianne Heiberg, *Norway and Keeping the Peace in Lebanon* (*NUPI NOTAT* 317, Oslo, 1995).

[17] R. Smith, *Under the Blue Flag* (Dublin, Aherlow Publishers, 1980), pp. 80–2.

did. Congress legislated a mandatory funding cut-off, which resulted in the withdrawal of American troops within six months, an action that did not directly mirror public opinion.

American public opinion toward the early Yugoslav crises was influenced by pictures of Croats imprisoned in Serb death camps in 1992. But while the public for years urged the government to "do something," it was hostile to the risk of casualties associated with US intervention on the ground. Similar attitudes were also found in Great Britain and France. According to the 1998 Chicago Council on Foreign Relations poll, "Overall public commitment to engagement coexists with reluctance to support the use of U.S. troops overseas."[18] Despite this reluctance, the same survey reported that 57 percent of Americans thought the United States should participate in UN peacekeeping (only 20 percent wanted to leave it to others). Over 72 percent thought such action should be taken only in concert with others in multilateral operations. Given this ambiguity, it took the 1995 Bosnian massacres to create an American elite and public consensus on the need to intervene in the former Yugoslavia.

Thus, in most democracies, government leaders have considerable latitude, given the ambiguity of public opinion. Elected officials also have some discretion in interpreting polling data, since most polls do not distinguish among the different types of peacekeeping operations or different approaches to enforcement. Depending on the circumstances, as NATO's 1999 experience in Kosovo showed, the public is at least willing to consider the full range of military options, including the use of ground troops, if it believes that responsible democratic governments are prudently weighing such decisions.

Societal groups

Historically, few societal groups have been involved in a government's decision to participate in a specific peace operation, but the broad support of groups in countries such as Sweden, Norway, Canada, and Ireland helps build a consensus that makes participation possible. This consensus has been strengthened over time as non-governmental organizations (NGOs) monitoring human rights and conducting civic and police training from these countries have engaged in peacekeeping plus state-building operations with their military. The role of NGOs in the field has led to systematic government consultations with these groups. This provides an opportunity for them to have a voice in decision-making, making government elites more accountable.

[18] John E. Rielly, "Americans and the World: A Survey at Century's End" (1999) 114 *Foreign Policy* 100.

Societal groups are important in determining the level and type of commitment when there are economic implications, ethnic ties, or the prospect of refugees that directly affect their specific interests. This was evident in Germany's response to the outbreak of war in Yugoslavia, where specific domestic constituencies were affected. These included the Croatian community, local governments whose constituents were asked to deal with an influx of refugees, and taxpayers already burdened by the cost of German unification. Domestic groups in the United States had specific reasons to support intervention in Haiti. Not only did a tide of refugees threaten to overwhelm the welfare system in Florida, it would have had political consequences over the long term, by affecting long-standing Latino–American coalitions in state and national politics.

In most democracies, however, there are few cases where societal groups have direct and substantial interests in making international security commitments. The Scandinavian and Canadian cases are more the norm. Groups supportive of making international commitments can and have reshaped the discourse from support of international security commitments to support of state-building activities and humanitarian concerns.

The impact of domestic political considerations by type of peace operation

Along the spectrum of peace operations identified by Ku and Jacobson, the shift from traditional peacekeeping to compliance and enforcement actions has implications for domestic attitudes toward government policy. In general, the more coercive the commitment, putting military personnel in physical danger and requiring costly back-up and support, the more domestic political considerations will matter. There will be greater public and legislative scrutiny and sometimes divisive demands for accountability.

In the 1990s, many operations which began as traditional peacekeeping became enforcement actions, sometimes clearly mandated by the Security Council and sometimes as de facto responses to situations on the ground. To assure deliveries of humanitarian relief in Somalia, peacekeepers had to use force to protect supplies and relief workers; later, when UN peacekeepers were killed, they were required to pursue the Somali clan leader, General Aideed. To provide safe havens for Bosnian civilians, UN peacekeepers used military force, even against direct orders. So the once clear line between peacekeeping and enforcement has blurred, with major implications for states that contribute troops.

Table 3.1. *Domestic factors that matter by form of use of military forces*

Forms of use of military forces	Political culture	Political relationships				Societal factors	
		Top leaders	Contending political elites	Budgetary commit-ments	Military	Media	Public opinion
Monitoring and observation	++	–	–	–	–	–	–
Traditional peacekeeping	++	++	+	+	+	–	–
Peacekeeping plus state-building	+	++	+	+	+	+	+
Force to ensure compliance	–	++	+	+	++	+	+
Enforcement	–	++	+	++	++	++	++

Key:
++ Most important
+ Important
– Less important

Table 3.1 delineates which domestic factors are apt to matter. When armed forces enter lower-risk environments, political culture variables are most influential. There is a high tolerance for commitments congruent with national-identity aspirations and societal values, as Canada, Norway, and India demonstrate. There is little dissent, either among senior leaders, contending political parties, or the military, or in the media or public opinion. Legislatures, likewise, have little say, since budgetary authorizations are relatively small and packaged as standard military appropriations. Accountability at this level is indirect or tacit, because of the compatibility between attributes of the political culture and the peacekeeping mission.

In democratic states, whether traditional troop contributors or new ones, compliance (Bosnia, Kosovo, Iraq) and enforcement (Korean and Gulf Wars) operations generate more public discussion and legislative scrutiny. (For a contrary view, see the French chapter in this study.) This is also true when peacekeepers are engaged in state-building in the midst of civil war (Congo, Somalia).

For this reason, both enforcement actions were "subcontracted" to multilateral coalitions of the willing, acting under UNSC Chapter VII authorizations. Only the states with the capabilities to use coercive force

and the will to do so could be expected to send troops into situations analogous, on the ground, to traditional inter-state wars. In the coalition states, public opinion and the media shaped the environment of governmental decisions. Thus, elected officials were doubly accountable, domestically to established political institutions (political parties, the legislature, and their own military) and to public opinion, and internationally to the UN. As the UK chapter and others in this book demonstrate, domestic accountability remains the more important of the two when compliance or enforcement are involved.

In a traditional peacekeeping nation such as Sweden, the increase in compliance and enforcement actions since the end of the Cold War has shaken the consensus on the use of force under international auspices, but not yet shattered the norm. As new alignments and new issues took shape in the 1990s, polls revealed Swedish ambiguity. Seventy percent of those polled in 1996 favored continued neutrality, yet subsequent polls found that across the political party and ideological spectrum 61 percent favored the idea of Swedish participation in European defense cooperation and 55 percent approved of more extended contacts with NATO. The public, unlike political elites, were skeptical about Swedish participation in UN enforcement actions. Only 29 percent thought that Sweden should contribute combat forces, while 24 percent favored matériel contributions, and 46 percent rejected any Swedish role at all.[19] The Swedish press in the 1990s, including the nation's second-largest daily, began to question participation in enforcement actions.[20]

In Russia, the distinction between peacekeeping and enforcement is unclear. What Russians call peacekeeping is actually a diverse collection of operations from peacekeeping under multilateral organizations such as the UN and OSCE to bilateral treaty operations within the CIS framework.[21] "Mirotvorchestvo" (peacemaker) is a more active involvement than traditional peacekeeping, including counter-insurgency, active fighting, and establishing control over local military situations. The lack of a formal distinction between peacekeeping, enforcement, and other uses of the military for national purposes means that the debate in other democracies over the type of operations is less relevant in the Russian case.

[19] Horan Stütz, "The Views of the Swedes on Peace Keeping Efforts" in Jervas and Lindahl, *Skall Sverige tvinga fram fred?*

[20] Robert Dalsjo, "Sweden and Balkan Blue Helmet Operations" in Lars Ericson (ed.), *Solidarity and Defence: Armed Forces in International Peacekeeping Operations During the 19th and 20th Centuries* (Sweden, Svenska Militarhistoriska Commissionen, 1995), p. 109.

[21] Susan L. Clark, "Russia in a Peacekeeping Role" in Leon Aron and Kenneth M. Jensen (eds.), *The Emergence of Russian Foreign Policy* (Washington, DC, US Institute of Peace Press, 1994), p. 119.

Trying to avoid the "slippery slope" between peacekeeping and enforcement, many states, including the traditional peacekeeping states and the newest contributors of troops, have attempted to put a cocoon of restrictions around their international commitments. The United States' 1994 Presidential Decision Directive 25 (PDD-25) specified six conditions for US participation in peace operations, including the presence of domestic (including congressional) support. Japan and Germany have similar guidelines that could easily be invoked at any time to decline involvement in a particular mission, whether proposed by the UN or a regional organization. Canada will no longer make open-ended commitments for the duration of a mission, preferring to plan the "front end" of operations and train peacekeepers. In the field, Canadian forces now concentrate on specific strengths: language specialists, medical support, training civilian police, and mine clearance.[22]

Democratically elected leaders of contributing countries make profoundly political decisions when they interpret these formal restrictions. The decision to participate (or not) in peace operations is, in this respect, no different from other decisions. Democratic accountability is a complex interplay of formal law and institutions and informal practices and habits, negotiated for each specific situation.

International pressures

Domestic political and societal actors both consider international pressures when making the decision to use, or support the use of, force under international auspices. In the absence of an international consensus on what needs to be done, most states will not unilaterally undertake a peace operation. While restricted resources have generally prevented smaller democracies from acting alone, the issue is not only one of capabilities. Forty-eight percent of the American elite polled by the Chicago Council opposed the United States acting alone.[23]

If a state's international prestige and self-image have been tied to multilateral peacekeeping, as is the case with the traditional contributing countries studied in this book, then the views of international organizations are likely to have a good deal of influence on domestic decision-making. In countries where the defense establishment's self-image has little to do with peacekeeping, external influences will be less important. However, as the UK and French chapters in this book discuss, changing issues

[22] Duane Bratt, "Rehabilitating the Military: Canadian Peacekeeping in the Post-Somalia Era," paper presented at the Eleventh Annual Meeting of the Academic Council on the United Nations System (Cornwallis, Nova Scotia, June 17–19, 1998).

[23] Rielly, "Americans and the World," p. 102.

and capabilities and the attitudes of elected officials can refocus a military on a new role in multilateral peace operations. A crisis in one's own "backyard," as Australia experienced with East Timor and western Europe with Yugoslavia, will also increase the propensity to lead or participate in a peace operation; the definition of "backyard" is itself subject to change in a globalized world.

Domestic and international politics: changes over time

Domestic politics matter; and in a democracy especially, international imperatives may be subordinated to domestic interests, unless they are seen to be congruent with each other. Strong national leaders supportive of making and maintaining a commitment to peace operations have played a decisive role in many countries, including Canada, Germany, India, and France. Societal variables are especially critical in shaping and implementing government policy in democratic countries, where contending interests are multiple and constantly evolving. Six observations seem particularly salient to the issue of democratic accountability.

First, when a democratic country decides to reevaluate its traditional stance and participate in multilateral peace operations, the decision will be politically contentious, as in Germany and Japan. In these democracies, policy changes necessitated by international developments were driven by senior executive-branch leaders. In addition to dealing with a public comfortable with more aloof policies towards international political commitments and the use of force, those leaders had to persuade the legislature to make any necessary legal changes and commit financial resources, forge agreement among the relevant political parties, and seek acquiescence from the military. Even after the legal framework has been modified, policy changes are apt to be tentative and, for a time at least, revocable should controversy arise.

Secondly, the task of making international commitments to use force and ensuring democratic accountability while doing so is most problematic for countries which are themselves in the throes of a democratic transition, such as Russia. A democratic political culture has not yet been established and embedded. To drive change, the leadership may behave in a dictatorial fashion. Civilian control over the military is likely to be weak, or to have been exercised by a discredited political party. Societal groups, and even formal institutions including the judiciary, have not acquired the habit and confidence needed to voice opposition to state policy. Aware that the democratic transition may not succeed, they can make this fear self-fulfilling.

Thirdly, as the level of coerciveness in the multilateral use of force intensifies, at the compliance/enforcement end of the peace-operations spectrum, the more domestic variables, structural and societal, will affect government decision-making. A high risk of casualties is especially difficult for the United States to accept.[24] It seems less problematic for Britain and France, but legislative scrutiny, if not public dissent, will still be more intense than it is when consensual peacekeeping is involved, as the relevant studies in this volume show. Developing countries with larger populations and higher birth rates may be able to sustain greater loss of life without causing a domestic political uproar, but casualties of a certain magnitude will always raise issues of prudent civilian decision-making and responsible military leadership.

Fourthly, the timing of the multilateral use of force is important. One negative experience with an international peace operation may adversely affect the possibility of participating in subsequent operations, as the Somali mission did in the United States and elsewhere. Leaders in critical countries had no inclination to support a peace operation in Rwanda and were also reluctant to get involved in Yugoslavia. As memory of the negative experience fades, and if the situation on the ground worsens, as it did in the Balkans by 1995, the international community may nevertheless come to a consensus on the multilateral use of force.

Fifthly, as the number of international organizations willing and able to use force increases, political factors will affect which ones do so. States show preferences for one organization over another, but that may change over time. The United States, for example, has a preference for NATO, where decisions are consensual, and is wary of the UN, where its veto is one among five in the formal voting procedures of the Security Council. The initial enthusiasm of the UK and US for the "Uniting for Peace" Resolution and a security role for the General Assembly has waned over time. Countries such as India, with no permanent seat on the UNSC, maintain, as discussed in the relevant chapter in this study, that the General Assembly has more legitimacy than the Council. As the European Union develops its Common Security and Defense Policy (CESDP) and rapid reaction force, its members may look to the EU, rather than NATO, for implementation, if not for authorization, of peace operations. The UN, once "the only game in town" for various military operations under international auspices, has competition.

Finally, demands to use force under international auspices are likely to escalate in the coming decades, as will the demand for democratic

[24] Edward Luttwak, "Give War a Chance" (1999) 78 *Foreign Affairs* 41.

accountability within international organizations. While there is little likelihood that such organizations will become democratic in Robert Dahl's sense of the word, their democratic member states are all making efforts to enhance accountability at the national level. This may compensate for any "democratic deficit" at the international level. There are also signs that this deficit will be addressed in innovative, informal ways, including an increased role for NGOs and responsiveness to public opinion and the media, even when not formally required by law.

For the foreseeable future, the multilateral use of force will depend on the capabilities and will of states to participate in UN, regional, or ad hoc peace operations. Democratic accountability at the national level, and the ever-changing landscape of domestic politics, will be important factors in the international authorization and implementation of the use of military force.

4 Collective security, peacekeeping, and ad hoc multilateralism

Edwin M. Smith

Putting collective security into practice

For centuries, diplomats, politicians, generals, scholars, and philosophers have struggled with the same question: can those with sufficient power to preserve order be trusted to do so in a just manner? In his account of the Melian Dialogue, Thucydides implied that justice would only emerge at the sufferance of the powerful.[1] Hobbes suggested that the existence of order was possible only with submission to the most powerful authority: the Leviathan.[2] The pursuit of a just and peaceful world has always seemed idealistic and impractical to many.

The decades of carnage that engulfed Europe at the end of the sixteenth century and the first half of the seventeenth century caused the monarchs of the region to seek more peaceful means of conducting their relations. The result of their efforts, the Peace of Westphalia, led to the creation of some of the founding documents of the contemporary state system. One of those documents, the Treaty of Osnabrück of October 1648, provided for an arrangement of mutual commitments very similar to the modern notion of collective security.[3] That treaty's provision foreshadowed a concept of international relations that would intrigue influential international leaders and thinkers for centuries.

By the dawn of the twenty-first century, there was a good deal of international experience in using multilateral forces for collective purposes; but national leaders still resisted surrendering control of national military forces to external authorities. Indeed, in 2001, the international

[1] Thucydides, *The Peloponnesian Wars* (Penguin Classics, Harmondsworth, 1982), book V, p. 402.

[2] See Thomas Hobbes, *Leviathan* (Cambridge, Cambridge University Press, 1991), ch. 12.

[3] "... all and every one of those concern'd in this Transaction shall be oblig'd to join the injur'd Party, and assist him with Counsel and Force to repel the Injury, being first advertis'd by the injur'd that gentle Means and Justice prevail'd nothing, but without prejudice, nevertheless, to every one's Jurisdiction, and the Administration of Justice conformable to the Laws of each Prince and State": Wilhelm G. Grewe (ed.), *Sources Relating to the History of the Law of Nations* (Berlin, W. de Gruyter, 1988).

community's efforts were focused on coordinating national forces to serve multilateral purposes defined by international institutions. Efforts to create viable universal security systems encountered complexities on three levels – conceptual, structural, and operational.

Collective security as a concept has generally been held to assume the existence of an accepted status quo and an organization formed by members who would oppose, with force if necessary, any attempt to change that status quo by the use of force. Viewed this way, collective security looks little different from the assurances provided in the Treaty of Osnabrück in 1648. The difference comes in the institutional structure – members forming an international institution charged with determining that a breach has occurred and enjoining its members to respond collectively.

Collective security systems commit members to combined retaliation against any state, including a member of the system, that commits aggression against a member state. In contrast, members of an alliance explicitly or implicitly direct their efforts against an external state or group of states perceived to threaten alliance members. Proponents of collective security believed that the international community could assemble overwhelming force to defeat an aggressor. With US President Woodrow Wilson chief among them, they sought to banish the European system based on balance of power – the ad hoc alliances and coalitions that formed to counter security threats – where decentralization and uncertainty created a climate that could itself become a cause of war. Collective security involves an attempt to manage the use of force multilaterally in a more centralized manner than under a balance-of-power system.

Proponents of collective security thought that the threat of such an overwhelming coalition would be sufficient to deter aggression. The threat of collective military action would be made credible by solidarity in prior implementation of effective economic and political sanctions that would, therefore, avert the collective use of military force. As a result of these expectations, collective security advocates gave little thought to issues such as the operational command and control of multilateral forces involved in action against an aggressor. They never considered whether the objectives of collective security operations should include more than restoration of a territorial status quo.

The League of Nations was the first attempt to replace the European balance of power with the elements of a global collective security system. Article 10 of the League Covenant defined the status quo by obligating members to "respect and preserve as against external aggression the territorial integrity and existing political independence of all Members." Articles 12 through 15 spelled out various mechanisms for the peaceful

settlement of disputes. Should war nevertheless occur, Article 16 provided for a boycott and embargo against the aggressor and also authorized the League Council to recommend that the armed forces of member states be used "to protect the covenants of the League."

Despite gaps in the Covenant – situations in which war might be regarded as legal or in which the Council might be unable to act – it provided more than a rudimentary basis for the establishment of a collective security system; yet in a real sense, it was never tested. Three major states – the Soviet Union, Germany, and the United States – were not members of the League at the outset, and their absence diminished the credibility of collective deterrence. The most powerful original members, Britain and France, were unwilling to entrust their security entirely to the League. The USSR and Germany were strongly opposed to the status quo, and even the victorious allies of the First World War were uneasy about its legitimacy. For all these reasons, no sooner had the League been established than alliances and armaments, the traditional mechanisms of the balance of power, began to reappear. In the end, neither the new mechanisms of collective security nor the traditional elements of the balance of power were able to prevent the Second World War.

After the second global conflict of the twentieth century, the founders of the United Nations hoped to create a more effective instrument of collective action than the League had been. The UN Charter is much more detailed and specific than the League Covenant, and responsibility for the operation of collective security was focused on the five permanent members of the Security Council – China, France, the Soviet Union (now Russia), the United Kingdom, and the United States. Each of these states can veto any decision on enforcement actions. An entire section of the Charter, Chapter VII, is devoted to specifying the manner in which the UN might take "action with respect to threats to the peace, breaches of the peace, and acts of aggression."

The UN system also provides for sanctions short of force and empowers the Security Council to decide on such measures, including the complete or partial interruption of economic relations and the severance of diplomatic relations. In the provisions of Article 43, the drafters of the Charter incorporated the expectation that members (or "groups of Members") of the United Nations would negotiate with the Security Council agreements that would make available military forces and facilities for collective purposes, should the Council authorize enforcement action using military forces.

The institutional structure of the United Nations reflects many of the same assumptions found in the Covenant of the League of Nations, but the Charter also included significant differences. In conceptual terms, the

UN can be viewed as a limited collective security system. That system was designed to operate against violent breaches of the status quo by any state other than the Security Council's five permanent members. The states originally envisioned by the Charter as potential targets of collective action were, naturally enough, those that had just been defeated in the Second World War – Germany, Italy, and Japan.

The structural and operational provisions of the Charter were thought to improve the ability of the institution to respond to threats to the peace by ensuring not only acquiescence, but also leadership and participation from its most powerful members. In the period after the Second World War, however, two of the permanent members of the Security Council, the Soviet Union and the United States, came to regard the other as the principal threat to its security. As a result, each resorted to the traditional tools of the balance of power – alliances – as a way to enhance its security. First the North Atlantic Treaty and then the Warsaw Treaty led to the creation of substantial intergovernmental organizations that became involved in the management of force through balance-of-power strategies.

In a way, the UN Charter presaged this development, because Article 51 states, in part: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." The North Atlantic Treaty and the Warsaw Treaty both referred to Article 51, as did the constitutional documents of other post-Second World War alliances.

In Chapter VIII, the Charter also envisaged that regional collective security organizations might be created, as indeed they were. These included the Organization of American States (OAS) and the Organization of African Unity (OAU). The OAS functions as both a collective security system against an aggressor within the region and as an alliance against a state outside the region. Members have used it in both ways.

Throughout the twentieth century, states developed many multilateral arrangements involving a variety of approaches to the management of violent inter-state conflict. Although President Wilson and others believed that it was possible to create a formal institutional system in which the management of force would be entrusted to a single central authority, the reality has proved much more complex. The contemporary management of violent conflict is neither completely decentralized nor is it entrusted to a single collective security system. Instead, although ultimate control of the use of military force continues to rest with sovereign states, different

types of multilateral organizations and arrangements are also involved in a variety of ways.

The League of Nations: an institutional legacy

Its failure to thwart the aggressors of the 1930s led to devastating criticism of the League of Nations. Much emphasis has also been placed on the crippling impact of US non-participation on the effectiveness of the League. France and the United Kingdom shared US concerns about committing to an open-ended call to action by an international body, and although those powers founded the League, they did much that limited its efficacy. On the other hand, the memory of its failures often prevents recognition of the considerable institutional and operational legacy of the League. Its experience provided the UN with a foundation on which to develop further a system of collective action for international security.

President Wilson believed that the application of legal dispute-resolution mechanisms and arbitration could serve the international community well. He was less interested in a prior commitment to use military force to resist aggression, which might involve the United States in exactly the entangling alliances that had historically been an anathema to Americans. The substance of disagreements between states was much less important, Wilson thought, than the means by which those states addressed their disputes. For Wilson, procedural dispute-resolution techniques stood at the core of the concept of collective security that the League embodied. His ideas reflected a distinctive American understanding of the international order and the role that the United States could play in it.

With the rejection by the United States of the Versailles Treaty in 1920, the initial exclusion of Germany and the USSR from the League, and the dissatisfaction of League member countries such as China and Japan with key elements of the Paris settlement, the major powers spent much of the 1920s creating regional arrangements designed to rectify or compensate for shortcomings of the universal institution headquartered in Geneva. These regional attempts to "organize the peace," as French Foreign Minister Aristide Briand called them, included the Washington Conference of 1921–2 and the 1925 Locarno treaties.

At a global level, the Draft Treaty of Mutual Assistance of 1923, the 1924 Geneva Protocol, and the 1928 (Kellogg–Briand) Pact of Paris were also attempts to create an international system which all of the powers would be committed to maintain. In the case of the Kellogg–Briand Pact, the formal participation of the United States was especially welcome to

France and Germany as a way to involve Washington in the political, as well as economic, issues of Europe. Throughout the inter-war period, although not a League member, the United States was always present as an observer of its work in Geneva.

Some of the treaties of the 1920s sought legal and political formulas that would create alternative ways to manage conflict. However, by sometimes establishing special territorial guarantees for specified areas, they implicitly cast more doubt on the universal guarantee. Nor did these treaties manage to eliminate the dissatisfaction of several of the major powers with important aspects of the status quo. To the extent that the League did not support or encourage the changes they wanted, those powers were not inclined to work within the League framework.

Nevertheless, the League left a normative as well as an institutional legacy to the United Nations. The establishment of a permanent venue for decision-making (the Council) and the creation of a platform available to any state to plead its case (the Assembly) were important changes from the ad hoc and exclusive great power councils that typified the balance-of-power system. The League failed in its inability to create the operational capabilities and political will to respond to these pleas. Although the abstract obligation embedded in the doctrine of collective security was conceptually attractive, in practice states remained unwilling to make open-ended commitments without a clear understanding of the purposes involved and the interests implicated.

Although the League served to mitigate conflict on some occasions, it failed on others. During the life of the League, the application of enforcement sanctions was inconsistent. Its record of effective action was mixed, but by the 1930s, a pattern of states recognizing the Council as the center of international dispute settlement had begun to develop.[4] Despite this, the League could not survive the determination that eventually took hold in Japan, Germany, and Italy, not only to press for change in the status quo, but to do so by the use of force. The ideology of all three states by the late 1930s saw violence not only as a means of change but as an end in itself.

The combination of these forces, together with its novel character as an international security institution, made the League an uncertain player in the face of their hostility. The inability of the League to take effective action against the Japanese invasion of Manchuria, the Italian invasion of Ethiopia, and the German remilitarization of the Rhineland and annexation of Austria may be the lasting images. But given its novelty and

[4] See Larry S. Finkelstein and Marina S. Finkelstein, *Collective Security* (San Francisco, Chandler Publishing, 1966), pp. 11–41.

the forces arrayed against it, the durability of the League's institutional innovation remains impressive.

An evolving security role for the United Nations

The architects of the United Nations Charter based much of their effort on the desire to remedy the flaws of the League. They paid special attention to the need to involve all of the most powerful states in the new organization; they also attempted to establish an enforcement system that applied both military and economic power. They provided for an infrastructure that would enable a much broader international community, expected to emerge in the post-war world, to participate in the work of the UN.

The United States and its allies intended that the United Nations would provide constraints on aggression and warfare between states. An organization based on traditional notions of diplomacy and state power, it also incorporated new approaches, combining the rejection of war and aggression with promotion of peace, economic and social cooperation, and human rights. The massive destruction of the Second World War led political leaders and diplomats to plan an organization that would deal not only with inter-state conflict, but also with issues of human dignity, prosperity, and the individual's right, as Franklin Roosevelt put it, to "freedom from fear."[5]

Politically, however, the wartime alliance on which the UN Charter was premised began to split and fractured completely within a few years of the defeat of the Axis powers in 1945. This left the organization with no consensus among the permanent members of the Security Council and no means to carry out military operations. Article 43 provisions were never put into effect. The veto served to assure Security Council inaction whenever one of the five permanent members objected to a proposed resolution.

Filling security gaps during the Cold War

Despite these problems, the United Nations maintained an active peace and security role from the very beginning by developing creative – and, at times, controversial – methods of dealing with conflict that had not been envisioned in the Charter. The first deployment by the UN of military forces was to the Middle East in May 1948, when the Security Council

[5] See generally Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia, University of Pennsylvania Press, 1998).

approved the United Nations Truce Supervision Organization (UNTSO) to monitor the truce between Israel and its Arab neighbors. UNTSO, which has been deployed continuously since then, began with thirty-six unarmed military observers. In the late 1990s it had a few more than a hundred. Financed through the UN's regular budget, it has played an important role in providing support for other UN military operations in the Middle East and elsewhere.

The status of individuals serving under UN mandates was tested early in the organization's history through the International Court of Justice (ICJ)'s 1949 Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations. The ICJ concluded that, for the UN to carry out the responsibilities that states had given it in the Charter, it required legal personality when discharging those functions. This included protection of its personnel.[6]

The first major test of the UN's collective security system occurred in 1950 with the invasion of South Korea by North Korea. Two elements of the UN's institutional structure and operational procedures played a key role: the organization's lack of direct control of military forces, and the Charter's requirement that all permanent members of the Security Council concur in the majority decision to take enforcement action.

The lack of UN forces was overcome by identifying a member state willing to take the lead in carrying out the mandate by supplying the required forces and materiél. This led to the first delegation (in UNSC Resolution 84) of a UN-mandated operation to a member state (in this case the United States) that supplied the force commander and led a coalition of eighteen other willing states. The United States provided more than 50 percent of the ground forces, 85 percent of the naval forces, and 93 percent of the air forces assigned to the United Nations Command in Korea. It also carried the major financial burden of the war.

The Soviet Union, boycotting the Security Council when it took its initial decisions to authorize enforcement action, failed to exercise its veto. Since the Chinese seat was still held by Taiwan, as it would be until 1971, there was also no Chinese veto of the enforcement resolution. (Protest over the refusal to give the UNSC seat to the newly established People's Republic of China was, in fact, the reason for the Soviet boycott.)

When the USSR returned to the Security Council, the United States, supported by the United Kingdom, gained approval by the General Assembly of the "Uniting for Peace" Resolution. This clamed for the

[6] International Court of Justice, Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations, April 11, 1949.

Assembly the right to recommend enforcement action if the Security Council proved deadlocked on a matter. The legality of "Uniting for Peace" remains challenged by strict Charter constructionists to this day.

In 1956, in the aftermath of the French, Israeli, and British attack on Egypt, following its nationalization of the Suez Canal, the General Assembly, acting under "Uniting for Peace," created the United Nations Emergency Force (UNEF I) to secure and supervise the cessation of hostilities, including the withdrawal of foreign forces from Egypt. The terms of reference for UNEF I were to be replicated often in the UN's history and are regarded as the central tenets of classical peacekeeping. Its three key characteristics are:

(1) the consent of the parties to a conflict, especially the host nation(s) of the peacekeeping force, to the establishment of that force;
(2) the impartiality of the peacekeeping force in terms of the substance of the conflict (which precluded P-5 participation in peacekeeping throughout the years of decolonization and the Cold War); and
(3) the equipment of the peacekeeping force only with light weapons and authorization to use them only for self-defense.

Since peacekeeping missions, which had not been envisioned by the Charter, fall somewhere between the peaceful settlement mechanisms of Chapter VI and the enforcement actions envisioned by Chapter VII, they were called "Chapter Six-and-a-Half" operations by UN Secretary-General Dag Hammarskjöld.

Classical peacekeeping operations are based on consent. In the absence of the will of the parties to a conflict to settle it, war may reignite, as it did in the Middle East in 1967. When Egypt requested the withdrawal of UNEF I from its territory, there was no doubt that the UN would comply. Indeed, as the Indian chapter in this book points out, had it failed to comply, the government of India would have withdrawn its forces (which made up the largest UNEF I contingent) in any case, since Indian participation in peacekeeping is always based on consent of the parties.

By 1960, with the establishment by the Security Council of the United Nations Operation in the Congo (ONUC), another dimension was added to UN operations – that of going beyond serving as a neutral buffer between states and becoming involved in intra-state conflicts. ONUC began with a mandate to provide for the orderly withdrawal of Belgian troops from its newly independent former colony. However, ordered to maintain the territorial integrity and political independence of the Congo, ONUC soon became engaged in the country's civil war. The Soviet Union stopped supporting ONUC and exercised its veto in the Security Council when the operation took the side of the US-backed faction.

The General Assembly, acting under "Uniting for Peace," then modified ONUC's mandate and authorized it to use force to prevent the secession of Katanga province from the Congo. This action by the Assembly was contrary to French and Soviet conceptions of the Security Council's prerogatives under the Charter (as the French chapter in this book makes clear). As a result, France and the Soviet Union refused to pay their assessed contributions to support ONUC, which led to the 1962 Advisory Opinion of the International Court of Justice on Certain Expenses of the United Nations.[7] The Court upheld payment of the operation's expenses, but the judges were careful to avoid prescribing precisely how they were to be met. Despite the ICJ ruling, France, the Soviet Union, and other states persisted in their refusal to pay for ONUC. The impasse was ultimately resolved by the creation of special budgets for each UN peacekeeping operation. Eventually, in the 1980s, a formula was developed for assessments to these budgets. This formula placed special financial responsibilities on the permanent members of the Security Council.

Although "Chapter Six-and-a-Half" operations were sometimes undertaken because the permanent members of the Security Council during the Cold War were unable to agree on Chapter VII actions, a need still remains for classical peacekeeping, as it developed in those years. Monitoring and observation missions have been an important part of the UN's role in the last decade, as the other chapters in this book discuss. Since 1990, the UN has authorized the use of military forces for all of the five types of missions identified in the Introduction by Ku and Jacobson on the peace-operations spectrum.

Post-Cold War transitions

The ascendancy in 1985 of Mikhail Gorbachev to power in the Soviet Union led to a vast transformation in the international terrain. After the 1986 Reykjavik summit between Gorbachev and US President Ronald Reagan signaled a thaw in US–Soviet relations, their bilateral negotiations led to the signing of the Intermediate Range Nuclear Forces Treaty on December 8, 1987. This was the first arms-control agreement that led to a reduction of nuclear forces.

[7] The opinion affirmed that the UN had wide latitude to reach its primary goals of maintaining peace and security as long as it did not violate a specific provision of the Charter. Since neither UNEF nor ONUC was authorized under Chapter VII, the question of whether these expenses were general obligations of the organization did not arise. The ICJ determined that they were expenses of the organization as provided for under Article 17, paragraph 2 of the Charter. International Court of Justice, Advisory Opinion on Certain Expenses of the United Nations, July 20, 1962.

The same year also saw a shift in Soviet attitudes towards the UN, when Gorbachev affirmed the USSR's commitment to the organization. In articles published in *Izvestia* and *Pravda* and then in an address to the Forty-third General Assembly in 1988, Gorbachev stunned the international community with proposals for arms reductions and commitments to conduct international relations in a manner consistent with the United Nations Charter.[8] Looking back on events that took place after this speech, one could regard it as the end of the Cold War.[9]

The thaw in the Cold War coincided with a number of new initiatives at the United Nations. Secretary-General Javier Perez de Cuellar recognized the potential for an important shift in international political affairs, and he exploited that potential by inviting the United States and the Soviet Union to cooperate in the Security Council and pressure Iran and Iraq to end their long war. The two former adversaries worked together quietly for a year to realize a cease-fire supervised by a UN observer mission.[10] Reduced superpower tension also enabled the United Nations to field peacekeepers in the United Nations Transition Assistance Group (UNTAG) to assist in the birth of Namibia. One remarkable mission, the United Nations Observer Group in Central America (ONUCA), helped facilitate an end to conflicts that had plagued the region throughout the 1980s. Despite the improved climate in the Security Council, however, the United States intervened without UN authorization in Panama in 1989, in pursuit of General Manuel Noriega.

Although cooperation among the permanent members of the Security Council was much improved by 1990, the speed of the international community's response to Iraq's invasion of Kuwait still stunned many observers. The Security Council met within twelve hours of receipt of the news of the invasion.[11] After passing UNSC Resolution 660 on the day of the incursion, condemning the invasion under Chapter VII of the Charter, the Council proceeded over the next four months

[8] Federal News Service, "From the White House: An Address To The United Nations General Assembly By Mikhail Gorbachev," General Secretary of the Soviet Union, New York, 7 December 1988.

[9] Robert E. Hunter, "A Day That Will Live On, Famously," *Los Angeles Times*, December 8, 1988, section 2, p. 11.

[10] The United Nations established the Iran–Iraq Military Observer Group (UNIIMOG) to facilitate the cease-fire; the mission lasted from August 1988 through February 1991. United Nations, *The Blue Helmets: A Review Of United Nations Peace-keeping* (2nd edn., New York, United Nations, 1990), pp. 323–3. See also Stanley Meisler, *United Nations: The First Fifty Years* (New York, The Atlantic Monthly Press 1995), pp. 247–51.

[11] *The Kuwait Crisis: Basic Documents* (Cambridge International Documents Series 1) (Cambridge, Grotius, 1990).

to pass eleven additional resolutions against the Iraqi action.[12] Led by the United States, a multinational coalition force of 500,000 (including 400,000 Americans) liberated Kuwait from the occupying Iraqi forces. The air campaign lasted forty days in early 1991, the war on the ground 100 hours.

The response of the United States to the Gulf crisis and war marked a momentary shift in American foreign policy, as Michael Glennon discusses in his chapter in this book. American decision-makers began to talk publicly about the possibilities of military cooperation in the UN to maintain international stability. It seemed for a time as if collective action against aggression, as originally envisioned in 1945, might be possible. US President George H. W. Bush saw the end of the Cold War as the beginning of "the new world order."[13]

But a new series of issues soon confronted the Security Council. UNSC Resolution 687, passed in April 1991, after coalition troops had liberated Kuwait and overwhelmed the Iraqi army, imposed a series of coercive restraints on Baghdad in order to prevent any further Iraqi aggression.[14] The United States and the United Kingdom also secured approval in April 1991 of UNSC Resolution 688, which demanded that Iraq allow immediate access to its Kurdish minority for the delivery of humanitarian assistance, and appealed to member states to assist in that relief.[15]

UNSC Resolution 688 raised the question of whether the Security Council can authorize the use of force under Article 42 of the Charter, not only to repel an attack on the territorial integrity of a member state (such as Kuwait), but also to compel a state to treat its own citizens in a certain way. Many member states believed at the time that the Security Council could not authorize intervention solely to protect citizens of a state from the actions of their own government.[16] As the different approaches reflected in the Norwegian and Indian chapters of this volume show, there is still no universal agreement among UN members on this question.

[12] Full texts of the resolutions can be found in *ibid.*, pp. 88–98.

[13] President George Bush, "Toward a New World Order," address before a joint session of Congress, Washington, DC, September 11, 1990, reprinted in *1991 United States Department of State Dispatch*, September 17, 1990. See also George Bush and Brent Scowcroft, *A World Transformed* (New York, Knopf, 1998), p. 363.

[14] Security Council Resolution 687, April 3, 1991, reprinted in *Iraq and Kuwait: The Hostilities and Their Aftermath* (Cambridge International Documents Series 2) (Cambridge, Grotius, 1991).

[15] Security Council Resolution 688, April 5, 1991, reprinted in *Iraq and Kuwait*, pp. 12–13.

[16] China has consistently asserted that Article 2(7) (withholding any authority "to intervene in matters which are essentially within the domestic jurisdiction of any state") stands as the Charter's clearest affirmation of the primacy of national sovereignty.

The Security Council majority that passed Resolution 688 included the Soviet Union, but China and India abstained. The vote reflected a schism between those states that believed that humanitarian intervention justified the violation of sovereignty, and those who prioritized national sovereignty in all cases. Although the division did not lead to overt opposition to Resolution 688, it foreshadowed confrontations to come. The UN action in the Gulf began as a classic enforcement action to end the aggression of one state against another; it evolved into a mission to protect a minority within a state against the depredations of the government of that state.

Meeting for the first time in its history at the level of heads of state and government in 1992, the Security Council identified new challenges that make the absence of military conflict insufficient as a definition of international peace and security. Its president cited "non-military sources of instability in the economic, social, humanitarian and ecological fields" as "threats to peace and security."[17] By adopting the language of Chapter VII to characterize these transnational problems, the statement seemed to indicate that traditional state sovereignty, to the extent that it impedes efforts to preserve peace and security, is no longer sacrosanct. This reflected a changing conception of the Security Council's responsibilities in the new international context, but the consensus was a fragile one, as it remains today.

Optimism about the "new world order" did not survive for long. A humanitarian mission evolved into nation-building in Somalia, and subsequent casualties led to hesitancy and doubt, both in the United Nations and, as Glennon discusses, within the US government. Humanitarian outrages took place in Bosnia as UN peacekeeping contingents watched fecklessly. The horror of genocide and the dilatory international response in Rwanda only exacerbated collective doubts.

Subsequent peace operations undertaken without United Nations authorization, either from the Security Council or the General Assembly, have served both to complicate and to clarify the larger picture. In the late 1990s, the success of operations conceived and implemented independently of the UN, through ad hoc coalitions and regional organizations, demonstrated that, particularly where compliance and enforcement missions are concerned, limited UN capabilities require augmentation. In the twenty-first century, powerful states and alliances would continue to perform unique and essential functions in maintaining international peace and security.

[17] Statement of the president of the Security Council, S/23500, January 31, 1992, reprinted in Boutros Boutros-Ghali, *An Agenda for Peace* (2nd edn., New York, United Nations, 1995), p. 115.

Challenges to international peace operations at the end of the twentieth century

Somalia

At the end of his administration, in December 1992, President Bush responded to media coverage and congressional demands by initiating Operation Restore Hope in Somalia.[18] As the enormous scope of the humanitarian crisis captured the attention of both domestic and international public opinion, the US planned a large intervention operation of limited duration, an action involving the use of military force to insure the security of the distribution of humanitarian assistance.

The UN had earlier responded to the growing emergency by creating the United Nations Operation in Somalia (UNOSOM I), but the modalities of its response reflected a very different set of organizational values, based on years of experience with "Chapter Six-and-a-Half" actions. As noted above, the principles of classical peacekeeping had always been the consent of the parties to the conflict; impartiality of the peacekeepers; and their use of force only in self-defense, as a last resort.[19] While peace operations had experienced difficulties in following those principles in earlier years, they proved impossible to maintain in Somalia. There, they led to rules of engagement that paralyzed the UN contingent, forcing it to remain in fortified barracks and preventing its involvement in mitigation of the on-going humanitarian disaster.[20] The Security Council therefore welcomed American assistance in establishing secure modalities for the distribution of humanitarian relief, and passed a resolution formally authorizing the formation of the Unified Task Force (UNITAF), involving nineteen countries under US leadership.[21] The United Nations planned

[18] Accounts of the diplomacy, peacekeeping, and humanitarian efforts in Somalia can be found in John L. Hirsch and Robert B. Oakley, *Somalia and Operation Restore Hope: Reflections on Peacemaking and Peacekeeping* (Washington, DC, United States Institute of Peace Press, 1995); John Hillen, *Blue Helmets: The Strategy of UN Military Operations* (Washington, Brassey's, 2000); United Nations, *The Blue Helmets: A Review of United Nations Peace-keeping* (3rd edn., New York, United Nations Department of Public Information, 1996). Many of the relevant UN documents may be found in United Nations, *The United Nations and Somalia 1992–1996* (The United Nations Blue Books Series 8) (New York, United Nations Department of Public Information, 1996). A gripping and horrifying account of the American military engagement at Mogadishu on October 3, 1993 can be found in Mark Bowden, *Black Hawk Down: A Story of Modern War* (New York, Atlantic Monthly Press, 1999).

[19] Classical peacekeeping is described in United Nations, *The Blue Helmets* (2nd edn.), pp. 6–7.

[20] Hirsch and Oakley, *Somalia and Operation Restore Hope*, p. 27.

[21] Security Council Resolution 794 of December 3, 1992 authorized the use of "all necessary means."

to assume control of the operation (UNOSOM II) after the initial humanitarian situation had been stabilized.

Unfortunately, the results of the Somali missions did not redound to the benefit of future UN peace operations. As an exercise in using coercive military power to make possible a humanitarian intervention, they began with optimism, but ended by creating skeptics in many national capitals. The skepticism within key governments, however, especially in Washington, was not about the efficacy of force, but about the desirability of using it under the aegis of the UN.

Rwanda

Little time was available for the UN to recover from the difficulties of Somalia before a humanitarian disaster began to unfold in Rwanda. An effort to end years of civil war between Hutu and Tutsi populations included Security Council authorization of a peacekeeping operation, but UNAMIR suffered from neglect and inadequate logistics support from an over-stretched New York headquarters also attempting to deal with Yugoslavia and Somalia.[22] No major power had an abiding interest in the security of Rwanda; no member of the Security Council felt any pressure to become involved. As the Council debated a response to the situation, nearly 1 million civilians died in genocidal chaos.[23] The humanitarian and moral cost of failure to act in Rwanda combined with the military and political cost of action in Somalia to create a policy tightrope for national leaders considering their countries' participation in peace operations.

Bosnia

With the disintegration of the Yugoslavian state, domestic and international pressures mounted for and against the creation of independent states from the former Yugoslav republics. Slovenia and Croatia declared their independence in June 1991, following popular referenda; several months later, Bosnia and Macedonia took similar actions. Except in Slovenia, these declarations led to brutal hostilities between the authoritarian regime of Yugoslavia and the seceding republics. The fighting reflected conflicts between the three religious groups of Yugoslavia: Croat Roman Catholics, Serb Orthodox, and Bosnian Muslims. The war in Bosnia proved particularly ruthless, since that republic was equally demographically divided between the three groups.

[22] William Shawcross, *Deliver Us From Evil: Peacekeepers, Warlords, and a World of Endless Conflict* (New York, Simon & Schuster, 2000), p. 129.
[23] See *ibid.*, pp. 124 ff.

The Security Council authorized a United Nations Protection Force (UNPROFOR), the first task of which in the spring of 1992 was to assist in implementing the cease-fire between Yugoslavia and the new republic of Croatia.[24] Later, UNPROFOR received two additional tasks, protection of the distribution of humanitarian assistance during the continuing fighting in Bosnia, and establishment of a preventive deployment in Macedonia.[25] The Security Council adopted dozens of resolutions and statements establishing arm embargoes, no-fly zones, and other measures and initiatives intended to address the situation in the former Yugoslavia.

UNPROFOR faced impossible contradictions in the conflicting mandates of its missions; those contradictions only became more alarming as new tasks were added to the duties of a force that did not get all the troop contingents promised by UN member states. UNPROFOR never reached the force levels that had been recognized as essential for it to accomplish its authorized tasks, especially the safeguarding of refugees in Srebrenica and other towns declared by the Security Council to be "safe areas," free from armed attacks.[26] UNPROFOR's abandonment of Srebrenica to Bosnian Serbs in July 1995 and the massacre of more than 7,000 Bosnian Muslim men led to recriminations against the Dutch peacekeepers,[27] the demise of the UN operation, and the humiliation of the United Nations.[28]

The culmination of the war in Bosnia came with the decision of France and the United Kingdom, the principal contributors to UNPROFOR, in the summer of 1995 to move from classical peacekeeping to a robust use of force to ensure compliance with UN mandates. Their diplomacy, the situation on the ground in Bosnia, and domestic factors in the United States also finally convinced the Clinton administration to engage diplomatically and militarily to end the conflict. NATO air strikes on Serb forces in Bosnia in mid-1995, flown principally by the US Air Force, were used to bring pressure on Belgrade to come to the negotiating table. In the Dayton Accords, signed in October 1995, the parties to the conflict accepted the ad hoc Implementation Force (IFOR) created by the agreement. Shortly before Christmas, IFOR contingents, principally from NATO nations, but with many other participating countries, including Russia, moved into Bosnia.

[24] United Nations, *The Blue Helmets* (3rd edn.), p. 487.
[25] For an account of the evolution of the mandate of UNPROFOR, see *ibid.*, pp. 521–38.
[26] UNSC Resolution 819 (1993), April 16, 1993.
[27] In April 2002, the Dutch government of Prime Minister Wim Kok resigned following the release of a government-commissioned report on the failure of Dutch troops to protect the UN-designated "safe area" of Srebrenica.
[28] For accounts of the massacre, see *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, A/54/549, November 15, 1999; Shawcross, *Deliver Us From Evil*, pp. 161–78.

Regional security arrangements and ad hoc multilateralism

The rapid resolution of the Bosnian conflict that followed the application of air power in 1995 led to two conclusions. First, negotiation of peace settlements during continuing conflicts may be facilitated by the application of coercive sanctions on recalcitrant parties. Secondly, the breadth of political, regional, and cultural differences that are institutionalized in the UN Security Council still makes it difficult to rely on that body to authorize and effectively implement the use of coercive force against a member state, despite the end of the Cold War. Under certain circumstances, ad hoc coalitions of willing and capable states, perhaps drawn from the membership of regional organizations and alliances, may provide the only instruments for such action.

Some UN member states suspect such coalitions of serving parochial national or regional interests rather than common objectives involving international peace and security. The tendency of former colonial powers to intervene in the affairs of their erstwhile colonies raises troubling memories and new concerns in many quarters. Former colonial powers themselves fear the alleged unilateralism of the United States.

Ultimately, the United States, and any state participating in an ad hoc coalition, must strike a fine balance between legitimacy and effectiveness whenever such coalitions use force beyond the strict bounds of UN Security Council authorization. NATO operations in Kosovo and Macedonia since 1999 have shown how difficult it is to find that balance. They indicate that one of the principal tasks of the twenty-first century will be arriving at an international consensus that answers two questions: which authority or authorities may legitimately authorize the multilateral use of force; and in what ways and by which actors can a legitimate mandate to use force in international peace operations be most effectively implemented?

NATO and Kosovo

The air campaign that NATO waged in 1999[29] without express authorization from the UN Security Council brought both questions into a clearer light. Its background was the predicament of the Albanian Muslim majority in Kosovo after 1989, when Slobodan Milosevic began to

[29] For informative accounts of NATO's intervention in Kosovo, see Ivo H. Daalder and Michael E. O'Hanlon, *Winning Ugly: NATO's War to Save Kosovo* (Washington, DC, The Brookings Institution, 2000); General Wesley K. Clark, *Waging Modern War* (New York, Public Affairs, 2001).

exploit the nationalism of the Serb minority for his own political future. Massive Serb retaliation against Albanian villages for the violence of the Kosovo Liberation Army (KLA) resulted in indiscriminate civilian deaths and the creation of tens of thousands of homeless internal refugees during the summer of 1998. The Security Council demanded a cessation of violence and the admission of OSCE observers, but despite their presence, violence continued. Serbia greatly increased the size of the military and police contingents stationed in Kosovo.

The Security Council again demanded a peaceful settlement, but authorized no action should Serbia fail to comply. The violence caused NATO members to fear another Bosnian-style humanitarian disaster; they also feared an explosion that could involve Albania and Macedonia, neighboring states having ethnic ties to Kosovo Serbs and Albanians. Those fears motivated NATO to threaten Serbia with air strikes unless it agreed to a negotiated settlement in Kosovo. When the resulting negotiations collapsed and Serbia expelled foreign observers in March 1999, NATO officials concluded that air strikes were required, despite the lack of a UN mandate, to force a return to meaningful negotiations.

NATO launched the first air strikes on March 24, 1999. One author captured the unprecedented character of the event:

> This was the first sustained use of force by NATO in its fifty-year history; the first time force was used to implement Security Council resolutions without specific authorization from the council; the first time a major bombing campaign was launched against a sovereign country to stop crimes against humanity within that country; and the first time that a bombing campaign alone, without assistance of ground troops, appeared to succeed in its aims.[30]

After the first days of limited air strikes and cruise-missile attacks, Serb military and police units accelerated a massive and premeditated campaign to displace or destroy the Albanian population of Kosovo. In response, NATO escalated the bombing campaign to include more targets in Kosovo and Serbia. After seventy-two days, Yugoslavia agreed to comply with NATO's demands; the air campaign ended on June 3. Yugoslav troops and police withdrew from Kosovo and were replaced by NATO-led peacekeeping forces. For the second time in four years, NATO's coercive military power had ended an on-going conflict, allowing more traditional peacekeeping contingents to enter a less volatile environment.

Some UN member states, notably China and India, objected to NATO's application of coercive force without prior authorization from

[30] Shawcross, *Deliver Us From Evil*, p. 358.

the Security Council.[31] But maintaining that its actions were efforts to enforce international legal norms, NATO insisted that they were lawful and justified.[32] While the United Nations clearly prefers that arrangements such as NATO limit their use of force to actions authorized by the Security Council, the UN has not asserted that the NATO action against Yugoslavia violated the Charter or other legal norms.[33]

Regional arrangements

As NATO's actions in the former Yugoslavia from 1995 to 1999 underline, the place of regional arrangements within a universal security system is not a clear one. The ambiguity stems from the assumption that collective security makes about the massing of a maximum concerted response to a violation of international law. It also reflects states' continued concern that international politics not revert to the instability of a balance-of-power or alliance system. Yet, "regional understandings" predated the universal security system, and their "validity" was reaffirmed in Article 21 of the Covenant of the League of Nations.

Chapter VIII of the UN Charter provides a role for "regional arrangements or agencies" in the settlement of regional disputes "before referring them to the Security Council" (Article 52). The Security Council remains the primary venue for decision-making on collective action involving peace and security, but, under Article 53, it "shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority."

Regional arrangements have long been favored to fill gaps created by particular political or military circumstances. As noted above, recognition in the 1920s that major powers had security concerns inadequately addressed by the League of Nations led to the regional arrangements represented in the Pacific by the Washington treaties and in Europe by

[31] Russia and China advocated a Security Council resolution to terminate NATO's bombing of Yugoslavia, but that effort failed. See "NATO Action Against Serbian Military Targets Prompts Divergent Views As Security Council Holds Urgent Meeting On Situation In Kosovo," Press Release, SC/6657, March 24, 1999; Daalder and O'Hanlon, *Winning Ugly*, pp. 126–7.

[32] "We confirm today the preparedness of our Alliance to support, on a case-by-case basis and in accordance with our own procedures, peacekeeping operations under the authority of the UN Security Council, which has the primary responsibility for international peace and security": NATO Ministerial Final Communiqué, para. 4, M-NAC-2(92)106, December 17, 1992.

[33] Kofi Annan made a very measured statement at the beginning of the bombing, concluding that the Security Council "should be involved in any decision to resort to the use of force." *Kofi Annan Holds Media Availability On Kosovo*, FDCH Political Transcripts, March 24, 1999; see Bart Gellman, "U.S., Allies Launch Air Attack On Yugoslav Military Targets," *Washington Post*, March 25, 1999, p. A1.

those signed at Locarno. During the Cold War, the Rio Treaty and its inter-American security arrangement provided the framework for defense of the western hemisphere.

The UN system was therefore a bystander to actions taken under the umbrella of the Organization of American States in the Dominican Republic in 1965 and in Nicaragua in 1986. A similar regional arrangement, the Organization of East Caribbean States, provided an umbrella for military intervention in Grenada in 1983. With the end of the Cold War, the UN's role in the western hemisphere was revived and the UN provided monitoring for the election in Nicaragua in 1988 and the transition to a post-Sandinista government. It also mediated the civil conflicts in Guatemala and El Salvador, authorized sanctions against Haiti following the overthrow of the elected government, and authorized a mission to assist in the restoration of that democratically elected government.

With the end of the Cold War, UN Secretary-General Boutros Boutros-Ghali in 1992 recommended that regional organizations be considered for an expanded role in UN-mandated peace operations:

> Under the Charter, the Security Council has and will continue to have primary responsibility for maintaining international peace and security, but regional action as a matter of decentralization, delegation and cooperation with the United Nations efforts could not only lighten the burden of the Council but also contribute to a deeper sense of participation, consensus and democratization in international affairs.[34]

The Secretary-General also noted that, "should the Security Council choose specifically to authorize a regional arrangement or organization to take the lead in addressing a crisis within its region, it could serve to lend the weight of the United Nations to the validity of the regional effort." This, of course, is what did not happen in the case of the Kosovo air campaign, although the NATO-led KFOR was authorized by the Security Council.

The ability to "lighten the burden" of the UN presupposes a capacity to do so on the part of regional organizations. In fact, few existing regional arrangements have the capability to provide security for their region, and there remains heavy reliance on the universal system of the United Nations to address security questions. At the same time, the need for peace operations has grown since the end of the Cold War, putting severe strain on the resources and capacity of the organization. The UN Secretary-General warned in 1995 that "the United Nations faces imminent crisis

[34] *Agenda for Peace*, 1992 A/46/277–S/24111, p. 64.

and along with it the risk of collapse of the entire structure of peace" established since 1945.[35]

Can regional arrangements help to fill some of the UN's capabilities gaps? The UN has worked with regional and subregional organizations in Liberia, Sierra Leone, Haiti, Croatia, Eastern Slavonia, Georgia, Tajikistan, Bosnia, Cambodia, and Papua New Guinea. Based on this experience and anticipating future needs, the UN has worked since the late 1990s to develop cooperative arrangements with regional and subregional organizations in the security area.

The states of Europe over the past fifty years have developed far-reaching institutional structures to support their common economic and political interests, but the European Union has only just begun to address common security concerns. Europe attempted to combine the purely political institutions of the OSCE with the military might of NATO in addressing the crisis in Kosovo. That effort met with mixed results, given the different functions and structures of the two organizations.[36] The record of the performance of regional organizations in security matters is overall a spotty one. Fifteen of the forty-nine UN peacekeeping operations mounted between 1948 and 1998 had contributions from such regional arrangements. With the exception of NATO, however, these organizations have little standing capacity and experience in peacekeeping, and even less in complicated peace operations involving compliance and enforcement. It will take time to develop the political consensus and capabilities necessary to make them reliable peacekeeping partners of the United Nations.

Conclusion: the United Nations and ad hoc multilateralism

The recent history of United Nations peace operations demonstrates that universal collective security alone is not an adequate mechanism to address the world's security concerns. Ad hoc multilateral or regional organizations' capabilities to deploy military forces are sometimes more effective tools to ensure compliance or provide robust peacekeeping. Rather than relying only on the formal mechanisms established under the United Nations Charter, coalitions of interested and capable states

[35] *Cooperation Between the United Nations and Regional Arrangements in a Peacekeeping Environment: Suggested Principles and Mechanisms* (March 1999) at http://www.un.org/Depts/dpko/lesson/regcop.htm, p. 2.

[36] See Daalder and O'Hanlon, *Winning Ugly*; Marc Weller, "Current Development: the International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia" (1992) 86 *American Journal of International Law* 569.

have formed to respond to threats to the peace. It may be useful to recall that the Charter carefully avoided the use of the term "collective security." Article 1 instead refers to "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 . . ."

UN practice recognizes that the organization does not command a monopoly in carrying out the tasks of peacekeeping, peacemaking, sanctions, or enforcement. The Secretary-General noted in *An Agenda for Peace* in 1995 that the UN could not function alone because of the complicated requirements that "need to be carefully coordinated in an integrated approach to human security."[37]

The UN has always delegated certain operations to states and regional organizations able to carry out particular tasks, and has acted in partnership with states and regional organizations, where needed. Ad hoc groups of willing states are especially important where the level of violence is high and the risk of casualties great, since states willing to participate generally know that they have a domestic political consensus to run such risks.

But while the efficiency and effectiveness of an ad hoc coalition seem attractive, there are also political costs associated with them. The most serious of these costs accrue to the international system as a whole. When powerful and capable states form temporary alliances (or coalitions within existing alliances) to engage in international actions involving military coercion, they make it easier for other states to justify the resort to force and self-help in other situations. Ad hoc action by self-judging groups of powerful states can threaten the development of broad-based multilateral dispute-settlement mechanisms and their use during international crises. Action sanctioned by a broad-based multilateral organization benefits from a presumption of legitimacy. When that action is authorized by the Security Council under the UN Charter, it carries the imprimatur of international law. This may explain the tendency of recent coalitions to seek UN support, if not formal authorization, whenever possible.

Coalitions of powerful states must rely on their particular capabilities to bring their power to bear; all too often, those capabilities involve coercion through military force. As a result, coercive military measures may again become the countermeasure of choice, as in the balance of power of the early twentieth century, allowing certain states to exploit their relative advantages in that particular domain. Those same powerful states may come to disdain nonmilitary collective measures that could engage more of the international community in the implementation of remedial action.

[37] *An Agenda for Peace*, 1992 A/46/277–S/24111, p. 30.

Perhaps even more important, powerful states that resort to force may inadvertently mitigate the moral exposure of the culpable state. Arguments about the coercive military tactics of the ad hoc coalition may overshadow the wrongful acts of the transgressor that instigated the coalition's action. Where there is a United Nations mandate as the source of coalition action, that is far less likely to occur.

5 The legal responsibility of military personnel

Robert C. R. Siekmann

Introduction

States have worked for many years to develop systems to ensure that military personnel act responsibly and in accordance with humanitarian principles. This can be seen as an aspect of democratic accountability within national systems. Now that military forces are increasingly used under the auspices of international institutions, the international community must ensure that modalities are in place to ensure that such personnel meet the same standards.

This chapter will deal with the responsibility of armed personnel in peace support operations conducted under the auspices of the UN and NATO. In recent years, the criminal responsibility of military (armed) personnel has arisen, particularly in connection with internal, intra-state operations, during which hostilities continue. Violations of international humanitarian law may occur between the parties concerned. There may also be cases of serious violations of the law committed by members of the peace support operations themselves. This contribution will deal with the rules that are applicable to the military in such situations. Some practical cases and situations will also be presented.

The broader framework of criminal responsibility involves the following definitions:

(1) *Legal status* is derived from the law that is applicable to personnel in military operations under international auspices, of which four aspects must be stressed.

(i) First, the law that military personnel have to respect, in principle, is the local law of the area of operations – namely, the national law of the receiving or host state.

(ii) Secondly, the law of the intergovernmental organization under the auspices of which the personnel operate is relevant. In the context of this contribution, UN law is of particular relevance. UN law can then be differentiated into general law, relevant for all operations or categories of operations, and law specifically laid down for the operation

in question. The best examples of general legislation are the 1994 UN Convention on the Safety of United Nations and Associated Personnel[1] and the 1990 UN Model Status-of-forces Agreement for peacekeeping operations.[2] There is still only a small body of general legislation in this field. As far as specific law is concerned, rules and guidelines adopted per operation in the UN context concern the mandate and terms of reference, including rules of engagement.

(iii) Thirdly, the law of the sending or participating state (troop-contributing nation) is relevant as the domestic, municipal law of the personnel.

(iv) Fourthly, in the widest sense, military operations under international auspices operate under applicable rules of general international law, for example, rules of international humanitarian law or human rights law.

The legal status of the military personnel refers to their rights and obligations under the applicable law, and to the terms of service and civil and criminal jurisdiction that are applicable. It includes answers to the question of criminal responsibility for violations of the applicable law. At the same time, several types of law (local law, UN law, domestic law, general public international law) can be violated. Local and municipal law will not be addressed in this chapter; rather, the emphasis will be on the public international law side of the coin: general as well as specific types of UN law, and general international law, especially humanitarian law.

(2) Generally speaking, *personnel* refers to the members of military operations under international auspices. Since this contribution focuses on the legal, especially criminal, responsibility of personnel in the field, it is primarily concerned with violations of the applicable law while performing operational duties. Personnel, therefore, here refers to armed military personnel (as distinguished from civilian personnel and unarmed military observers).

(3) In a general sense, *military operations under international auspices* refers to operations under the direct command of an intergovernmental organization (IGO) or authorized by an IGO. These may be designated "third-party missions," since they are based on an IGO decision, and not merely that of a single state or ad hoc group of states.

[1] Reprinted in (1995) 34 ILM 482; see also Robert C. R. Siekmann, "The Convention on the Safety of United Nations and Associated Personnel: Its Scope of Application" in E. Denters and N. Schrijver (eds.), *Reflections on International Law from the Low Countries – In Honour of Paul de Waart* (The Hague, Boston, and London, Kluwer Law International, 1998), pp. 315–23, and the literature mentioned there in note 1.

[2] UN Doc. A/45/594.

Three types of international military operations should be distinguished:

(a) collective self-defense operations (enforcement, as defined by Ku and Jacobson in the Introduction);
(b) peacekeeping operations (monitoring and observation, traditional peacekeeping, and peacekeeping plus state-building, using the Ku and Jacobson typology); and
(c) peace enforcement operations (force to ensure compliance).

The concept of "peace support operations" as used in this chapter encompasses peacekeeping and peace enforcement operations.

(a) The first category, collective self-defense operations, implies taking sides against an aggressor state. They have never been under the direct command of an IGO, since Chapter VII of the UN Charter was never implemented as planned in 1945. Article 43 of the Charter is a "dead letter"; the envisaged stand-by agreements between member states and the UN Security Council (UNSC) were never concluded. No international force has ever been placed under the direct command of the UN, and no regional organization has ever been authorized under Chapter VIII of the Charter to undertake a collective self-defense operation. The Korean and Gulf Wars were ad hoc coalitions of states authorized by the Security Council to undertake such action using their own command structures. In Korea, the US coalition commander was "double-hatted" as the UN commander in the area.

(b) The second category, peacekeeping operations, may be further subdivided into UN and non-UN operations. Non-UN operations are mainly regional operations based on the decision of a regional IGO. They do not require UNSC authorization, since they are not authorized to maintain or restore peace and security, and thus Chapter VIII (Article 53) of the Charter is not applicable. Fundamentals of peacekeeping operations are the consent of the parties concerned, non-enforcement of the mandate (use of force only in self-defense), and maintaining impartiality between the parties concerned. UN peacekeeping operations, by far the most important category, are not referred to in the Charter. They were developed in practice, in response to inter- and intra-state crises, beginning with the 1956 Suez crisis. However, peacekeeping is consistent with the main purpose of the UN as embodied in the Charter, namely the maintenance of international peace and security.

(c) The third category concerns what are called in this chapter peace enforcement operations. These operations also developed in practice, but under Chapter VII of the UN Charter. They always require UNSC authorization. Unlike peacekeeping, personnel may use force in an active manner, not only in self-defense. UNOSOM II (Somalia) is the only example

of a UN-commanded operation authorized, if necessary, to use force to implement its mandate. The NATO-led Implementation Force (IFOR, 1995) and Stabilization Force (SFOR, 1996) in Bosnia were based on the agreement of all parties concerned – that is, the parties to the conflict expressly agreed that enforcement action could be taken against them, if they violated the cease-fire agreement.

The structure of this chapter is as follows. First, the legal framework applicable to and the status of military personnel in UN peace support operations (categories (b) and (c), above) will be considered. UN-authorized operations of the Korean and Gulf War type are not considered in this chapter, since their legal situation and that of the military personnel involved did not fundamentally differ from a classical inter-state war situation. The central elements of UN peace support operations which will be discussed are the mandate and terms of reference (rules of engagement), status-of-forces agreements, and participation agreements. The crucial question of the applicability of international humanitarian law to UN peace support operations is then reviewed. The status of military personnel in NATO peace support operations is dealt with separately. Finally, the Srebrenica case illustrates the question of peacekeepers' responsibility to implement the mandate (and related orders), and the question of the extent of a duty by peacekeepers to ensure respect for the law by others operating in their area.

The status of military personnel in UN peace support operations

UN law: mandate and terms of reference[3]

In order to evaluate the behavior of military personnel in UN peace support operations, the first question that should be addressed is whether the force and its members acted in accordance with its official tasks or, in UN parlance, their mandate. What were the obligations arising from it? Mandates, of course, differ by operation, and are outlined in the UNSC enabling resolution or in a report by the Secretary-General approved by the Security Council. An essential question in this context is whether the mandate assigns any explicit tasks to the force and its members with

[3] Robert C. R. Siekmann, "Peace-keeping in the Middle East: Establishing the Concept" in Alfred E. Kellermann, Kurt Siehr, and Talia Einhorn (eds.), *Israel among the Nations – International and Comparative Law Perspectives on Israel's 50th Anniversary* (The Hague, Boston, and London, Kluwer Law International, 1998), pp. 367–80; and A. S. Paphiti, "Rules of Engagement within Multinational Land Operations" (1996) 1 *Militair Rechtelijk Tijdschrift* [Military Law Review] 1–12.

regard to protecting human rights or enforcing adherence to international humanitarian law by the parties concerned.

The mandate defines the tasks of the peace support operation, and in its terms of reference also describes the means by which these tasks should be accomplished. In peacekeeping operations, personnel can only use force in self-defense and must act with complete impartiality. Defining clearly what use of force is allowed is crucial if the force and its members are tasked to implement the protection of human rights and/or humanitarian law. The usual formula is: "The Force will be provided with weapons of a defensive character. It will not use force except in self-defense." The principle of self-defense is, however, usually broadened to specify that: "Self-defense would include resistance to attempts by forceful means to prevent the Force from discharging its duties under the mandate of the Security Council."

The rules of engagement (ROE) for a force elaborate on the means that it may use and "translate" them into military operational terms. The scope of the ROE for a UN force is, as far as the fundamental points are concerned, aimed at preserving non-coerciveness: negotiations first, then, if necessary, the application of unarmed force and, only after that, armed force, but as little as possible. Peacekeepers may never take the initiative for the use of force: action should always be a reaction and never a preventive action.

Status-of-forces agreements and participation agreements

Looking more specifically at the status of members of UN peacekeeping operations, the 1990 Model Status-of-forces Agreement for peacekeeping operations (SOFA) is of central importance. This document, which is not a treaty in force, was based on established practice and drew extensively upon earlier and current agreements. The model was intended to serve as a basis for the drafting of individual agreements to be concluded between the UN and countries on whose territory peacekeeping operations are deployed. Of a similar nature is the UN model participation agreement regulating the relations between the UN and troop-contributing states (1991).[4] It confirms that participating states, their national contingents, and its members are bound by the relevant provisions of the SOFA concluded for each operation.

In this context, the most important provisions in the Model SOFA are as follows. Peacekeepers shall respect all local laws and regulations (Article 6). Peacekeepers shall be subject to the exclusive jurisdiction

[4] UN Doc. A/46/185.

of their respective participating states in respect of any criminal offences which may be committed by them in the host country or territory (Article 46(b)). The host state's waiver of jurisdiction should not result in a vacuum, in which a crime is not subject to prosecution either by the host state or by the troop-contributing country in question. That is why the UN Secretary-General requests assurance that troop-contributing countries will exercise this jurisdiction instead of the host state (Article 48). These provisions of the Model SOFA contain rules that can be considered as customary law binding the UN, host state, and participating states with regard to all UN peacekeeping operations, even if for an individual operation no SOFA has been concluded.

The applicability of international humanitarian law to UN peace support operations[5]

There have historically been two schools of thought concerning the applicability of international humanitarian law to UN peacekeeping operations, one most clearly represented by the UN, and the other by the International Committee of the Red Cross (ICRC).

UN position It has been maintained that the UN is not bound by the Geneva Conventions (and Additional Protocols) or any of the other treaties concerning international humanitarian law, because the UN is not a party to the conventions, and may never be one, since they only allow for ratification by states. It has also been maintained that the UN is unsuited for carrying out most of the obligations in the conventions, because it lacks the administrative organs with which states are endowed. In particular, until the establishment of the ICC in 2002, the UN has no courts or system of criminal law by which it could try and punish persons responsible for war crimes. It has also been argued that, even if the UN were bound by the contents of the conventions as part of customary law, it would still remain outside the scope of their application: the UN is not a "Power" or "High Contracting Party" in the sense of the conventions. The same would apply to the law of armed conflict in general.

According to this line of reasoning, the UN may be involved in a conflict, but may never be a party to it. The UN cannot be at war, but may find itself in a war-like situation with the sole purpose of maintaining or

[5] Christopher Greenwood, "International Humanitarian Law and United Nations Military Operations" in H. Fischer (ed.), *Yearbook of International Humanitarian Law* (The Hague, T. M. C. Asser Institute, 1998), vol. I, pp. 3–34, and the literature mentioned there in note 1.

restoring international peace and security. Therefore, it is argued that soldiers serving in UN operations can never be classified as combatants.

Traditionally, UN Force Regulations provide that "The Force shall observe the principles and spirit of the general international Conventions applicable to the conduct of military personnel." Through participation agreements with the UN, troop-contributing countries were obliged to adhere to this rule. In particular, the conventions referred to were the 1949 Geneva Red Cross Conventions (Concerning Wounded, Sick and Shipwrecked Members of Armed Forces, Prisoners of War, and Protection of Civilian Persons) and the 1954 UNESCO Convention on the Protection of Cultural Property in the Event of Armed Conflict. The troop-contributing countries were requested, especially with respect to the humanitarian provisions of these conventions, to ensure that members of their national contingents were fully informed of the obligations they entail and that they enforce them. The UN's model participation agreement for UN operations confirms this (including the Additional Protocols of 1977), and the same is true for some recent SOFAs (although the Model SOFA itself is silent on this).

The UN held the view that it was bound only by the "principles and spirit" of international humanitarian law treaties. It never conceded that forces serving in UN operations were under a legal obligation to comply with the entire body of international humanitarian law. The UN approach is minimalist. The underlying reason for this position is that UN peacekeeping forces are not to be put on the same footing as the parties concerned. The UN wants to avoid the impression that it is taking sides in a conflict, and the formal acceptance of the law of armed conflict could imply that the UN is leaving its impartial position.

In this context, one should not forget that attacking "the blue helmets" amounts to a criminal act. This may be considered as a rule under customary law, which is confirmed by the Model SOFA for UN peacekeeping operations (Article 45). It is supported by the Convention on the Safety of United Nations and Associated Personnel (1994), which creates a regime for the prosecution or extradition of persons accused of attacking, *inter alia*, UN peacekeepers.

It is in accordance with the UN's approach towards the applicability of international humanitarian law to UN peacekeeping operations and their protected status that peacekeepers cannot be captured as prisoners of war during an armed conflict. According to the Model SOFA (Articles 42(b) and 43), peacekeepers taken into custody shall be delivered immediately, without delay, to the UN force. This rule is confirmed by Article 8 of the Convention on the Safety of UN and Associated Personnel, providing that, if such personnel are captured or detained in the course of the

performance of their duties, and their identity has been established, they shall not be subjected to interrogation, but be promptly returned to the UN force. While detained, they shall be treated in accordance with universally recognized standards of human rights and the principles and spirit of the 1949 Geneva Conventions.

The Convention on the Safety of UN and Associated Personnel does not apply to an operation authorized by the UNSC as an enforcement action under Chapter VII of the Charter. When personnel are engaged, as they were in the Korean and Gulf Wars, as combatants against organized armed forces, the law of international armed conflict contained in The Hague and Geneva Conventions applies. The situation is not fundamentally different from a classical inter-state war. The United States stated in 1951 that all forces participating in the UN action in Korea had been instructed to comply with the provisions of the Geneva Convention.

International humanitarian law applies to intra-state conflicts in which armed forces under national command and control, but with the authorization of the Security Council, become involved. Member states acting with UNSC authorization remain bound by the principles and rules of international law regulating the conduct of armed conflict, in exactly the same way as if they had acted without UN authority. It should be noted that the law applicable to intra-state conflicts is a separate body of international humanitarian law, more limited in scope than that applicable to international conflict.

Finally, although attempting to adhere to impartiality, peacekeepers may become involved in hostilities with one or more of the parties concerned. There seems to be great reluctance within the UN community to acknowledge that a UN force which was not established to carry out enforcement action of the Korean/Gulf War type has become a party to an armed conflict. The consequence is that a higher threshold for determining the existence of armed conflict is applied to peace support operations than to fighting between states, to the potential detriment of peacekeepers on the ground. In my opinion, de jure impartiality and being, de facto, a party to an armed conflict should be clearly distinguished.

ICRC position In contrast to the UN's position, there have been others who argued that international humanitarian law is applicable to UN peacekeeping operations, on the following grounds. The object and purpose of humanitarian law is to contain the inherent suffering brought about by armed conflict to the greatest extent possible. Seen from this point of view, it makes no difference who is holding the gun, and for what reasons. Every person involved in an armed conflict will have to abide by

the rules of international humanitarian law, even those wearing a "blue helmet."

A related argument recognizes that the UN often loses its impartiality during a given operation. It may do so by gradually siding with one of the parties to the conflict. It is also possible that it is the perception of one (or both) of the parties at war that the UN is siding with the other party. In either situation, the UN will become involved as if it were a party to the conflict, thereby turning its soldiers into combatants, to whom the rules of international humanitarian law apply. In a legal sense, the UN is subject to customary international humanitarian law, even if not bound by the relevant treaties, to the extent that it engages in armed conflict.

The ICRC has always taken the view that all provisions of international humanitarian law are applicable when UN contingents resort to force. In November 1961, the ICRC sent a general memorandum to the governments of all states parties to the Geneva Conventions and to members of the UN, concerning the application of those conventions to armed forces on UN missions. The memorandum states, among other things, that in view of the fact that the UN as such is not a party to the conventions, each troop-contributing country is responsible for their application. It would be desirable, therefore, if national contingents received instructions before their departure from their respective countries that would enable them to comply with the conventions, in the event of their having to use force. The ICRC reminded countries that under common Article 1 of the four Geneva Conventions, parties were obliged not only to respect the conventions, but also to ensure respect for them. It expressed the hope that contributing countries would exercise their influence to ensure that provisions of humanitarian law were applied by all contingents and by the UN command.

The Secretary-General's Bulletin On August 6, 1999, UN Secretary-General Kofi Annan promulgated fundamental principles and rules of international humanitarian law applicable to forces under UN command and control in situations of armed conflict.[6] The Secretary-General's Bulletin on "Observance by United Nations Forces of International Humanitarian Law" entered into force on August 12, 1999, the fiftieth anniversary of the signing of the 1949 Geneva Conventions. The directives contained in it are, in effect, an executive order to all UN member states.

[6] UN Doc. ST/SGB/1999/13: Observance by United Nations Forces of International Humanitarian Law.

The Bulletin's contents may be summarized as follows. The directives are applicable to all peace support operations, both enforcement actions and peacekeeping (categories (b) and (c), above). The Bulletin's provisions do not exhaust the field of international humanitarian law, and do not prejudice the application thereof, nor do they replace pertinent national laws. Particular emphasis is given to the obligation of UN forces to act in compliance with status-of-forces agreements. It is explicitly provided that, in status-of-forces agreements, the UN undertakes to ensure that the force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel. The UN also undertakes to ensure that military personnel are fully acquainted with the principles and rules of those international instruments; the obligation to respect said principles and rules is applicable to UN forces even in the absence of a status-of-forces agreement.

Under the terms of the Bulletin, in cases of international humanitarian law violations, members of UN forces are subject to prosecution in their national courts. Attacks on civilians or civilian objects are outlawed, and the Bulletin's provisions call for feasible precautions to protect them from the dangers resulting from military operations. UN forces are prohibited from engaging in operations of a nature likely to cause unjustified casualties among civilians or damage to civilian objects. Section 6 of the Bulletin states that "[T]he right of the United Nations force to chose methods and means of combat [is] not unlimited." Ordering that there shall be no survivors is expressly forbidden.

Cultural property and objects indispensable to the survival of the civilian population are also protected from attack. UN forces shall not make installations such as dams, dikes, and nuclear power stations the object of military operations, if so doing might result in severe civilian losses.

Section 7 of the Bulletin addresses the treatment of civilians and persons *hors de combat*, who shall be treated humanely and without any adverse discrimination on the basis of race, sex, religion, or any other ground. The Bulletin's provisions enumerate acts against these persons which are absolutely prohibited. Special protection is given to women and children, particularly against rape and any other form of indecent assault. Treatment of detained persons shall be humane and dignified.

Where applicable, the Third Geneva Convention of 1949 shall be respected. Protection, humane treatment, medical care, and attention are guaranteed to wounded and sick persons. Unless used for non-humanitarian purposes, medical establishments and mobile medical units shall not be made objects of attack. UN forces shall respect the Red Cross and Red Crescent emblems.

The Secretary-General's Bulletin is important in two respects. First, it is a legally binding text for any future UN-commanded operations. Secondly, it evokes "fundamental principles and rules of international humanitarian law," whereas in the past the UN had declared its adherence only to "the principles and spirit" of international humanitarian law. The Bulletin does not affect the protected status of members of peacekeeping operations under the Convention on the Safety of United Nations and Associated Personnel, discussed above.

The status of military personnel in NATO peace support operations

NATO has participated in several peace support operations connected with the civil war in the former Yugoslavia: Operation Deny Flight, to control the airspace over Bosnia; air strikes in support of UNPROFOR (including protection of the "safe areas" in Srebrenica and elsewhere); and IFOR and SFOR, pursuant to the 1995 Dayton Accords. It undertook an air verification mission over Kosovo and deployed an evacuation ("extraction") force in Macedonia, both in support of the Organization on Security and Cooperation in Europe (OSCE) mission on the ground. In 1999, NATO authorized Operation Allied Force, to stop Serbia's ethnic cleansing of the Albanian population in Kosovo, and deployed KFOR peacekeepers, with UN authorization, in Kosovo.

Many NATO member states have participated on an individual basis, not as part of the alliance, in UN and other peace support operations outside Europe. These include UNITAF in Somalia, the Haiti operation, and *Opération Turquoise* in Rwanda. The same is true for the 1991 humanitarian assistance operation in northern Iraq, in which individual NATO countries were involved, and for the US–UK air control operations in the no-fly zones above Iraq.

Concerning Bosnia, military members of NATO peace support operations had the status of "experts on mission." This status is regulated in the Convention on the Privileges and Immunities of the United Nations of 1946 (Article VI).[7] Experts performing missions for the UN as non-UN officials shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions. The experts enjoy, *inter alia*, immunity from personal arrest or detention in the host state, including immunity in criminal affairs. The Convention is applicable in all UN member states, so that official

[7] UN Treaty Series (UNTS), vol. I, p. 16.

expert-on-mission status has to be respected, in principle, wherever the experts operate.

There are two ways in which this status has been granted to NATO military personnel: directly, or by application of the status to them. Members of NATO air forces above Bosnia were directly granted the status of "experts on mission for the United Nations." Their air operations were all based on a decision of the Security Council, which authorized NATO member states to execute the respective mandates.

IFOR was an example of the application of "expert on mission" status to NATO personnel. On the basis of the Dayton Accords, IFOR consisted of military units from NATO and non-NATO countries. It operated under the authority and was subject to the direction and political control of NATO. The parties to "Dayton" agreed to establish a cease-fire, and authorized IFOR to take the necessary action, including the use of force, to maintain it. It was explicitly stipulated that all parties would be equally responsible for compliance, and subject to any necessary enforcement action by IFOR to ensure implementation of the agreement and protection of the Force.

Article VI, paragraph 11, of Annex 1A of the General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Accords) provided that all parties should accord IFOR and its personnel the assistance, privileges, and immunities set forth in Appendix B. That appendix contained the Agreement between the Republic of Bosnia and Herzegovina and NATO concerning the status of NATO personnel. It explicitly provided that the provisions of the Convention on the Privileges and Immunities of the United Nations concerning experts on mission should apply, *mutatis mutandis*, to NATO personnel involved in IFOR, except as otherwise provided for in the Agreement (Article 2).

Other relevant provisions of the Agreement stipulated as follows. All personnel shall respect the laws of the Republic of Bosnia and Herzegovina in so far as this was compatible with the entrusted tasks and mandate (Article 3). NATO military personnel under all circumstances and at all times shall be subject to the exclusive jurisdiction of their respective national elements in respect of any criminal or disciplinary offences which may be committed by them in the Republic of Bosnia and Herzegovina (Article 7). Also, as experts on mission, NATO personnel shall be immune from personal arrest or detention; personnel mistakenly arrested or detained shall immediately be turned over to NATO authorities (Article 8).

The Interim Agreement for Peace and Self-government in Kosovo, of February 23, 1999, stated in Appendix B (Status of Multi-national

Military Implementation Force) that, without prejudice to their privileges and immunities under the appendix, all NATO personnel shall respect the laws applicable in Yugoslavia, whether Federal Republic, Kosovo, or other, in so far as compliance with those laws was compatible with the entrusted tasks/mandate. NATO personnel, under all circumstances and at all times, shall be immune from the parties' jurisdiction in respect of any civil, administrative, criminal, or disciplinary offenses which may be committed by them in Yugoslavia. The parties shall assist states participating in the operation in the exercise of their jurisdiction over their own nationals. NATO personnel shall be immune from any form of arrest, investigation, or detention by Yugoslav authorities, and personnel erroneously arrested or detained shall immediately be turned over to NATO authorities.

As far as the applicability of international humanitarian law to NATO peace support operations is concerned, the situation is similar to UN peace support operations. The states involved in NATO-led peacekeeping or humanitarian operations do not regard themselves as parties to an armed conflict. There is thus the same tendency to set the threshold for determining whether personnel have become a party to an armed conflict higher than in the case of classical inter-state wars. NATO countries acting with UN authorization have regarded themselves as parties to an armed conflict only when engaged in Chapter VII enforcement actions (Korean/Gulf Wars).

As noted, the Convention on the Safety of UN and Associated Personnel may be considered to apply also to UN-authorized (even if not UN-led) operations, including all NATO operations in Bosnia. Article 20(a) of the Convention provides that nothing in the Convention shall affect the applicability of international humanitarian law to UN operations and UN and associated personnel, or the responsibility of such personnel to respect the standards in this respect. The UN recognizes the applicability of the principles and spirit of the relevant international conventions to all UN-authorized peace support operations.

International humanitarian law applies in principle to NATO peace support operations, whether authorized by the UN or not. Under Article 8 of the Convention on the Safety of UN and Associated Personnel, parties to a conflict are bound to adhere to the spirit and principles of the Geneva Conventions in their treatment of UN and associated personnel and to release them promptly, if detained. By analogy, the same would apply to NATO peacekeepers, as long as they also respect the spirit and principles of the Geneva Conventions. This is in conformity with the position that states participating in NATO-led peace support operations do not regard themselves as parties to an armed conflict.

Dutchbat in Srebrenica[8]

Implementing the mandate

According to UNSC Resolution 819 (April 16, 1993), the Bosnian town of Srebrenica and its surroundings formed a "safe area," which should be free from any armed attack or other hostile acts. Paragraph 5 of UNSC Resolution 836 (June 4, 1993) ordered UN Protection Force (UNPROFOR) troops to deter attacks against safe areas; monitor the cease-fire; promote the withdrawal of military and paramilitary units other than those of the government of the Republic of Bosnia and Herzegovina; and occupy key points on the ground, in addition to participating in the delivery of humanitarian relief to the population. According to this paragraph, UN troops were only ordered to "deter" attacks, not to engage in battle.

Paragraph 9, however, seemed to go further. It authorized UNPROFOR, in carrying out the mandate defined in paragraph 5, and acting in self-defense, to take the necessary measures, including the use of force, to reply to bombardments against the safe areas or to armed incursions into them by any of the parties. Peacekeepers were also authorized to respond, with force if necessary, to any deliberate obstruction in or around safe areas of the freedom of movement of UNPROFOR or of protected humanitarian convoys. The UN troops were, thus, entitled to defend themselves against attack.

As a rule, self-defense in UN peacekeeping operations implies that peacekeepers may use force in return when they are forcefully prevented from carrying out their mandate. Attacks on Srebrenica meant the obstruction of the duties of the Dutch battalion (Dutchbat). It was, therefore, entitled to react. Moreover, "in and around the safe areas" the use of air power was permitted (UNSC Resolution 836, paragraph 10). Dutchbat could, if necessary, request air support from NATO.

A confidential UNPROFOR force commander's directive of May 29, 1995 provided, however, that "the execution of the mandate is secondary

[8] Soon after the return of the Dutch troops to The Netherlands, the government commissioned a study by the Netherlands Institute for War Documentation that released its 7,600-page report in 2002. " 'The report weighed so heavily on the cabinet and the ministers that they had to accept the consequences,' said Ad Melkert, the designated successor in the coming elections to Prime Minister Wim Kok, who tendered his entire government's resignation to Queen Beatrix": Peter Finn, "Dutch Government Quits After Report on Serb Massacre: Srebrenica Inquiry Faults Troops' Role," *Washington Post*, April 17, 2002, p. A8. On Dutchbat in Srebrenica generally, see Robert C. R. Siekmann, "The Fall of Srebrenica and the Attitude of Dutchbat from an International Legal Perspective" in Fischer, *Yearbook of International Humanitarian Law*, vol. I, pp. 301–12.

to the security of the UN personnel," and that force could only be used as a last resort. In addition, the military means to ward off an attack were extremely limited. At the moment of the Bosnian Serb attack on Srebrenica at the beginning of July 1995, only 429 Dutch soldiers were still present in the enclave. Only half of them were infantry; the others were support and medical troops. Even though they disposed of about thirty armored infantry battle vehicles, several anti-tank rocket systems, and half a dozen 81-mm mortars, they had very little fuel and ammunition.

The Bosnian Serb attack on the "safe area" of Srebrenica commenced on July 6, 1995. The Dutchbat commander was faced with an acute dilemma: should fire be answered in a legitimate attempt at self-defense, should he request air support, or should he try to allay the crisis through diplomacy? He chose the third option: the Bosnian Serbs were asked for an explanation. They, in turn, demanded that the Dutch request be made in writing. On July 9, Dutchbat received the order from the highest UN echelons to assume "blocking positions" with all means available to prevent a further breakthrough into and march on Srebrenica by Serbian units.

To support the "blocking positions," the commander of the United Nations Peacekeeping Force, of which UNPROFOR was a part, and the special representative of the UN Secretary-General in the former Yugoslavia sent the Serbs an ultimatum. If the "blocking positions" were attacked, use would be made of NATO "close air support." In such a case, according to another UNPROFOR directive, UNPROFOR first had to lodge a request with UN Sector North-East in Tuzla. From there, the request had to be sent on to the next link in the chain of command, UNPROFOR in Sarajevo. If consent were received, the request would be transmitted to the highest headquarters of the UN peacekeeping force in the former Yugoslavia in Zagreb. The UNPF commander would then consult the special representative. If they consented, the request would be lodged with NATO (the "dual-key" formula).

On July 10, the Dutchbat deputy commander requested air support when the Bosnian Serbian attack was still in full swing. The UNPF commander and the special representative of the Secretary-General in the end only agreed that, if the Dutch were attacked, air strikes could be carried out on actively attacking Serbian forces or "smoking guns" (firing tanks, mortars, and artillery). Dutchbat expected air support to be deployed at the first opportunity that presented itself. UNPF and UNPROFOR, on the other hand, were, in fact, waiting for Dutchbat to contact them as soon as a new Bosnian Serb attack occurred, as was the usual practice regarding air support. After two air strikes had taken place, the Bosnian Serbs sent an ultimatum: if the air strikes did not cease immediately, they would kill the Dutch soldiers who had been taken hostage and open

fire on both Dutchbat and the refugees. The air strikes were called off by the Secretary-General's special representative and the UNPROFOR commander in Sarajevo.

Did Dutchbat, as part of the UN peacekeeping force in the former Yugoslavia, disregard its obligations under the operation's mandate? Did it violate any law by failing to employ its powers during the Bosnian Serb attack on Srebrenica? Did Dutchbat disobey or insufficiently obey orders of higher commanders? After all, it may be that the mandate of a UN peacekeeping force is not binding, and that a duty to use force to carry out that mandate does not exist (Dutchbat was merely "authorized" to use force); but military orders for the implementation of a mandate (in this case, to assume blocking positions) should, of course, be carried out.

One cannot reasonably arrive at the conclusion that Dutchbat violated UN law, considering the fact that the safety of the blue helmets had to prevail over the UNPROFOR mandate. (Dutch soldiers were, moreover, being held hostage by the Bosnian Serbs.) In addition, one should consider the important fact that, due to the circumstances, real air support had not been given.

On July 11, 1995, Srebrenica fell. The Dutchbat commander, a lieutenant colonel, was summoned to Bratunac by the Serb General Mladic, as the former later testified before the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague. The UN in Sarajevo would have sent the UNPROFOR chief of staff, a general, by helicopter, but Mladic did not consent to overflight of the Republika Srpska. He wished to do business with Dutchbat directly.

In an attempt to maintain some control over the course of the meeting, UN command transmitted from its Sarajevo headquarters orders for defense of Dutchbat and protection of refugees in Srebrenica. Among these orders were: "Enter into local negotiations with BSA [Bosnian Serb Army] forces for immediate cease-fire," "Take all reasonable measures to protect refugees and civilians in your care," and "Continue with all possible means to defend your forces and installations from attack. This is to include the use of close air support if necessary." In his report of July 12 on the meeting with Mladic, which was, *inter alia*, addressed to the UNPF commander, the Dutchbat commander wrote that he was unable to defend Bosnian Muslims or his own battalion.

On July 17, 1995, a meeting was held in Srebrenica between the new Bosnian Serb "authorities" of Srebrenica and the UNPROFOR representative, the Dutchbat deputy commander. The meeting was also attended by three Bosnian Muslim representatives, who had also been present at meetings with General Mladic on July 11 and 12. Among other items, Dutchbat's departure from the Dutch compound in Potocari was on the agenda. At the end of the meeting, the Bosnian Serbs unexpectedly asked

the Muslim representatives to sign a "declaration," consisting of two parts. The largest part dealt with what had allegedly been discussed at the meeting of July 12 in Bratunac between the same representatives and General Mladic. The Dutchbat commander had also been present at that meeting. According to the declaration, it had, at that time, been agreed that the Muslim population would be evacuated "voluntarily" and under UN military escort. The declaration did not refer to any differentiation as to groups of refugees. The second part of the text, the actual declaration, certified that the evacuation of the refugees had been carried out in a correct manner, in accordance with what had been agreed on July 12, and with due regard for the Geneva Conventions and international humanitarian law. The declaration was signed by one of the representatives of the Muslim refugees, who did not object to its contents, and by the representative of the Bosnian Serbs.

The Dutchbat deputy commander, as a representative of UNPROFOR, was asked to co-sign the declaration. He asked that it be translated into English, and agreed to verify only convoys which had been escorted by Dutch UN soldiers. He refused to accept the declaration for those convoys which Dutchbat had not been able to adequately supervise, and he made handwritten additions to the text.

Did Dutchbat violate UN law during the evacuation of the Muslims from Srebrenica? The superior orders stipulated the taking of "all reasonable measures" to protect refugees and civilians after the fall of Srebrenica. This specifically concerned the thousands of people who had fled to Potocari. The guidelines, which prescribed that the safety of Dutch soldiers was to prevail over the mandate, were also in force during this phase. What, given the circumstances, was "reasonable" in the talks between the Dutchbat commander and Mladic, and during the evacuation itself? The Dutchbat commander had to decide, and what the situation looked like to him cannot be established after the event. In any case, reasonableness is a different criterion from moral or ethical ones. From a legal/normative perspective, in the UN context, it cannot be concluded that Dutchbat acted unlawfully during the evacuation of Srebrenica.

Witnessing war crimes

The preceding section considered whether Dutchbat violated UN law during the fall of Srebrenica and the evacuation of Muslims from that town. The question may also be posed whether members of Dutchbat who witnessed war crimes were not themselves also guilty of war crimes through their passive behavior.

Concerning the applicability of international humanitarian law to Dutchbat, it should first be observed that UNPROFOR was, in any case,

at least a peacekeeping operation (use of force in self-defense), if not a peace enforcement (in Ku and Jacobson's typology, a force to ensure compliance) operation. The conflict in Bosnia was a non-international armed conflict in the sense of Article 3 of the Geneva Conventions and Additional Protocol II. Dutchbat was not itself, during the evacuation of the Muslim population of Srebrenica, involved in a situation of armed conflict as a combatant. International humanitarian law was, therefore, not applicable to Dutchbat.

From a UN law perspective, an order had merely been given to take all "reasonable" measures for the protection of refugees and civilians. It was concluded above that the behavior of Dutchbat during the evacuation of Srebrenica may not be qualified as unreasonable and, therefore, unlawful. The same applies to Dutch behavior in witnessing war crimes committed by Bosnian Serb forces.

Apart from UN law and the possible applicability of international humanitarian law, members of UN peacekeeping forces remain subject to the criminal jurisdiction of their respective national states. Irrespective of the international applicability of the law of armed conflict, at a national level, a troop-contributing country may declare that a "state of war" exists with regard to its participation in UN peace support operations, so that violations of the mandate, disobedience of orders, and criminal acts, including violations of international humanitarian law, can be dealt with as "war crimes."

Dutch criminal law is applicable to military personnel charged with a criminal offence outside the Netherlands. One of the offences in the Dutch Criminal Code is the "violation concerning those in need," *i.e.*, omission, of a witness to an immediate life-threatening situation. The witness, to be found guilty, must have been in a position to grant assistance without reasonable fear of danger to himself or others. This criminal law provision could be considered as the juridification of an ethical or moral rule.

However, if Dutch soldiers in Bosnia had acted to prevent war crimes, they would undoubtedly have exposed themselves to danger without, moreover, having been able to accomplish much against the militarily dominant Bosnian Serbs. Dutch criminal law did not require the prosecution of members of Dutchbat as witnesses of war crimes during their evacuation from Srebrenica.

Summary and conclusions

From an international legal perspective, UN law and international humanitarian law are the focal points of the law applicable to UN peace support operations. The local law of the receiving state and the municipal

law of the sending state are also part of the body of law concerning such operations. The question of criminal responsibility should be subdivided into criminal responsibility for the behavior of the members of UN peace support operations themselves, and criminal responsibility for not having prevented or suppressed the criminal responsibility of the parties concerned.

The general operational and legal framework for the military members of a UN peace support operation is determined by its mandate, terms of reference, and other modalities for implementing the mandate. Noncompliance with the mandate (that is, with the orders for its execution) may result in criminal responsibility of the military personnel. One of the aspects of the Srebrenica case concerns the appropriate action that can be reasonably taken by commanders of a UN operation, when its mandate involves protection of the civilian population against attacks by the parties concerned. Standard rules for UN peace support operations are respect for local law and the exclusive jurisdiction of the sending state for any criminal offences committed by military members of the force.

The applicability of international humanitarian law to its peace support operations is recognized by the UN, since the Secretary-General's 1999 Bulletin, as far as "fundamental principles and rules" are concerned. (Before then, as discussed above, the UN acknowledged only the "principles and spirit" of international humanitarian law.) Apart from the question of criminal responsibility, this implies that peacekeepers may not be captured as prisoners of war, and they enjoy immunity from local arrest and detention in criminal matters. Military members of UN operations have a protected status in the receiving state; attacks against them are of a criminal nature and should be punished. With regard to Bosnia, military personnel of NATO peace support operations enjoyed the status of "experts on mission." In fact, their status did not fundamentally differ from that of military members of UN peace support operations.

Of a more troubling nature is the question whether peacekeepers have a duty to take action against violations of international humanitarian law by the parties to the conflict. The Srebrenica case illustrates this dilemma very well. The mandates of UN peace support operations have not systematically referred to a monitoring role for the "blue helmets" in cases of flagrant violations of human rights and/or international humanitarian law by the parties concerned.

It should be a standard formula in each and every future UNSC mandate that military members of peace support operations are obliged to report flagrant human rights violations to their commanders, and that these reports, in turn, are to be submitted through the UN force commander to the Secretary-General for consideration by the Security Council. UN

forces should be bound to do what can reasonably be expected in order to prevent or stop such violations. One must recognize, of course, that, under the circumstances, it will not be possible for them to undertake any concrete action that influences the situation in the field. *Mutatis mutandis*, the same conclusion should be drawn with regard to peace support operations that are not under UN command and control (for example UN-authorized).

Finally, it should be noted that IFOR, and in particular SFOR, fulfilled a unique role by arresting a number of suspects – after termination of the armed conflict – for surrender to the International Criminal Tribunal for the Former Yugoslavia. Every future mandate of a UN or non-UN peace support operation should contain the explicit power to do the same in relation to the permanent International Criminal Court (ICC) to be established in The Hague.

Part III

Traditional contributors to international military operations

6 Canada: committed contributor of ideas and forces, but with growing doubts and problems

Fen Osler Hampson

Introduction

The issues of political, legal, and constitutional accountability in sending Canadian forces into harm's way have come to national attention because of debate about the 1999 NATO Kosovo War. These issues of accountability have to be understood within the context of Canada's parliamentary traditions and long-standing commitment to international peacekeeping and the United Nations. Debates about the forms of authorization and accountability have become increasingly pronounced in recent years.

On the one hand, there is growing concern about the UN's international peace and security role and the general political accountability of the five permanent members (P-5) of the Security Council to the wider membership of the UN. On the other hand, there are important domestic political accountability issues, too. Many parliamentarians, particularly those in opposition, feel that successive governments neither adequately informed parliament nor sought approval from it when Canadian forces have been deployed in peace operations. Ironically, this frustration seems to parallel a trend towards greater – not reduced – levels of consultation and parliamentary debate by the current Liberal government. In the aftermath of the Somalia Inquiry, issues of civilian control of military personnel and operations, as well as civilian responsibility to the military, have been especially salient. Somalia provoked calls for improved systems of accountability within both the military and civilian hierarchies in Canada's defense establishment.

This chapter first discusses the constitutional and legal context of the use of military force by Canada. It then reviews the debates about accountability in those instances where Canadian forces were deployed in peace operations with a significant enforcement component. This is

followed by a more general discussion of international and national authorization issues as they have emerged in Canada.[1]

Constitutional and legal situation

Nothing in the Canadian Constitution requires the government to seek parliamentary approval for declarations of war or lesser military deployments. The issue did not arise in the First World War because Canada did not enjoy autonomy in its foreign affairs. In any case, Canada went "wholeheartedly into the war . . . and there was no question that Britain's declaration of war had bound Canada as part of the empire."[2] The situation was somewhat different during the Second World War. With the Statute of Westminster (1931), Canada had gained control over its own foreign affairs and judicial system. In 1939 Prime Minister Mackenzie King initiated a process of consultation with parliament which culminated in a declaration of war approved by the House of Commons ten days after Britain declared war against Germany.[3]

Commons and the Senate moved quickly to proclaim a state of war between Italy and Canada in June 1940. Interestingly, though, parliamentary approval was not obtained when Canada subsequently declared war against Japan, because parliament had adjourned the day Japan attacked Pearl Harbor. A proclamation dated December 8, 1941, indicating that a state of war existed between Canada and Japan, was only tabled in parliament on January 21, 1942, as was a similar proclamation declaring war between Canada and Romania, Hungary, and Finland. The prime minister clearly felt that parliament did not need to be reconvened to approve these two subsequent declarations of war.

The key legislative authority for placing Canadian forces on active service is the National Defence Act (NDA). Under section 31 of the Act, the governor in council can place the entire Canadian forces or any unit "on active service anywhere in or beyond Canada at any time when it appears advisable to do so (a) by reason of emergency, for the defence of Canada; or (b) as the consequence of any action undertaken by Canada under the United Nations Charter, the North Atlantic Treaty or any similar instrument for collective defence that may be entered into by Canada." If parliament is not in session when Canadian forces are deployed, "a

[1] See Appendix B, "Country participation in international operations, 1945–2000," for information on Canada's contribution.

[2] J. M. S. Careless, *Canada: A Story of Challenge* (Toronto, Macmillan, 1970), p. 328.

[3] J. L. Granatstein, *Canada's War: The Politics of the Mackenzie King Government, 1939–1945* (Toronto, Oxford University Press, 1975); Dominion of Canada, *Official Report of Debates, House of Commons, Fifth (Special War) Session – Eighteenth Parliament, September 7–13, 1939, 3 George VI, 1939* (Ottawa, J. O. Patenaude, ISO, King's Printer, 1939).

proclamation shall be issued for the meeting of Parliament within ten days."[4]

The Act does not define what "active service" means, nor does it specify what parliament should do once it is recalled. Governments have therefore been able to deploy Canadian forces into the theatre of conflict while arguing that such deployments do not constitute "active service," *per se*.[5] And the interpretation of the law regarding parliament's role is that it simply be in session ten days after the government issues its proclamation deploying Canadian forces. In practice, successive governments have sought varying degrees of parliamentary approval for major peacekeeping and enforcement actions under the UN or NATO.

Civil–military relations and civilian control over the armed forces are also governed by the NDA and supplementary regulations. The Act established jurisdiction between the civil authority and the Canadian forces (CF). The CF are distinct from the government, and during the 1950 debate on the NDA, parliament separated the Department of National Defence (DND) from the armed forces. Neither the CF nor DND have a stated statutory purpose, distinguishing them from other government agencies which do. The employment of Canadian forces, with the exception of the "aid of the civil power" under Part XI of the NDA, is entirely at the discretion of the Crown. Thus, it is up to the government to decide how it wants to use the armed forces.

The minister of national defence is responsible for the "management and direction" of the CF, and the chief of defence staff (CDS), "under the direction of the Minister," has authority for their "control and administration." He is subject to the direction of the minister in the exercise of general powers, but has exclusive authority over the rate of pay for general officers and the conduct of military operations within the general financial, political, or foreign-policy constraints set by the government.[6]

Debates about peacekeeping and the use of force

There are strong elements of continuity in the way debates about the use of Canadian military forces in peace operations have been framed and

[4] As quoted in Michel Rossignol, "International Conflicts: Parliament, the National Defence Act, and the Decision to Participate," background paper BP-303E (Ottawa, Research Branch, Political and Social Affairs Division, Library of Parliament, August 1992), pp. 14–15.

[5] *Ibid.*, p. 17.

[6] Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Legacy*, *Vols. I–V* (Ottawa, Minister of Public Works and Government Services Canada), vol. I, pp. 92–3.

the issues that have surfaced. Canadian decisions to deploy forces are affected by a variety of political cultural factors. They include:

- a reluctance to deploy and use force unless it is sanctioned by the UN and is subordinate to the requirements of collective security;
- a reluctance to provide support for US-led initiatives involving the threatened or actual use of force (particularly when such actions are not sanctioned by the UN and do not involve collective security or collective self-defense);
- a strong preference for negotiated solutions to threats to international peace and security and solutions that do not involve the use of force;
- a desire not to involve Canada in military or diplomatic actions that would compromise or jeopardize its future peacekeeping role;
- a long-standing preference for (1) institutionalized multilateral approaches regarding the use of force; and (2) the establishment of a permanent international peacekeeping force under UN auspices;
- concern in recent years about political accountability in the control and management of Canada's armed forces, particularly with regard to peace operations;
- concern about the use of ad hoc coalitions and regional instruments in the maintenance of international peace and security where there is no UN authorization or involvement;
- growing concern about the accountability of the UN Security Council in general, and the P-5 in particular, to the broader membership of the UN in approving and directing peace operations.

Traditional peacekeeping

When Canadian troops are involved in "traditional" peacekeeping missions, the practice is for the government to issue an order in council which is then tabled in the House of Commons. This has meant that "while Parliament has a role in approving the process of placing military personnel on active service, its most important role is in reviewing the government's decision concerning Canadian participation in international conflicts."[7] This was the case in Suez, Cyprus, and other peacekeeping missions. Accountability issues loomed large in debates about peacekeeping in the early 1950s and 1960s, but fell by the wayside as the concept of Canada as the world's foremost "peacekeeper" came to be accepted by the public and all political parties.

Concerns about the accountability of international institutions, the UN in particular, surfaced in domestic debates in the aftermath of Canada's

[7] Rossignol, "International Conflicts," p. 21.

greatest peacekeeping venture: the 1956 Suez crisis. With Egyptian nationalization of the Suez Canal, followed by British, French, and Israeli military intervention, the world stood on the edge of a major political and military crisis that threatened the very fabric of the NATO alliance. For Canada, the crisis presented an opportunity not only to strengthen the UN, but to ameliorate British–American relations. Using his special relationship with both countries, Lester Pearson was able to prevent UN condemnation of Britain and France, establish a cease-fire and disengagement, and deploy peacekeeping forces to monitor the withdrawal of British, French, and Israeli forces from the occupied territories.[8] Although Pearson won the Nobel Peace Prize for his efforts, his domestic critics argued that Canada had sold out the British and allied itself too closely with American interests.

The subsequent election in June 1957 of a Progressive Conservative government led by John Diefenbaker reflected domestic disaffection with Pearsonian "internationalism." Diefenbaker made clear Canada's continuing commitment to NATO and the UN, but underscored his desire for greater consultation within NATO, the UN, and the Commonwealth, based on the principle of equality. He was the first Canadian leader to propose the establishment of a permanent UN peacekeeping force. Diefenbaker's brand of "assertive internationalism," which sought to distance Canada from the US and further institutionalize multilateralism, was also premised on the notion that NATO's collective defense role should extend out-of-area, particularly on issues such as disarmament and economic cooperation.[9]

The only non-UN peacekeeping activities in which Canada participated were the International Commissions for Supervision and Control (ICC) established in Vietnam, Cambodia, and Laos following the 1954 Geneva Conference on Indochina. Canada hesitated to take on the task, since the UN was not involved, the United States was disassociating itself from the accords, and "The legal basis of the agreements themselves was hazy in the extreme."[10] None the less, in spite of these doubts, by early August 1954 Canada had sent 150 army officers and civilian personnel from the Department of External Affairs to Indochina.

[8] John A. Munro and Alex I. Inglis (eds.), *Mike: The Memoirs of the Right Honourable Lester B. Pearson; Vol. II 1948–1957* (Scarborough, New American Library of Canada, 1975); John English, *The Worldly Years: The Life of Lester Pearson; Vol. II 1949–1972* (Toronto, Alfred A. Knopf, 1992).

[9] David B. Dewitt and John J. Kirton, *Canada as a Principal Power* (Toronto, John Wiley & Sons, 1983).

[10] Alistair Taylor, David Cox, and J. L. Granatstein (eds.), *Peacekeeping: International Challenge and Canadian Response* (Toronto, The Canadian Institute of International Affairs, 1968), p. 109.

The ICC had some success in supervising the immediate cease-fire and restoring order, but it was not able to make progress on the holding of free elections within two years, as agreed in Geneva. By 1956, it had withered to a token force, and by 1958 it was withdrawn at the request of the Laotian government. The ICC was reconstituted in 1962 as a small observer team to deal with the worsening situation in Vietnam. Although it continued operating until 1973, as the Vietnam War escalated the ICC ceased to serve any useful purpose, other than resisting US pressure to send Canadian troops to Vietnam.[11]

Peacekeeping by the mid-1960s had already entrenched itself in the Canadian psyche and come to be seen as a foreign policy "niche" in which Canada could make a unique contribution to international peace and security. Any disquiet about its purposes and utility was largely confined to the Canadian military, which consistently remained less enthusiastic about peacekeeping than did Canada's foreign-policy elites.

Canada's next major peacekeeping venture after Suez came in Cyprus, following the outbreak of war in 1964. Both NATO and the Commonwealth approached Canada to provide peacekeeping forces, but neither could get President Makarios of Cyprus to accept the idea. Eventually the parties agreed to the deployment of a UN peacekeeping force, and once again Canada was approached to contribute troops. Despite concerns about the way the force was to be managed and financed, Canada eventually took a leading role in assembling the peacekeeping force (UNFICYP).

Cyprus turned into one of Canada's longest peacekeeping commitments, lasting until 1995, when Ottawa decided it could no longer afford to continue. UNFICYP always sat uncomfortably with the Canadian military, which saw it as a needless distraction from Canada's Cold War role on NATO's central front.[12] However, the Cyprus operation was crucial to training peacekeepers and became a symbol of the durability of Canada's peacekeeping commitment.

Canadians prided themselves on participating in every UN peacekeeping operation – until the 1990s, when Canada decided to opt out of certain missions. Its more recent involvement in peace operations has become controversial. The erosion of the domestic political consensus parallels the changing mandate (and nature) of operations in the 1990s.

[11] J. L. Granatstein and David J. Bercuson, *War and Peacekeeping: From South Africa to the Gulf – Canada's Limited Wars* (Toronto, Key Porter Books, 1991), pp. 204–5.

[12] J. L. Granatstein, "Peacekeeping: Did Canada Make a Difference? And What Difference Did Peacekeeping Make to Canada?" in John English and Norman Hillmer (eds.), *Making a Difference? Canada's Foreign Policy in a Changing World Order* (Toronto, Lester Publishing, 1992), p. 230.

When the United Nations Protection Force (UNPROFOR) was created on February 21, 1992, Canada agreed to contribute approximately 1,200 of the 13,000 personnel required, and Canadian Brigadier-General Lewis Mackenzie was appointed UNPROFOR chief of staff. Although initially established as an interim measure to create conditions for negotiations to settle the crisis in Croatia, UNPROFOR evolved into a traditional disengagement mission in Croatia, a humanitarian support mission in Bosnia, and a small preventive deployment mission in Macedonia. To ensure safe havens for civilians, NATO, at the request of the UN Security Council, implemented plans for the military enforcement of a no-fly zone. UN peacekeepers were also given a mandate to use force, if necessary, in self-defense.

US unwillingness to participate in the mission concerned Canada's political leaders. There was strong opposition to air strikes against Bosnian Serbs that would negatively affect the security of Canadian forces on the ground. These differences surfaced in February/March 1994, when Canada opposed an ultimatum to Bosnian Serbs threatening air strikes and again in November when Canadian peacekeepers were detained by Bosnian Serb forces in retaliation for the NATO bombing of Serb-controlled airfields.

The first significant parliamentary debate on Canada's contribution to UNPROFOR came only in early 1994, after the Liberals had come to power with a commitment to involve the House of Commons more in issues of foreign policy. It was a "take note" debate, based on a non-votable motion which simply states that the House takes note of a specific issue. Such a debate is intended to allow all members who wish to speak to express their views on an issue, after it is dropped from the Order Paper (from discussion). The motion before the House on January 25, 1994, was "That this House take note of the political, humanitarian and military dimensions of Canada's peacekeeping role, including in the former Yugoslavia, and of possible future direction in Canadian peacekeeping policy and operations." Essentially, the government was looking for two things in this debate: the position of members as to whether Canada should renew its mandate in Bosnia (due to expire in March), and their views on Canada's future commitment to peacekeeping in general.

The Bloc Québécois stated that they were in full support of Canada remaining in Bosnia, although a peace agreement seemed remote.[13] Several Reform Party members seemed to advocate the withdrawal of Canadian peacekeepers from Bosnia to Croatia, on the grounds that only in Croatia

[13] *Hansard*, HC, January 25, 1994. Recent parliamentary publications are drawn from the electronic version of *Hansard* found at http://www.parl.gc.ca.

was there any peace to keep. However, most members supported Canada's continued role in Bosnia. On March 10, 1994, the government announced a six-month extension of the mission in Bosnia, in part due to the support MPs expressed during the debate.

Members were less generous when Canadian participation in the Dayton peace process came up for discussion and debate on March 29, 1996. The motion for debate was "That this House, in light of the UN Security Council consideration of renewed mandates for UN forces in the former Yugoslavia, take note of the rotation of Canadian forces serving with UNPROFOR in Bosnia-Herzegovina and Croatia." Many opposition members complained that parliament had not been adequately consulted about new commitments undertaken by the government to extend the deployment of Canadian peacekeepers in the Balkans.[14]

There was a special House debate on SFOR extension in Bosnia on April 28, 1998, that began with a joint presentation by the foreign and defense ministers. Although the mandate extension was supported by all parties, with some concerns over force capabilities, opposition members complained that the debate was *pro forma* and a rubber stamp for decisions already taken by the government.[15]

Monitoring and observation

Canada has contributed military personnel to a wide range of monitoring and observer missions, which have been relatively uncontroversial and attracted little public attention. The first was the United Nations Military Observer Group in India and Pakistan (UNMOGIP, January 1949 to the present). Canada provided up to thirty-nine military observers, at any given time, to UNMOGIP between 1949 and 1979, and, until 1992, a CC-130 Hercules aircraft for the biannual rotation of UNMOGIP headquarters between India and Pakistan. Another important observer mission was the United Nations Observation Group in Lebanon (June–December 1959), created to ensure that no personnel or arms were illegally infiltrated across Lebanese borders. Canada provided up to seventy-seven UNMOs at any given time to this operation.

Force to ensure compliance with international mandates

The UN Operation in the Congo (ONUC, 1960–4) was the first UN force sent to ensure compliance. It took place within the borders of a country that had only recently received its independence. Although it initially appeared that the UN was only going to provide a small military

[14] *Hansard*, HC, March 29, 1996. [15] *Hansard*, HC, April 28, 1998.

"technical assistance" mission to help the Congolese government restore political order, the size of the operation quickly blossomed, eventually reaching 20,000 troops from thirty contributing countries. The possibility that Canada would contribute troops was first discussed in parliament on July 12, 1960.

In parliamentary debate two days later, Prime Minister Diefenbaker indicated that the government was going to set careful limits on Canadian involvement. Although Canada was prepared to provide limited logistics and humanitarian assistance, it was not about to commit stand-by battalions or major units to the operation. Canada's forces were already stretched with their existing commitments, the economy was not doing well, and the UN Secretary-General had indicated that he wanted the bulk of the peacekeeping force to come from African states.[16] The government came in for strong domestic criticism for its modest contribution to the operation and slow response to the crisis. On July 30, Diefenbaker assuaged his critics with an expanded Canadian contribution, including communications and liaison officers and over 200 signalers eventually employed in small detachments throughout the Congo – a total of 500 military personnel.[17] Parliament gave its approval two days later.

There was considerable bureaucratic tension throughout the crisis, since, "When it came to UN requests for Canadian assistance in the Congo, the Department of External Affairs and National Defence often took on opposite roles. DEA assumed the guise of persistent street vendor, searching for the most opportune method for making the best sales pitch. Meanwhile, DND played the part of the always discriminating and sometimes skeptical consumer, wary of receiving an inadequate return on his investment."[18] Part of the problem was that neither department had "a proper regard for the other's mandate. Certainly DEA rarely asked DND *if* Canada should make additional contributions to peacekeeping missions. And DND often adopted what was at best an ambivalent posture toward the significance that DEA assigned peacekeeping."[19] This pattern repeated itself throughout future peacekeeping missions, particularly actions to ensure compliance with international mandates.

The 1996 crisis in the Great Lakes Region of Africa involved a humanitarian emergency in which the UN and other external actors were

[16] Taylor, Cox, and Granatstein, *Peacekeeping*, p. 154.
[17] Col. John Gardam, *The Canadian Peacekeeper* (Burnstown, General Store Publishing, 1992), p. 26.
[18] David A. Lenarcic, "Meeting Each Other Halfway: The Departments of National Defence and External Affairs During the Congo Peacekeeping Mission, 1960–64," YCISS Occasional Paper No. 37, CDISP Special Issue No. 1 (Toronto, York University, August 1996), p. 12.
[19] *Ibid.*, p. 17.

called upon to facilitate the delivery of aid in a dangerous environment. On November 8, 1996, UN Security Council Resolution 1078 called on member states "to prepare the necessary arrangements" for the immediate return of humanitarian agencies to the refugee camps in Zaire and a voluntary, safe repatriation of refugees. Although France wanted immediate military intervention, the United States did not. Canada was asked to assemble a coalition of the willing, as French leadership of a multinational force (MNF) would be unacceptable to Rwanda, Burundi, and Uganda, and the Clinton administration was constrained by domestic political resistance to intervention. The prime minister agreed, although Canada had never before led a coalition of this kind or commanded an MNF under Chapter VII of the UN Charter. The House of Commons was not sitting when this decision was made.

On November 15, UNSC Resolution 1080 cited Chapter VII and welcomed efforts to establish "a temporary multinational force" to facilitate the restoration of aid to the refugees and their voluntary repatriation to Rwanda. However, Canada faced considerable logistics difficulties, which delayed a timely deployment to the region. With only a few hundred MNF personnel on the ground, the original rationale for the force began to dissolve, as many refugees had already returned to Rwanda.

On November 18–19, the government introduced a motion to the House: "That this House take note of the evolving situation in the Great Lakes region of Africa and of Canada's leadership role in the international community's efforts to alleviate human suffering in the region." Opening remarks by Foreign Minister Lloyd Axworthy and Prime Minister Chrétien indicated that the government had sought approval from all party leaders through private discussion, and decided to schedule debate as soon as parliament reconvened on November 18. By then, several hundred Canadian personnel had deployed, and up to 1,500 personnel had been committed to the MNF.

Bloc Québécois members expressed considerable support for the initiative, but also cautioned the government to plan carefully for a complicated peacebuilding effort. Reform Party members expressed support, but were skeptical of Canada taking the lead, given on-going concerns about Canadian equipment quality. In a recent briefing, Canadian military officers had apparently said that Canada was incapable of handling more than two peacekeeping missions at a time. Noting that Canada had a lead role in Zaire and Haiti, Reformers suggested the government consider withdrawing from IFOR, where Canada had little say in the conduct of the mission. There was criticism that Chrétien might be exploiting the Zaire situation because of the upcoming election, since Canada had never responded before to the numerous humanitarian crises in the region.

Critics also pointed out the desirability of a House vote on such issues before troops were deployed.

As the crisis wore on, there were significant interdepartmental divisions within the Canadian government: "Axworthy remained committed to the utility and the possibility of mounting an MNF operation," and the Canadian International Development Agency (CIDA) was "similarly convinced that intervention was necessary and practical, with a strong preference for convoys over airdrops; CIDA's NGO partners vigorously insisted that refugees and displaced Zairians urgently needed help, but in the main opposed airdrops as dangerous and inefficient." The DND, however, "showed ever more open willingness to stand down Operation Assurance now that conditions had so significantly changed in Zaire."[20] International enthusiasm for intervention also began to dissipate, and the operation was terminated on December 31, 1996.[21]

In September 1999, 650 Canadian forces personnel joined the Australian-led 7,500-man international peacekeeping force in East Timor (INTERFET), with a mandate to restore peace and order following violence precipitated by a vote to secede from Indonesia. CF activities included the airlift of over 900,000 kilograms of cargo and 2,100 passengers, at-sea and ashore replenishment duties, and the control of over 1,000 square kilometres of jungle by a reinforced infantry company. The only controversy was the embarrassing performance of a Hercules transport aircraft that had to return to base a number of times before it could leave for the mission, which prompted much ridicule over the deteriorating state of the equipment of Canada's armed forces.

Although parliament would not reconvene until mid-October, Ministers Axworthy, Art Eggleton, and Maria Minna appeared on September 17, 1999, before a special joint session of the Standing Committees of Foreign Affairs and International Trade, National Defence and Veterans Affairs, and the Senate Committee on Foreign Affairs. Critics did not question the commitment of Canadian troops, but rather focused on the readiness of Canadian forces and DND financial cutbacks since 1993. They also criticized the government's response time to what was seen as a predictable conflict, and Canada's record of financial and military assistance to the Indonesian government since 1993.[22]

[20] John Hay, "Canada's Intervention in the Great Lakes Crisis," unpublished paper (Ottawa, The Norman Paterson School of International Affairs, 1999), p. 46.

[21] See James Appathurai and Ralph Lysyshyn, "Lesson Learned From the Zaire Mission" (1998) 5(2) *Canadian Foreign Policy* 93–106.

[22] Standing Committee of National Defence and Veterans Affairs, *Evidence: Special Meeting with Standing Committee of Foreign Affairs and International Trade and Senate Committee of Foreign Affairs* (Ottawa, House of Commons, September 17, 2000).

Peacekeeping with state-building

With the rapid growth of UN peace operations in the late 1980s and early 1990s that were considerably more complex and "multidimensional" than previous ventures, Canadian concerns about their conditions, mandate, and financing grew. Nevertheless, Canada continued to remain an enthusiastic participant, providing everything from commanders to logistics support to engineers and civilian police, in major operations including UNTAG in Namibia, UNTAC in Cambodia, and ONUCA in Central America. Peacekeeping continued to remain an article of faith in Canadian foreign and security policy, to the point where, in the words of one of Canada's most distinguished historians, it became "a substitute for policy and thought."[23]

The shift to multidimensional peace operations raised growing concerns in the Canadian government about what might be termed *operational* accountability issues – financing, management, and operational command – but they were not the subject of intense national debate. Nor was the basic premise that Canada should participate in these operations ever seriously questioned. With Chapter VII operations in Somalia, Bosnia, and Haiti, as well as the Gulf War enforcement operation, however, there was a mounting chorus of critics who questioned the rationale and legitimacy of Canadian involvement. Not only did these operations erode the national consensus around peacekeeping, *political* as well as *operational* accountability was increasingly at the forefront of national debate, with a variety of strongly held opinions being expressed on all sides of the political spectrum.

For example, in February 1994, Foreign Minister André Ouellet told US Secretary of State Warren Christopher that Canada would "have an independent policy" with regard to Haiti. Canada subsequently refused to involve itself in the initial phase of the "invasion" which took place later that year. Given Canada's long-standing involvement in Haiti and the desire of Montreal's sizeable Haitian community for Canadian action, Canada's refusal to participate in the coercive action took some members of the opposition and some commentators by surprise.[24] Canada did agree to provide police forces and military assistance once democracy had been restored, but this was uncontroversial, although the opposition complained about the government's "zigzagging" foreign policy and the costs and duration of the commitment.[25]

[23] Granatstein, "Peacekeeping: Did Canada Make a Difference?" p. 234.
[24] Roy Norton, "Posturing and Policy Making in Canada–US Relations: Evaluating the First Two Mulroney and Chrétien Years" (1998) 5(2) *Canadian Foreign Policy* 31.
[25] *Hansard*, HC, May 4, 1994.

Enforcement

Canada's involvement in Korea predated the outbreak of war in 1950. Canada was a member of the UN Temporary Commission on Korea (UNTCOK), established in 1947 to supervise free elections. Prime Minister Mackenzie King strongly opposed Canadian membership, while Foreign Minister Louis St. Laurent and his deputy, Lester Pearson, supported it. King feared that the Commission would not solve the Korean problem, but would raise US–Soviet tensions and risk dragging Canada into a new conflict. He was also concerned that the United States was using the UN Security Council (to which Canada had just been elected) to suit its own purposes. Although Canada did not withdraw from the Commission, the membership issue provoked a major cabinet crisis between the isolationist prime minister and his more internationalist colleagues.[26]

When the Korean War broke out in 1950, Canada was not in a strong military position, having demobilized following the end of the Second World War. When it became clear that the United States was intent on using force to repel the North Korean invasion, Canada sought to place US military action within the framework of the UN: "It was thought Canadians, French- and English-speaking, would rally with fewer complexities to a United Nations call."[27] Canadian objectives were twofold: to prevent the United States from embarking on a unilateral crusade against communism and to strengthen the collective security provisions of the UN Charter.

Canada agreed to send several destroyers to Korean waters and to airlift supplies and arms to South Korea. The issue of ground troops was somewhat more controversial, although Canada eventually supplied a brigade. These decisions were made with strong parliamentary approval, but several ships and transport aircraft had already been deployed to the region (they were not considered to have been on "active service") while parliament was debating their deployment.[28]

In the next UN enforcement action in the Gulf War, forty years after Korea, Canada was a member of the US-led coalition against Iraq. Canada supported the remarkable international consensus in the UN Security Council behind Resolution 678, which authorized member states "to use all necessary means" to enforce previous resolutions demanding Iraq's withdrawal from Kuwait. There was not strong domestic support for military action against Iraq, and the government sought parliamentary

[26] Munro and Inglis, *Mike*; John W. Holmes, *Canada: A Middle-aged Power* (Toronto, McClelland & Stewart, 1976); Dewitt and Kirton, *Canada as a Principal Power*.
[27] Holmes, *Canada*, pp. 79–80. [28] Rossignol, "International Conflicts," p. 17.

approval in stages. In September 1990, parliament approved – though not without rancorous debate – the government's Active Service Cabinet Order placing the armed forces on a "war footing." The opposition parties had wanted parliament to be recalled when the government announced on August 10 that Canada was sending three ships to the Persian Gulf. However, the order in council placing the ships on active service was only passed on September 15, well after the ships had crossed the Atlantic and entered the Mediterranean, but in time to meet the ten-day requirement for informing parliament when it reconvened on September 24.

On September 24, parliament was asked to approve a motion calling for the "despatch of members of the Canadian Forces to take part in the multinational military effort in and around the Arabian Peninsula." This motion was subsequently amended to include a resolution asking the government to "to present a further resolution to this House in the event of the outbreak of hostilities involving Canadian Forces in and around the Arabian Peninsula."[29] The amended motion was approved on October 21.

Parliament again convened on January 15, 1991, in an emergency session resulting from a decision of the "ad hoc cabinet committee on the Gulf" when the war was about to begin.[30] Prime Minister Brian Mulroney moved "That this House reaffirms its support of the United Nations in ending the aggression by Iraq against Kuwait." The newly elected Liberal opposition leader, Jean Chrétien, proposed an amendment to the government's resolution: "through the continued use of economic sanctions, such support to exclude offensive military action by Canada at this time." Chrétien also recommended that Canadian naval forces participating in the embargo of Iraq be withdrawn in the event that war broke out. The New Democratic Party (NDP) also objected to giving the government a blank cheque.[31]

Chrétien's position was hotly debated within his own party and strongly opposed by John Turner, the former Liberal leader. The House of Commons eventually approved the government's motion on January 22, 217 to 47, with many Liberal MPs supporting it, but the NDP opposing it. Canada provided air support and naval forces in the operation against Iraq, but did not supply ground forces.

Public opinion polls showed that Canadians were willing to support military action against Iraq provided that it took place under UN auspices and in support of UN objectives. One poll showed that 53 percent of Canadians wanted Canada to play only a defensive role in the conflict.[32]

[29] *Ibid.*, p. 21.
[30] Granatstein and Bercuson, *War and Peacekeeping*, p. 245.
[31] *Ibid.*, p. 246.
[32] *Ibid.*, p. 247.

Canadian peace groups were strongly opposed to military action, including the Canadian Peace Alliance, women's and labor groups, and the United Nations Association (UNAC). In response to criticism that the government was doing the bidding of the United States, the prime minister and external affairs minister gave speeches on post-war planning for the Middle East. They recommended a regional security structure similar to the Conference on Security and Cooperation in Europe (CSCE), which would guarantee borders and provide for dispute resolution and confidence-building measures. They also urged a negotiated settlement to the Arab–Israeli conflict and suggested a "world summit on instruments of war and weapons of mass destruction." Some of these ideas were passed on to the UN Secretary-General, although they did not find much favor with Canada's key allies.[33]

Much of the domestic debate about Canada's involvement and participation in peace operations since the Gulf War has focused on government reluctance to consult fully with parliament before committing and deploying Canadian troops. Political accountability issues surfaced in the political debate about Iraqi noncompliance with UNSCOM (1998) and the US–UK retaliatory bombing of Iraq. They were at the center of opposition criticism of Canadian participation in NATO air strikes against Yugoslavia in 1999. The Kosovo crisis also prompted considerable national debate about the legitimacy of an enforcement action not authorized by the UN Security Council.

There were four basic issues that concerned the House on February 9, 1998, when it took up the Iraqi compliance issue: the lack of a votable motion, limited time to debate, the US secretary of state's announcement in the media of Canadian support *before* the government had consulted the House, and concern that the United States and not parliament was determining Canadian policy.[34] In the case of Kosovo, the government agreed to a House special debate on October 7, 1998, on the "take note" motion "That this House take note of the dire humanitarian situation confronting the people of Kosovo and the government's intention to take measures in cooperation with the international community to resolve the conflict, promote a political settlement for Kosovo and facilitate the provision of humanitarian assistance to refugees." Once again, opposition members complained about the absence of a vote and the lack of in-depth briefing on the crisis supplied by the government. They suggested that a formal vote would get more members and the general public involved.[35]

[33] Martin Rudner, "Canada, the Gulf Crisis, and Collective Security" in Fen Osler Hampson and Christopher J. Maule (eds.), *After the Cold War: Canada Among Nations* (Ottawa, Carleton University Press, 1991), pp. 241–80.

[34] *Hansard*, HC, February 9, 1998. [35] *Hansard*, HC, October 7, 1998.

As the Rambouillet negotiations on Kosovo floundered, the House of Commons debated the possibility that Canada might become involved in some sort of peacekeeping operation. The situation in the Central African Republic was also deteriorating, and the House debated the motion "That [it] . . . take note of possible Canadian peacekeeping activities in Kosovo and the possible changes in peacekeeping activities in the Central African Republic."

Unlike the debate on Iraq, however, there was a nearly unanimous feeling that diplomatic efforts in Kosovo had been exhausted and military intervention might be necessary. There was considerable discussion about the role of international law, given UNSC paralysis.[36] The usually dovish NDP members voiced their support for the motion, although they too were concerned about the lack of formal parliamentary debate.[37] All parties agreed that Canada should support NATO air strikes to stop the growing humanitarian disaster, on condition that all diplomatic options had been exhausted and with the hope at some point to bring the UN back into the process.

A special meeting of the House Standing Committee on Foreign Affairs was held on March 31, 1999, to consider what the unfolding situation in Kosovo meant for Canada. Foreign Minister Axworthy, Defence Minister Art Eggleton, and CIDA President Diane Marleau made presentations on, respectively, diplomatic/political, technical/military, and humanitarian/refugee developments. The opposition tried to get a commitment from the government that would guarantee a House of Commons debate and vote in the event of a change in the nature of intervention operations.[38]

There was a grueling special House debate that started during Question Period in the early afternoon of April 12 and lasted throughout the night, until 8:00 a.m. on April 13.[39] Formal debate on the following motion began late in the afternoon: "That this House take note of the continuing human tragedy in Kosovo and the government's determination to work with the international community in order to resolve the conflict and promote a just political settlement for Kosovo that leads to the safe return of the refugees." Much of the debate centered on members' wish for a vote before the government authorized the deployment of Canadian forces.[40]

Throughout the fall and winter of 1998–9, Foreign Minister Axworthy had worked vigorously to engage the UN Security Council in the crisis. This effort, in part, reflected Canada's frustration at being excluded

[36] *Ibid.* [37] *Ibid.*

[38] Standing Committee on Foreign Affairs and International Trade, *Evidence* (Ottawa, House of Commons, March 31, 1999).

[39] *Hansard*, HC, April 12, 1999. [40] *Hansard*, HC, April 13, 1999.

from the Contact Group handling the negotiations at Rambouillet. When Canada joined the UNSC as an elected member in January 1999, it pressed the Council to engage more deeply in the unfolding crisis, and redoubled its efforts after assuming presidency of the Council in February. Axworthy tried unsuccessfully to get the UNSC to endorse the use of force against Serbia if an agreement was not reached at Rambouillet.

When the decision was finally taken to launch the NATO air campaign, there was widespread political support for the military action, which was defended on humanitarian grounds: analysts noted that "Canada's willingness to act without UN authorization reflects the government's belief that a new international norm has emerged on the need to give primacy to individual over state rights in situations of egregious human rights abuses: 'human security is no longer simply a theoretical construct – it is becoming a norm of international behavior, where the security of the person is at the center of our attention and care.' "[41]

Canada contributed eighteen CF-18 fighters at the height of the campaign, flew over 675 combat sorties, and accounted for 10 percent of all NATO strike missions. Widespread public and party support (with the exception of Canada's Serb and Greek communities) initially made it easier for the government to participate in the NATO bombing campaign without UN authorization. Eventually, some of that support began to erode, including among opposition members such as NDP MP Svend Robinson, who had earlier championed the use the force but then very publicly changed his mind. Following the end of the air campaign in June 1999, 1,400 CF personnel joined KFOR. The government during the Rambouillet negotiations had committed to send peacekeepers to Kosovo in the event an agreement was reached.

Canada's continued commitment to international operations

The Canadian experience in Somalia raised a different set of concerns, having to do with accountability, training, and the civilian–military chain of command. Successive governments' handling of the issue raised troubling questions about the willingness of senior DND officials to accept responsibility for their actions and function without political interference. In the aftermath of the Report of the Commission of Inquiry into the Deployment of Canadian Forces in Somalia, the government introduced a widespread series of reforms intended to strengthen both political

[41] Hevina S. Dashwood, "Canada's Participation in the NATO-led Intervention in Kosovo" in Maureen Appel Molot and Fen Osler Hampson (eds.), *Vanishing Borders: Canada Among Nations* (Toronto, Oxford University Press, 2000), p. 294.

accountability and decision-making and military judicial procedures in DND and the CF. These reforms, however, did not completely assuage the critics. A brief history of this episode follows.

Canada contributed 750 peacekeepers to UNOSOM I in 1992. They were sent to the northern region of Somalia, which was generally free of civil disorder and famine – a deployment that puzzled some observers. When the UN changed the mission and created UNITAF in December 1992, Canada decided to participate in the multilateral force with up to 900 military personnel, but also indicated it would not participate in any subsequent peacekeeping operation. The Canadian Airborne Regiment Battle Group assigned to Belet Heun fulfilled its mandate with little or no opposition from local forces. However, the operation was compromised by the torture and murder of a local Somali, and eight members of the Regiment were subsequently charged in connection with his death. This "highlighted for Canadians the difficult situation in which the troops were operating, as well as the differences between usual peacekeeping operations and the enforcement mandate in Somalia." Moreover, for "a mission with a mandate such as Somalia, military training had to be supplemented with cultural sensitivity training and knowledge of the local situation."[42]

In 1995, the Liberal government established a Commission of Inquiry to "look at specific matters relating to the pre-deployment, in-theater, and post-theater phases of the Somalia operation."[43] Its terms of reference "obliged" the Commission "to conduct an examination of the joint structure, planning, and execution of the Somalia operation by the Canadian Forces and the Department of National Defence." The mandate "required" the Commission to consider several fundamental issues: "How is accountability defined, determined and exercised in the chain of command of the Canadian Forces? Were reporting procedures adequately and properly followed and the adoption of appropriate corrective measures when required? Did actions taken and decisions made in relation to the Somalia operation reflect effective leadership or failures in leadership?"[44]

As the inquiry worked its way up the chain of command by calling in different witnesses, it encountered growing resistance from DND and senior government officials. Although the Liberal government was happy

[42] Nancy Gordon, "Beyond Peacekeeping: Somalia, the United Nations and the Canadian Experience" in Maureen Appel Molot and Harald von Riekhoff (eds.), *A Part of the Peace: Canada Among Nations* (Ottawa, Carleton University Press, 1994), p. 293.

[43] Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy*, p. 4.

[44] *Ibid.*, p. 5.

to see the inquiry probe into the actions and decisions of the previous Conservative government, it became concerned as the spotlight shifted to its own actions and those of senior civil servants who had served under both governments. On January 10, 1997, while parliament was adjourned, the defence minister announced that cabinet had decided the inquiry had gone on long enough and had to deliver its Report with recommendations by the end of June. The government's decision forced the Commission to cut off hearings and prevented it from addressing all the matters it considered to be under its terms of reference. The Commission was scathing in its criticism of the government's decision and characterized the testimony of some witnesses, including senior civil servants and officers, as being marked by "inconsistency, improbability, implausibility, evasiveness, selective recollection, half truths, and even plain lies."[45]

The final Report of the inquiry offered 160 recommendations on leadership, accountability, chain of command, discipline, mission planning, training, rules of engagement, operational readiness, and military justice. DND accepted 132 of them in whole or in part. The inquiry's recommendations on peace support operations called on the government to: (1) "issue guidelines and compulsory criteria for decisions about whether to participate in a peace support operation"; (2) "define clearly the respective roles and responsibilities of the Department of Foreign Affairs and International Trade and Department of National Defence in the decision-making process for peace support operations"; (3) "require a comprehensive statement of how the peace support guidelines and criteria apply to the proposed operation"; (4) have "the Chief of the Defence Staff develop Canadian Forces to guide the planning, participation, and conduct of peace operations"; and (5) "establish a new and permanent advisory body or secretariat to coordinate peace support operations and decision-making."[46] Only the third and fourth recommendations were accepted. The others were rejected on the grounds that appropriate guidelines and/or decision-making procedures were already in place.

The Commission's recommendation to establish an Office of the Inspector General (IG) with independent jurisdiction and comprehensive powers to evaluate problems in the military justice system and conduct investigations into officer misconduct was also rejected on the grounds that an IG "would serve to obscure the authority of the Minister before Parliament and introduce ambiguities regarding the responsibilities and accountabilities of the Chief of Defence Staff and Deputy Minister in both practice and law."[47] The Report's recommendation to replace the office of Judge Advocate General with two independent institutions, an

[45] *Ibid.*, p. xxxii. [46] *Ibid.*, pp. 58–62. [47] *Ibid.*, p. 9.

office of the Chief Military Judge and an office of the Director General of Military Legal Services, was only partially accepted; and the recommendation that the chief military judge and all other judges be civilians appointed under the federal Judges Act was rejected on the grounds that the military required its own justice system and judges who are "familiar with the values and needs of the military community."[48]

Implementation of some of the recommendations that the government was prepared to accept involved amendments to the National Defence Act (Bill C-25). In the second reading on March 19 and 30, 1998, parliamentary debate centered around aspects of the Somalia inquiry not incorporated into the amendments, particularly calls for a civilian judge advocate general, protection for "whistle blowers," and an office of Inspector General to act as ombudsman. Much was also made of the Liberal decision to cut short the inquiry's work. There was limited praise for the removal of the death penalty and a feeling that the amendments would bring the military justice system more in line with the civilian one.[49]

The Commission of Inquiry saw a more general need to increase and strengthen the oversight role of parliament in all aspects of national defense, including peacekeeping. Its recommendations echoed those in a 1994 Special Joint Committee of the Senate and House of Commons Report on "Security in a Changing World," when it wrote that, "The quintessential condition for control of the military and all aspects of national defence is a vigilant Parliament." It noted that, "The oversight of the armed forces by members of Parliament during [the Cold War] was largely of a *pro forma* nature," but since then, the CF had "been called on to serve Canada in complex situations involving uncertain alliances, where the missions or the applicable doctrine are not always clear, and resources, too often, are inadequate." This meant, the Report concluded, that "Parliament must exercise greater diligence in critically monitoring the terms agreed to, or set by, the government for the employment of Canadian Forces overseas, and safeguarding members of the armed forces from unreasonable risks; it must also monitor the operations of commanders and troops in the field." The Report further noted that "Canada requires a modern and more effective mechanism for the greater control of national defence, one that is better suited to a sovereign liberal democracy and to the circumstances that the CF will most likely encounter at home and abroad."[50]

On October 14, 1997, the defence minister established a special Monitoring Committee on Change in DND and the CF to monitor progress

[48] *Ibid.*, p. 106. [49] *Hansard*, HC, March 19, 1998; *Hansard*, HC, March 30, 1998.
[50] Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy*, pp. 1453–4.

in implementing the accepted recommendations of the Somalia Commission. The Committee's 1998 Interim Report covered the issues of openness and disclosure, accountability, human-resources management, the basic structure of the CF, leadership, military justice, operations, and reserves. It noted that there was still work to be done in defining the term "accountability," which should not be considered as "blamability," but more positively as "answerability," to enable an organization "to learn from its faults as well as its successes, to identify weaknesses, and to take corrective action."[51]

The Committee noted that the minister had released a document in March 1997 entitled "Authority, Responsibility and Accountability" "to help all personnel understand . . . the roles they play within [DND] accountability structures," but it saw "the lack of an adequate statement of the principles of accountability in the CF, and of the processes whereby an accountability regime should operate, as a serious and urgent problem."[52] On the other hand, a "satisfactory framework" had been put in place "for reporting to Parliament on the plans of DND and on results achieved,"[53] and progress had been made in clarifying the duties and roles of the integrated civilian–military structures in National Defence Headquarters, particularly those of the chief of defence staff and the deputy minister. The inquiry Report had particularly criticized "situations where no one is sure of who has authority over whom and who is accountable within the defence establishment for policy, command, and administration of the CF."[54]

The Committee's 1999 Interim Report expressed the concern that "the Department and the CF have pursued the reform program without a clear vision of where they want to be and how they will arrive there." This had led to "delays in the implementation of some elements critical to the complaint resolution system, such as the Ombudsman, the Grievance Review Board and the Military Police Commission," that threw into doubt "the seriousness and determination of the leadership to effect the reforms they represent."[55] Although the new National Defence Act had received Royal Assent on December 10, 1998, it still had not been proclaimed by the government, further impeding the pace of reform.

[51] National Defence Minister's Monitoring Committee on Change, *Minister's Monitoring Committee on Change in the Department of National Defence and the Canadian Forces: Interim Report – 1998* (Ottawa, Department of National Defence, 1998), p. 2.
[52] *Ibid.*, pp. 11, 12. [53] *Ibid.*, p. 17.
[54] Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy*, p. 90.
[55] National Defence Minister's Monitoring Committee on Change, *Minister's Monitoring Committee on Change in the Department of National Defence and the Canadian Forces: Interim Report – 1999* (Ottawa, Department of National Defence, 1999), p. 2.

Efforts to strengthen parliamentary oversight over peacekeeping operations have met with little success. One of these was Bill C-295, introduced as a private member's Bill to the House on December 7, 1994, by Reform MP Chuck Strahl. On April 27, 1995, the Bill was brought back to the House for second reading and debate. In introducing the Bill, Strahl cited the 1994 Special Joint Committee Report, which called for a strengthened parliamentary oversight role in defense policy.[56]

Under the proposed Bill, if Canada were approached by the UN to participate in a multilateral effort involving more than 100 soldiers for a period exceeding one month, the government would have to develop a plan and present it to the House as a votable motion for a minimum five-hour debate. The plan would have to include the estimated cost of the mission, its geographic location, duration, and role to be played by Canadian personnel. Once approved, this plan would become the mission's mandate. If it needed to be revised or extended, the government would have to come back to the House with amendments and pass a new resolution. Strahl claimed this procedure would allow "official" endorsement by members through a vote, facilitate preparedness and coordination, and maintain a ceiling on costs.

The government was not enthusiastic about the Bill. Liberals argued that it would restrict the prerogative, speed, and discretion of the Crown to determine Canada's contribution to UN peace operations. They also felt that it would add another layer to the decision-making process and delay Canada's response to requests from the UN. Initially, the Bill called for the Canadian commanding officer to be placed under UN or other international command, not done since the Second World War, and likely to create less, not more, effective national control of peacekeeping missions. Strahl subsequently corrected this provision, but the Bill was defeated on June 19, 1995.

In parliamentary debates on Iraqi noncompliance and NATO intervention in Kosovo, a number of themes recurred. Opposition parties (mostly the Reform Party, but also the New Democratic Party, Progressive Conservative Party, and the Bloc Québécois) repeatedly called for a precisely worded motion by the government, to be followed by a vote in the House, not simply a "take note" debate with no vote, as had always been the case. The status and relevance of international law, Canada's commitment to the UN, and fears of tarnishing its "good image" abroad by siding too closely with the United States outside of UN-mandated operations loomed prominently in these debates, as they did in wider public discussion and the media.[57]

[56] *Hansard*, HC, April 27, 1995.

[57] See "A Peacekeeper Goes to War," *The Globe and Mail*, April 22, 1999, p. A16; "Time for Diplomacy in Yugoslavia," *The Globe and Mail*, April 24, 1999, p. D6; Graham

Opposition members expressed considerable frustration about the lack of detailed information provided by the government as well as the quality of media information on peace operations. Although almost all of the MPs ultimately seemed to approve of government decisions (or did not criticize them overtly), many opposition MPs complained that the government was merely "informing" them rather than seeking "true" consultation with parliament and the Canadian people. Parenthetically, only a small number of members were present for these debates, despite a rule, obviously not enforced, requiring their attendance.

Canadian public opinion has been remarkably consistent in its support of peacekeeping as a priority for Canada's armed forces, even though public support for defense spending as a whole is rather low.[58] However, there does seem to be a drop in public support for Canada's involvement in all forms and varieties of UN peacekeeping.[59] This mood shift parallels the controversies over the performance of Canadian contingents in Somalia and the kidnapping and mock execution of Canadian soldiers during UNPROFOR's difficult mission in Bosnia. But the overall "commitment in principle" to peacekeeping and what many Canadians see as Canada's own unique contribution to international peace and security none the less remains strong.[60]

Canada has continued to be an active participant in UN operations and NATO-led peacekeeping missions (IFOR and SFOR) in the former Yugoslavia. However, Canada opposed the NATO bombing raids in Bosnia prior to the 1995 Dayton Peace Accords, as discussed above. It initially chose not to participate in displays of NATO air power over Kosovo, but, as the crisis wore on and the Rambouillet talks foundered, joined the subsequent NATO bombing campaign aimed at bringing Milosevic to the bargaining table and allowing for the return of refugees. Prime Minister Chrétien indicated that he would not stand in the way of a collective NATO decision to send ground troops into Kosovo.[61] On April 28, 1999, the government announced that Canada would send 800 soldiers, 280 military vehicles, and eight helicopters to Macedonia to join 12,000 other troops from NATO countries in an eventual peacekeeping mission.[62] However, as noted above, as the crisis continued, all-party

N. Green, "Standing Firm on Kosovo," *Ottawa Citizen*, April 21, 1999, p. A19; Paul Knox, "Keeping the World Safe for Hypocrisy," *The Globe and Mail*, May 3, 1999, p. A12; Marcus Gee, "NATO's Unjust War," *The Globe and Mail*, April 21, 1999, p. A13.

[58] Pierre Martin and Michel Fortmann, "Canadian Public Opinion and Peacekeeping in a Turbulent World" (1995) 50(2) *International Journal* 379.

[59] *Ibid.*, p. 392. [60] *Ibid.*, pp. 395–6.

[61] Graham Fraser, "PM Says He'd Bow to NATO's Will on Kosovo," *The Globe and Mail*, April 21, 1999, p. A1.

[62] Jeff Sallot, "Canada Sends 800 Troops to Balkans," *The Globe and Mail*, April 28, 1999, p. A1; Jeff Sallot, "Canadian Troops could have a Long Stay in Balkans," *The Globe and Mail*, April 29, 1999, p. A1.

support for the operation began to erode, and the government found itself under increasing pressure to allow for a full parliamentary debate over Canada's policies and the possibility of ground-troop deployments in the region.

With regard to reform of UN peacekeeping, in September 1995 Canada submitted a proposal to the General Assembly calling for a UN rapid reaction force.[63] The short-term objective of the proposal was to establish a UN rapid reaction capability through a series of interrelated components: early-warning, intelligence capabilities, command and control, logistics, inter-operability in terms of equipment, and training. The long-term goal was to establish a UN standing emergency force that would be largely independent of national authority.[64]

Although this proposal floundered, Canada has worked hard to make the Security Council more accountable to members of the General Assembly, especially to countries like Canada that regularly contribute troops to peacekeeping operations. With the growth of P-5 involvement in peacekeeping since the end of the Cold War, Canada has worried that it will be left out of decision-making. During the Bosnian crisis, it was not invited to join the Contact Group despite having major troop deployments on the ground in UNPROFOR. The 1994 Defence White Paper noted, "The Security Council requires reform if it is to serve the international community adequately. Its decision-making needs to be made more transparent. Its resolutions should be more carefully drafted. Non-members of the Council – especially troop contributors – need to be consulted more systematically."[65]

The November 1994 Report of the Special Joint Committee of the Senate and the House of Commons echoed this belief "that steps should be taken without delay to enlarge the Security Council to make it more representative, and that the Council should adopt more transparent methods of work that would facilitate communication between Council members and countries that are not on the Council but have specific interests or concerns to express." The Committee called for clearer political and operational guidance and criteria for subsequent UN peacekeeping operations "if Canada is to continue to put its soldiers in harm's way," and for "improving political direction and control by the Security Council, and

[63] Government of Canada, *Towards a Rapid Reaction Capability for the United Nations: Report of the Government of Canada* (Ottawa, Canada Communications Group, 1995).

[64] James Ferguson and Barbara Levesque, "The Best Laid Plans: Canada's Proposal for a United Nations Rapid Reaction Capability" (1996–7) 52(1) *International Journal* 118; André Ouellet, "Towards a UN Rapid Reaction Capability" (1995) 3 *Canadian Foreign Policy* 2.

[65] Department of National Defence, *1994 Defence White Paper* (Ottawa, Minister of Supply and Services Canada, 1994), p. 30.

coordination among the Council, the Secretary-General and the troop-contributing countries."[66] Meanwhile, an executive branch report noted that, when Canada does participate in P-5-led peace operations, it "risks the perception (both domestically and internationally) of being linked excessively to U.S.-led action . . . In the view of some, the UN's capacity to act as an effective conflict management instrument is already compromised by the dominance of the United States and the West in the Security Council."[67]

Conclusion

As this survey of Canada's involvement in peacekeeping, peacemaking, peacebuilding, and peace enforcement operations reveals, national debate and public discussion about accountability, particularly regarding the use of force, have evolved over the years, but are marked by elements of continuity. During the 1950s, whether about peacekeeping (for example, Suez) or peace enforcement (for example, Korea), debates about accountability focused on the legitimacy of UN peacekeeping and peace enforcement actions. The concern was that the broader purposes of the UN not be corrupted by American unilateralism. Canadian participation in UN operations was seen as a way to curb American unilateral tendencies while ensuring that the UN served the broader interests of the international community. Canadian involvement in peacekeeping (both militarily and diplomatically) was thus seen as a way to ensure the accountability of international institutions, and expressed a rather unique brand of national hubris – one that assumed almost mythical proportions with the passage of time.

During the 1960s and 1970s, Canada expressed some concern about operational accountability issues, such as financing and management of UN peacekeeping. These concerns magnified with the onset of so-called "multidimensional" peacekeeping operations in the 1980s and 1990s and renewed UN activism in peacekeeping and peacebuilding. Like many other countries called upon to contribute peacekeeping forces to UNSC-mandated operations, Canada became increasingly concerned about the demands placed on it and what seemed to be a consistent unwillingness

[66] Special Joint Committee of the Senate and House of Commons, *Canada's Foreign Policy: Principles and Priorities for the Future: Report of the Special Joint Committee of the Senate and the House of Commons Reviewing Canadian Foreign Policy* (Ottawa, Publications Service, Parliamentary Publications Division, November 1994), p. 16.

[67] Allen G. Sens, *Somalia and the Changing Nature of Peacekeeping: Implications for Canada: A Study Prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia* (Ottawa, Minister of Public Works and Government Services Canada, 1997), pp. 112–13.

by the permanent members of the Council to consult adequately with troop-contributing countries. Successive Canadian parliamentary and government reports called on the UNSC to become more transparent and consultative with other members in its deliberations and decisions, particularly in the area of peacekeeping.

Crises in Iraq and Kosovo prompted another set of Canadian concerns having to do with the use of force by individual states or coalitions of states without any kind of UN authorization. Although Canada has been a member of some of these coalitions and committed its own forces to these operations, it has done so with a considerable degree of discomfort and political unease. During the Gulf War, whenever it was challenged by domestic opponents to the war, the Conservative government justified its participation in the US-led coalition on the grounds that the enforcement action was taking place under UN auspices.

At the domestic level, in both peacekeeping and peace enforcement operations, the trend is towards more frequent consultation with parliament by the government on Canadian troop deployments. Some of this has to do with the complex nature of these operations, since even in so-called peacekeeping operations, Canadian forces are in harm's way. But it is also because opposition parties and the public are demanding greater levels of political accountability.

One important constraint on Canada's ability to field peacekeepers has been a declining defense budget (in real and nominal terms). In 1992–3, for example, defense spending was Can$12.3 billion, or approximately 37 percent of total federal government operating and capital expenditures. The defense budget for 1994–5 was Can$11.8 billion and by 1998–9 had shrunk to slightly over Can$9 billion. During the 1990s, Canada's defense budget suffered a decline of more than 30 percent. These declines have taken their toll on the overall size of Canada's military, which now numbers only about 60,000 troops, compared to early 1990s levels of almost 80,000.[68] The number of civilians working in National Defence has also decreased quite dramatically. As a consequence, Canada has had to look much more carefully at new peacekeeping commitments, and the country can no longer claim that it has participated in every UN peacekeeping operation.

In the aftermath of the Somalia Inquiry, the issue of accountability in the context of civil–military relations has received considerable attention and scrutiny. Although not all of the key recommendations of the Somalia Commission were accepted by the government, many were, and reforms

[68] *Ibid.*, pp. 108–9.

directed at enhancing accountability and transparency in the broad sense of these terms are in the process of being implemented.

As this chapter has argued, there are many dimensions to the accountability aspects of Canada's long-standing involvement in international peacekeeping operations. The salience of the accountability issue – in all of its various dimensions, including improved civil–military relations, greater parliamentary control, and greater accountability by international institutions – has grown in recent years. Some of this interest and pressure for reform has to do with the conduct and performance of Canada's armed forces, which have highlighted problems in existing command structures and systems of accountability. But much of it also has to do with the increasingly problematic nature of international peacekeeping operations and what many see as a growing crisis of legitimacy, accountability, resources, and systems of governance within international institutions themselves.

7 Norway: political consensus and the problem of accountability

Knut G. Nustad and Henrik Thune

When Norway's first minister of foreign affairs, Jørgen Løvland, in 1905 delivered Norway's first official statement on foreign policy, he famously stated that "our foreign policy is to have none." The attitude behind this statement has proved durable. Despite Norway's reputation as an advocate of a foreign policy based on humanist values, its foreign policy cannot be understood by reference to authentic values and a specific national culture. Rather, Norwegian foreign policy generally, and decisions to deploy military personnel in international operations specifically, is best understood by analogy to Jean-Jacques Rousseau's concept of the *social person*, for whom motivations for actions are rooted in a concern with other people's judgments.[1] The result is a constant adaptation to dominant international norms and ideas. Norway, a small country with limited resources, is dependent on converting its role in "low political" issue-areas through involvement in international peace operations to "high political" gains.

Norway has, since the Second World War, ordered its international contacts in two closely connected and mutually coherent arenas: NATO and the UN. From 1949 until the early 1990s, engagement in these two fora was to a large extent justified with reference to an underlying argument in support of an international legal order. Involvement in international military operations has historically been an important expression of a commitment to this order.[2] From a population of 4 million, more than 50,000 Norwegians have taken part in international operations, almost all of them under UN leadership. At the end of the 1990s, however, there was a departure from the long-standing consensus on the necessity of a UN mandate for taking part in international operations (primarily from the UN Security Council or alternatively from the UN General Assembly when the Council is blocked). As a result, a discrepancy arose between practice and the political and legal justification of that practice.

[1] Jean-Jacques Rousseau, *Discours sur l'origine et les fondemens de l'inégalité parmi les hommes* (Editions Flammarion, 1996 [1755]), p. 269.

[2] See Appendix B, "Country participation in international operations, 1945–2000," for information on Norway's contribution.

This sudden break in established policies is grounded in the replacement of one constellation of "security" with another. A concern with security as linked to sovereignty and, hence, territoriality was replaced with one that tied the meaning of security not to the state, but to the person. This change paved the way for justifying military intervention with reference to security, but without linking it to sovereignty and the principle of non-intervention in the UN Charter.

This dismantling of the established juridical foundation and political practice has important consequences for the main issues in this volume: democratic accountability and the rule of law. This chapter argues that accountability issues seem to be replaced by another overriding concern: that of establishing a consensus. The thesis, then, is that issues of accountability, the legal aspects of committing forces, the ideology behind the operations, and so on have played second fiddle to another overriding concern: that of toeing the line internationally, and establishing a consensus nationally.

This change in policy marks a discursive shift in Norwegian foreign policy. This chapter examines the background of this shift and the implications for legal and informal democratic checks and balances. The first section provides a historical overview of the operations to which Norwegian personnel have contributed; the second section looks at the Norwegian legal and constitutional framework relevant to participation in these operations and considers specific limitations imposed by domestic law on the use of Norwegian forces abroad. The last section offers an interpretation of the background of the establishment of a new consensus, the new constellation of "security", as well as an attempt to explain the "political logic" of Norwegian involvement internationally.

Norwegian involvement abroad

Since the end of the Second World War, Norwegian military personnel have taken part in a wide range of international military operations. These operations have varied in the extent of force deployed, from preventive deployments to enforcement in war operations.[3] There exists a bewildering amount of classifications of these operations. Gareth Evans[4] suggests five categories: preventive deployment, traditional peacekeeping, expanded

[3] *Forsvarskommisjonen av 1946. Instilling fra Forsvarskommisjonen av 1946: Grunnleggende synspunkter og forslag* (Oslo, University of Oslo Press, 1949); *Forsvarskommisjonen av 1974* (Norsk Offentlig Utredning 1978:9, Oslo, Universitetsforlaget); *Forsvarskommisjonen av 1990* (Norsk Offentlig Utredning 1992:12, Oslo, Universitetsforlaget).

[4] Gareth Evans, *Cooperating for Peace: The Global Agenda for the 1990s and Beyond* (St. Leonards, Allen & Unwin, 1993).

peacekeeping, enforcement to support peacekeeping, and enforcement in response to cross-border aggression. Extensive as this list is, it has already become outdated by recent events – for instance, NATO's air strikes against the former Yugoslavia in 1999 do not fit into any of the categories. In the following the general classification of Charlotte Ku and Harold Jacobson in this volume is applied: (1) monitoring and observation, (2) traditional peacekeeping, (3) peacekeeping plus state-building, (4) force to ensure compliance and (5) enforcement.

Monitoring and observation

The largest number of international operations to which Norway has contributed involves the use of personnel to monitor peace agreements.[5] Norwegian involvement in international peacekeeping operations began in February 1949, when two officers were sent to New Delhi, India, as observers in UNMOGIP (United Nations Military Observer Group in India and Pakistan). The mission was established in July 1949 to monitor the January 1, 1949 cease-fire agreement between India and Pakistan, to end their conflict over Kashmir.[6] The Norwegian deployment was requested by UN Secretary-General Trygve Lie, a former Norwegian foreign minister, in January 1949. As far as one can establish, there was no discussion in parliament about the operation. This has led Rolf Kristiansen to conclude that the decision to participate was reached jointly between the Ministry of Defense and the Ministry of Foreign Affairs.[7] As is shown below, this *modus operandi* is characteristic of subsequent decisions to take part in international armed operations.

Traditional peacekeeping

Norwegian involvement in traditional peacekeeping operations also has a long history, stretching back to the United Nations Emergency Force, UNEF, set up in response to the 1956 Suez crisis. From 1957, these troops were stationed in Gaza for almost eleven years. When UNEF was established in November 1956, Egypt's precondition for allowing forces on its territory was that UNEF be manned by personnel from countries that were not permanent members of the Security Council. Norway was asked to send a unit of about 190 persons, and after an extremely

[5] For an early analysis of peacekeeping, see Per Frydenberg, *Peacekeeping: Experiences and Evaluation – the Oslo Papers* (Oslo, Norwegian Institute of International Affairs, 1964).
[6] Rolf Kristiansen, *Norsk militærinnsats for de Forente Nasjoner (1949–1970)* (Oslo, Forsvarets Krigshistoriske Avdeling, 1970), p. 16.
[7] *Ibid.*, p. 19.

fast parliamentary decision, was the first country to plan, establish, and deploy a contingent.[8] There was no formal debate on whether Norway ought to contribute personnel to UNEF.[9] The UN General Assembly empowered the Secretary-General to make a plan for an emergency force on November 3. The Norwegian ambassador to the UN discussed the matter with the minister of foreign affairs, and the following day informed the Secretary-General that Norway would supply a unit. On November 5 the decision was rushed through parliament; the proposal was supported by all its members, and the UN was informed that Norwegian personnel could be deployed the same day. Norwegian troops, together with a Danish contingent, were the first to reach Egypt. This first Norwegian contingent grew to a total of 468 men.

However, the longest and most substantial Norwegian involvement abroad was the UNIFIL operation in Lebanon. From the first contingent in March 1978 to the withdrawal of personnel in November 1998, an estimated 30,000 Norwegians were involved in UNIFIL. UNIFIL was intended as an interim operation, but has continued to exist for more than twenty years. Several reasons have been given for the Norwegian decision to discontinue its support to UNIFIL. The official explanation[10] cites a lack of recruits, but the decision to withdraw was the culmination of a long debate. When the Armed Forces Committee of the Norwegian parliament visited Lebanon in 1992, it voiced skepticism about whether to continue Norwegian support for UNIFIL.[11] Catherine Gillund, who has conducted a survey of Norwegian newspaper articles relating to the disengagement, isolates three strands of arguments: in addition to a recruitment shortage, a wish to strengthen involvement in Bosnia through UNPROFOR and a budget deficit (the impossibility of maintaining two such large international involvements) were given as reasons.

The economic argument had surfaced as early as 1990, when the minister of foreign affairs had to answer questions in parliament after his state secretary was quoted in the media as having said that Norway would reduce its involvement in Lebanon because of "economic considerations." The confusion was increased by the minister of defense, who told the

[8] Stortingsproposisjon (hereafter St. prp.) no. 132: *Om deltakelse av et norsk kompani på ca. 190 befal og menige i de Forente Nasjoners vaktstyrke i Midt-Østen* (Oslo, Utenriksdepartementet, 1956); St. prp. no. 31: *Om fortsatt deltaking med en norsk kontingent i de Forente Nasjoners vaktstyrker i Midt-Østen* (Oslo, Forsvarsdepartementet, 1958).

[9] Innstilling til Stortinget (hereafter Innst. S.) nr. 240: *Innstilling fra den forsterkede utenriks- og konstitusjonskomité om deltakelse av et norsk kompani på ca. 190 befal og menige i De Forente Nasjoners vaktstyrke i Midt-Østen* (Oslo, Stortingsreferat, 1956).

[10] St. prp. no. 1 1998–9.

[11] Catherine E. Gillund, *UNIFIL: A Closer Look at Norway's Withdrawal* (unpublished paper, Oslo, 1999).

Norwegian Broadcasting Corporation that this was "mainly a question of economic resources, and the fact that our military experts believe that the resources could be put to better use at home."[12] The question again surfaced in parliament in 1996, when the government argued that "Abolishing the Norwegian engagement in UNIFIL would give a very unfortunate signal to our partners."[13] Nevertheless, Norway finally withdrew from UNIFIL in 1998.

Peacekeeping plus state-building

Norway's most important involvement in peacekeeping plus state-building operations was its contribution to the UN operations in Somalia, UNOSOM I and UNOSOM II. On September 4, 1992, Norway received a request for seventy people to be attached to the UNOSOM headquarters in Mogadishu. Because meeting this request would have involved exceeding the budgetary limits set by parliament on military operations abroad, the government had to seek the support of parliament before responding. The debate which followed, on the proposition to increase the number of active military personnel in UN operations, saw a polarisation between the Conservative Party (*Høyre*) and the Progress Party (*Fremskrittspartiet*) on the one hand, and the rest of parliament on the other. The two parties were opposed to sending more military personnel to Somalia for two reasons. First, they argued, Norway should reserve its engagement for areas where the country had special competence. Somalia, it was argued, was different from Norway in terms of climate and culture. Secondly, rather than expanding the contingent, additional personnel should be kept ready in anticipation of future engagements in the former Yugoslavia. Their alternative proposition was defeated, and Norway sent additional military personnel to Somalia.

Peacekeeping to ensure compliance with international mandates

Norwegian military personnel have been involved in several operations, including ONUC, UNPROFOR, and Operation Allied Force, classified as peacekeeping to ensure compliance with international mandates. When the Congo declared independence on July 30, 1960, it marked the beginning of decades of unrest. The former colonial power, Belgium, sent troops to protect its interests and citizens, and these troops were soon engaged in conflict with factions of the recently established army. On

[12] Debate in parliament, January 31, 1990 (Oslo, Stortingsreferat, 1990).
[13] Debate in parliament, April 24, 1996 (Oslo, Stortingsreferat, 1996).

July 12, 1960, President Kasavubu and Prime Minister Lumumba sent a request to the UN Secretary-General asking for assistance to protect the national territory from "Belgian aggression."[14] As a consequence, the Organisation des Nations Unies au Congo (ONUC) was set up and the first UN personnel arrived in the country three days after the request. The Secretary-General contacted the Norwegian Ministry of Foreign Affairs on July 16, 1960, and requested pilots, helicopter pilots, mechanics, and light airplanes. Norway's first contingent consisted of sixteen persons and two Otter airplanes; eventually a total of 1,173 Norwegians served with ONUC. Here, as in the other deployments in this period, it was stressed in parliament that Norway should try to meet the requests made by the UN, as long as they did not weaken the primary task of national defense.[15]

As Norway began to scale down its operations in Lebanon in the 1990s (see above), it strengthened its involvement in the former Yugoslavia (UNPROFOR). This operation was first debated in August 1993, when a proposal to increase the upper limit of personnel set aside for UN operations to 2,000 was put before parliament. This was in response to a request from the UN to supply additional personnel to maintain the so-called "safe areas." At that time, a total of 362 Norwegians were serving in UNPROFOR. In the proposal, the Ministry of Defense informed parliament of NATO's decision to support the UN operation with NATO air forces.

Interesting with regard to the subject of this book, the Ministry of Defense stressed that several countries, including Norway, had put as a precondition for a NATO operation that it have the approval of the UN Security Council. This point was repeated several times – in the recommendation of a parliamentary committee, for instance, that stated that "The Norwegian involvement must in all circumstances be part of a credible UN operation that serves a just and peaceful development in the area."[16] The importance of involving the UN in any operation continued to be stressed when parliament discussed Norwegian participation in IFOR, the NATO-led Implementation Force, in December 1995, and later SFOR, from December 1996. However, most of the representatives seemed at this time to have become disillusioned with the effectiveness of a UN force alone, and there was a hopeful consensus in parliament that NATO would be more successful.

NATO's Operation Allied Force in 1999 (and the "activation order" on October 8, 1998) was the first time that the Norwegian government

[14] Kristiansen, *Norsk militærinnsats*, p. 148.
[15] Stortingsmelding (hereafter St. meld.) no. 8 1960.
[16] Innst. S. nr. 247 (1992–3).

participated in a military attack on a sovereign state without the backing of a UN mandate. Somewhat surprisingly, the decision was taken without any formal debate in parliament. *Aftenposten*, a Norwegian liberal-conservative daily, covered the story on April 17, 1999.[17] While the newspaper's main concern was the government's lack of consultation with military experts, it also reported that the decision was made in the parliament's "Enlarged Foreign Policy Committee," the minutes of which will not be made public for thirty years. The Committee is made up of members of the Foreign Affairs Committee, the president and vice president of the parliament, the chairman of the Defense Committee and up to eleven members appointed by the Elections Committee. It is discussed further below.

Enforcement

Enforcement operations involve active participation in war. The first of two enforcement actions was the 1950–3 Korean War, at the time the largest involvement of Norwegian troops in an international conflict. Norway contributed an army hospital from July 1951 to November 1954. The hospital, which at first had a sixty-bed capacity, increased to 200 beds towards the end of the period and treated an estimated 90,000 patients.[18] The second enforcement operation to which Norway contributed was Operation Desert Shield/Desert Storm in 1990–1. The decision to take part in this operation marked a break with previous policies, and was extensively debated in parliament. This debate is discussed in the next section.

Nordic cooperation in UN operations

In the past, support of the UN has been an important component of the foreign policy of all the Scandinavian countries. They decided in the early 1960s to create a Nordic stand-by UN force, based on an idea of Secretary-General Dag Hammarskjöld. In June 1959, he approached the countries that had contributed to UN forces in the Middle East and Lebanon, and asked them to consider future UN engagements when planning their military and defense strategies. At a meeting in Stockholm in the autumn of 1960, the Norwegian, Danish, and Swedish ministers of defense discussed strategies for a coordinated and rapid response to future UN requests. (Finland joined later.) Norway decided to concentrate

[17] H. Hegtun and P. A. Johansen, "Med rett til å bombe," *Aftenposten*, April 17, 1999.
[18] *Forsvaret og Samfunnet* (Oslo, Oslo Militære Samfund, 1975), p. 124.

on supplying support functions rather than combat units: the proposed contingent included a surgery unit and a mechanical unit. Norwegian participation was approved by parliament on June 8, 1964.

There was no disagreement in parliament about the need to create a stand-by force for future UN operations. The speakers in the debate[19] all stressed the need for maintaining Norway's political consensus on participation in UN operations. Two issues emerged and were debated. The first issue was whether participation in the force should be entirely voluntary. All representatives agreed that, to as large an extent as possible, volunteers should be used. The question was whether ordering personnel should be allowed if an insufficient number volunteered. The Defense Ministry's proposal[20] suggested this solution, but in the parliamentary committee's proposal[21] it was suggested that all personnel be recruited on a voluntary basis. The reason given for this was that all other Nordic countries based their forces on volunteers. Officers are asked at the time of recruitment if they are willing to serve in international operations and, if they agree, cannot later refuse if the need arises. The second issue concerned the funding of the stand-by force. The disagreement on this point was not substantial; basically the controversy was whether the costs of maintaining the force should be covered by funds already allocated to the defense budget or through extra allocations.

While Nordic cooperation from 1960 until the early 1990s consisted mainly in preparing and educating troops for UN missions prior to deployment, recent years have seen an increase in cooperation in the field as well.[22] The first case of a combined Nordic unit was NORDBAT I in Macedonia as a part of UNPROFOR. Nordic cooperation continued in Bosnia with NORDBAT II, where Norway contributed an army hospital, engineers, and helicopter personnel.

From 1945 to 2000, Norwegian personnel participated in a wide range of international operations. At the beginning of the period, the importance of the UN as both a sanctioner and leader of international operations was stressed. The insistence on UN leadership gradually disappeared in the operations in Iraq and later in Bosnia, but the necessity of basing operations on a clear UN mandate was still underlined in these operations. Only in 1998 was there a break with previous policies, when

[19] Parliamentary negotiations no. 427, June 8, 1964 (Oslo, Stortingsreferat, 1964).

[20] St. prp. no. 61: *Norske beredskapsstyrker til disposisjon for De Forente Nasjoner* (Oslo, Forsvarsdepartementet, 1964).

[21] Innst. S. no. 248: *Innstilling fra militærkomiteen om norske beredskapsstyrker til disposisjon for De Forente Nasjoner* (Oslo, Stortingsreferat, 1964).

[22] Espen Barth Eide, Vegrad V. Hansen, and Bengt Holmen, *Nordisk samarbeid om internasjonale fredsoperasjoner*, NUPI background paper (Oslo, 1997).

the government decided to support unilateral NATO action against the former Yugoslavia without an explicit Security Council mandate.

The uses of military forces and the politics of legality

Before discussing this further, one must look at the domestic legal and constitutional bases for Norwegian participation in international military operations. This is necessary because, as is argued below, the policy shift does not only reveal that the international context and conceptual framework of Norwegian foreign policy have been altered; it also challenges the traditional interpretation of the interrelationship between domestic law and international law within established constitutional practice.

The central legal provisions for the use of force are laid down in the 1814 Constitution and must be understood against the background of the Norwegian political system established after the Napoleonic Wars in 1814, and later (1884) transformed into a parliamentary system. As with other Westminster systems, the government is dependent on the confidence of parliament (*Stortinget*). This parliamentary system differs from a presidential one – for instance that of the United States – in which the executive cannot, with the exception of impeachment, be removed by the legislature. Each minister, and the Council of State, is politically and constitutionally responsible to parliament.

Under the Norwegian Constitution, the highest executive power is vested in the king. The Council of State (the government) exercises the king's authority. Government decisions are made in a special government Conference. The king does not attend the Conference, but adopts, in a weekly "Council of State meeting," the decisions reached by the government. All matters concerning the Norwegian armed forces that are not decided in the government Conference are formally decided by the minister of defence or on his/her behalf. But there is one constitutional exception to this: "matters strictly relating to military command may, to the extent determined by the King, be excepted from proceedings in the Council of State" (article 28). In other words, the minister of defence presents these matters to the king in the presence of only the prime minister and the minister of foreign affairs. In practice, this arrangement is seldom used.

The king is the "Commander-in-Chief of the land and naval forces of the Realm" (article 25) and, as commander-in-chief, he has the authority to deploy military forces outside Norway. Article 25 of the Constitution also provides certain constraints on the formal right of parliament to interfere in the execution of military command. Parliament is prevented from giving any directives on how the authority of the king and government

is exercised. It can neither transfer this authority to other bodies of the state, nor deprive the king of his authority to instruct subordinate bodies to whom the king has delegated command authority, nor his right to override and change decisions made by subordinate bodies. Exercise of military command is a royal prerogative – an exclusive power of the executive established by the Constitution.

The royal prerogative "is a constitutional anachronism which has been kept intact because there has been no practical need for amending or abolishing this article in the constitution."[23] This is not to say that the prerogative is not respected, but simply that it does not have any important practical implications for the relationship between government and parliament.[24] In any case, the prerogative of the king does not undermine the legislative or financial authority of parliament to make decisions with regard to the organization of the armed forces. Despite the constitutional provisions that give the government the authority to deploy military forces outside Norway, the budgetary authority of parliament will often require legislative consent prior to deployment.

The parliament's "Enlarged Foreign Policy Committee" is a forum for formal contact between the government and parliament. The committee can be called by the prime minister, the minister of foreign affairs, one-third of the Enlarged Committee or the head of the standing Foreign Policy Committee "to discuss foreign policy issues of great importance" (*Stortingets forretningsorden* § 13). The Committee is illustrative of an important feature in Norwegian foreign policy – the prominent consultative role played by the parliament. But the Committee may also be viewed as a political tool by which the government can ease political disagreement and at the same time prevent a backlash from parliament. From a democratic point of view, however, the most striking feature of the Committee is its lack of transparency. The documents and debates are all exempt from the public, and it is up to the head of the Foreign Policy Committee to decide whether the meetings are to be kept secret. As noted above, the minutes of its discussion of Operation Allied Force will not be made public until 2029.

Legal constraints on the use of the military

There are several specific limitations on the government's authority to use Norwegian forces abroad. In the following paragraphs two such limitations are discussed. The first concerns military personnel who can be used

[23] Torstein Eckhoff, *Tidsskrift for Rettsvitenskap* (Oslo, Universitetsforlaget, 1964), p. 222.
[24] Johs. Andenæs, *Statsforfatningen i Norge* (Oslo, Tano, 1964), p. 327.

in international military operations; the second is related to the transfer of Norwegian personnel to the service of foreign powers or coalitions.

Norwegian military personnel in international operations Legislation is needed as a basis for any action by the government that interferes with the private life of Norwegian citizens. On principle, the recruitment of Norwegian soldiers has been undertaken on a voluntary basis and the soldiers assigned to international missions continue to be under Norwegian legal authority and jurisdiction, even when they are taking part in an operation led by the UN or another state.

Three provisions of the Civil Criminal Code (article 12) are particularly relevant to the legal accountability of soldiers: first, specifically defined violations of the criminal code; secondly, actions that are directed against the Norwegian state; and thirdly, actions by soldiers that violate the criminal code of the country in which they operate. (A recent example of the application of this is the lawsuit against a former Norwegian KFOR soldier who was found guilty by a Norwegian court for misconduct while serving in Kosovo.) The Military Criminal Code (*Den militære straffelov*) on the other hand, does not distinguish between different types of unlawful acts, but is – as stated in its article 11 – generally applicable to all actions by Norwegian military personnel at home and abroad.

There is no general agreement on the question of the king's legal authority to order soldiers to participate in international operations. In article 2 of the Law of Conscription[25] the aim of the military is defined as "defending the national interests of the country." Does this imply that soldiers can be ordered abroad simply by arguing that UN operations should be viewed as a means to protect Norwegian national interests? According to the Ministry of Justice and the Police, it does: "In our [the juridical section of the Ministry] view the 'Law of Conscription' gives the King a legal right to order conscripted soldiers for service in UN-led operations."[26]

Other legal experts have disputed this conclusion and claim that there is no foundation in existing law for the interpretation by the Ministry of Justice. In this view, assignment of conscripted soldiers for missions in war zones must be voluntary, or else would require that the Law of Conscription be changed. Since parliament is the legislator, they argue, the authority to order soldiers for military operations abroad lies with parliament and not the government.

During ONUC in 1962, parliament decided that the government might, if necessary, order officers and other personnel to take part in

[25] *Vernepliktsloven* of July 17, 1953. [26] St. meld. no. 14 1992–3.

the operation. Later, it proposed to formalise this legal authority so that it would be permanently in a position to order personnel to any future UN operation.[27] But the proposal was dismissed in conformity with the Swedish and Danish doctrines for peacekeeping missions, both of which were based on voluntary recruitment (see above). Despite the legal controversy, the decision made by parliament in the 1960s prevailed for thirty years as the main principle for the use of Norwegian soldiers. In 1995, however, a new law established two legal provisions for using Norwegian forces abroad in peacekeeping or peace enforcement operations.[28] All personnel, conscripted soldiers as well as professional officers, should be recruited on a voluntary basis. Officers recruited on a nonvoluntary basis can be ordered to take part in operations only when there is an insufficient number of officers willing to participate.[29]

Norwegian forces and foreign control Article 25 of the Constitution limits the use of forces abroad. It states that Norwegian military forces "may not be transferred to the service of foreign powers." How is this to be understood? Is it, as it seems, a general legal negation of any Norwegian involvement in peacekeeping/peace-enforcement activities where the command-and-control authority is vested in non-Norwegian authorities? The short answer is no – article 25 has not been interpreted as a prohibition against Norwegian involvement in a collective military operation, even when the operation is not under Norwegian command. To substantiate this, it has been argued that the article must be read in the light of its historical context: its original aim was to prevent the king from profiting on renting out his troops to other states, a practice that was common before and during the Napoleonic Wars.[30] Two historical cases form the constitutional practice for article 25. The first was related to the UN Charter, especially Article 43 provisions to place national forces at the disposal of the UN. The other concerns Article 5 of the North Atlantic Treaty.

The UN, NATO, and the question of command

According to Article 42 of the UN Charter, the Security Council may decide to "take action by air, sea, or land forces as may be necessary to

[27] *Ibid.*
[28] Odelstingsproposisjon (hereafter Ot. prp.) no. 56: *Om lov om tjenestegjøring i internasjonale fredsoperasjoner* (Oslo, Forsvarsdepartementet, 1994).
[29] See also St. meld. no. 46: *Bruk av norske styrker i utlandet* (Oslo, Forsvarsdepartementet, 1994).
[30] Andenæs, *Statsforfatningen i Norge*, pp. 321–2.

maintain or restore international peace and stability." Further, Article 43 establishes that all member states are obliged, on the Security Council's request, to make available "armed forces, assistance, and facilities." Accordingly, a fulfillment of Norway's obligations to the UN could conflict with article 25 in the Constitution. This dilemma was discussed in a governmental White Paper[31] submitted to parliament in 1945. The main conclusion was that "the aim of the law [article 25] was to prevent Norwegian troops from being used as mercenaries, and it was not supposed to be a legal obstacle against military disposition to strengthen the United Nations, and thereby peace and security." This interpretation of the Constitution has become accepted as customary practice.

It would, however, be incorrect to conclude that article 25 is now an insignificant constitutional limitation on the use of Norwegian forces in international operations. Rather, the interpretation of the article is a reflection of a dominant overall political consensus on the authority of the Security Council, as well as the importance of committing Norway to the UN Charter. Consequently the agreement on the interpretation of article 25 prevails only as far as military operations are under the direct command of the UN. When that is not the case, article 25 and the legal provisions for using Norwegian troops abroad become politicized. The Norwegian involvement in the Gulf War in 1991 is an illustration of this.

In 1990 the government decided to send a team of medical personnel to support the British in Saudi Arabia, and to deploy a vessel (the *Andenæs*) to assist in upholding the economic sanctions against Iraq. Despite formal authorization by the Security Council (Resolutions 661 and 678), there was, none the less, an important difference between the Gulf operation and other UN operations in which Norway had participated for more than forty years: the UN was not in direct command of the multinational forces deployed in the region around the Gulf. As a result, the legal controversy over article 25 in the Constitution reappeared after more than forty years, this time with clear political connotations. In a debate in parliament, the Socialist Left Party (SV) challenged the government on the issue:

> We have been against Norwegian involvement in the war against Iraq because the operation is not led by the UN, nor is the international force under the command of the UN. In our view this is in accordance with what has until now been Norwegian foreign policy, namely that forces can only be deployed internationally if the soldiers are under the flag of the UN. Our aim, therefore, is to maintain a central dimension of Norwegian foreign policy.[32]

[31] St. prp. no. 5: *Om Norges tiltredelse av De Forente Nasjoner* (Oslo, Utenriksdepartementet, 1945).

[32] Rolf Ketil Bjørn, parliamentary debate, May 1991 (Oslo, Stortingsreferat, 1991).

The critical remark raises the question of whether article 25 of the Constitution can be bypassed only when an operation is under the direct command of the UN. The official response to this challenge came in a White Paper[33] that was later approved by parliament:

> When handling this question, one first has to bear in mind the historical background of the provision. Actions of the kind we are dealing with are necessarily beyond what the authors of the Constitution had in mind. Second, it is important that this, after all, is an international action and one where the support of the international community is practically unanimous. The fact that the UN does not formally lead the action cannot be decisive in this question. Besides, the action has a clearly limited aim – to expel Iraq from Kuwait . . .

The established constitutional practice of article 25 is not limited to the UN and the question of UN-led or UN-authorized operations. In 1949, when Norway signed the North Atlantic Treaty, the government faced a similar problem, this time in relation to Article 5 of the Treaty. In Article 5, the parties agreed that "an armed attack against one or more of them in Europe or North America shall be considered an attack against them all." If such an armed attack occurred, each of them agreed to act "in exercise of the right of individual or collective self-defense recognised by Article 51 of the Charter of the United Nations." To try to solve the dilemma that arose when the NATO integrated military command was established in 1951, Professor Frede Castberg was asked to submit a memorandum on its constitutional implications. Its conclusion has become an authoritative text:

> it can be considered as established in Norwegian constitutional practice that it will not be inconsistent with § 25 of the Constitution to agree to an international arrangement whereby Norwegian military units will take part in collective military activities under the command of bodies of non-Norwegian nationality. What must be decisive is whether it concerns an international arrangement in which Norway participates, provided by Norwegian State authorities according to what they judge to be serving Norway's interests.[34]

Thus, the logic of constitutional practice seems to be clear: the king (that is, the government) can only delegate the command of the forces if (a) the operation is led by the UN or authorized by the Security Council, or (b) when an international arrangement (for example, NATO) is serving Norwegian national interests (but not in violation of international law). The problem arises in relation to (b) – what is a legitimate operation

[33] Stortingsproposisjon no. 44, 1990–1.

[34] Frede Castberg, "Statsrettslige spørsmål i forbindelse med felleskommando og felles styrker for Atlanterhavspakens land" (Oslo, Utredning, Justidepartementet, February 26, 1951), p. 6.

according to international law? Traditionally, the answer to this has been given with reference to the UN Charter. As the case of Kosovo and NATO's Activation Order of October 8, 1998 illustrates, however, this notion seems to be changing. The constitutional implications of this have not yet been laid out by the government or discussed in parliament in any substantial manner.

The UN, NATO, and the question of mandates

One important question was left out of Castberg's 1951 memorandum. His concluding remarks presuppose a situation where military operations are either authorized by the UN, or are in conformity with Article 5 of the North Atlantic Treaty. What about military operations such as peacekeeping or enforcement not authorized by the UN's Security Council or General Assembly (for example, "Uniting for Peace") and not covered by Article 5? If one follows the logic of the argument presented by the government for the legality of Norwegian involvement in the 1991 Gulf War, it seems questionable whether the Constitution allows any military involvement that is not consistent with the UN Charter, as is the case if or when NATO operates *out of area* without an explicit mandate from the Security Council. However, surprisingly little has been said or written about this issue.

NATO's October 1998 Activation Order and the air campaign against the former Yugoslavia from March 24, 1999 are concrete illustrations of an unresolved tension between political practice and legality, between the current political consensus and the traditional interpretation of the Constitution. Whatever one may think of NATO's air campaign, Security Council Resolutions 1160, 1199, and 1203 do not provide an explicit mandate for the military operations.[35] It is not surprising, therefore, that Norway's involvement in the air campaign led to a debate over whether NATO's operation against the former Yugoslavia and NATO's new Strategic Concept from April 1999 were a violation of international law.[36] This chapter does not attempt to settle this debate.

The point here is not what may or may not be an appropriate legal or moral basis for NATO's military campaign. To put it simply, the point is not what the Norwegian legal debate on Kosovo has been about, but,

[35] For a legal defense of humanitarian intervention, see Christopher Greenwood, "Is There a Right of Humanitarian Intervention?" (1993) 49(2) *The World Today* 34–40; Espen Barth Eide, "Intervening Without the UN: A Rejoinder" (1999) 30 *Security Dialogue* 91–5.

[36] Espen B. Eide, "Natos Kosovokrig – ett aer ettet" (2000) 58(1) *Internasjonal Politikk* 27–63.

rather, what has not been discussed: the legality of using Norwegian forces abroad when an operation is not authorized by the Security Council or to defend the North Atlantic area. The lack of legal debates is a general feature of the period between 1945 and the 1990s.

This may be viewed as a natural consequence of Norwegian history. With the Second World War as the only exception, Norway was not directly involved in war until NATO's decision to use air power against the former Yugoslavia in October 1998. However, the lack of debate is also a symptom of a political culture characterized by broad agreement on the importance of the UN, and the role of the Security Council as a facilitator of order in world politics. (The notion of foreign policy as a way of maintaining what Hedley Bull once named "the anarchical society" – an international society based on certain common interests, values, and common institutions – is widespread.[37]) The general, and somewhat obvious, point to be drawn from this is that legal controversies about the international use of military force surface only when the consensus among the political elite has broken down.

In sum, the UN Charter and Norway's membership in NATO have been essential for the formation of the constitutional practice that evolved after 1945. This constitutional practice, however, presupposed a harmonious relationship between NATO policy and the UN Charter. When this is not the case – Kosovo is one obvious example, and NATO's Strategic Concept is a formalization of Kosovo-type operations – the domestic legal justification for military involvement becomes unclear and inadequate. Therefore, it appears as a contradiction that the situation in Kosovo has led to a legal debate related to international law, but not to a consideration of the conditioned relationship between domestic constitutional provisions and international law. At least, this appears to be the case from the juridical perspective.

Seen from the angle of political science, the development is not surprising. The reason is simple: the political climate has changed, and with it the idea of the necessary legal grounding for Norwegian military involvement abroad.[38] After more than fifty years, the widespread agreement that all military involvement abroad must be in accordance with the UN Charter or legitimized with reference to an explicit Security Council resolution seems to have ended. This raises important questions with regard to accountability: the transformation has taken place within the political elite and the majority of the public, but has not been reflected in a

[37] Hedley Bull, *The Anarchical Society – A Study of Order in World Politics* (London, Macmillan, 1977).
[38] Malin Stensønes, "Maktbruk i Kosovo," *Dagbladet*, December 16, 1998.

corresponding change in the legal framework. Consequently, there is a tension between existing legal provisions (which, amongst other things, are meant to secure democratic accountability) and political practice.

Lori Damrosch argues in her chapter that a process of "parliamentarization" – a shift in the control of foreign-policy matters from government to parliament – has taken place in most European countries and the United States in the last decades. In the Norwegian case, this process does not appear to have occurred. On the contrary, the political consensus on foreign-policy issues has maintained parliament's consultative role, but parliament has seldom found it necessary to challenge the government. In contrast to some other European parliamentary systems, the lack of debate in Norway on deploying military personnel abroad has meant that this issue is unlikely to change the balance of power between parliament and the executive. However, were the political consensus on foreign policy issues to break down, a process similar to that suggested by Damrosch might well evolve. In other policy areas not characterized by the same political consensus, a succession of minority governments has led to a situation in which parliament has increased its influence on government policy.

The two constellations of Norwegian foreign policy

The history of Norwegian foreign policy can be described as one conceptual world-view replaced by another. Throughout most of the period under discussion, 1945 to 1998, the same theme has been repeated time and again by all political parties and by a succession of governments. In his account of the period, historian Rolf Tamnæs[39] has identified this as the core of what he calls Norway's "activist policy" (*engasjementspolitikk*). Foreign Minister Knut Vollebæk summarized its essence in the following manner: "It is in the interest of a small state like Norway to maintain a strong UN and support the role of the UN and its ability to uphold a degree of peace and order in international relations."[40]

The principle of non-intervention was the central point of reference for this political sentiment.[41] The principle was perceived as an absolute – a principle that could only be passed over on the basis of a decision reached by the Security Council (or, alternatively, the General Assembly).

[39] Rolf Tamnæs, *Oljealder 1965–1995. Norsk utenrikspolitisk historie* (Oslo, Universitetsforlaget, 1998).

[40] Knut Vollebæk, "Utenrikspolitisk redegjørelse for Stortinget" (speech in parliament, January 22, 1998).

[41] Raino Malnes, *National Interests, Morality and International Law* (Oslo, Scandinavian University Press, 1994).

Recently, however, the absolutism of the principle of non-intervention has been challenged and criticized on historical and ethical grounds. An ethical delegitimization of the principle has been celebrated as a necessary development for the coming of a "new humanitarian world order."[42]

It is uncontroversial in Norway to claim that in the late 1990s a new paradigm has replaced the old consensus, in theory as well as in practice. There has been a clear shift in official Norwegian attitudes to participation in international military operations. The political elite's consensus has moved towards a new *modus operandi* – military operations without a UN mandate. Why could this sudden shift take place? How can one understand the continuity in consensus when the object of that consensus was suddenly altered? It is suggested below that the shift can be construed as two different constellations of key conceptual packages in Norwegian foreign policy: *the nation*, *the state*, and *security*.

First constellation: sovereignty, security, and the UN

Our survey of the debates concerning the use of Norwegian forces abroad, and the underlying conceptual framework, confirms that the combination of the state as a *territorial* container, and security as *territorial* integrity dominated most of the discourse since the Second World War. This is also evident in Norwegian military doctrines, which were, and mainly still are, based on territorial defense and large but immobile army units stationed at the territorial borders.[43] Thus, in the first constellation, "Norway" the "nation" is conceptually superimposed on "Norway" as a "political entity," which in turn is congruent with "Norway" understood as a territorial entity. As an extension of this, security became territorialized as well: it meant the security of the Norwegian nation/state/territory.[44]

In this constellation, there was a potential tension between national security and external military involvement. Given that security was defined with reference to national territory, deployment of forces abroad created a tension that needed to be resolved. This was done through two interrelated arguments. First, given that funding for military activities was

[42] Carsten Rønnfeldt and Henrik Thune, "Conflicting Global Orders: The Principle of Non-intervention and Human Rights" in Anthony McDermott (ed.), *Sovereign Intervention* (PRIO Report 2/99, Oslo, 1999); T. Biersteker and C. Weber (eds.), *State Sovereignty as Social Construct* (Cambridge, Cambridge University Press, 1996); David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford, Stanford University Press, 1995).

[43] Iver Neumann and Ståle Ulriksen, "Norsk forsvars- og sikkerhetspolitikk" in Torbjørn L. Knutsen, Svein Gjerdåker, and Gunnar Sørbo (eds.), *Norsk utenrikspolitikk* (Oslo, Cappelens Akademiske Forlag, 1996), pp. 94–124.

[44] Put most strongly in a parliamentary debate, September 2, 1993 (Oslo, Stortingsreferat, 1993), by Johan J. Jacobsen and Kjell Magne Bondevik.

limited, there had to be a trade-off between territorial defense and operations abroad. This was expressed in debates about whether to fund international operations from the defense budget, or to make extra allocations.

A central argument in this debate was that, while international operations in the short term weaken Norwegian capacity for national defense, they would in the long term strengthen that defense by the active operational experience obtained by Norwegian soldiers. The second argument was that many parliamentarians stressed that small nations such as Norway depend on international law being maintained, because small countries could not survive if the "law of the jungle" were established in international relations. Accordingly, peacekeeping was seen as a means for small states to influence the development of international politics and strengthen the "international rule of law." Norwegian security depended on the presence of an international order. By maintaining that order through contributing to the UN, Norway helped itself at the same time it was helping others.

In this first period, then, from 1945 to the early 1990s, Norwegian policy with regard to contributing to international military operations was informed by a set of ideas that conflated the state, the nation, and the territory. The ordering of these elements produced a coherent outlook: support of the UN, involvement in peacekeeping, and a strong territorial defense were all elements of the same policy – securing the Norwegian state (that is, its territory) and securing Norwegian national identity.

Since 1990, however, security has been more widely defined, and it has become deterritorialized. The constellation of elements has been altered. Security and ideals have both become placed outside the boundaries of the nation-state. This has involved a fundamental alteration of the term "security." From taking as its object the nation/state/territory, its object has now become, at least at the level of rhetoric, redefined as universal human values.

Second constellation: human rights and humanitarian intervention

The political practice and rhetoric of the late 1990s seem to run directly counter to one of the most important pre-1990 arguments: that a small country like Norway depends on international law for its existence. So what has changed? Why did the Norwegian government and the foreign-policy elite rapidly play down the traditional importance of UN mandates almost without any debate in parliament? This chapter suggests that the change entails a conceptual renewal, arising from abandoning territoriality as an ordering principle. In the past, the idea of territoriality served to place security as an internal concern, and what may be called the

missionary spirit as an external concern. These two ideas were mediated through national identity. The border between the internal/external, the "/" as it were, was the territorial border that demarcated Norway from the outside world. All debates over Norwegian participation in international organizations, as seen above, were ordered according to this dichotomy.

The change of policy in the late 1990s rests on an alternative nonterritorial concept of the state, and a widened idea of security. From being the term which *par excellence* was concerned with nation-states,"security" is being redefined as humans, societal qualities, and "security interdependence" between territorial states. At the time of writing, the concept "human security" is gaining in popularity.

Norwegian security policy towards the end of the 1990s had become deterritorialized. The following October 1996 statement by the foreign minister is illustrative:

> Norwegian society's deep respect for humanitarian values has made the promotion of Human Rights a cornerstone of all our policy. This is of special importance to our work for peace, where it combines idealism and self-interest. *The more respect for Human Rights, the safer the World will be for all of us.*[45]

By changing the object of its reference, and by "securitizing" human rights, an opening was made for interventions that previously would have been blocked by the principle of territorial security and sovereignty.[46]

At the bottom of this lies a reinterpretation of state sovereignty. In the first constellation, sovereignty was the unmoveable ordering principle, and this was expressed in the importance of adhering to the UN Charter. As illustrated by the political debate on Kosovo, however, a universal notion of human rights has led to a new understanding of de jure sovereignty. Instead of being viewed simply as a territorial demarcation line, sovereignty has been politicized. What has occurred is a shift from the primacy of states to the primacy of individuals.

The sovereign rights of states are measured against the states' will and capacity to maintain basic human rights. In Norwegian political discourse, the traditional concept of "sovereignty" and Article 2(1) of the UN Charter confirming "the sovereign equality of all its Members," is transformed and reestablished as the concept of "state legitimacy" according to which sovereignty is conditioned.[47] Interference in the

[45] Utenriksminister Bjørn Tore Godal, "Redgjørelse for Stortinget om menneskerettigheter" (Oslo, Stortinget, October 10, 1996) (emphasis added) (Oslo, Stortingsreferat, 1996), pp. 46–85.

[46] For a discussion of "securitization" see Ole Wæver, "Securitization and Desecuritization" in Ronnie D. Lipschutz (ed.), *On Security* (New York, Columbia University Press, 1995).

[47] Biersteker and Weber, *State Sovereignty as Social Construct*.

domestic affairs of another state is seen as a way of promoting a more just world order and securing a more stable and peaceful international system.

This double justification was evident in the case of Kosovo. Norwegian involvement was not only given a humanitarian justification, but also defended as a way of securing Norwegian national interests and Norwegian society. Participation in international military enforcement operations is viewed as legitimate even though the operation is not led by the UN, or authorized by the Security Council. To some extent the mandate of the Security Council is replaced with a moral mandate. This might account for the lessening of the importance of the UN, as the organization is seen as a guarantor of the old state-centered order, based as it is on the principle of territorial sovereignty.

Conclusion

The period between 1945 and 1998 witnessed a large number of international military operations, and Norwegian troops participated in many of them. From 1945 until the mid-1990s, the justification for Norwegian involvement was the importance of the UN and the collective security system of the Charter. Then, as demonstrated above, there was a shift, and a new consensus emerged.

Both before and since 1998, there was a tension between national and international policy, and between legality and practice. The first period was based on a traditional idea of security as security of the territorial state. In this constellation, there was tension between maintaining a territorial defense and participating in international operations. This tension was partly solved by stressing that the UN provided an international order from which Norway benefited, and that international operations provided training for military personnel. In the 1990s, this consensus was replaced by another that built on a wider and deterritorialized idea of security. From that followed a reevaluation of the principle of sovereignty. In the first period, a strong commitment to state sovereignty was the guiding principle for participating in international operations. Now, however, this principle plays second fiddle to the idea of "state legitimacy," the notion that state sovereignty should be conditioned by universal ideologies and human rights. A different tension is manifest here, the tension between constitutional provisions and political practice, between law and politics.

For a country that has promoted itself as a major supporter of and participant in international military operations, the legal provisions for deployment and their relationship to different military engagements should be highly relevant questions. Therefore, it is somewhat ironic that one

will seek in vain for substantial political discussions and systematic academic inquiries into questions of democratic accountability in the light of Norway's military engagement abroad. There are two accountability issues at stake here, and they both relate to the analogy with Rousseau's social person with which this chapter began. As maintained throughout this chapter, the one overriding concern of Norwegian foreign policy generally, and participation in international military operations more specifically, has been to maintain a strong political consensus among the representatives in parliament and government.

While this is often portrayed as a benefit of a small "homogenous" nation, it has implications for democratic accountability. First, the consensus leads to a lack of debate among politicians: thus, the large minority of the Norwegian population who are opposed to the current foreign-policy doctrine find themselves almost without representation in parliament. (According to public-opinion polls conducted during the Kosovo crisis, an average of more than 35 percent of Norwegians were opposed to the NATO operation.) Secondly, continued political consensus has implications for legal accountability. As the second section of this chapter argued, the legal foundation on which Norwegian participation in the new interventionist policy of NATO has been based is uncertain. But the consensus surrounding participation in these operations has prevented any substantial legal discussion. For these issues to be raised, there would have to be a certain degree of political disagreement among the political elite. This is the inconsistency of a consensus-oriented foreign policy: there is no opposition to secure consistency between political practice and the rule of law, to represent popular dissent, or to raise issues of accountability.

8 India: democratic, poor, internationalist

Ramesh Thakur and Dipankar Banerjee

Why India matters in this study

This country study of India has a fivefold significance. First, India is the largest troop contributor to UN Peacekeeping Operations (UNPKO), including twenty-four missions, ten force commanders, 4,747 officers, and 47,353 soldiers.[1] As all Indian soldiers serve for a minimum of one year under the UN, rather than the more usual six months, the overall contribution is larger than these numbers might suggest. Ninety-four Indian soldiers have died on peacekeeping duty since 1961, and forty officers and soldiers were decorated or received commendations during UNPKO. India also provided the bulk of the personnel for the three international control commissions (ICC) in Indochina after the 1954 Geneva Agreements. This is a record in which India and its armed forces take immense pride. It is seen both as the nation's commitment to international peace and as a showcase of its military proficiency and tradition.[2]

The Indian army has adequate manpower readily available and trained for peacekeeping, experience in all types of climate and terrain, and the full range of military capabilities from mechanized operations to dismounted infantry, engineer-dominant and humanitarian support, to meet all types of UNPKO. Since a 1993 memorandum of understanding (MOU) with the UN, India has maintained a Standby Brigade Group for UNPKO with a comprehensive all-round capability numbering 4,056 all ranks. An infantry battalion group is deployable within thirty days, and the remainder of the brigade within eight weeks. The force is kept at a high state of readiness; its actual commitment, of course, is subject to the government's decision.[3]

[1] Kamalesh Sharma, Permanent Representative of India to the United Nations, Agenda Item 122: Improving the Financial Situation of the UN, Fifth Committee, New York, March 23, 2000, p. 2.

[2] See Appendix B, "Country participation in international operations, 1945–2000," for information on India's contribution.

[3] Briefing by the Indian army's UN cell to Dipankar Banerjee, April 1999.

India's democratic credentials

Secondly, India is democratic, albeit robust and rambunctious. It is by far the world's most populous democracy – more than three times the size of the next-largest democracy, the United States. Thirteen general elections have been held for the federal parliament, and hundreds for the more than twenty provincial legislatures, in the past half-century. India's politics are chaotic, colorful, combustible, noisy, panoramic, kaleidoscopic, and larger than life. India satisfies all five criteria listed by Robert Dahl for being a polyarchal democracy: effective participation, equality in voting, enlightened understanding, agenda control, and inclusion of adults.[4] On the basis of these criteria, Dahl identifies six political institutions required by large-scale democracies: elected officials, free and fair elections at regular intervals, freedom of expression, alternative sources of information, associational autonomy, and inclusive citizenship.[5] India meets all six of these tests as well. It has universal adult suffrage, with each person's vote being of equal weight in determining the outcome of elections; free and fair elections at legally prescribed intervals underwritten by such procedures as secret ballot, open counting, and absence of fraud and intimidation to an extent that affects the overall outcome of elections; and the right to organize competing political parties with alternative platforms of public policy.

The result of the commitment of India's elite to democratic governance has been the development of the infrastructure of democratic society: well-organized groups that compete through established norms and procedures; a number of trade unions that compete for the loyalties of workers and have organizational links with different political parties; a free and vibrant press; an autonomous university system; and a constant exposure to and interaction with the evolution of the values of civil society elsewhere in the world. India's seemingly chaotic democracy is thriving: its elected government is accountable to the people, not a mere figurehead for the military, bureaucracy, or an oligarchy.

India as a postcolonial developing country

Thirdly, India is a developing country, the only one studied in this volume. On the one hand, in the length, scope, and sophistication of its democracy and the size and professionalism of its armed forces, India is closer to some of the western powers represented in this collection. On the other hand, as a very poor country, it is acutely representative of

[4] Robert A. Dahl, *On Democracy* (New Haven, Yale University Press, 1998), pp. 35–43.
[5] *Ibid.*, pp. 83–99.

developing countries and quite different from the other case studies assembled here.

Fourthly, India is unique in this collection in its history of colonialism. Canada and the United States were settler societies, where the conquerors stayed to become the majority group. India achieved independence as the result of a protracted nationalist struggle, the leaders of which shaped and guided the founding principles of the new state. The anticolonial impulse in their world-view was instilled in the country's foreign policy and survives as a powerful sentiment in the corporate memory of the Indian elite.

Thus, for most westerners, the North Atlantic Treaty Organization (NATO) is an alliance of democracies, a standing validation of the democratic peace thesis. For Indians and other ex-colonies, however, the most notable feature of NATO is that it is a military alliance of former colonial powers: every historical European colonial power is a member of NATO. It is not possible to understand India's reaction to the 1999 Kosovo War without appreciating the significance of the trauma of historical input: countries that in previous centuries had carved up Africa and Asia were now carving up central Europe and pursuing familiar policies of divide-and-leave.

That policy produced the partition of the subcontinent and an intractable conflict between the successor states, which required the injection of a UN presence. Of all the countries examined in this volume, finally, India is the only one that has been and still is host to a UN mission, the UN Military Observer Group in India and Pakistan (UNMOGIP), established by Security Council Resolution 47 (April 21, 1948) to supervise the cease-fire in Kashmir. UNMOGIP is one of the longest-functioning UN observer missions. India's concerns about host-country sensitivities are not just hypothetical; they are real and based on long experience. In this respect, too, India is closer to developing countries not represented in this volume than to the industrialized countries that are.

India's peacekeeping credentials

Before examining India's case using the framework provided in the introductory chapter by Ku and Jacobson, it is useful to explore why India has been popular as a peacekeeper, and why international peacekeeping has been popular in India. There are three broad reasons why India was asked to contribute troops to traditional peacekeeping operations: the size and professionalism of its armed forces; the lack of such forces from most developing countries until recently; and India's influence in world affairs through the Non-Aligned Movement (NAM). The principle of equitable

geographic/geopolitical representation pervades every aspect of the UN system. India was doubly attractive: as a representative of the developing world, and as cofounder (with Egypt and Yugoslavia) of the NAM. There were not many countries in the developing and NAM groups that could field professionally trained and competently equipped soldiers for overseas deployment. The size of its defense forces meant that India could detach some units from duty on national borders without jeopardizing national security.

Why did India agree to take part in so many UN operations? The answers mirror those in the preceding paragraph. In the case of the Indochina control commissions, India's sense of being a great power in the making was a key factor: "We cannot shed the responsibilities that go with a great country," said founding Prime Minister Jawaharlal Nehru. India's chairmanship of the three Indochina commissions "became one of the necessities of the settlement . . . our refusal would have meant imperiling the whole agreement." Just as important was the prime minister's conviction that, as a result of the Geneva Agreements, there were better prospects for peace and stability in Asia as a whole.[6] The two calculations, the contribution to the proposed peacekeeping operation by India, and to regional and international stability by the proposed peacekeeping mission, have been constant refrains in the history of India's involvement in international peacekeeping.

India's participation in PKOs declined in the post-Cold War period. This is true even in absolute numbers, but it is particularly striking in proportion to the greater number of UN operations in the 1990s. In part, this is due to reduced international interest in Indian contributions, as other developing countries acquired the capacity to field units. But it also reflects doubts in India about the merits and wisdom of the more complex tasks mandated to new generations of PKOs. India was particularly troubled by the use of force to ensure compliance and by the trend to subcontract enforcement operations to standing or ad hoc military coalitions of the willing.

International authorization

As a general rule, India has favored authorization for the international use of force by representative international organizations or bodies, preferably the United Nations. The higher up the scale from monitoring and observation to enforcement, the more stringent the requirement of UN authorization. It is difficult to visualize India ever agreeing to the use of

[6] Ramesh Thakur, *Peacekeeping in Vietnam: Canada, India, Poland and the International Commission* (Edmonton, University of Alberta Press, 1984), pp. 50–1.

force without explicit authorization from the Security Council (UNSC) or General Assembly; it is impossible to imagine India ever agreeing to the use of force against the wishes of the host government. The one significant exception to the first caveat is where two countries sign a bilateral agreement for the dispatch of troops by one to the other, as did India and Sri Lanka in 1987.

Nehru supported UNPKO enthusiastically and ensured maximum Indian participation whenever an opportunity presented itself. This was entirely in accord with New Delhi's activist foreign policy in the 1950s and 1960s. Even today, when Indian ministers and parliamentarians visit the UN, the ambassador and staff at India's Permanent Mission do not have to explain the importance or relevance of the international organization to the lawmakers. That much is taken for granted. India has usually responded positively to the international use of force for humanitarian and nonmilitary purposes. In other situations, its response has been conditioned by the circumstances, as assessed primarily by its foreign-policy establishment. India has been more easily persuaded of the need to use international force to preserve territorial integrity than to violate or fracture it. With the nonmaterialization of Article 43 arrangements, in India's view even the UNSC lacks the legal basis to *require* troop contributions from member states; their participation can only be by their consent. If the Security Council is deadlocked, India has no difficulty with the transfer of the issue to the General Assembly as the authentic and representative voice of the international community. It has great difficulty with the self-transfer of this right by/to NATO in the name of the international community.

Examples

The first international dispute transferred to the General Assembly was the 1950 Korean issue, when the Uniting for Peace Resolution was used to circumvent the Soviet veto in the Security Council. In other words, the UN Korean operation was inextricably tied to the Cold War, and India feared that it was in danger of becoming de facto a US operation, hence its hesitations in providing any combat units. Yet Nehru felt that India had to respond positively to one of the early employments of forces under the UN, and compromised by providing an Indian field ambulance unit. Such studied neutrality was useful in India's subsequent role in the Neutral Nations Repatriation Commission in Korea. India fielded a strong brigade of nearly 5,000 soldiers to facilitate the exchange of prisoners between the contending sides.

If India was ambivalent about conflicts with Cold War connotations, it was relatively decisive on those viewed primarily through the

lens of anticolonialism. Speaking in the Lok Sabha (parliament) on November 19, 1956, Nehru was harshly critical of the parallel crises in Suez and Hungary as gross and brutal exercises of violence and armed might against weaker countries. His reaction to Suez, widely viewed in India as an act of aggression by former colonial powers, was the more swift and uncompromising. India had been involved in the Suez negotiations all year, Gamel Abdal Nasser and Nehru, fellow founders of NAM, were good friends, and the closure of the Suez Canal had a direct impact on India's trade. For these reasons, India was closely involved in the creation of the UN Emergency Force (UNEF), and supplied infantry, supply, transport, and signal units to UNEF I from 1956 until it was withdrawn in 1967.[7]

Secretary-General U Thant was much criticized when he acquiesced in the Egyptian request to withdraw UNEF. Thant argued that, legally, UNEF's presence was conditional upon Egyptian consent; once the latter was withdrawn, the force had no choice but to follow. Morally, a contrary interpretation would penalize the victim of the original aggression. Politically, the force would have quickly disintegrated with the announcement by India and Yugoslavia, two of the largest contributors, that they would withdraw their contingents from UNEF in deference to the Egyptian request, whatever the decision of the Secretary-General. This was fully consistent with India's insistence that an international force can enter and stay on any country's territory only with the explicit consent of that country.

India viewed the French Indochina war principally as a war of liberation by the Vietminh from French colonial rule. At the 1954 Geneva Conference, India was not a formal delegate, but Krishna Menon attended as Nehru's envoy. India supported this non-UN forum for resolving the Indochina war because only then could the People's Republic of China (PRC), which was long denied its rightful place on the Security Council, take part in the negotiations. The co-conveners of the conference, Britain and the Soviet Union, took care to include balanced representation, and the participation of France and the United States meant that the "real" five permanent members of the UNSC (as opposed to Taiwan holding the Chinese seat) were all involved. The 1954 Geneva Agreements were hailed in India as the outcome of Asian generalship and Asian diplomacy, and essentially in conformity with India's international principles. Without being required to guarantee the agreements, India had an institutional mechanism to influence events in Indochina

[7] Nehru was also instrumental in convincing Nasser to accept a Canadian presence in UNEF. John A. Munro and Alex I. Inglis (eds.), *Mike: Memoirs of the Right Honourable Lester B. Pearson, Vol. II 1948–1957* (Scarborough, New American Library of Canada, 1975).

through its chairmanship of the three supervisory commissions set up in Cambodia, Laos, and Vietnam.

Of the three, that in Vietnam had the most troubled history. Notionally in existence until replaced by a new commission after the 1973 Paris Accords, the International Commission for Supervision and Control (ICC) functioned effectively from 1954–6, progressively less so from 1956–62, and ineffectually thereafter. The Indian member of the ICC was both its chairman and secretary-general. India also provided the bulk of the military personnel. The fate of the ICC during the Vietnam War provided India with object lessons in the difficulties of international peacekeeping outside the UN framework when caught up in an entirely new war involving the security interests of a major power, and of terminating a moribund mission.

India was the largest contributor to the UN Operation in the Congo (ONUC, 1960–4). When ONUC encountered resistance and challenges, the UN responded with the robust use of force. Katangan secession was effectively defeated by the end of 1962 (even though ONUC stayed in existence until June 1964) through this first example of peace enforcement by the UN. Rajeshwar Dayal of India served as the Special Representative of the Secretary-General from September 1960 to May 1961. The force was commanded by an Indian officer, Major-General (later Lieutenant-General) Dewan Prem Chand, who distinguished himself in command of two more UN forces in Cyprus and Namibia over three decades. Indian troops from the start had no hesitation in seeking to end secession by forthright military means, and they bore the brunt of the fighting in Katanga. Even then such a military operation was not possible without major US logistics support, which General Prem Chand obtained after discussions with the US administration.[8] There was a risk in 1962 of Indian units being withdrawn because of the India–China border war, but this did not happen.

After the Congo operation, although India supplied three force commanders for the UN force in Cyprus (UNFICYP) and some military observers to the UN mission in Yemen, the lull in new UNPKO was matched by a downsizing of India's contributions until the late 1980s. In terms of the classifications used in the present volume, as the older type of peacekeeping gave way to missions of expanded tasks and increased complexity, India grew progressively more restive.

India's participation in UNOSOM II (1993–4) in Somalia took place at a time when the Indian army was stretched to the maximum with operational commitments within the country. Four divisions of around 75,000

[8] General Prem Chand in conversation with Dipankar Banerjee in December 1997.

soldiers had returned from an intense, bilaterally approved peacekeeping mission in Sri Lanka in April 1990 and badly needed a rest. At the same time, the key western provinces adjoining Pakistan, Punjab, and Kashmir were dealing with a foreign-backed insurgency, requiring heavy military deployment. Nevertheless, India could not but watch anxiously the deteriorating situation in Somalia, its nearest neighbor in Africa. When US efforts failed and the UN called on India, it considered it an important duty to participate.

There was some debate in the media over whether India could spare any forces at this critical juncture, but, overall, both the government and public supported the commitment of a brigade group to the western part of Somalia, away from the public gaze. Here it performed a silent yet hugely popular role, rebuilding civil society and providing humanitarian support while simultaneously maintaining peace. When the Indian brigade departed, all factional leaders of Somalia personally met Brigadier Mono Bhagat, the brigade commander, to express their thanks and gratitude.[9]

While the non-involvement of the UN had distinctive explanations in the case of Indochina in the 1950s, and was acceptable because only by keeping the UN out could China be brought into the negotiations, India was harshly critical of NATO's 1999 military action in Kosovo.[10] New Delhi rejects the doctrine that any state or coalition can decide to intervene with force in the internal affairs of one country that has not attacked another. The trigger to the war was not ethnic cleansing, but Yugoslavia's refusal to sign the Rambouillet accord. In issuing the ultimatum to sign or face attack, NATO arrogated to itself a right that the international community has not granted even to the UN, namely to dictate the terms of settlement between a central government and one of its provinces. NATO advocates defended the war as a humanitarian campaign uncomplicated by national interests, but as a country colonized by the "civilizing" zealots of earlier centuries, India did not find this quite as reassuring as westerners innocent of their own history seem to think. Nor was India happy at the racial basis for discriminating between Kosovo and other comparable and worse atrocities in Afghanistan, Angola, Rwanda, and Congo.[11]

NATO members ignored and bypassed legitimate UN channels for seeking the opinion and mandate of the international community, choosing not to play by the rules of the game when the result was not to their

[9] Bhagat was still serving as a senior military planner in UNPKO at the end of 2000.

[10] Satish Nambiar, "India: An Uneasy Precedent" in Albrecht Schnabel and Ramesh Thakur (eds.), *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship* (Tokyo, United Nations University Press, 2000), pp. 260–9.

[11] Ramesh Thakur, "The West's Kosovo Rationale Doesn't Look Virtuous," *International Herald Tribune*, May 20, 1999.

liking. NATO unilateralism was a powerful threat to the prospects of a rules-based world order centered on the UN. In India's view, coalition might triumphed over international right, force over the rule of law. India called on the UN for an immediate halt to the arbitrary, unauthorized, and illegal military action.[12] With "ex post facto ratification of [NATO's] coercive action,"[13] the UN was subverted from an institution to protect the weak into one to serve big-power interests. In terms of the Charter, Serbia had every right to call on UN assistance in repelling armed aggression by NATO.

By contrast, India was satisfied with the way that the crisis in East Timor was handled by the international community. The requirement of forging a consensus in the Security Council, no matter how elusive, shallow, or brittle, was not evaded. Even the Australian-led non-UN intervention force, INTERFET, went into East Timor only after authorization by the UNSC; it was required to report to the Council; and it was planned to replace it with a UN force once the security situation had been stabilized.[14] INTERFET entered East Timor only after the consent of the Indonesian government had been obtained. Still, because East Timor involved the break-up of an existing UN member state, India was reluctant to provide troops to the operation, and others were not so desirous of India's participation as to try to persuade it otherwise.

International authorization and democratic accountability

The inference is valid that India was concerned about precedents being set for outside intervention in its own internal conflicts, but to explain its opposition solely in these terms would be mistaken. "Indians are surprisingly conscious of constitutional probity."[15] They find it difficult to understand why, if unlimited government is regarded as tyrannical rather than democratic in domestic political systems, then an unchecked and rampant Security Council should not be thought of as a threat to democracy and accountability in international affairs. The lack of judicial review of executive actions is of particular concern for the protection of minority rights, one of the key tenets of the modern definition of polyarchal

[12] India's Permanent Representative Kamalesh Sharma to the UN Security Council on March 24 and 26, "NATO Military Action against FRY" and "NATO Attack on FRY," respectively; and to the Special Committee on Peace-keeping Operations on March 26, 2000 in *Statements by Indian Delegates at UN Conferences in New York, 1999* (New York, Permanent Mission of India, 2000), pp. 181–3, 200–2.

[13] V. S. Mani, "The U.N. and human rights," *The Hindu* (Chennai), September 6, 2000.

[14] Alexander Downer, "East Timor – Looking Back on 1999" (2000) 54(1) *Australian Journal of International Affairs* 5–10.

[15] Ramesh Thakur, *The Government and Politics of India* (London and New York, Macmillan and St. Martin's Press, 1995), p. 37.

democracy. The absence of independent checks on the arbitrary exercise of power by the UNSC means that there are correspondingly fewer limits on majority rule, and this in turn lessens the protection against the tyranny of the majority and the most powerful.

A similar mix of prudential fears of precedents being set that could one day be used against India, and principled concerns about a departure from Charter principles, underlay India's emphatic rejection of the suggestion of an emerging doctrine of humanitarian intervention. Even during the 1971 Bangladesh War, India did not assert such a doctrine, but concentrated its rhetoric on the potential for national and regional destabilization created by the influx of 10 million refugees said to have crossed into India. It is also worth recalling that robust Indian action in the 1960s had underpinned the UN operation in the Congo to *end* secession.

Perceptions of bias in the UNSC may over time erode India's long-established multipartisan national consensus on UNPKO. The Council is neither representative in composition, democratic in functioning, nor accountable in decision-making. Its permanent membership reflects the world of 1945, not 2002. Some countries remain permanent members for their historical role, not for their current or projected contributions to UN activities. Major players in the UN political, security, or financial sectors are not permanent members of the UNSC; developing countries in particular are seriously under-represented. In the General Assembly on September 27, 2000, Ambassador Kamalesh Sharma was blunt: "The lack of adequate representation of developing countries in the Council severely impairs its functioning and casts a shadow on the legitimacy of its decisions, which impact mainly on developing countries."[16] The UNSC's lack of transparency is another recurring criticism.[17]

Indians are not enamored of an organization that does not practice the principles of democratic accountability that it preaches to others. The UNSC is not likely to meet Dahl's rigorous democratic criteria of political equality, effective participation, agenda control, and inclusiveness. When a peacekeeping mission is authorized by the UNSC, but not given a crisp enough mandate or adequate military means to discharge its functions, who is to be held accountable for the shortcomings? Do those who authorize a mission have any responsibility to contribute appropriate personnel,

[16] Kamalesh Sharma, permanent representative of India to the United Nations, on the Report of the Secretary-General on the Work of the Organization, September 27, 2000, p. 2.

[17] David Malone, "The Security Council in the 1990s: Inconsistent, Improvisational, Indispensable?" in Ramesh Thakur and Edward Newman (eds.), *New Millennium, New Perspectives: The United Nations, Security, and Governance* (Tokyo, United Nations University Press, 2000), pp. 21–45.

skills, and equipment? Alternatively, should those who carry the burden of peacekeeping have commensurate representation in the Council? What is to be done with permanent members who willfully refuse to accept the process of collective decision-making with regard to the funding of UN activities and operations?

Funding is linked to democratic accountability. Noting that India was still owed money for its peacekeeping duties, Ambassador Sharma reminded the Fifth Committee in March 2000 that legislatures could be difficult. Indian MPs, he said, were starting to question why the UN was remiss in making payments. If the practice continued, "legislative and parliamentary support for peacekeeping operations will decline in democracies; the UN might therefore have to turn only to countries free of democratic processes or parliamentary questioning" for troop contributions.[18]

The Sierra Leone crisis of May 2000

The extent to which the UN has become captive to those most reluctant to put peacekeepers into potential danger zones became an issue affecting an Indian infantry battalion operating under the 9,000-strong UN Observer Mission in Sierra Leone (UNAMSIL), commanded by Indian Major-General Vijay Kumar Jetley. On May 1, 2000, about 500 peacekeepers, mainly Zambians but including thirty-five Indians, were encircled by forces loyal to the rebel leader Foday Sankoh. The news of their entrapment caused no ripples in the Indian media or parliament. The government quickly decided to reinforce the troops in Sierra Leone with another infantry battalion, but this again made little news. This was striking but not unexpected, since Sierra Leone is far away, only a handful of MPs can find it on a map, no national interests were involved, and casualties are part of the military's role, provided they are not too high. Only if things go badly wrong will there be serious introspection and a government accounting.

However, the situation was complicated by comments made by the UN Secretary-General to an American reporter, in which he referred to complaints about Major-General Jetley's lack of consultation with members of his peacekeeping team. New Delhi was not impressed with criticism of the force commander by the Secretary-General while the force was under attack, and officially reacted with expressions of renewed confidence in Jetley's professionalism and competence.[19] Indeed, the UN Under-Secretary-General for Peacekeeping, Bernard Miyet, after visiting

[18] Sharma, Agenda Item 122, pp. 2–3.
[19] "Annan Casting Aspersions on Jetley not Justified," *The Hindu*, May 15, 2000.

Sierra Leone, praised the motivation, determination, and competence of Indian and Kenyan soldiers.[20] The Secretary-General's public comments did not help the domestic politics of sending reinforcements to the beleaguered general and his force, but, nevertheless, India accelerated the deployment of 500 additional soldiers.

The crisis underscored the reluctance of the major industrialized countries to put their soldiers at risk under UN command on African frontlines. Ambassador Sharma, speaking in the Security Council on May 12, 2000, cautioned against the temptation to subcontract robust enforcement to a UN-authorized multinational force. This would reinforce the image of UN peacekeeping being for "wimps," and enforcement for the "real" powers. There are some who believe that the UN cannot do what needs to be done, and that "force should be deployed and used by others, with the blessings of the Security Council," he said, adding "As long as UNAMSIL is in place, we cannot warn too strongly against this." He went on to note that Somalia had shown the dangers of military action by forces outside UN command in a theater where peacekeepers are deployed.[21] This is about as clear and authoritative a statement of the Indian position as one can get after the experiences of international peacekeeping, state-building, and peace enforcement of the 1990s.

The tenor of the international press coverage was that those who had the capacity to field professional, well-trained, and well-equipped troops lacked the political will to do so, at least in African theaters. Conversely, those who had the will lacked the professionalism. The result was that the force comprised mainly Third World soldiers. The elision from "Third World" to professional incompetence to aspersions on the quality of the Indian military is likely to engender resistance in India to taking part in UNPKO, if there is near-total absence of troops from industrialized countries.

In the event, Britain did send an aircraft carrier, 900 paratroopers, and 600 marines who secured the airport at Freetown, allowing UNAMSIL forces to be redeployed elsewhere. Subsequently, on July 15, British Chinook helicopters worked with Indian Mi-8 helicopters and 300 Indian para-commandos in a daring and successful rescue mission, personally commanded by Major-General Jetley, to free the peacekeepers.[22] The results vindicated Ambassador Sharma's confidence in the ability of UN

[20] "U.N. Hails Indian Peacekeepers," *The Hindu*, May 17, 2000.

[21] "Britain, Vowing Troops Would 'Hit Back,' Sends Carrier to Freetown," *International Herald Tribune*, May 13–14, 2000.

[22] Michael Evans, "Helicopter Jungle Rescue took 30 Seconds," *The Times* (London), July 17, 2000 and Atul Aneja, "Indian Mission in Sierra Leone to Continue," *The Hindu*, July 17, 2000.

peacekeepers to do the necessary job if given the requisite means and support. The action won praise from Indian commentators, not least for bolstering the credibility of UN peacekeeping.[23] And it was through the press, not parliament, that the government spoke to the people about the international success of Indian armed forces on UN duty.

However, when the UN decided to replace Major-General Jetley with a force commander from another country in September 2000, India announced that it was pulling all its troops out of Sierra Leone. This was the first time that India had ever withdrawn from UN peacekeeping. New Delhi felt that its engagement was being taken for granted. The press generally supported the government's decision as "the only honourable option open to it."[24]

National authorization

India's motives for participating in UNPKO are a mix of idealism (commitment to internationalism) and pragmatic calculations (pursuit of national interests). International activism and sharing the burden of global peacekeeping are perceived as supporting India's self-definition as a "good international citizen." They also fulfill India's role as a representative of developing countries and the NAM in global forums. Through such endeavors, India hopes to promote the cause of its permanent membership on the UNSC. From the point of view of the defense forces, participation in international PKOs provides an opportunity for image-building for the nation and particularly for the armed forces. In the absence of formal alliances and substantial multilateral exercises with allies, UNPKOs provide Indian troops with the only opportunity for systematic interaction with the forces of other nations and facilitate the development of important international operational skillsets.

PKOs can require considerable financial outlays. Problems arise because of differences in equipment and procedures. The personnel selected must have the requisite language skills, and the host country has to accept foreign military personnel being stationed on its territory – a symbolic violation of territorial sovereignty. On the benefits side, participation in UNPKOs is tangible, demonstrable evidence of willingness to serve in the cause of international peace maintenance. PKOs increase mutual understanding and confidence and facilitate networking and political contacts. They lead to cross-cultural professional exposure and to the fostering of a cross-national professional military culture. They also produce better

[23] "Making Peacekeeping Safe," editorial in *The Hindu*, July 19, 2000. See also Evans, "Helicopter Jungle Rescue."

[24] "Peacekeeping Imponderables," editorial in *The Hindu*, September 27, 2000.

understanding of the political system, defense perspectives, and culture of the host country. They promote transparency and interoperability, and permit benchmarking and measurement. The multilateral frameworks of UNPKOs are thus useful in nesting national security interests collaboratively.

A well-crafted policy exists to decide India's participation in overseas military missions. Procedures were refined in the 1990s, as India's contribution grew steadily during this period. Opposition to participation is limited. Within the generally supportive policy framework set by the government, the decision to participate in any specific operation lies more with the bureaucracy than with the elected representatives of the people. Debates in parliament are rare and muted. There have been some discussions in the media, but this is more in the nature of highlighting the activities of the forces rather than scrutinizing the policy decision regarding participation.

Parliament formally controls the reins of government in the sense that the cabinet is required to have the confidence of the Lok Sabha (House of the People) and is collectively responsible to parliament. Thus, in theory, the prime minister and cabinet hold office at the pleasure of parliament. In reality, parliament is usually in existence until the executive decides to call elections. While in principle the executive is subject to parliamentary control, in fact parliament is malleable to the executive's will. Acting with the government, parliament is all-powerful; if it chose to act independently of the government, it would sow confusion and unpredictability in the affairs of state and the minds of the people; if it chose to act against the executive, parliament would bring the business of government to a standstill until fresh elections were held.

The prime minister is the linchpin of India's system of government.[25] The Constitution defines the duties of the prime minister, but not the powers of the office. The peculiarities of Indian politics give large scope for prime-ministerial control of political life through domination of party processes. In principle, the cabinet is the chief governing authority in the country and the final arbiter of India's external relations: from declaration of general principles of foreign policy to decisions of war and peace and negotiations of trade agreements and military alliances. Its central role in government makes it the focus of most interest-group activity and lobbying, which in turn makes it one of the chief mediators and conciliators of sectoral interests. The power and influence of cabinet collectively, or cabinet ministers individually, depend principally on the personality of the prime minister of the day, and secondarily on how independently

[25] Thakur, *The Government and Politics of India*.

powerful and independent-minded cabinet ministers are. Cabinet is assisted by several committees, the most important of which deal with parliamentary, political, foreign, defense, and economic affairs. Important issues are usually examined in committee before being taken to the cabinet as a whole for debate and approval or rejection.

Agencies in the decision-making process

The Ministry of External Affairs (MEA) determines the international political acceptability of a proposed peacekeeping mission and whether it serves national interests. The Ministry of Defense (MOD), which does not have any separate organization to deal with international security, examines the request from the perspective of domestic political acceptability. The Armed Forces Headquarters is responsible for the military operational aspect of the decision-making. Of the three, as the nodal agency for all international interactions, the MEA's view is usually decisive in the decision to say aye or nay to a UN request for an Indian contribution to an existing or proposed PKO. Sometimes personal or departmental matters, rather than policy, may intervene in the actual decision.[26]

The MEA's UN Division, headed by a joint secretary with a small staff, is the main coordination body responsible for policies relating to UNPKOs. Peacekeeping is a comparatively small part of its responsibility, and given its nature and staffing, peacekeeping decisions receive somewhat limited attention, restricted to according political approval and its attendant analysis. The MOD sets out broad policy guidelines. The defense minister is a senior member of the cabinet, a member of its Political Affairs Committee and the National Security Council. The Permanent Mission of India (PMI) to the UN in New York, overworked and with no military officer to provide it with military expertise, acts as liaison between the MEA/MOD and the UN, effectively serving as a conduit for information and requests, rather than an advisory body.

The nodal body for all staff support to decision-making about an operation, launching peacekeeping and observer missions, and liaison with Indian contingents when abroad, is a special UN cell at Army HQ, headed by a colonel, invariably with experience in a UN mission, with a small staff. The cell functions under the deputy chief of army staff (lieutenant-general), the additional director-general staff duties (major-general), and a deputy director-general staff duties (brigadier) of the Army HQ. This UN cell coordinates participation by the navy and air force, but they

[26] At an informal interaction with Dipankar Banerjee, senior Indian army officers claimed that a defense minister in the mid-1990s, piqued by the army's reluctance to clear a favored candidate for promotion to senior ranks, withheld permission to participate in a UNPKO, against the army's wishes.

make independent decisions regarding force composition and operational preparedness.

The decision-making process

India's decision-making on participation in UN operations can be divided into two parts, the procedure on receiving an informal request from the UN DPKO, and action following a formal request. (see Figure 8.1).

Informal request The military adviser of the DPKO makes an informal request to the PMI in New York, spelling out the requirement in broad outline, such as the estimated strength of forces, country of deployment, nature of the task, and other broad details that may be available. The request is transmitted by the PMI to the MEA and the UN cell at Army HQ. The UN Division at the MEA carries out a political risk analysis to determine participation. This will include whether:

- it is consistent with or contrary to India's national security interests;
- the operation is in a friendly country where Indian participation may result in misunderstandings and diplomatic difficulties;
- there is a sizeable Islamic population where Indian forces might be involved in sectarian or religious strife. For example, India was reluctant to participate in Bosnia, as the former Yugoslavia was a founding member of the NAM and the conflict there involved Muslims;
- the operation respects the sovereignty and territorial integrity of the host country;
- the operation will be undertaken as far as possible with the consent of the government where troops are being deployed. It should also have regional and international consensus;
- besides peacekeeping, UN missions will focus on the economic and social problems that lead to political tensions which are not sufficiently addressed in UNPKOs;
- there is absolute unity of command and control vesting in the UN. All troops must be under the UN flag and not under multinational force operations. Unilateral interventions are to be avoided;
- peacekeeping operations have a clear mandate with a finite timeframe.

The whole examination process takes approximately forty-eight hours. If the MEA considers the potential mission unacceptable, it rejects it and informs the PMI, which in turn will convey the government's decision to the UN. A few missions have been rejected, including a request for a battalion for UNTAES (Eastern Slavonia), which was considered likely to get Indian troops involved in a European environment and, therefore, prove unproductive. If the MEA approves the mission, the request is sent to the joint secretary (G) MOD, usually within twenty-four hours.

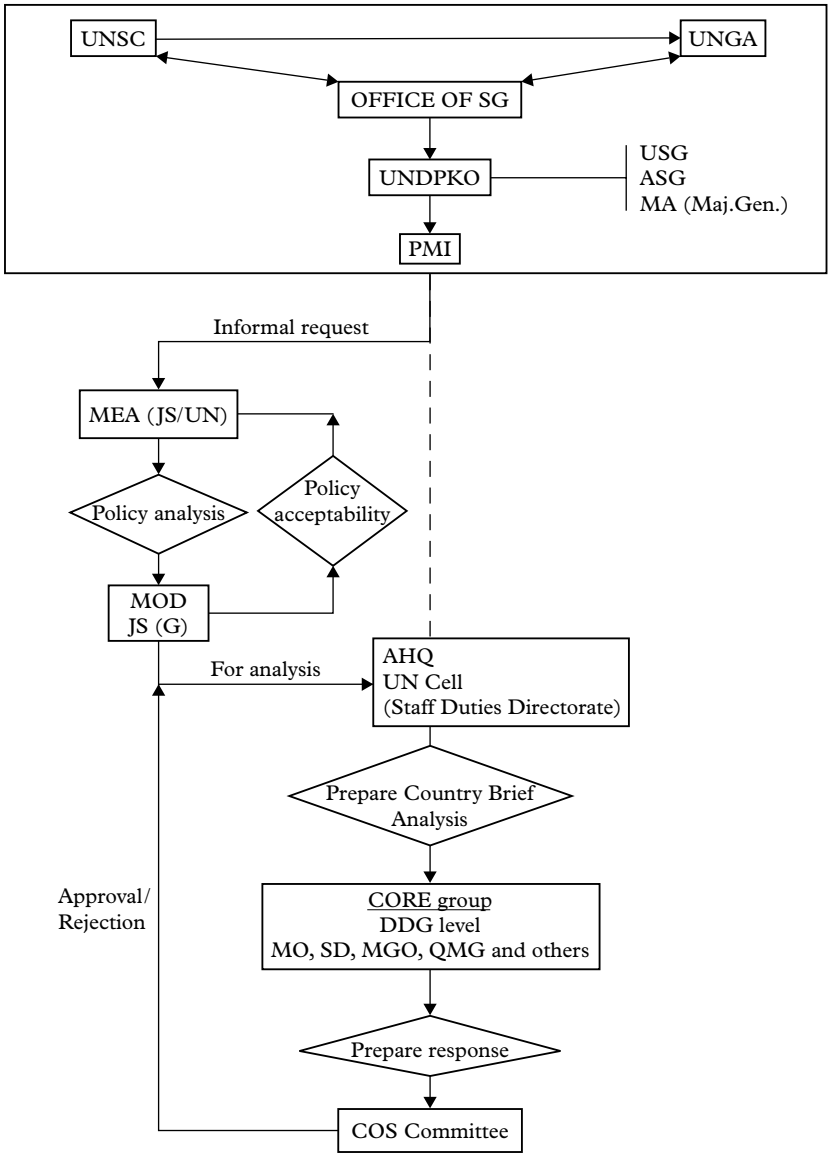

Figure 8.1 Force contribution decision-making flow chart.

Figure 8.1 (*cont.*)

Abbreviations/Acronyms

UNSC – UN Security Council
UNGA – UN General Assembly
UNDPKO – UN Department of Peacekeeping Operations
PMI – Permanent Mission of India in the UN
USG – Under Secretary-General
ASG – Assistant Secretary-General
MA – Military adviser

MEA (JS/UN) – Ministry of External Affairs Joint Secretary United Nations
MOD JS (G) – Ministry of Defense, Joint Secretary (General)
AHQ – Army Headquarters
UN Cell – United Nations Cell
CORE Group – Combined Operations Review and Evaluation Group
DDG Level – Deputy Director General (one star) level
Representatives from
MO – Military Operations
SD – Staff Duties
MGO – Master General of Ordnance
QMG – Quarter Master General

COS – Chiefs of Staff

Simultaneously, the informal request is processed at the UN cell at Army HQ. It carries out a country analysis and, with the sister services, a joint military analysis. The country analysis examines the nature of the problem, infrastructure available, and sensitivity and practicability of the mission. The military analysis examines the feasibility of the mission and resources required. A core group of one-star officers from different branches of the HQ and sister services then assemble to discuss the analyses. The Chiefs of Staff Committee will give approval in principle if it is a tri-service operation; otherwise, the Chief of Army Staff will approve the mission. The request is then transmitted to the joint secretary (G) MOD for approval of the defense minister. The armed forces take pride in never having rejected a mission as militarily unacceptable. The MOD will rarely oppose the recommendation of the service chiefs.

The informal request will then be approved by the foreign minister and transmitted to the PMI in New York.

Formal request The DPKO will initiate a formal request only after the UNSC has approved the mission and made a decision regarding force participation. The request will now include:

- a description of the threat perception and analysis of the situation;
- the mission objectives;

- an outline of the plan of action envisaged;
- the allotted area of responsibility for each country.

If India has already received and considered an informal request, the next steps are practical measures for implementation. The procedure to be followed remains largely the same. If details in the formal request include any new element, this will now be examined. The MEA carries out a more thorough examination at this stage. The UN cell at Army HQ initiates the standard operating procedure for implementation and does a careful cost analysis of the mission.

Mission costs are of two types: launch and maintenance. The launch costs include the equipment costs of the unit and any additional cost for the particular operation. For an Indian infantry battalion this comes to Rs. 250,000,000, about US$5,319,000 at 2002 exchange rates. The maintenance costs at the location of operation are borne by the UN. Financial issues are separately examined by the financial adviser (defense services) in the MOD.

Once the staff examination is over and before preparations begin, the formal sanction of the cabinet is obtained. This is done through a cabinet paper prepared by the MEA through the cabinet secretary. It is not necessary that this information or the decision to participate be shared with the public. More often, it is only after the decision has been made that the public is informed through a press briefing. Participation in UNPKOs is not a political problem for any government of India. The only contentious operation was the 1987–90 Indian Peace Keeping Force (IPKF) in Sri Lanka (which, as a unilateral PKO, is outside the scope of this study).

Monitoring of deployed forces abroad is done at two levels. One is through an active and independent media that often disseminates human-interest stories carried in a very positive manner. When there are casualties, these may attract some questions, but the PKO itself is seldom put in an adverse light. The other is through parliamentary Question Hour. In a parliamentary session lasting a few weeks, there will be an average of four questions related to UNPKOs. These range from the equipment profile of the unit, to issues of risks and casualties, compensation to troops, and financial and accounting matters. Detailed notes are prepared for the minister in advance by the Defence and Foreign Ministries, with inputs from the services HQ. Statements made in parliament become part of official records and are also quoted in the media.

Civil–military relations

Questions of civilian responsibility to the military and of Indian peacekeepers complying with international norms have not been issues in India. They will not, therefore, be discussed in separate sections, but subsumed

within the broader topic of civil–military relations. Nehru and his ministers asserted and established the supremacy of political control over the military. Ministers are responsible for defense policy, soldiers carry out military operations.

The Indian armed forces

The 1 million plus Indian defense force – an all-volunteer force of long-serving career soldiers – is among the largest in the world, and one of the most powerful and sophisticated among the developing countries. While it is an effective lobby group in the competition for scarce resources, its influence over domestic politics is limited. Defense expenditure (over $13 billion in 1999, in 1995 prices) accounts for about 20 percent of central government expenditure and 3.2 percent of GDP.[27]

India inherited from the British a large defense force, the pattern of military organization, the tenets of military doctrine, and the subordination of the military to civilian authority. The British Indian army instilled in its officers the discipline of political neutrality. Had the army played a major role in the independence struggle, it might have developed a claim to political power, but it did not. The Indian army remains depoliticized, despite the contrary examples of military forces in neighboring countries and of the Indian bureaucracy and police.

Thus, India conforms to the liberal model of civil–military relations in which government is firmly in the hands of civilian politicians. The commander-in-chief is the president of India, but this is a constitutional arrangement, and he exercises little actual power over the military or any of its decisions. Ministerial responsibility is the doctrinal assertion of the supremacy of elected officials over the machinery of government. If citizens do not like the uses to which the military is put, they can vote the government out at the next elections. The most efficient route to political power in India has been through the Congress Party, and latterly the Bharatiya Janata Party (BJP), plus quite a few regional parties, not the Indian army.

Constitutional inhibitions and bureaucratic structures have kept the advisory and representational functions of the military in the defense-security sector. The military establishment retains control of command and operational matters; military policy-making is firmly in the hands of the civilian MOD and cabinet. The military leadership may sometimes question the extent of civilian-political control of defense matters, but they have never questioned the right of such control. The participation

[27] IISS, "India's Military Spending: Prospects for Modernisation" (2000) 6(6) *Strategic Comments*.

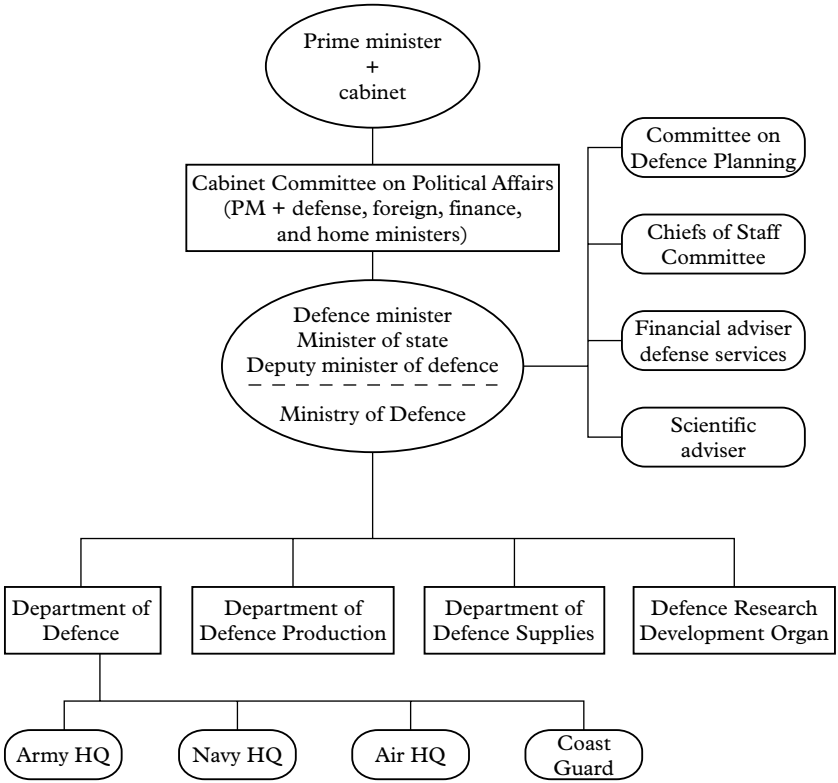

Figure 8.2 The structure of India's civil–military relationship. *Source:* Thakur, *The Government and Politics of India*, Figure 8.1, p. 213 (reprinted with permission of Macmillan Press).

of the military in the policy process is limited to interest-group activity, such as lobbying for increased resources. Their unhappiness stems more from a perceived lack of strategic knowledge by the bureaucrats and politicians when making decisions on such things as force modernization and weapons acquisitions. (This is not unlike the unhappiness of professional military officers with the lack of significant military input into UN decisions on peacekeeping.) There has also been periodic restiveness in the armed forces at a lack of promotion opportunities and deteriorating pay and service conditions, compared to their civilian counterparts.

Until very recently, India did not have a National Security Council (NSC) or any comparable institution which could take a holistic view of national security and assist in the decision-making process. The bureaucracy strongly opposed such a supra-decision-making structure in a cabinet/parliamentary system. It may well have feared that an NSC system

would erode the powers of the civil bureaucracy, which would lose much of its importance. The idea was nevertheless mooted periodically, and the BJP included the intention to establish such a council in its 1998 election manifesto. When it came to power that March, it set up a task force to examine the idea. The task force submitted its recommendations on June 26, 1998, and five months later the government constituted the NSC.

The Council is a six-member committee headed by the prime minister and consisting of ministers of defense, external affairs, finance and home affairs, plus the deputy chairman of the Planning Commission. The principal secretary to the prime minister, in addition to his other duties, is the national security adviser. Under him, there is a three-tiered back-up structure:

- *the Strategic Planning Group*, consisting of the cabinet secretary, the three service chiefs, and a number of key secretaries to the government of India. The Strategic Planning Group is expected to undertake a strategic defense review, assess long- and short-term security threats to the nation, and prioritize these threats;
- *the National Security Advisory Board*, consisting of about thirty members presently, including retired military officers, civilian bureaucrats, strategic specialists, media analysts, and other generalists outside government. Their task is somewhat vague and is expected to be mainly advisory. However, the head of this organization recently came out with a Nuclear Doctrine for the country, a report that was subsequently released as a basis for future planning;
- *the National Security Council Secretariat*, an existing intelligence assessment body that has been suitably revamped and renamed to provide staff support to the NSC.

The NSC has not been functioning long enough to assess its performance. Over time, it may well develop an important role in deciding macro-strategic issues and security policies, including Indian participation in using force internationally.

On the question of civilian responsibility to the military, probably the most crucial point to grasp is that India's casualty-tolerance level is significantly higher than that of the major western democracies. The major explanation for this lies in the acceptance of the occupational risks that are part and parcel of professional soldiering. Indian Lieutenant-General Satish Nambiar, the first UNPROFOR force commander, has spoken scathingly of the dishonor to the military profession of the zero-casualty, high-altitude warfare fought by NATO in Kosovo in 1999.[28] Because the

[28] In discussions with Ramesh Thakur as part of the UN University project on Kosovo; see also Nambiar, "India: An Uneasy Precedent."

Indian military has itself been so keen to participate in UNPKOs, it has been relatively unconcerned with the question of civilian responsibility for decisions to do so.

As for norm compliance, members of the Indian armed forces remain subject to national military discipline for all acts of commission and omission, even while serving on UNPKO missions. In agreeing to contribute units to UNPKOs, India does not thereby hand over control of policy matters to the UN or the force commander. All important matters, including – indeed, especially – the question of robust use of force, are still referred back to New Delhi through the appropriate military chain of command. Troops violating international norms or national regulations are dealt with and disciplined, if necessary, through established procedures governing the conduct of Indian soldiers. In this respect, India is not different from most troop-contributing countries.

It is also worth recording a basic questioning by India of the assumption that the UN Security Council is the interpreter, arbiter, and enforcer of global norms. The manner in which norms emerge and are consolidated to the point where it is accurate to speak of "global" norms is a seriously under-researched subject. The UNSC is the geopolitical center of gravity in world affairs; the normative center of gravity is the General Assembly. Although the harshest questioning by India of the Council's role as norm-enforcer occurred in the context of the criticisms of India's 1998 nuclear tests,[29] the critique has more general relevance.

Democratic accountability domestically

There is no special constitutional provision in India governing participation in UNPKOs or committing forces abroad. The formal mechanisms for ensuring democratic accountability are neither more than, nor different from, the general checks and balances that operate in a parliamentary system of government. It is the informal processes that keep the democratic deficit from getting out of control in India.

Formal mechanisms

The Constitution of India is unusual in explicitly exhorting the state to promote international peace and security. Article 51 provides that "The State shall endeavour to promote international peace and security; to maintain just and honourable relations between nations; to foster respect for international law and treaty obligations in the dealings of organized

[29] Ramesh Thakur, "South Asia and the Politics of Non-proliferation" (1999) 54(3) *International Journal* 404–17 at 414.

people with one another; and to encourage settlement of international disputes by arbitration." This is buttressed by article 253, which gives the central parliament the power to legislate on any subject (even those falling within the provinces' purview in the constitutional division of subjects) for the purpose of implementing international treaties, agreements, and conventions.

India ratified the UN Charter and thereby accepted its international commitment; participation in UNPKOs is an executive prerogative. Parliamentary approval or discussion is not required before the dispatch of forces abroad for this purpose; but there are many indirect ways of maintaining parliamentary oversight. A decision having been reached to participate in a particular UNPKO mission, the foreign minister or the prime minister may make a *suo moto* statement in parliament or in an appropriate public forum. If necessary, the consultative committees of the Ministries of External Affairs and Defense may be briefed regarding the decision. Parliament itself may discuss participation in UNPKOs through various procedures, for example during debates on the Foreign or Defence Ministries' budget. However, not much time is available for discussion, and, in practice, direct parliamentary oversight has been limited.

As discussed earlier, there is a multipartisan consensus in support of Indian participation in UNPKOs. Only two factors are likely to affect this. One is very heavy casualties, but "very heavy" is difficult to quantify. As already noted, the casualty-tolerance threshold in India is high. About 400 soldiers die every year in internal insurgencies, other operations, and along the Line of Control in Kashmir. Over 550 Indian soldiers died in the Kargil War alone in mid-1999. Compared to that, the total casualties in UNPKOs have been negligible. The other factor is the availability of forces after meeting national operational requirements. The Indian army's peacetime strength of over 1 million soldiers is sufficiently large to find the requisite forces under most conditions.

Informal controls

Democratic accountability is ensured more effectively through informal bargaining, accommodation, and explanations than through the formal mechanisms of parliament. Five such informal controls are particularly important: the nature of the party system, the persistence of coalition governments, the changing role and influence of opposition parties, the politics of federalism, and the changing nature and growing influence of the press.

The ruling party has always represented a range of interests, political constituencies, and philosophical perspectives. For the first two decades

after independence, the Congress Party operated in what came to be labeled a "one-party-dominant" system. Although India formally had a multiparty system, in practice the Congress Party was dominant at both the federal and state levels. It was an aggregative party whose reach extended into the furthest corners of the country. The introduction of universal adult suffrage was the prelude to the incorporation of the hinterland into the political system. Policy debates within the party were frequent and vigorous. The social diversity of India and the multiplicity of points of view were channeled into the cabinet room through the party's organization.

In order to retain its dominance in the Indian political system, Congress had to work consciously at remaining an aggregative political force. This meant that every significant opposition party had an ideological or sectional counterpart within Congress. Precisely because the formal opposition parties were so sparsely represented in parliament and posed no threat to it as the governing party, elements within Congress claimed and were granted a certain leeway in functioning, in effect, as the real opposition to majority preferences and policies. Although the BJP is not quite as broad a church, it is not restricted to just one region, class, or caste. It is a genuinely national party. It is, however, predominantly a Hindu party, and appeals mainly, but not exclusively, to upper castes.

More importantly, the BJP is in government as the result of having formed a winning coalition both before and after the last election. In the coalition of over a dozen political parties, the BJP is the only truly national party; all others are restricted to just one or two provinces. Their interests and perspectives, therefore, are far from being convergent or cohesive. The process of making and implementing policy is thus an exercise in political bargaining around the cabinet table. The last time that a party won a majority in its own right was in 1984, when Congress achieved a solid majority under Rajiv Gandhi's leadership. Coalition politics, with its built-in premium on democratic accountability, is the norm in modern Indian politics.[30]

The opposition in a parliamentary democracy is expected to play the role of an alternative government. This was not the case for much of independent Indian history, due to the complete dominance of the Congress Party, until its defeat in 1989. With the alternation of governments a very real prospect since then, the role of opposition parties has acquired a new significance. Regardless of their numbers or capability to form an alternative government, they register and express the diversity of Indian opinions. The opposition also serves to keep a government on its political toes, even if it loses when the votes are tallied on any motion. Its

[30] Ramesh Thakur, "A Changing of the Guard in India" (1998) 38(6) *Asian Survey* 603–23.

statements in parliament, televised over the national channel, are heard in the country at large and often listened to within the ranks of the ruling party or coalition. This makes the opposition parties in India more influential than is suggested by mere numbers, since the debate ostensibly between the government and opposition serves to structure the internal debate within the ruling party. This has been a distinctive feature of Indian politics.

By the 1990s, politicians had become less cosmopolitan and more provincial, even as federalism became steadily more complex, requiring bargaining and accommodation between governments run by various political parties. Provincial governments are controlled by a full range of parties, not many of which are national in interests, presence, or activity. India's competing pulls of ethnic assertion and national integration have been reconciled in a complex yet adaptable system of power-sharing and devolution. Democracy and federalism are the two great institutions of its constitutional structure, seeking a balanced distribution of power between the state and the citizen, and between the central and provincial governments. The Constitution attempts to establish institutions and practices that permit the preservation of distinct regional identities while maintaining a sense of Indian nationhood. But there is also considerable center–provinces and province–province collaboration. While the Constitution emphasizes demarcation, practical politics place a premium on cooperative bargaining.

Finally, the mushrooming press keeps the government on its collective toes. The explosion in information technology, the impact of globalization, and the erosion of one-party dominance have combined to usher in a revolution in media expectations, irreverence toward government, inquisitiveness, and analyses that would bewilder someone from the Nehru era. The government-controlled radio and television channels have suffered an erosion of audience size and credibility as the market for news and current affairs has grown. The vacuum has been filled by independent national and global satellite-broadcast networks and channels. Any "spin" that the government might put on the news can be neutralized by people switching to BBC, CNN, Star TV, or Zee TV channels, or reading the leading world papers on the internet in real time. In turn, of course, independent news sources are grist to the opposition parties, or to dissident voices within the ruling coalition, in demanding explanations and policy modifications.

The Sri Lanka crisis of May 2000

The complex nature of Indian consensus-building and decision-making in external peacekeeping operations was exemplified most clearly in the

case of Sri Lanka in May 2000.[31] The Liberation Tigers of Tamil Eelam (LTTE) had controlled the Jaffna peninsula from 1990 to 1995, but then lost it to government forces. The strategic Elephant Pass fell to the Tigers in late April 2000, throwing open the gates to the peninsula and exposing it to an early attack, which soon followed. The rapid progress of the LTTE in May 2000 against an army six times its size highlighted major flaws in the training, intelligence-gathering, motivation, and operational tactics of the Sri Lankan armed forces. It appeared that the only way the Sri Lankan government could retrieve the military situation was through intervention by the Indian army. The government appealed for Indian military assistance, arguing that India owed a moral debt for having trained and armed the Tamils in the 1980s.

Four considerations shaped India's response. First, its responsibility for regional security as the preeminent power in South Asia. Secondly, India's disastrous involvement in Sri Lanka from 1987 to 1990, when the 75,000-strong IPKF lost over 1,100 men to LTTE attacks and came to be simultaneously hated by the Sinhalese. Thirdly, that over 50 million ethnic Tamils live in the Indian province of Tamil Nadu, just across the narrow straits from Sri Lanka; and fourthly, India's firm opposition to secession through terrorism. The corresponding policy principles were concern and interest in the crisis, avoiding a military intervention, securing the legitimate aspirations of Tamils within a united Sri Lanka, and preserving the sovereignty and territorial integrity of Sri Lanka.

National opinion was clearly split, and in consequence the government refused to be rushed into a decision. Tamil Nadu in the south, and particularly certain political factions from that province supporting the ruling coalition government in New Delhi, wished for a Tamil victory and *Eelam* (independence) and wanted India to do nothing to prevent it. Many others, particularly in north India, saw in this a principled opportunity for India, and also part of the responsibility of an aspiring regional power, to take a firm stand against terrorism aimed at secession.

The prime minister held long deliberations, first within his cabinet and then with the NSC. Separate discussions were held with the foreign minister of Sri Lanka, leaders of coalition parties, the chief minister of Tamil Nadu, and all members of the central parliament from that province. Finally, there was a meeting with all opposition parties. Every effort was made to develop a consensus, and only when this emerged was the policy

[31] In addition to the authors' own discussions with policy makers, the section on Sri Lanka draws on P. Sahadevan, "India's Wise Decision," *The Hindu*, May 12, 2000; C. Raja Mohan, "India to Tread Cautiously," *The Hindu*, May 16, 2000; and Celia W. Dugger, "A Wary India Prepares to Step Back into Sri Lanka's War," *New York Times*, May 25, 2000.

announced. It had four pillars: no military intervention, mediation in the situation only if both parties wished it, humanitarian assistance (including evacuation of troops and civilians) to be provided as the situation warranted, and, finally, no recognition of the LTTE, even if it established control over the peninsula. As parliament was in session, tradition demanded that a policy statement be made there. This was done first by the foreign minister in both Houses of Parliament. Later, the prime minister made a detailed statement in the Lok Sabha.

Conclusion

India has a proud record of commitment to UNPKOs, in both principle and practice. Participation in UNPKOs is neither a politically contentious issue in India, nor a constitutionally complicated exercise. It has not been a divisive subject of public debate. PKOs permit India and other countries to reconcile the potential tension between the commitment to international idealism and the requirements of national security, but there is no automatic commitment to participate. Each request for a contribution to a UNPKO is decided by the government of the day under normal democratic processes.

Democratic accountability exists in the form of the executive being accountable to the legislature. In theory, the prime minister and cabinet hold office as long as they command the confidence of parliament. In reality, as in almost all cabinet systems of government, the parliament can be dissolved and new elections called by the executive. This chapter has argued that the modalities of accountability for the international use of force are more nominal than real constraints on the Indian government's freedom of action. De facto democratic accountability in India exists through vigorous intra-party and contested inter-party political debate, public opinion, an independent press, and the increasingly rich texture of civil society. India therefore offers a good example of Karen Mingst's arguments on the role of historical memory, societal variables, and domestic political interactions determining decisions within the relevant enabling/limiting constitutional framework.

Having said this, four potential developments could have an adverse impact on India's willingness to contribute troops for overseas deployment under UN authority: the emergence of a powerful India, the breakdown of the national consensus on foreign policy, growing unease about the extent to which the UN agenda is being hijacked by the most powerful member states, and the translation of this agenda into military interventions.

For self-evident reasons, a prosperous and powerful India would develop a longer and fuller train of interests in many conflict-prone parts of the world where presently it has few direct interests. Since political

neutrality and military impartiality are major assets for peacekeepers, this would correspondingly erode India's peacekeeping credentials.

Secondly, the foreign policy consensus on national security issues broke down, for the first time since independence in 1947, with respect to the testing of nuclear weapons in 1998. If partisan divisions spread to other areas of foreign policy, then India's contributions to UNPKOs could also become subject to party-political wrangling in domestic Indian politics, just as they are in the United States. Alternatively, the divisiveness may be restricted to nuclear issues while a broad multipartisan consensus is maintained on all other fronts. Ironically, the NATO action in Kosovo helped restore the national consensus in India, in that it seemed to validate the need for an independent nuclear deterrent and vindicated India's nuclear tests. Thus, a former Foreign Secretary noted, "If it is Iraq and Yugoslavia today, it could very well be India tomorrow."[32]

Thirdly, there has been a perceptible undercurrent of unease since the end of the Cold War that the will of the UNSC has been bent too easily and too often to the wishes of the sole superpower. The Security Council is the core of the international law-enforcement system. The threat of bypassing it, if it does not heed the call to action by a particular military alliance, subverts it from an instrument of the international community into a tool in the hands of the dominant coalition. We have only one superpower, the United States, and only one general-purpose international organization, the United Nations. Progress toward a world based on reason and justice, where force is put in the service of law, requires that US power be harnessed to UN authority. The risk is that the latter will be subverted to serve the interests of the former. If that perception were to take hold, then the willingness of many countries, including India, to accede to UNSC requests for troop contributions would be severely tested.

Fourthly, and following from the last concern, Kosovo and East Timor fueled fears that the traditional balance between governments and non-state groups in the legitimate recourse to violence is being challenged. In Europe, centralizing states sought to bring order to their societies by claiming a monopoly on the legitimate use of force. Developing countries fear that in some sections of the west today, the view has gained ground that anyone *but* the legitimate authorities can use force. If this is then used as an alibi to launch UN-authorized humanitarian interventions against the wishes of the legitimate governments of member states, the international organization would quickly be viewed more as a threat to the security of many countries than as a source of protection against major-power predators.

[32] Muchkund Dubey, "The NATO Juggernaut: Logic of an Indian Defence Deterrent," *Times of India* (Delhi), April 8, 1999. See also the editorial "Might on Show," *Times of India*, April 2, 1999.

Part IV

Newcomers to international military operations

9 Japan: moderate commitment within legal strictures

Akiho Shibata

Introduction

Japan's participation in United Nations peace operations has long suffered from an underlying tension between the country's general support for the United Nations and its deep-rooted reluctance to use military force.[1]

The devastation of the Second World War had created an abiding suspicion among the Japanese toward military organizations and military solutions. This suspicion was manifest in the strong support for article 9 of the Showa Constitution of 1946, which renounced war and the means to prosecute war. At the same time, Japan has consistently been one of the strongest proponents of the United Nations. Since the time Japan was admitted to membership in the UN in 1956, the Ministry of Foreign Affairs (MOFA) has made every effort to play an active role in all aspects of the organization, except those involving the military. The Japanese public generally approved these efforts. However, as the UN's primary role of maintaining peace and security revives with the demise of the Cold War and its peace operations expand and diversify, Japan has come under growing pressure to commit more substantially to peace operations under UN auspices, including direct participation in UN military activities.

In the 1990s, the tension came to the fore in a dramatic fashion, as the government and people of Japan were compelled to reconsider the policy defining the scope of Japanese contributions to UN peace operations. The Peacekeeping Law adopted on June 19, 1992[2] is the main building block of that policy. The revision of the Peacekeeping Law in 1998,[3] and

[1] L. William Heinrich, Akiho Shibata, and Yoshihide Soeya, *United Nations Peace-keeping Operations: A Guide to Japanese Policies* (Tokyo, United Nations University Press, 1999), p. 7.

[2] "The Law Concerning Cooperation for the United Nations Peacekeeping Operations and Other Operations," Law No. 79 (June 19, 1992). For an unofficial translation, see (1993) 36 *Japanese Annual of International Law* 272–89.

[3] Law No. 102 (June 12, 1998).

the adoption of the so-called "Surrounding Situations" Law of 1999,[4] demonstrate the development of that policy. The debate relating to these laws in the Diet (Japanese parliament) and by the Japanese public sheds some light on certain aspects of democratic accountability.

This chapter aims to clarify the Japanese domestic legal framework, policies, and mechanisms which enable as well as limit Japanese participation in UN military operations. In so doing, an emphasis is placed on the democratic aspects of that framework and those policies and mechanisms.

The debate within a historical context

The debate on the possibility of Japanese participation in UN military operations is as old as the history of Japan being a member of the United Nations. Though such a debate took place in several contexts, the dispatch of Japanese Self-Defense Forces (SDF) was never a realistic policy option until the end of the 1980s.[5]

After it was admitted to the United Nations in 1956, there was a discussion about whether Japan could participate in the UN peacekeeping operations. This discussion took place in the context of two UN operations: the UN Observation Group in Lebanon (UNOGIL) in 1958 and the UN Operation in the Congo (ONUC) in 1960.[6] But in both cases, the domestic laws, especially the provision of the SDF Law, were cited as not authorizing the dispatch of SDF personnel abroad, irrespective of the nature of the UN operations.

In the 1970s and early 1980s, the MOFA initiated a series of studies clarifying the parameters of possible Japanese participation in UN peacekeeping operations. One outcome of the studies was an official unified view (*toitsu kenkai*) of the government submitted to the Diet on October 28, 1980.[7] In this statement, the government distinguished two types of UN peacekeeping operations: the cease-fire monitoring missions and the so-called peacekeeping forces. The UN forces in Korea, according to this statement, did not fall under either of the UN

[4] "The Law Concerning the Measures ensuring the Peace and Security of Japan in Cases of Surrounding Situations," Law No. 60 (May 28, 1999).

[5] Akihiko Tanaka, "United Nations Peace-keeping Operations and Japan" in T. Nishihara and S. Harrison (eds.), *United Nations PKO and the Japan–US Security* (Tokyo, Aki Shobo, 1995), p. 140 (in Japanese).

[6] Heinrich, Shibata, and Soeya, *A Guide to Japanese Policies*, pp. 8–14.

[7] Prime Minister Zenko Suzuki, Response Paper regarding the questions submitted by Mr. Inaba (October 28, 1980), reproduced in Akira Nakamura, *Article 9 of the Constitution and Post-war Politics* (Tokyo, Chuokeizaisha, 1996), p. 266 (in Japanese).

peacekeeping operations. The statement then went on to delimit Japanese participation:

> If the purpose and duties of a particular UN operation involve the use of force, the Japanese SDF shall not be permitted to participate under the present constitution. On the contrary, if the purpose and duties of a particular operation do not involve the use of force, the participation of the SDF may be permitted under the constitution. However, since the present SDF Law does not provide such tasks to the SDF, the SDF cannot participate in these UN peacekeeping operations.

This framework is still relevant today.

Active Japanese participation in UN operations under the then existing laws began when Prime Minister Noboru Takeshita launched the International Cooperation Initiative in 1988. The most notable participation was that of twenty-seven Japanese electoral monitors in UN Transition Group (UNTAG) in Namibia in 1989. These personnel were all civilians, sent under the law that allowed the MOFA to dispatch its personnel to international organizations. With these personnel on the ground, by 1990 the Japanese government succeeded in establishing a presence, albeit a minimal one, in UN peacekeeping missions. However, the dispatch of military personnel to UN missions was still viewed with strong suspicion by the opposition parties, led by the Japan Socialist Party (JSP), and by the Japanese public in general.

The turning point came in the summer of 1990, when Iraq invaded Kuwait and the UN Security Council, released from its Cold War fetters, swiftly and decisively acted on the crisis. The Japanese government throughout the crisis supported the UN resolutions and the measures taken under them. The government also submitted a Bill that would have enabled the SDF to cooperate with the multinational coalition forces, but this Bill encountered strong criticism and was dropped without taking a vote.[8] Instead, the Japanese government passed a special tax law and raised US $13 billion to contribute to the coalition forces. But to the surprise of the government and the people, this unprecedented financial contribution did not satisfy the United States and some of the European members of the coalition. Japan was accused of resorting to "chequebook diplomacy" in order to avoid "sweating" with the coalition forces. At the conclusion of the Gulf War, Kuwait pointedly excluded Japan from a full-page advertisement in the *New York Times* thanking those countries that had provided assistance.

[8] Akiho Shibata, "Japanese Peacekeeping Legislation and Recent Developments in UN Operations" (1994) 19 *Yale Journal of International Law* 307 at 314–15.

On the Asian front, in 1990, the Japanese government was struggling to take an initiative in the Cambodian peace process. Not being a permanent member of the UN Security Council, this required painstaking efforts on the part of the Japanese government.[9] With Japan's substantial contribution, the peace agreement was finally reached in October 1991, and UN peacekeeping forces were to play a vital role in solidifying the peace in Cambodia. The desire of the Japanese government to play a part in the UN Transitional Authority in Cambodia (UNTAC) was understandably strong. This time, Japan could not be humiliated by another *New York Times* advertisement.

There has also been an argument that Japan will only obtain a permanent seat on the UN Security Council after it accepts increased responsibility in UN military operations. Against this political background, the Japanese government submitted the Peacekeeping Bill in September 1991. The Liberal Democratic Party (LDP), supported by the Komei Party and the Democratic Socialist Party (DSP), managed to pass the Bill in June 1992. Under the newly enacted Peacekeeping Law, for the first time since the Second World War, Japanese soldiers in September 1992 were dispatched abroad to participate in UNTAC. Since then, elements of the Japanese SDF have been dispatched to Mozambique in 1993, to Zaire in 1994, to the Golan Heights in 1996, and most recently to West Timor in 1999.[10]

The end of the Cold War, the consequent revitalization of the Security Council, and the increased political role of Japan internationally all made it possible, and indeed necessary, for the Japanese government to implement more active policies in relation to international military operations. These policies, however, are within its long-standing security policy framework: active diplomacy within the limits of article 9 of the Constitution. This "moderate approach"[11] has acquired general public support, as polls show.[12] The question that will face the Japanese people in the twenty-first century will be whether they are ready to take a step forward and commit more aggressively to international military operations that

[9] Tadashi Ikeda, *The Road to Cambodian Peace* (Tokyo, Toshi Shuppan, 1996) (in Japanese); Masaharu Kohno, *Peace Initiatives: Cambodian Diplomacy* (Tokyo, Iwanami Shoten, 1999) (in Japanese).

[10] See Appendix B, "Country participation in international operations, 1945–2000" for information on Japan's contribution.

[11] Yoshihide Soeya, "Japan's Peacekeeping Policies" (2000) 73 *Keio Law Review* 117 (in Japanese).

[12] In June 1992, just before the Peacekeeping Law was adopted, opinion was evenly divided, as 38.8 percent of Japanese people opposed the dispatch of SDF to UN peacekeeping operations, whereas 40 percent approved. In July 1995, 75.1 percent of Japanese people approved the dispatch of SDF to UN peacekeeping operations, whereas only 14.2 percent opposed.

go beyond the limits of article 9 of the Constitution. The establishment of Constitutional Research Committees within the Diet in 1999[13] raised expectations that this important question will be thoroughly debated among the Japanese people.

The Constitution and utilization of military forces

Article 9 and the current official interpretation

The defeat of Japan in the Second World War, the subsequent occupation of the country by Allied forces led by the United States, and the promulgation of the new Constitution under such circumstances led to a break in almost all aspects of fundamental Japanese political structures. The changes in the military structure were revolutionary: article 9 of the 1946 Constitution stripped the state of Japan of the sovereign power to use force and to maintain land, sea, and air forces. The 1946 Constitution has no other provisions relating to the military or the use of force. The revolutionary nature of these changes can be highlighted by comparing it to the Meiji Constitution of 1889. The Meiji Constitution provided, in articles 11 and 13, that the emperor had the prerogative powers to command the army and navy, and to declare war. Because of the revolutionary "peace provisions" in the current Constitution, the accountability debate in Japan demonstrates its unique legalistic nature.

Article 9 of the Constitution provides:

(1) The Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.
(2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

The traditional debate regarding this provision revolved around the following two issues:

(1) whether Japan is constitutionally prohibited from using any and every use of force other than self-defense; and
(2) whether Japan is constitutionally prohibited from deploying its military forces (the SDF) abroad.

A literal interpretation of article 9 may lead to the conclusion that Japan is prohibited from any and every use of force, including even the use of force in self-defense. In fact, this seemed to be the interpretation the Japanese government maintained when the Constitution was

[13] Law No. 118 (July 29, 1999) (amending the Diet Law).

promulgated in 1946.[14] It was the gradual reinterpretation of the provision, with the careful setting of the political stage for its acceptance, which led to the present position. At present, the Japanese government interprets the Constitution as not prohibiting the use of force for defending the nation of Japan. This interpretation and the political consensus behind it were the foundation for the establishment of the SDF in 1954. Article 88 of the Self-Defense Forces Law of 1954 specifically provides that the SDF may use necessary force in defending the nation of Japan against an external armed attack. This is the sole provision within the Japanese legal system that explicitly permits the SDF to use force.

The Japanese government maintains that the use of force by Japan, other than in this strict case of self-defense, is prohibited under the Constitution. Thus, the SDF is constitutionally prohibited from joining the armed forces of other nations in the exercise of the right of collective self-defense. The director general of the Cabinet Legislative Bureau stated in 1969 that "the right of collective self-defense is not admissible for Japan under Article 9 of the constitution, in the sense that Article 9 does not allow dispatch of our forces for the security of other states."[15] The Cabinet Legislative Bureau is a bureaucratic branch responsible for drafting bills and providing legal advice to the cabinet. Its official statement on the interpretation of the Constitution possesses significant political if not normative weight and is extremely difficult to change.

With regard to the foreign deployment of Japanese forces, the House of Councilors passed in 1954 a resolution prohibiting dispatch abroad of the SDF.[16] This resolution did not, however, necessarily bar Japan from participating in all foreign operations. At the time of its adoption, the Japanese government interpreted the phrase used in the resolution, "dispatch abroad," narrowly, to mean the dispatch of troops with the intent to exercise fully the right of belligerency. Under this interpretation, the SDF was allowed to dispatch abroad in order to undertake non-military activities. For example, the SDF Law allows it to participate in scientific activities in Antarctica (article 100-4), to provide air transport abroad for the prime minister and other national dignitaries (article 100-5), and to undertake international emergency relief operations in the case of natural disasters (article 100-6). In November 1998, an SDF unit was dispatched to Honduras to provide medical and sanitary services to hurricane-stricken people there. This was the first dispatch of the SDF under Article 100-6, which was promulgated in 1992.

[14] Nakamura, *Article 9*, pp. 60–3.

[15] Shigeru Oda and Hisashi Owada (eds.), *The Practice of Japan in International Law 1961–1970* (Tokyo, University of Tokyo Press, 1982), pp. 388–9.

[16] Shigeru Kozai, *UN Peacekeeping Operations* [Kokuren no Heiwa iji Katsudo] (Tokyo, Yuhikaku, 1991), pp. 477–8.

A more sensitive question was whether the deployment of the SDF to undertake military activities abroad could be allowed under the constitution. As described above, the 1980 government's unified view still governs this question: namely, if the purpose and duties of a particular operation involve the use of force, the SDF cannot participate under the Constitution. This constitutional interpretation forms the foundation of and the justification for the 1992 Peacekeeping Law. Article 2, paragraph 2 of the Peacekeeping Law reaffirms that the activities the SDF undertakes "shall not be tantamount to the threat or use of force."

The critical question, then, becomes what constitutes the prohibited "use of force" under the Constitution. The Japanese government defines the "use of force" prohibited under the Constitution as "any belligerent action by Japan using materiél and personnel in the context of international armed conflict." It is important to note that this definition does not necessarily coincide with the definition of the use of force under international law or practice. Japanese legislation makes a distinction between the use of force (for example, article 88 of the SDF Law) and the use of weapons (for example, article 95 of the SDF Law and Article 24 of the Peacekeeping Law). From the Diet debate on the Peacekeeping Law, the use of weapons in certain cases borders on the use of force prohibited under the Constitution. Government explanations are fluctuating if not inconsistent.

For example, during the discussion on the Peacekeeping Law, the government explained that Japanese peacekeepers would never use force because, under the Law, they were allowed to use weapons only when, in an individual's judgment, they were required for personal self-defense. In other words, the use of weapons would never be institutionalized. In June 1998, the Peacekeeping Law was revised, and the decision to use weapons by Japanese personnel, including SDF members, will now in principle be made by a Japanese superior officer. Government officials argued that, even with this revision, the "organized" use of weapons would still be intended only for the personal safety of individual SDF members. Thus, the use of weapons under the command of a superior, according to the government, does not constitute the use of force prohibited under the Constitution.[17]

Different forms of military operations and Japanese participation

From the above analysis of article 9 of the Constitution, certain forms of military operations would be excluded outright from this consideration

[17] Statement by Minister Hyuma, the director general of the Defense Agency, Security Committee, House of Representatives, May 7, 1998.

of possible Japanese participation and related issues of accountability. To reiterate, if the purpose and duties of a particular operation involve the use of force, Japan is constitutionally prohibited from committing its military forces to that operation.

First, judging from the Diet debate on the Peacekeeping Law, it is fairly clear that Japan cannot participate in operations which are not under UN command but are instead authorized by the Security Council under Chapter VII of the UN Charter to use "all necessary means." This view was confirmed in September 1999 by Foreign Minister Masahiko Kohmura, who stated in a press conference that the SDF may not be permitted under the present laws to provide logistics support to the Australian-led multinational forces deployed in East Timor under Security Council Resolution 1264 (1999).[18]

Secondly, Japan is also unlikely to participate in an operation under the command of the UN with a mandate that "confer[s] authority for appropriate action, including enforcement action as necessary" to achieve certain objectives. UNOSOM II, the Somalia operation established in March 1993, was the prime example of this type (Security Council Resolution 814). Most recently, the UN operation in East Timor (UNTAET) is authorized "to use all necessary means" (Security Council Resolution 1272). These kinds of operations were virtually unknown when the Peacekeeping Law was under discussion in 1991 and 1992. Prime Minister Kaifu did state in 1991, however, that Japan could not participate in UN operations like that in the Congo (ONUC), which was authorized to use force (Security Council Resolution 161).[19]

Though other interpretations of article 9 have been proposed,[20] Japanese involvement in military forces under international auspices will be limited as long as the present government policy remains. Thus, Japan cannot commit its SDF to operations that authorize the use of "force to ensure compliance with international mandate" and "enforcement" measures, as defined by Ku and Jacobson in the Introduction to this volume.

There is no constitutional bar to Japan committing its SDF to other forms of military operations that do not involve the use of force. However, in order for Japan actually to send forces to any of these operations, their mandates must satisfy the conditions stipulated in the Peacekeeping Law. In fact, these conditions represent precautionary safeguards to ensure that Japanese troops will never face a situation where the unconstitutional use of force becomes necessary.

[18] Statement by Foreign Minister Kohmura, September 16, 1999.
[19] See House of Representatives, 121st Session, Special Committee, No. 3, at p. 17 (September 25, 1991) (Statement of Prime Minister Kaifu Toshiki).
[20] Shibata, "Japanese Peacekeeping Legislation," pp. 332–3.

Under the Peacekeeping Law, Japan may participate only in peacekeeping operations that are based on a resolution of the UN General Assembly or the UN Security Council. That operation, moreover, must be carried out under the command and control of the United Nations and be impartial. In addition, article 3(1) of the Peacekeeping Law requires that there be a cease-fire agreement among the parties to the conflict. The same article requires the consent of the host state as well as the disputing parties to the UN operation and specifically to Japanese participation in peacekeeping operations. As to the cease-fire, the Law requires that the parties to a conflict agree to, and have in place, a cease-fire before Japanese personnel are introduced. However, during the Cambodian operation, when a number of cease-fire violations and some direct attacks on UN personnel occurred, the Japanese government, refusing to withdraw, explained that the defiant party was still committed to the cease-fire. Since Cambodia, the government has required only a de jure "overall cease-fire."

The 1992 Peacekeeping Law provides for another type of operation in which the Japanese SDF may participate. These are "humanitarian international relief operations," intended to rescue persons suffering from armed conflicts and to restore the damage caused by such conflicts. The requirements for participation in these relief operations are less stringent, compared to those for peacekeeping operations. For example, Japan may participate in a humanitarian operation initiated by any of the UN organs or UN specialized agencies and other international organizations listed in Appendix A at the end of this volume. The Law requires only a "request," rather than a resolution, from these international organizations. More significantly, these operations may be commanded by international organizations or even by individual states. Thus, operations undertaken by regional organizations such as NATO or by a multinational ad hoc coalition may well be "humanitarian international relief operations" in which Japan can participate.

Moreover, humanitarian relief operations require only consent and a cease-fire, excluding the condition of impartiality. The reason for such exclusion is that "humanitarian relief operations" are by definition impartial. The consent for the operation and for Japanese activities is required only from the host state, not other parties to the conflict. Even a cease-fire is unnecessary if the host state is not itself a party to the conflict.

In 1994, a 250-man SDF unit took part in a relief operation for Rwanda refugees in eastern Zaire (now the Democratic Republic of the Congo). The request for Japanese involvement came from the UNHCR, but the operation itself was not under UN command. The Japanese government took the view that, since Zaire was not itself a party to the armed conflict, the cease-fire requirement could be omitted. Consent to dispatch

the SDF was obtained only from the government of Zaire. At the time, however, soldiers from the former Rwandan government had entered the refugee camps, having fled the rebel forces. This led to sporadic shootings in and around the camps and even Zairian soldiers were involved. In order to justify SDF participation, the Japanese government adopted a loose interpretation of the requirement that a cease-fire agreement be concluded, should the host country be a party to the armed conflict.

The second humanitarian relief operation involving the Japanese SDF was undertaken from November 1999 to February 2000 in West Timor, Indonesia, where thousands of refugees had fled from the violence in East Timor. This was an attempt on the part of the Japanese government to contribute substantially to international efforts to improve the East Timor situation, where its national interests were visibly present. Japan was in a difficult position in this case. The main peacekeeping operation in East Timor, the UN Transitional Authority in East Timor (UNTAET) was established under Chapter VII of the Charter (Security Council Resolution 1272), and the operation as a whole was authorized "to use all necessary means." Hence, Japan could not participate. In addition to the financial contribution of US $100 million to support the multinational forces deployed in East Timor, Japan decided to send SDF transportation units as a humanitarian relief operation to West Timor, where, technically, no conflict existed. The only requirements for dispatching the SDF in such a situation are the request from an international organization and the consent of the territorial government. And, indeed, the UNHCR requested the airlift of supply materials and the Indonesian government consented.

Authorization within the Japanese legal framework

International authorization and statutory requirements

Article 98, paragraph 1 of Japan's Constitution provides that the constitution shall be "the supreme law of the nation." The same article in paragraph 2 requires the Japanese government to observe international obligations stipulated in treaties and the established laws of nations or those emanating from custom. These provisions suggest the following two conclusions. First, the Japanese government may not constitutionally commit its military forces to those operations that are internationally illegal. Secondly, even when the operation in which Japan intends to participate is internationally a lawful one, the activities that the SDF undertakes must conform to the requirements of the Constitution.

It is generally understood that, within the Japanese legal order, the Constitution prevails over international law. Thus, the constitutional

requirement that Japan may never use force abroad always applies. Also, the SDF may undertake activities abroad only when they are specifically mandated by Japanese legislation. At present, the SDF Law of 1954, the Peacekeeping Law of 1992, and the "Surrounding Situations" Law of 1999 authorize and limit the utilization of the SDF in international military operations. The latter piece of legislation, however, relates mainly to bilateral defense cooperation with United States forces in the Far East.

The national laws mentioned above establish different criteria relating to international authorization required for Japan to consider involvement of the SDF in international military operations. Under the Peacekeeping Law, the peacekeeping operations in which Japan may participate must be established by a resolution of the General Assembly or the Security Council of the UN. In other words, Japan must obtain international authorization in the form of a formal resolution of the General Assembly or the Security Council before it can commit its troops to UN peacekeeping operations. Thus, Japan cannot commit its SDF to "peacekeeping" missions established by regional organizations such as NATO or ECOWAS (for example, in Liberia) or by an ad hoc agreement of interested states (for example, CIS missions in Georgia and Tajikistan).

The same Law provides that Japan may participate in a humanitarian international relief operation, which may be organized by UN organs and specialized agencies or even by individual states, if there is a "request" from the organs and agencies listed in Appendix B, "Country participation in international operations, 1945–2000." In other words, the international authorization required in this case is only a "request" from the head of international organizations, for example the High Commissioner of the UNHCR. Of course, the relief operation in which Japan intends to participate must secure the consent of the host state, and the cease-fire among the conflicting parties must be in place. Thus, the Japanese military involvement may never be justified solely on so-called "humanitarian considerations."

Under Article 100-8 of the SDF Law, as revised in 1999, the SDF may be dispatched to provide air and sea transport for Japanese and non-Japanese civilians caught in emergencies, including armed conflicts abroad. The international authorization necessary in these "rescue operations" by the SDF is not clearly defined. The article does not explicitly require the consent of the territorial state where the evacuations take place. In the Diet, the government explained that, in the process of ascertaining the feasibility of such an operation, the existence of consent from the territorial state, as well as the opposing parties, would be one of the factors examined.

National authorization to use the SDF: parliamentary accountability

Parliamentary cabinet system The Japanese Constitution established a parliamentary cabinet system. Under this system, it is presumed that the cabinet has majority parliamentary support at least in the House of Representatives, which has the power to pass a no-confidence resolution (article 69 of the Constitution). It is therefore natural that the Constitution entrusts the powers relating to external affairs to the cabinet with little concern for the Diet's role in checking such powers. The cabinet is vested with the executive power and shall manage foreign affairs (article 65 and article 73(2) of the Constitution). This provision has been interpreted to mean that the powers relating to foreign affairs are exclusively within the competence of the cabinet. The Diet's power of the purse (articles 83 and 85) is also limited, since it is the cabinet that prepares the budget (article 86). Thus, the Diet has little constitutional means to intervene in the management of foreign affairs by the executive.

There is another unique element one must take into account when considering parliamentary accountability under the Japanese constitutional system: the lack of explicit constitutional provisions regarding the allocation of powers on the making of war or the use of force internationally. The Constitution of Japan does not have a "commander-in-chief" provision or a "war-declaring authority" provision like those of the US Constitution. This lacuna was the logical consequence of article 9 of the Constitution, which renounced war and prohibited the establishment of war potential. In other words, there were no war powers to be allocated between the executive and the legislature when the present Constitution was promulgated in 1946.

The SDF Law of 1954 (article 7) endowed the prime minister with "the supreme right" to command the SDF. As it is generally interpreted, this provision is a confirmation of the prime minister's constitutional authority to direct and supervise the various administrative branches (article 72 of the Constitution).[21]

Parliamentary authorization to use the SDF As discussed above, since the cabinet has the prerogative to manage foreign affairs, decisions as to the timing, shape, conditions, and termination of Japanese participation in international military operations are made by the executive. However, when a decision is made to use the SDF, the Diet displays its legislative power to the maximum.

[21] Hiroshi Yasuda (ed.), *Peace, Security and the Law* (Tokyo, Naigaishuppan, 1996), pp. 83–8 (in Japanese).

Because article 9 of the Constitution basically prohibits the use of force and the maintenance of "war potential," the establishment of the SDF and its use must specifically be authorized by legislation promulgated by the Diet. The Diet is "the sole lawmaking organ of the State," and the cabinet must "administer the law faithfully" (articles 41 and 73(1) of the Constitution). The SDF Law of 1954 has been and still is the cornerstone of such legislation. The SDF Law stipulates that the prime duty of the SDF is to "defend the nation of Japan from direct and indirect aggression" (article 3). When the cabinet considered necessary the use of the SDF in international operations, it had to submit a Bill revising the SDF Law to the Diet. Until the Bill became law in 1998 by passing both chambers of the Diet by majority (the House of Representatives can override the Councilors' vote by a two-thirds majority), the executive could not utilize the SDF. The revisions of the SDF Law, in fact, have been frequent in recent years as articles 100-6 to 100-9 of the SDF Law, added after 1992, all relate to SDF uses outside the territory of Japan. The "Surrounding Situations" Law of 1999 added yet another article, article 100-10, to the SDF Law.

Once the law was promulgated and the SDF was allowed to participate in certain types of international military operations, the cabinet decides, on a case-by-case basis, under what circumstances, whether, and to what extent to participate in a specific operation. As long as Japan's participation is within constitutional and legislative parameters, that decision is, in principle, within the discretion of the executive.

In this context, there are two exceptions to the provisions of the SDF Law and the Peacekeeping Law that do require prior Diet approval before the government may deploy the SDF. Article 76 of the SDF Law requires prior Diet approval (*ex post facto* approval in emergencies) when the prime minister mobilizes the SDF for the defense of Japan against external armed attack. Article 6, paragraph 7 of the Peacekeeping Law requires prior Diet approval (*ex post facto* approval when the Diet is in recess or the House of Representatives is dissolved) when the prime minister plans to send SDF units to participate in infantry missions of UN peacekeeping operations. The latter provision needs some clarification, since it has direct significance for the issue of accountability in relation to the different forms of military operations.

First, the Peacekeeping Law distinguishes between a proposal to dispatch SDF "units" and a plan to dispatch "individual" SDF members. Diet approval relates only to the former – in other words, only when the SDF units are to carry out certain military activities. Secondly, the Law distinguishes among the duties the SDF units are to carry out. Those requiring relatively high military capabilities and with high risk of being

involved in shooting are designated as peacekeeping forces (PKF) duties. These duties are stipulated in (a) to (f) of article 3, paragraph 3. Such duties include monitoring of cease-fire and withdrawal or demobilization of armed forces, patrolling in buffer zones, inspection, and collection of weapons, and assisting the exchange of prisoners. The non-PKF duties include medical, transportation, and other logistics support activities. In Cambodia, Mozambique, Zaire, the Golan Heights, and West Timor, SDF units were dispatched, but they undertook only engineering, transportation, medical, and sanitary activities. On the other hand, individual SDF members undertook cease-fire monitoring duties in Cambodia.

The reason for such a distinction, although it does relate to the risk or potential loss of life, is primarily a constitutional one. In Japan, PKF duties are considered to entail a higher risk of being involved in shooting and, in consequence, a greater possibility of using weapons in response. If SDF units respond by using their weapons, that action may be characterized as an institutionalized use of force prohibited under the Constitution. This explains why Diet involvement is only necessary when SDF units, and not individual SDF members, are to carry out such duties.

In other words, the Diet is expected to oversee the constitutionality of the executive's decision, or, more specifically, the risk of such a decision leading to Japanese action being characterized as an unconstitutional use of force. Currently, PKF duties by SDF units are "frozen" in the sense that, under article 2 of the supplementary provisions of the Peacekeeping Law, a separate law must be adopted to allow PKF duties to be performed by the SDF units.

At present, the legally and procedurally guaranteed power of the Diet directly to control the utilization of the SDF is limited in its scope of application. It applies only to the extent that the statutory laws explicitly provide and to the activities specifically enumerated in these laws. As yet, there have not been any cases in which these provisions were actually applied and the Diet exercised its control. There has been no call for "national defense mobilization" provided under article 76 of the SDF Law. The participation of SDF units to UN peacekeeping forces (infantry missions) is currently frozen under the Peacekeeping Law.

At the same time, one can discern a heightened perception that the legislature should be involved in the process of national authorization of SDF deployments abroad. This could be discerned in the Diet debate on the Peacekeeping Law and on the "Surrounding Situations" Law. In both cases, the original Bill submitted by the government did not contain such a provision, but during the Diet debate the opposition parties as well as some of the governing parties such as the DSP demanded a provision

requiring Diet approval before SDF units are deployed abroad. And in both cases, such provision was finally made in the laws. It is important to note, however, that this trend towards legislative oversight relates to the utilization of the SDF in military operations in general, and is not limited to those under international auspices.

Specific issues of accountability in Japan

Political accountability: bureaucrats vs. politicians

In Japan, the bureaucracy has a significant influence on governmental decision-making. The decision whether to commit military forces to international operations is formally a prerogative of the prime minister (article 7 of the SDF Law). In reality, the bureaucrats substantively establish the setting for such a decision. Since bureaucrats are not elected members of the government, an accountability issue exists.

Since adoption of the 1992 Peacekeeping Law, Japan has sent SDF units to five different UN operations. An examination of the decision-making process leading to deployments reveals the strong initiative by the Ministry of Foreign Affairs. MOFA provides the majority of personnel to Japan's International Peace Cooperation Headquarters (IPCHQ) personnel and its Secretary-General. It is MOFA/IPCHQ that instigates the initial examination as to whether Japan can participate in a specific operation under the Peacekeeping Law. In theory, when MOFA/IPCHQ determines that an operation meets the necessary legal conditions, it then forwards the proposal to the chief cabinet secretary. After this proposal, the political decision-making process is supposed to proceed involving mainly the elected politicians, relevant cabinet members and party leaders.

The actual decision-making process, however, is heavily influenced throughout by MOFA.[22] MOFA has its own agenda when it comes to participating in UN peacekeeping operations: sending the SDF abroad may improve Japan's chances of gaining a permanent seat on the UN Security Council, and reassures other countries that Japan is an active force in global affairs. Consequently, in addition to its initial investigation, MOFA usually makes a substantive predetermination as to whether Japan should participate in an operation and to what extent Japan should contribute to it. The MOFA role in such decisions may even include the type of duties and the number of SDF personnel, as it did in the case of Mozambique.

[22] Heinrich, Shibata, and Soeya, *A Guide to Japanese Policies,* pp. 33–41.

Against these bureaucratically initiated processes, the elected politicians voiced discomfort and endeavored to maintain political decision-making. An influential politician, Hiromu Nonaka, the home minister at the time, was reported to have said, in the case of the SDF deployment to the Golan Heights, that MOFA was trying to establish a *fait accompli* to commit Japan to participate in the UNDOF. Such an initiative, Nonaka continued, is extremely problematical from the perspective of parliamentary democracy. It is reported also that Yohei Kono, the chief cabinet secretary, stated in 1993 that, because the decision to participate in international military operations is a political one, to which the public immediately reacts, it must be made by elected officials.

In order to fulfill their role in the political decision-making process, elected officials need objective and independent information relating to the nature of an operation, the situation on the ground, and other facts necessary to determine the extent of Japanese participation in an operation. In the case of Cambodia, the politicians simply believed the information gathered and reported by MOFA. However, as the situation in Cambodia deteriorated and two Japanese personnel were killed in Khmer Rouge attacks, some amongst the public suspected that the government was deliberately deceiving the public. In the Rwandan case, too, MOFA was accused by some elected officials of not informing the public about the dangers of the situation in Rwandan refugee camps.

After these bitter experiences, the politicians decided to establish their own fact-finding missions. In the Rwandan case, the governing parties sent their own mission, composed of Diet members, despite the fact that a fact-finding mission composed of MOFA and Defense Agency officials had already been dispatched and submitted its report. Again, in the Golan Heights, the governing parties sent their own mission, this time concurrently with MOFA's fact-finding mission.

From the aforementioned examples, one may discern an increasing awareness among elected officials that decisions as to the Japanese military commitment in international operations must substantially be made by elected members of the Diet in order to ensure the political accountability of those decisions. This process is driven by the interest and the concern expressed by the Japanese public regarding the utilization of the SDF internationally.

Public accountability: the deliberative role of the Diet

The concept of public accountability relates to a citizen's participation in the decision-making process through the most representative organ of the nation, the legislature. The decisions to commit the SDF to international

military operations have generally attracted public attention and been discussed in the Diet as public issues. The extent of the Diet's involvement, however, is not consistent, as it differs according to the stages of decision-making. The initial decisions to participate in military operations have been fundamentally determined by the cabinet. The Diet's deliberative role has not been a significant factor in this process. During participation in an operation, especially when Japanese personnel were at substantial risk of being involved in combat or when there were casualties, the media and public expressed considerable interest and concern. As a result, the Diet, representing those public concerns, exercised a more significant influence on the government through its deliberative function.

The initial decision to participate involves two stages. The first stage is a formal one, involving the cabinet's decision on the Implementation Plan (IP) and its submission to the Diet. The IP specifies, among other things, the tasks the SDF are to undertake, the number of SDF personnel participating in the operation, the type of weapons the SDF are to carry, and the duration of its participation. The Diet has the opportunity to scrutinize the government's decisions and to question relevant cabinet members and government officials as to the legality and appropriateness of the decisions. However, since the government needs no approval of the IP from the Diet (except for when SDF units are to carry out infantry missions), the debate in the Diet tends to be a formality and is without major influence on the decision. In the Cambodian case, for example, there was no substantial discussion in the Diet when the IP was submitted to the Diet. The JSP did not even request a special examination of the case during the Diet's recess.

The more substantive and time-consuming stage of the initial decision-making process occurs when the cabinet considers the proposal to participate and, if sufficient support can be garnered from the leaders of the governing party or parties, decides the content of the IP. For example, in the Mozambique case, due to the hesitation of both the chief cabinet secretary and the prime minister in expanding SDF participation, it took a further two months to convince them to participate in ONUMOZ. In the Golan Heights case, due to the indecisiveness and fragmentation within the Socialist Democratic Party (formerly the Japan Socialist Party), one of the governing parties at the time, it took almost a full year for the government to decide to participate and another three months to agree on the content of the IP. During this process, however, the Diet did not seem to play a significant role. It was the internal politics of the parties concerned that seemed decisive.

Although there are external pressures for Japan to participate in UN operations, there is no international legal obligation to participate in

such operations. Thus, the government's main concern is initially domestic. First, the conditions set forth in the Peacekeeping Law must be strictly complied with. Secondly, cooperation from the governing parties and relevant ministries, for example, the Defense Agency and the Home Ministry, must be secured. Finally, the public must generally be supportive of the deployment.

Once Japan decides to send its personnel to a UN operation, however, there is at least an obligation of good faith not to undermine the whole operation and to notify the UN well in advance if SDF contingents are to withdraw. A conflict may arise at this stage if the government is faced with domestic opinion favoring immediate withdrawal. This was, in fact, the case in Cambodia, when a Japanese civilian volunteer and a policeman were killed in Khmer Rouge attacks in April and May of 1993. This case demonstrated both the success of the Diet's deliberations as a means of public accountability, and its limits when there is overwhelming international pressure tugging in the opposite direction.

When a Japanese volunteer (a UNV member) was shot dead in early April 1993 in a Khmer Rouge ambush, the Lower and Upper Houses convened special plenary meetings exclusively to discuss the peacekeeping issues. The opposition parties, especially the JSP, argued that it was no longer realistic for the government to maintain that the cease-fire was still in effect, since the Khmer Rouge was openly defying the UN and waging a guerrilla war. The doubt expressed by the JSP probably represented that of most of the Japanese people at the time. The government repeated its formalistic response by saying that "all-out war is not yet resumed." Prime Minister Miyazawa maintained that the fragile peace in Cambodia needed continued support from the international community and that the general election must be held as planned in order to solidify the peace process.

On May 5, a Japanese policeman was killed and several others wounded in an ambush blamed on the Khmer Rouge. This became the touchstone for the Japanese government in resolving the dilemma between domestic pressures and international obligations. The opposition parties requested emergency meetings of the Diet to discuss the Cambodian situation. The governing LDP agreed to this request, saying, "the people were very much shocked by the incident, and deliberation in the Diet cannot be circumvented."[23]

In the Diet, the SDP and the Japan Communist Party concluded that the cease-fire agreement no longer existed in Cambodia, and they demanded the withdrawal of Japanese personnel. The Komei, a longtime

[23] *Asahi Shimbun*, morning edition, May 16, 1993, p. 2.

supporter of the LDP in peacekeeping issues, also expressed the opinion that a suspension of the operation might be necessary. Further, some members of the DSP, another proponent of Japanese participation, argued that the civil police should be withdrawn and the SDF should take over their tasks. Overwhelmingly, public opinion felt that the five principles enumerated in the Peacekeeping Law were no longer satisfied in the Cambodia case.

In response to these criticisms, Prime Minister Miyazawa said that, "if Japan were to withdraw now and, consequently, the general election [in Cambodia] were to be delayed or canceled, the evaluation of Japan by international society will be irreparably damaged."[24] But in this case, the government was forced to act decisively. It knew it could not hold out against public pressure if another incident were to occur. The government requested the UN that the Japanese civil policemen be temporarily moved to a safer area, such as Phnom Penh. Yasuhei Akashi, the UN special representative, denied this request. The government then carried out a controversial measure: it ordered SDF ground troops to "visit" the ballot sites where Japanese election monitors were stationed. This was, in fact, a patrolling duty which was frozen under the Law. Fortunately, with these measures in place, no other incident involving Japanese occurred and Japan stayed in Cambodia as planned until September 1993.

Thus, the deliberative role of the Diet does have some impact on the decision-making process. Through the Diet's deliberation, the public could be considered as indirectly participating in it. Though the government refused to withdraw Japanese personnel due to international pressure, it at least recognized its political responsibility to explain that decision to the public. When the government realized the overwhelming concerns of the Japanese people for the safety of their compatriots, it took concrete actions to mitigate those concerns.

From the above analysis, one may conclude that public accountability in the initial decision to participate in international military operations has been considered as satisfied when the Diet adopted the Peacekeeping Law. This Law contains strict conditions that the government must comply with before it decides to dispatch the SDF. If conditions remain as initially expected in the field during SDF's participation, as in the Golan Heights, the public and Diet show little interest. However, when the situation undergoes a substantial change for the worse and there is a real risk to the personnel participating in the operation, the Diet, representing the public, initiates an inquiry and exercises its deliberative checking function over the government. The government also recognizes its responsibility

[24] *Nihon Keizai Shimbun*, morning edition, May 14, 1993, p. 2.

to explain its policy to the public and respond to its concerns, but only to the extent that international obligations allow.

Civilian accountability: role of the military establishment

With bitter memories of pre-war militarism and the consequent wartime devastation of Japanese society, the Japanese people, Diet members, and government are all united in demanding strict civilian control over the military establishment, namely the Defense Agency and the SDF. The Japanese military is composed of three services: Ground, Maritime, and Air Self-Defense Forces, with a combined strength of about 240,000.[25] Though this number ranks well behind other East Asian countries, the SDF is equipped with some of the most modern weapons systems available by virtue of its large defense budget (around US$45 billion per year) and its close ties to the United States. However, with Japan's constitutional limitations and strong anti-war feelings among the Japanese people, the SDF has been prohibited from acquiring offensive weapons and weapons systems with force-projection capabilities. As a result, the SDF has no air tankers and comparatively few air transports and landing craft, which has had an impact on the SDF ability to engage in UN operations abroad. Another limitation of the SDF is its lack of overseas experience and adequate training for UN operations. Pursuant to the new National Defense Program Outline approved in 1995, the SDF will be restructured to meet a variety of situations, including international peace operations, and more men have already been sent to training centers abroad.

Institutionally, the system of civilian control is well established in Japan. In practice, too, the system has worked fairly well. Article 66, paragraph 2, of the Japanese Constitution provides that the prime minister and other cabinet ministers shall be civilians. Civilian control is one of the subjects of growing importance as Japan expands its military role in international society.

The Japanese military establishment has had far less influence on the decision-making process than those of other nations. The abiding suspicion of the military that arose after the Second World War created strong support for constraints on the Defense Agency that have prevented it from having a major impact on policy-making. Recently, the Agency's constructive role in MOFA decision-making regarding peacekeeping operations is beginning to be recognized. The Agency's officials are seconded to IPCHQ. They have their own concerns and have, to

[25] Heinrich, Shibata, and Soeya, *A Guide to Japanese Policies*, pp. 85–98.

some extent, influenced the outcome. The most remarkable example of such influence was the successful revision of the Peacekeeping Law in June 1998 to allow SDF members to use weapons under the order of their superior officers.

The Defense Agency has attached much importance to the safety of its personnel. In order to ascertain conditions in the field, it has become a standard procedure for the Agency to send its own fact-finding missions to the field. They are usually dispatched after MOFA's missions. In Mozambique, the Agency insisted that, if the SDF were to participate in the operation, its own fact-finding mission must be dispatched in order to gather information from its own perspective. The cabinet approved this request. In the Rwandan refugees relief operation, from the information gathered by its own fact-finding mission, the Agency strongly recommended that the number of SDF personnel should be increased and that they should be allowed to carry at least two submachine guns in order to ensure their safety. This proposal to carry submachine guns was initially opposed by many members of the cabinet and especially by the JSP. In the end, Prime Minister Murayama, considering the safety of the personnel, decided to permit just one submachine gun to be carried by each SDF unit.

Soldiers' responsibility: compliance with humanitarian norms

With regard to the question of compliance by SDF personnel with the rules applicable during their military activities, the lacuna in Japanese law is conspicuous. Information on this subject is so scarce that one cannot definitively identify the position of the Japanese government.

Formally speaking, except in the case of self-defense against an armed attack against Japan, SDF personnel are constitutionally prohibited from using force and are presumably not to be involved in international armed conflicts. Thus, the only provision requiring SDF members to comply with international rules and custom relating to this area appears in article 88, paragraph 2, of the SDF Law. Paragraph 1 of the same article authorizes the SDF to use the force necessary to repel an armed attack. Japan is a state party to the 1907 Hague Convention and to all four Geneva Conventions of 1949. These treaties have the force of law in Japan without additional domestic legislation. Thus, SDF personnel using force when Japan is under armed attack must comply with the rules enunciated in these Conventions.

However, these rules seem to be inapplicable to SDF personnel participating in UN peacekeeping operations or other international military

activities, such as humanitarian relief operations. Legally speaking, they are not involved or supposed to be involved in armed conflicts, as provided in Article 2 of the 1949 Geneva Conventions, or in Article 1 of the 1999 Secretary-General's Bulletin, "Observance by United Nations Forces of International Humanitarian Law."[26] If there is an armed conflict, it means a cease-fire has broken down and, therefore, Japanese personnel must withdraw from the operation. Neither the Peacekeeping Law nor the Implementation Plans contain even a reference to the Geneva Conventions or other international humanitarian laws. Officially, the Japanese SDF does not possess military manuals or rules of engagement which incorporate these treaty and other customary international rules.

The concept that applies to the SDF's use of weapons seems to be analogous to that of the "police proportionality rule." This rule is basically incorporated in article 24 of the Peacekeeping Law. According to this rule, personnel may harm others only when it can be justified under legitimate self-defense or necessity as provided in the Japanese Criminal Law. If personnel violate these rules and commit crimes stipulated in articles 3 and 4 of the Criminal Law (crimes committed abroad by Japanese nationals and officials), they will be tried in Japanese domestic courts. It is possible that violations of international humanitarian law may be assimilated to those crimes stipulated in articles 3 and 4, and the person responsible may be tried under these crimes in Japanese courts. One problem is that articles 3 and 4 of the Criminal Law do not cover all the cases of serious violations stipulated, for example, in articles 49 and 50 of the First Geneva Convention.

Conclusions

The 1990s were marked by unprecedented legislative activism that expanded the role of the Japanese Self-Defense Forces internationally. These legislative activities included the promulgation of the 1992 Peacekeeping Law, revision of the Peacekeeping Law in 1998, promulgation of the "Surrounding Situations" Law in 1999, and consequent revisions of the SDF Law of 1954. This activism is especially notable if it is recalled that, just few years before, the discussion of the SDF itself was a kind of taboo in Japan. At the same time, these laws are the extension of Japan's long-standing "moderate approach": active diplomacy within the limits of article 9 of the Constitution. The reasons the Japanese government succeeded in passing these laws in this decade are many; but

[26] August 6, 1999, UN Doc. ST/SGB/1999/13.

undoubtedly, changes in the international political environment after the end of Cold War and the consequent convergence of the Japanese public's support for this "moderate approach" did contribute to the success.

With these laws in place, the question of democratic accountability arises, as Japan's SDF are now permitted to take part in several types of international military operations.

The first point to note is that SDF participation in international military operations is strictly regulated by the Constitution and the relevant laws. The operations in which the SDF participate must not involve the use of force and must satisfy the five conditions stipulated in the Peacekeeping Law. These statutory requirements are clear limits on the government's discretion to utilize the nation's military forces under the auspices of international organizations. These limits reflect the current preference of the Japanese people. At the same time, this policy is preventing Japan from participating in the UN operation in East Timor, the second major UN operation in Asia after Cambodia. Recently, there have been some views expressed, even from the opposition parties, that restrictions on SDF participation may be too prohibitive. The issue of accountability will continue to be debated within the Diet, especially within the newly established Constitutional Research Committees.

Secondly, there is a distinct trend development within recent legislation to strengthen parliamentary oversight when it comes to the dispatch of the SDF abroad. This oversight has come to take the form of Diet approval before the dispatch of SDF units to participate in PKF duties. The "Surrounding Situations" Law also provides for prior Diet approval when, for example, SDF units are to provide logistics support to US armed forces. This parliamentary oversight is designed to function primarily as a constitutional guardian. In other words, the Diet is expected to oversee the constitutionality of the executive's decision or, more precisely, the risk of such decision leading to Japanese actions that would constitute an unconstitutional use of force.

Thirdly, the public and Diet do react emotionally to casualties sustained during international military operations, as was the case in Cambodia. After this case, the government became more discriminating in sending the SDF to high-risk operations. But legally speaking, these concerns are already incorporated into the Peacekeeping Law. If an operation satisfies the five requirements enumerated in the Law, it is by definition a "safe operation," where the SDF will not need to use their weapons. In the five operations in which the SDF have participated so far, not a single bullet was fired by the Japanese soldiers.

Thus, democratic accountability concerning the Japanese participation in military operations under the auspices of international institutions has

been secured primarily through domestic legal strictures. The Peacekeeping Law does require the authorization of the UN and other UN agencies. These authorizations provide international as well as domestic legitimacy for Japanese participation, but they do not automatically entitle the executive to dispatch the SDF to international military operations. Such operations must satisfy the constitutional and statutory requirements that the Diet, with the support of the public, has imposed.

10 Germany: ensuring political legitimacy for the use of military forces by requiring constitutional accountability

Georg Nolte

Germany has grappled for several years with the issue of the use of armed forces under international auspices and democratic accountability. Some observers, such as Lori Damrosch in this book,[1] are tempted to look at the German case as an example of a worldwide trend towards greater democratic accountability in the use of armed forces under international auspices. Others may suspect that this view is misleading, since Germany is an exceptional example because of its twentieth-century history.

Historical introduction

In 1949, the new Federal Republic of Germany did not possess armed forces.[2] Germany as a whole, East and West, was still under occupation by the four wartime Allies, the United States, the Soviet Union, France, and the United Kingdom. By this time, however, the Cold War had begun; the North Atlantic Treaty was signed in Washington six weeks before the Federal Republic was formally established in Bonn. The creation of the two German states was part of the mobilization by the Cold War protagonists of their respective forces.[3]

Nevertheless, the *Grundgesetz*, the Constitution or Basic Law of the new West German state, contained only two indirect references to the use of armed forces. Article 4(3) guarantees the right of conscientious objection, and article 24(2) permits the integration of the new state into "systems of mutual collective security" (*Systeme gegenseitiger kollektiver*

[1] See chapter 2, above.

[2] See generally T. A. Schwartz, *America's Germany: John J. McCloy and the Federal Republic of Germany* (Cambridge, MA, Harvard University Press, 1991), p. 113; S. Mawby, *Containing Germany* (Oxford, Oxford University Press, 1999), pp. 1, 10; L. Kettenacker, *Germany since 1945* (Oxford, 1997), p. 57; D. F. Patton, *Cold War Politics in Postwar Germany* (London, Macmillan, 1999), pp. 18–19.

[3] C. S. Maier, "The Making of 'Pax Americana': Formative Moments of United States Ascendancy" in R. Ahmann et al. (eds.), *The Quest for Stability: Problems of West European Security 1918–1957* (Oxford, German Historical Institute, 1993), p. 389.

Sicherheit). These provisions do not, however, presuppose or require the existence of a national army.

While the *Grundgesetz* originally did not provide for the establishment of armed forces, it also, unlike the Japanese Constitution of 1946, did not contain an explicit prohibition against the establishment of an army or against the use of armed force. It only ruled out "aggression" (article 26). The lack of other specific constitutional rules on the use of force was not accidental. Lawyers have argued that this was simply the result of a lack of competence by the West German state, since the Allies retained the ultimate power to decide on questions concerning the establishment of German armed forces.[4] Domestically, the most important reason for the omission of rules concerning armed forces was the disagreement, at the time, between the main political parties about the future military role of the Federal Republic. The Social Democratic left (SPD) opposed any such role, while the Christian Democratic (CDU) and Free Democratic (FDP) center-right wanted to preserve at least the option of West Germany participating in a joint western defense system.[5] Thus, in 1949, the future military role of the Federal Republic, if there were to be one, was unresolved.

It was only after the outbreak of the Korean War in 1950 that the political mood outside and inside the Federal Republic decisively changed toward organizing a military West German contribution to the common western defense.[6] The project of a European Defense Community (EDC), however, failed in 1954.[7] The EDC treaty would have created a European army with a true supranational command.[8] Once this rearmament option was removed, the Federal Republic acceded to the North Atlantic Treaty. The 1954 Paris Accords provided for the unconditional return to Bonn of all sovereign rights from the Western Allies (except that those which concerned Germany as a whole and Berlin were legally considered two different issues), in exchange for the Federal Republic's

[4] E. Forsthoff, "Rechtsgutachten zu Wehrbeitrag und Grundgesetz," in *Der Kampf um den Wehrbeitrag* (Munich, 1953), vol. II, p. 312.

[5] Patton, *Cold War Politics*, p. 205; W. Loth, "The Korean War and the Reorganization of the European Security System 1948–1955" in Ahmann et al., *The Quest for Stability*, p. 465; D. Gosewinkel, *Adolf Arndt* (Bonn, Verlag J. H. W. Dietz Nachf, 1991), p. 283; Kettenacker, *Germany since 1945*, p. 58.

[6] Schwartz, *America's Germany*, pp. 116, 124; Loth, "Korean War," pp. 465–86; Patton, *Cold War Politics*, p. 18.

[7] Georges-Henri Soutou, "France and the German Rearmament Problem 1945–1955" in Ahmann et al., *The Quest for Stability*, pp. 487, 498.

[8] On March 29, 1954, the *Bundestag* passed the *Vertrag über die Gründung der Europäischen Verteidigungsgemeinschaft*, 1954 BGBl. II, vol. II, 343, 362; Mawby, *Containing Germany*, pp. 73, 76; Soutou, "France and the German Rearmament Problem," p. 502.

commitment to undertake a substantial role in the defense of the west, in particular, to raise armed forces, the *Bundeswehr*.[9]

Domestically, the process of rearmament created difficulties. The implementation of the program of rearmament raised some specific issues about the use of armed forces that are still relevant today to the question of democratic accountability in Germany. Less than ten years after the Second World War, the prospect of the creation of a new German army met with strong popular resistance in West Germany. This resistance was partly based on the physical and moral exhaustion resulting from the war, which created an inhospitable atmosphere to any idea of rearming.[10] The experience of the war had also led to the emergence of a strong pacifist movement. On the left, many feared that the creation of a West German army would exacerbate further the split between the two Germanies. The center-right parties, on the other hand, generally favored the creation of an army, given the aggressive posture of the Soviet bloc.[11]

In this situation, the attitude of the leadership of the Social Democratic Party was important.[12] Despite popular resistance, the opposition party by the mid-1950s did not deny the political necessity of a West German army. However, it demanded that the *Bundeswehr* receive a clear constitutional basis and not be at the sole disposal of the government, but be placed under a specific regime of parliamentary control. This insistence on parliamentary control reflected not merely the desire to ensure that the opposition would always play an important role in the use of the armed forces, but also a vision of democratic accountability as an effective tool to overcome the traditional monarchical or quasi-monarchical prerogative of the executive to use them. The determination with which this vision was advocated by the Social Democratic leadership can be explained by their interpretation of history, according to which the authoritarian structure of the pre-1933 German state had contributed to the rise of the Nazi regime. The center-right parties and their constitutional counselors, on the other hand, were more pragmatic, believing that valid practical reasons still existed for an executive prerogative in this field. Still, the debate in Germany in the early 1950s established that the question of the use of armed forces was to a large extent a question of democratic accountability.

[9] Maier, "The Making of 'Pax Americana,' " p. 422; Soutou, "France and the German Rearmament Problem," p. 499.

[10] For the time before 1952, see generally Loth, "The Korean War," pp. 470, 479; Patton, *Cold War Politics*, pp. 25, 47.

[11] Gosewinkel, *Adolf Arndt*, pp. 253, 280–6; Kettenacker, *Germany since 1945*, p. 58; Patton, *Cold War Politics*, p. 21.

[12] See Gosewinkel, *Adolf Arndt*, pp. 280, 384.

This political and historical background explains why, at the time, the question of whether and how to rearm was not merely a political issue but also a constitutional controversy.[13] Since the original *Grundgesetz* had not provided for a West German military role, the Social Democratic opposition applied in 1952 to the *Bundesverfassungsgericht* (Federal Constitutional Court) for an advisory opinion on whether West Germany could accede to the European Defense Community without a constitutional amendment. This issue became moot, however, after the center-right parties won a two-thirds majority in the parliamentary elections of 1953 which permitted them to change the *Grundgesetz*. After defeat of the EDC in the French parliament and signature of the Paris Accords, the government, to meet Bonn's new NATO obligations, in 1955 secured amendment of the *Grundgesetz*. New clauses authorized the state to establish armed forces for defense purposes. One of these clauses (article 59a) provided that "the determination that a situation which requires defensive action [*Verteidigungsfall*] has arisen must be taken by the *Bundestag* [Federal parliament]." According to a contemporary leading commentator this provision meant that the decision "on war and peace" rested with the *Bundestag*.[14]

Major political issues have changed since the 1950s. Concerns about the aggressive Soviet bloc, German unification and the reemergence of old elites are not germane anymore. In 1968, the *Grundgesetz* was changed again (see below). The issue of peacekeeping missions for the *Bundeswehr* within the framework of multinational operations has arisen since the end of the Cold War. Still, concerning questions of constitutional law, past debates on these issues continue to affect Germany today.

Political background and constitutional framework for the 1994 judgment

The German Constitutional Court decided in 1994 that the *Grundgesetz* posed no obstacle to sending German troops to participate in UN-authorized military operations, provided that the *Bundestag* gives specific "constitutive approval" for each deployment.[15] The debate that accompanied these proceedings suggested that the deeper issue was the self-conception of a newly reunified Germany – that is, which lessons the

[13] See generally *ibid.*, pp. 280–374.

[14] H. v. Mangoldt and F. Klein, *Das Bonner Grundgesetz* (3 vols., Berlin, Vahlen, 1964), vol. II, p. 1126.

[15] Decision of the German Federal Constitutional Court on July 12, 1994, BVerfGE (Federal Constitutional Court), vol. 90, 286, trans. in (1994) 106 *International Law Reports* 321.

country would draw from its Nazi past and what future role it should play within Europe and in the world. While the historical aspect was indeed important in the political debate, the Constitutional Court chose to frame the issue in terms of democratic accountability and thereby transformed it into a debate as to how to proceed in the future.

Political background

The German debate of the early 1990s on the use of the armed forces for UN operations existed on both a political and a legal level. Politically, the 1980s had seen the (re)emergence of a strong pacifist movement which vigorously opposed the decision by NATO to deploy medium range Pershing II missiles on West German territory.[16] This movement was supported by large segments of the Social Democratic and Green opposition parties. In a sense, the missile crisis contributed to a reawakening of pan-German consciousness, which was drawn, at first, from the perception that the territory of the two Germanies could become the theater of a third, and final, world war. Another phenomenon that contributed to this antimilitarist mood was the widening public debate about the Nazi period and the moral guilt and responsibility of the German people for the Third Reich. These two tendencies contributed to a powerful determination, particularly among the left-liberal intellectual and political elite, to draw the "right" lessons from history.

Thus, the perception of being threatened by extinction and the desire not to repeat the deeds of the past crystallized in the 1980s into a strong political force which abhorred the thought of German soldiers ever marching into foreign countries again for any reason. Many proponents of this view saw the Gulf War of 1990–1 only as a "war for oil," and there were large demonstrations in German cities against the efforts to defend Saudi Arabia and free Kuwait. Although the great majority of the Green Party still reacted negatively to the Allied military build-up in the Gulf, some intellectuals such as Daniel Cohn-Bendit and Hans-Magnus Enzensberger compared the aggression by Saddam Hussein's Iraq to that of Hitler's Germany. Suddenly the sloganistic formula "non-use of force = peace" did not appear quite so convincing any more. Still, the Gulf War did not yet decisively change the political landscape. Thus, when the

[16] S. Layritz, *Der Nato-Doppelbeschluss: Westliche Sicherheitspolitik im Spannungsfeld von Innen-, Bündnis-, und Aussenpolitik* (Kieler Schriften zur Politischen Wissenschaft 7) (Frankfurt, Lang, 1992); the constitutional law issues are discussed by P. J. Kuyper and K. C. Wellens, "Deployment of Cruise Missiles in Europe: The Legal Battles in the Netherlands, the Federal Republic of Germany and Belgium" (1987) 8 *Netherlands Yearbook of International* Law 174–93.

CDU–FDP coalition government of Helmut Kohl decided in the summer of 1992 to contribute *Luftwaffe* reconnaissance planes to maintain the UN embargo against Yugoslavia by flying patrols over the Adriatic Sea, the SPD and Green opposition parties in parliament challenged this decision before the Constitutional Court on August 7, 1992.

Constitutional framework

In their legal challenge, the opposition parties relied on a seemingly clear constitutional rule. In 1968, the *Grundgesetz* had been amended to include article 87a(2), which provides: "Other than for defense purposes the armed forces may only be employed to the extent explicitly permitted in this *Grundgesetz*." Since, according to the petitioners, the *Grundgesetz* did not explicitly provide for external uses of the armed forces except for defense purposes within the NATO area, they could not be used for UN peacekeeping or peace enforcement operations.[17] Politically, this argument was very powerful, because it was easily comprehensible and perfectly coincided with the critical mood of the 1980s. At closer inspection, however, the argument by the opposition parties did not rest on a firm foundation.

Article 87a was inserted into the *Grundgesetz* in 1968, because the Constitution had been amended to incorporate a domestic emergency rule. At this time, West Germany was not yet a member of the United Nations, and no one thought of the possibility of its armed forces participating in UN operations. The main purpose of article 87a(2) was therefore to ensure that the armed forces would not be ordered to act domestically in any manner other than that which was explicitly permitted by the *Grundgesetz*. There is no evidence that the insertion of article 87a(2) was intended to change or in any way restrict the possibilities which were provided for in article 24(2), the old collective security clause of 1949.[18] This historical argument, however, was rather sophisticated, compared to a seemingly clear-cut rule which coincided with deeply held political and moral convictions of a critical public and the media.

Initially, this historical-legal background put the *Bundesverfassungsgericht* in a difficult position. As the proceedings went on, however, roughly from the summer of 1992 to the summer of 1994, the abhorrent situations in many civil wars, in particular in Bosnia, started to change many people's views on the legitimacy of the use of force by German troops. In 1993

[17] BVerfGE, vol. 90, 286, at p. 316; trans. in (1994) 106 *International Law Reports* 321 at 325.
[18] *Ibid.*, p. 356; trans. in (1994) 106 *International Law Reports* 321 at 334.

the government decided to send the *Bundeswehr* to participate in the UN operation in Somalia (UNOSOM II), and it contributed German military personnel to AWACS reconnaissance flights, which guided NATO fighter planes in the Bosnian theater of operations. Objections to these operations were consolidated with the original case before the Court.[19] But UN action in Somalia and NATO's involvement in Bosnia, respectively to thwart the forced starvation of a populace by local warlords and ethnic cleansing, helped sway public opinion to reexamine its views on the foreign deployment of German troops and predisposed the public to the ultimate decision of the *Bundesverfassungsgericht*.

Another reason why the judgment had a pacifying effect on public opinion was its insistence on rules that would ensure democratic accountability of all decisions involving the use of the armed forces. Indeed, the Court interpreted the *Grundgesetz* to require every "armed operation" (*bewaffneter Einsatz*), meaning every use of the armed forces that entailed the possibility of their involvement in armed clashes, to be approved by the *Bundestag*.[20] The *Grundgesetz* does not explicitly contain such a requirement of parliamentary approval. In this respect, the Constitutional Court stretched the possibilities of constitutional adjudication and ventured into the field of judicial lawmaking.[21] Still, the decision as a whole was solomonic in a political sense – addressing the public's and opposition's concerns and creating new procedural law consistent with those concerns, even though the legal basis of the decision, article 24(2), did not explicitly demand it.

Most importantly, however, this part of the judgment transformed the debate about the use of German forces abroad from the question of "whether" into the question of "how"; from a fixation on the past into an orientation to the future; and from a debate between elite and popular sentiment into a debate on democratic accountability. The public and the media received the judgment with a wide-ranging acceptance, a fact that would have been unimaginable only a few years before.

The political and military situation since 1998

The late 1990s saw the active adoption, as a matter of policy, of the use of force under international auspices by the ruling center-left Social

[19] *Ibid.*, pp. 287–90; trans. in (1994) 106 *International Law Reports* 321 at 320.

[20] C. Kress, "The External Use of German Armed Forces – the 1994 Judgment of the Bundesverfassungsgericht" (1995) 44 *International and Comparative Law Quarterly* 414–26 at 420 n. 33 and 424.

[21] G. Nolte, "Bundeswehreinsätze in kollektiven Sicherheitssystemen" (1994) 54 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 652–85 at 674 n. 81.

Democratic and Green parties, even absent UN Security Council authorization. These parties won the federal elections in September 1998. Even before their coalition government entered office a month later, it was confronted with a difficult choice of how to deal with the escalating Kosovo crisis. The previous center-right German government had consistently maintained that military action against the Federal Republic of Yugoslavia would only be possible on the basis of an authorization of the UN Security Council.[22] Given the escalation of the fighting in the area, the massive outflow of refugees, and the unlikelihood that the Security Council would give an authorization to use military force, the incoming government, including the MPs of the Green Party and their new foreign minister, Joschka Fischer, a former pacifist, on October 16, 1998 agreed to the decision by NATO threatening the use of force against the Federal Republic of Yugoslavia.

A few days later, the *Bundestag* (still with the old majority) undertook a long and soul-searching debate on whether this decision to threaten the use of force without authorization by the Security Council would be lawful and appropriate.[23] This parliamentary debate in October 1998 was a watershed for most of those who until then had had moral or political objections in principle to the use of military force abroad, and for those who believed that international legality could only be conferred by the UN. When the government asked for parliamentary approval to participate in NATO states' use of force against Yugoslavia, if necessary, the *Bundestag* granted its approval without a long debate.[24] The approval of the Macedonian Operation Essential Harvest (August 2001) was also broad-based, although the government needed the support of the opposition because a number of pacifist MPs in their ranks refused to agree. This show of resistance by some MPs turned out to be not so serious since, one month later, the governmental parties received enough support within their ranks for the authorization of the essentially similar follow-up operation Amber Fox in Macedonia.[25]

The German polity is, by now, able to muster the political will to use German armed forces under international auspices.[26] Although at present the German armed forces are being reviewed and reconceived in many

[22] Statement by Dr. Klaus Kinkel, German minister of foreign affairs, June 14, 1998.

[23] Deutscher Bundestag "Plenarprotokoll 13/248," 193 *Stenographische Berichte* 23127 (October 16, 1998); http://www.Bundestag.de/pp/pp.htm.

[24] Deutscher Bundestag "Plenarprotokoll 14/6," 194 *Stenographische Berichte* 357 (November 13, 1998); http://www.Bundestag.de/pp/pp.htm.

[25] *International Herald Tribune*, September 28, 2001; *Frankfurter Allgemeine Zeitung*, September 28, 2001, 1–2.

[26] See Appendix B, "Country participation in international operations, 1945–2000" for information on Germany's contribution.

aspects, in particular their structure, military doctrine, technology, and capacity, it is unlikely that the guiding principle of the armed forces – democratic accountability – will be substantially affected by the reform process.[27]

International authorization to deploy military forces

The question of what kind of international authorization is necessary for the decision to deploy German armed forces raises three important issues. The first is whether any constitutional requirement exists as to which kind of international organization must give the authorization under the collective security clause of the *Grundgesetz* (article 24(2)). The second is whether there exists an additional constitutional requirement that the authorization by such an international organization be legal under international law. The third issue is which kind of international authorization is perceived to be politically legitimate.

Authorization by the UN and NATO

In a 1994 judgment, the *Bundesverfassungsgericht* declared that the United Nations is a legitimate source of international authorization.[28] Once it was accepted that the collective security clause in article 24(2) of the *Grundgesetz* permits the deployment of troops to a "system of mutual collective security," it was clear that the United Nations would qualify, since this organization is the paradigm of a collective security system. It is more difficult to determine whether NATO acting alone qualifies as a sufficient source of international authorization for the purposes of German constitutional law. It is true that an inherent characteristic of the concept of collective security, as originally conceived and as compared to that of an alliance, included a potential enemy or disturber of the peace. This concept, however, is not necessarily identical with the term "system of mutual collective security" as it is understood by the *Grundgesetz*.

In 1949, the demilitarized West German state was desperate to find at least some internationally acceptable form of security. Membership in a common European and/or transatlantic arrangement were possible

[27] See O. Thränert, "Die Reform der Bundeswehr: die Debatte bei den Regierungsparteien SPD und Bündnis 90/die Grünen" in *Aus Politik und Zeitgeschichte* (Beilage zur Wochenzeitung "Das Parlament") (B 43/2000), October 20, 2000, pp. 24–8; K. H. Kamp, "Die Zukunft der Bundeswehr: die Diskussion in der CDU/CSU," *ibid.*, pp. 29–33.

[28] BVerfGE, vol. 90, 286, at p. 353; trans. in (1994) 106 *International Law Reports* 321 at 332.

options.[29] The *Bundesverfassungsgericht* was therefore correct in 1994 to define the term "system of mutual collective security" broadly, as a "system of rules which are designed to secure peace and the establishment of an organization in which every member possesses an internationally legally binding status and which mutually obliges members to preserve peace and to guarantee security."[30] This definition is designed to include NATO, although the Court stressed that, in the cases under review, it only had to decide whether NATO was a "system of mutual collective security" when implementing resolutions by the UN Security Council.

Germany's involvement as a member of NATO in the Kosovo conflict called into question even the broad reading of a "system of mutual collective security" as defined by the *Bundesverfassungsgericht* in 1994, since NATO's actions were not authorized by the UN Security Council.[31] In fact, members of parliament from the Party of Democratic Socialism (PDS), heir to the old East German communists, challenged the constitutionality of German participation in the Kosovo campaign on precisely this ground.[32] The Court did not, however, reach the merits of this complaint because it held that the MPs did not have any standing to bring the claim. In contrast to the situation in the Yugoslavia and Somalia cases, the *Bundestag* in the case of Kosovo had authorized the deployment, so that the opposition MPs could no longer claim to represent the legal interests of the *Bundestag* as a whole.

Conformity of authorization with international law

Another question is whether the international authorization on which the deployment of German armed forces is based must be in conformity with international law. Article 26 of the *Grundgesetz* explicitly prohibits wars of aggression (*Angriffskrieg*). In addition, article 25 of the *Grundgesetz* accords the "general rules of international law" a higher rank than ordinary laws. It is clear that the UN Charter rules on the prohibition of the use of force and on the limits of self-defense are among those "general rules of international law." It is therefore well established that the *Grundgesetz* obliges the German state to act in conformity with international law when using its armed forces abroad.

[29] W. Matz, "Artikel 23" in G. Leibholz and H. v. Mangoldt (eds.), *Entstehungsgeschichte der Artikel des Grundgesetzes* (Jahrbuch des öffentlichen Rechts 1) (Tübingen, 1951), p. 222.

[30] BVerfGE, vol. 90, 286 at pp. 348–9; trans. in (1994) 106 *International Law Reports* 321 at 328.

[31] M. Wild, "Verfassungsrechtliche Möglichkeiten und Grenzen für Auslandseinsätze der Bundeswehr nach dem Kosovo-Krieg" (2000) *Die Öffentliche Verwaltung* 622 at 627, 628.

[32] U. Fink, "Verfassungsrechtliche und verfassungsprozeßrechtliche Fragen im Zusammenhang mit dem Kosovo-Einsatz der Bundeswehr" (1999) *Juristenzeitung* 1016.

The two questions of whether NATO acting alone is a "system of mutual collective security" in the sense of article 24(2) of the *Grundgesetz*, and whether NATO's intervention in Kosovo was in conformity with international law, are profound questions of German constitutional law. However, they are unlikely to be decided by the Constitutional Court in the near future. The reason is not because of application of a political question doctrine, since such a doctrine does not exist in German constitutional law;[33] rather, it is the lack of any potential litigant with standing to sue.[34] Theoretically, it is possible that an individual soldier ordered to participate in an operation could file a complaint to the Constitutional Court asserting that his right to life or liberty were being violated or endangered by such an order, but this has not yet happened.

National authorization to deploy military forces

In its 1994 landmark judgment, the Constitutional Court required a specific constitutive parliamentary authorization for each "armed operation" by German forces.[35] This requirement must be put into its proper legal and political context.

The constitutional and political system

Since 1949, Germany has had a parliamentary system. The chief of the government, the chancellor, is elected by a majority in parliament. A majority in parliament can dismiss the chancellor by electing a successor. There are only very limited aspects of direct democracy on the federal level. The federal level of the German governmental system reduces the citizen's official democratic involvement to their right to vote, referenda on *Länder* boundary changes, and, for party members, to the selection of a party's list and political platform. Individual MPs will therefore not be held accountable by the voters for having voted for or against the deployment of troops. Rather, it is the parties themselves that are held accountable. This does not mean, however, that votes in parliament on the issue of troop deployment consistently follow party lines.

Deriving the parliamentary authorization requirement

A parliamentary system *per se* does not necessarily imply or require that the decision to deploy troops be decided by the parliament itself. The

[33] T. M. Franck, *Political Questions – Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton, Princeton University Press, 1992), pp. 107–25.
[34] Fink, "Verfassungsrechtliche," p. 1016.
[35] BVerfGE, vol. 90, 286; trans. in (1994) 106 *International Law Reports* 321 at 324.

basic rule that a parliamentary majority can topple the government ensures that the government remains accountable. Indeed, the *Grundgesetz* does not contain an explicit requirement that the *Bundestag* must authorize every troop deployment. In order to understand how the Constitutional Court could nevertheless postulate such a requirement, it is necessary to look at the *Grundgesetz* as a whole.

Specific constitutional provisions The *Grundgesetz* contains a number of provisions that concern the military. At first sight, the most important of these provisions resemble those of the US Constitution: the *Bundestag* decides whether "a situation requiring defense" (*Verteidigungsfall*) has arisen (article 115a(1)) and whether "peace should be made" (article 115l(3)), and a member of the government possesses the supreme command (*Befehls- und Kommandogewalt*) over the armed forces (the minister of defense in peacetime (article 65a) and the chancellor once the *Bundestag* has determined that "a situation requiring defense" has arisen (article 115b)). The legal situation is a bit more complex, however. The main purpose of a determination of "a situation requiring defense" by the *Bundestag* is not so much to authorize the use of arms, but to trigger the powers of domestic emergency legislation and to simplify the proceedings for further emergency legislation, if needed.

Historical and systemic considerations The *Bundesverfassungsgericht* invoked historical and systemic considerations in order to show that the constitutional requirement of parliamentary approval was comprehensive and extended to every "armed operation." The historical argument basically consists in the assertion that a provision of both the *Grundgesetz*, as it existed from 1956 to 1968 (as article 59a and replaced by article 115a in 1968), and the 1919 Weimar Constitution had required parliamentary authorization for every form of deployment that was conceivable at the time (war and peace, defense).[36] The systemic argument relies on the fact that the *Grundgesetz* contains a provision that requires the existence of a permanent parliamentary defense committee with investigatory powers (article 45b); another that creates the office of a Parliamentary Ombudsman for the Armed Forces (*Wehrbeauftragte*) (article 45c); and, finally, that parliament may not allocate an unspecified budget to the minister of defense, but must specifically determine the structure and future development of the armed forces (article 87a(1)(2)). *In toto*, the *Bundesverfassungsgericht* reasoned, these historical and systemic arguments were evidence that the *Grundgesetz* conceives the armed

[36] *Ibid.*, p. 387; trans. in (1994) 106 *International Law Reports* 321 at 349.

forces to be "parliament's army" (*Parlamentsheer*).[37] This, in turn, demanded that every armed deployment of the armed forces abroad must be authorized by parliament.

Although the reasoning of the Constitutional Court sounds attractive, from a legal point of view it is, to put it mildly, courageous.[38] It is one thing to accord parliament the classical right to declare war; yet it is quite another to decide that every armed troop deployment outside of NATO must be authorized by the legislature. The fact that the armed forces are subject to stringent parliamentary control (defense committee, Ombudsman, budget law requirements) does not translate into a sufficiently strong legal basis to derive *per analogiam* an approval requirement for every "armed operation." Given that the *Bundesverfassungsgericht* placed a strong emphasis on the unique constitutional tradition of Germany and the prophylactic provisions of the *Grundgesetz* (parliamentary control over the army, its budgetary constraints, etc.), it must be asked whether another country's Constitutional Court could employ this line of reasoning to conclude that a requirement of parliamentary approval does exist for every armed operation, even though the constitution contains no explicit rule to that effect.

Parliamentary prerogative to decide "essential matters" There is one consideration that may give the German judgment a significance for other countries. An important general feature of German constitutional law consists in the general jurisprudential requirement that parliament must take the most important decisions itself.[39] In a parliamentary system, more than in a presidential system, the danger exists that the government can insulate itself from public criticism by using its majority in parliament to pass legislation that delegates legislative power to the executive. Taking also into account the importance of parliamentary elections as the only means of direct control of the government by the people, the *Bundesverfassungsgericht* has strengthened the role of parliament within the constitutional framework by giving teeth to what is called the "non-delegation doctrine" in the United States.[40] In Germany, the non-delegation doctrine has a textual basis in the Constitution (article 80(1)(2) of the *Grundgesetz*). In its jurisprudence, the Court has gone one step further by developing the so-called "rule of essential

[37] *Ibid.*, p. 382; trans. in (1994) 106 *International Law Reports* 321 at 348.

[38] See, *e.g.*, G. Roellecke, "Bewaffnete Auslandseinsätze – Krieg, Außenpolitik oder Innenpolitik?" (1995) 34 *Der Staat* 415–28 at 423.

[39] D. P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edn., Durham, NC, Duke University Press, 1997), pp. 147, 150–1.

[40] L. H. Tribe, *American Constitutional Law* (3rd edn., New York, Foundation Press, 1999), vol. I, pp. 977–97.

matters" (*Wesentlichkeitstheorie*).[41] This rule means that "all essential matters, especially those relating to the exercise of fundamental rights," must be decided in substance by parliamentary legislation – that is, not by the executive by way of delegated legislation.

In its 1994 judgment, the *Bundesverfassungsgericht* applied the jurisprudential "rule of essential matters" to the specific issue of troop deployment, although without expressly saying so. A direct application of this rule could not have been achieved without difficulty. This rule's usual application requires, first, that parliament should decide the substance of the matter by way of formal legislative procedure and, secondly, that it should create general rules. An approval for the deployment of troops, on the other hand, can in practice neither be taken by following any formal legislative procedure, nor does it in any way constitute the creation of a general rule. It is perhaps for these reasons that the Court did not mention the "rule of essential matters" in the 1994 judgment, but rather relied on questionable historical and systemic arguments to justify its requirement of parliamentary authorization for every troop deployment.

The specifics of the approval requirement

The *Bundesverfassungsgericht* did not stop at postulating a general requirement of parliamentary approval for "armed operations." Four more specific pronouncements are noteworthy, as follows.

Deployments requiring authorization According to the Court, all "armed operations" (*bewaffnete Einsätze*), other than those falling under Article 5 of the NATO Treaty, require parliamentary approval. This does not include the military's involvement in relief deliveries, as long as these do not involve armed operations.[42] It does not matter whether the armed operation in question is authorized by the UN or NATO, whether it is a peace enforcement mission or a simple peacekeeping mission, whether it is an operation for the purpose of self-defense, or for any other purpose. Thus, the scope of an "armed operation" requiring parliamentary approval is very wide and includes every operation in which members of the armed forces, while armed for that particular purpose, perform a duty outside the German territory which entails some minimal risk of taking or inflicting casualties.

[41] Kommers, *Constitutional Jurisprudence*, pp. 147, 150–1; G. Nolte, "Ermächtigung der Exekutive zur Rechtsetzung" (1993) 118 *Archiv des Öffentlichen Rechts* 378 at 399.

[42] BVerfGE, vol. 90, 286 at p. 388; trans. in (1994) 106 *International Law Reports* 321 at 350.

Urgent deployments If each and every "armed operation," including self-defense, requires parliamentary approval, it is necessary to provide for the possibility of emergency situations. The *Bundesverfassungsgericht* indicated that the executive may indeed, acting alone, order armed operations in "situations of immediate danger" (*Gefahr im Verzug*). In such a scenario, however, the executive must immediately address the *Bundestag* and seek its approval as soon as possible. Should that approval not be forthcoming, the government must recall the armed forces if the legislature demands it.[43]

A rescue operation by German forces in Albania in 1997 raised the issue of whether it is constitutionally necessary for the executive to receive parliamentary authorization when the urgent operation has been concluded before the *Bundestag* could vote. It has been argued that such post hoc authorizations would serve no purpose.[44] This is not convincing, since the executive is likely to act differently when it knows that it must defend its decision in parliament.

Right of initiative May the legislature at any time demand cessation of an operation? Could it demand a change of strategy – for example, not to use ground troops despite its initial approval of them? The Court clearly gave a negative answer. The Court insisted that the *Bundestag* may not force the government to deploy troops, and furthermore that it may neither determine decisions concerning "the modalities, the dimension and the duration of the operations, nor the necessary coordination within and with the organs of international organizations."[45] In a parliamentary system, limitations on the parliament's prerogative to decide details of troop deployments are perhaps less meaningful than in a presidential system, since the legislature also has the power to dismiss the government by electing a new chancellor. Still, the existence of a constitutional rule allocating the entire decision-making power over on-going operations to the executive provides for a certain buffer against parliamentary influence.

While this delimitation of responsibilities between "if" and "how" is consistent with the general principles of separation of powers in a parliamentary system, it nevertheless assumes a special significance in the context of democratic accountability for the deployment of armed forces. Like the US Constitution, the *Grundgesetz* accords the executive an area of

[43] *Ibid.*, pp. 387, 388; trans. in (1994) 106 *International Law Reports* 321 at 350.

[44] C. Kress, "Die Rettungsoperation der Bundeswehr in Albanien am 14. März 1997 aus völkerrechtlicher und verfassungsrechtlicher Sicht" (1997) 57 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 356.

[45] BVerfGE, vol. 90, 286 at p. 389; trans. in (1994) 106 *International Law Reports* 321 at 350, 351.

independent decision-making in the field of foreign affairs and defense.[46] This executive prerogative is justified in so far as the special character of these matters requires rapid decision-making and competent assessments of complex situations.[47] Operations of armed forces abroad typically raise such issues.

This means, however, that the legislature is considered to be structurally incapable of assuming full responsibility for decision-making in this field. Indeed, the importance of a coherent implementation of a chosen policy requires that special demands by parliament should be excluded, since they may endanger the ultimate success of the operation undertaken. If, therefore, the role of the legislature is restricted to the initial authorization, the question of democratic accountability cannot be answered simply by pointing to the requirement of *Bundestag* authorization. On the contrary, as far as questions concerning the conduct of operations are concerned, parliamentary authorization tends to obfuscate the issue of accountability, since the executive alone is responsible for decisions taken to carry out an operation once it has been approved by the *Bundestag*.

Form of authorization The parliamentary decision to approve armed operations does not have to be taken in the form of the usual legislative process. It suffices that the *Bundestag* takes a single vote by simple majority on a motion by the government to approve the deployment.[48] This is probably the most appropriate form for the speedy "yes or no" decision which the government must procure in order to be able to pursue its military policies. It is also true, however, that not every troop deployment will be of such importance as to require a vote in plenary of the *Bundestag*. The Court has provided for this possibility by not defining which situations require lesser forms of authorization, but by allowing the *Bundestag* to enact general legislation on the procedure for authorization of troop deployments.[49] It is therefore possible that the power to approve troop deployments in low conflict situations could be delegated to a parliamentary committee (though not to the executive). So far, however, the *Bundestag* has made no effort to pass a German War Powers Act and it is unlikely to do so in the near future.

[46] Decision of the German Federal Constitutional Court of December 18, 1984, BVerfGE (Entscheidungssammlung des Bundesverfassungsgerichts), vol. 68, 1 at p. 89, trans. in (1994) 106 *International Law Reports* 364 at 375.
[47] BVerfGE, vol. 68, 1 at p. 106; trans. in (1994) 106 *International Law Reports* 364 at 385.
[48] BVerfGE, vol. 90, 286 at p. 388; trans. in 106 (1994) *International Law Reports* 321 at 350.
[49] *Ibid.*, p. 389; trans. in (1994) 106 *International Law Reports* 321 at 351.

Authorizations in practice

Germany does not yet have much practical experience with the use of military forces under international auspices. It has not used its forces under any other international auspices than the UN or NATO. Since the two Germanies only joined the UN in 1973, they had nothing to do with its decision-making with respect to the Korean War, the Suez crisis, or the Congo. For several domestic political reasons, it was out of the question that the newly reunified Germany participate in operation Desert Storm in 1991. It was only during the Yugoslavian and Somalian crises that German troops started to operate under international auspices. Initially, they acted simply on the basis of government decisions, but after the *Bundesverfassungsgericht* decision that parliamentary approval was necessary, the *Bundestag* gave its consent after the fact.[50]

Until the Macedonian deployment in 2001, there were no noticeable tensions between parliament and the executive with regard to authorization of the use of the armed forces. It is telling that the government even consulted the leaders of the parliamentary party groups before deciding on the (unilateral) rescue operation in Albania in March 1997.[51] Since this operation was clearly an "urgent deployment" to rescue Germans and other foreigners, it necessitated no prior decision by the *Bundestag* or consultation with parliamentary leaders. Since, however, the government had informed and consulted leading MPs before the operation, a leading government lawyer noted that the Albanian operation had demonstrated a "climate favoring confidence-building measures"[52] in the *Bundestag*.

It appears that, on the whole, past parliamentary authorizations of troop deployments have not had the effect of restraining the government. On the contrary, the role of the legislature has been to enable the government to go ahead. It is true that most authorizations were not controversial. It is also true that, in the case of Kosovo, the government had already supported a NATO decision in 1998 to threaten the Federal Republic of Yugoslavia with air strikes before a parliamentary debate took place. The decision to participate in the NATO air strikes against Yugoslavia without authorization by the UN Security Council, however, could not have been taken by the government without parliamentary support. The parliamentary debate that preceded this decision was long, earnest, and searching. It was, therefore, a catalyst for public opinion which, until then, had not envisaged German troops acting without Security Council authorization.

[50] See generally Kress, "The External Use of German Armed Forces," p. 414.
[51] Kress, "Die Rettungsoperation der Bundeswehr," p. 355.
[52] K. Dau, "Die militärische Evakuierungsoperation 'Libelle' – ein Paradigma der Verteidigung?" (1998) *Neue Zeitschrift für Wehrrecht* 99.

Since only unarmed German medical units took part in the East Timor operation, questions of accountability did not arise in this case. The German government merely welcomed the decision by the UN Security Council to issue a mandate authorizing UNTAET under Chapter VII of the UN Charter.[53]

Civilian control

The question of civilian control of the military has a unique history in Germany. Today it raises important domestic and international issues.

Historical aspects of civilian control of the military

Historical experience led the framers of the *Grundgesetz* to provide constitutional guarantees for the civilian control of the military. The 1919 Weimar Constitution established that the president of the Republic (*Reichspräsident*) exercised supreme command over the armed forces. Since the *Reichspräsident* was directly elected by the people, his position with regard to the military was less subject to parliamentary control by the *Reichstag* than other members of the executive. Thus, although the *Reichspräsident* delegated his power of supreme command to the minister of defense (who was responsible before parliament), the German army (*Reichswehr*) was able to cooperate with the Soviet Red Army in order to prepare for rearmament in circumvention of the Versailles Treaty. In addition, the army could not be relied upon as an instrument of the democratic and republican system, since many officers were nostalgic about their role and status in pre-First World War Germany. After the Second World War, this was regarded as one of the major reasons why the army was ultimately won over by the Nazi regime.

Safeguards for the civilian control of the military

The specific safeguards which the *Grundgesetz* provides to ensure civilian control over the military have already been mentioned: ministers, responsible to parliament, who exercise supreme command (*Befehls- und Kommandogewalt*) over the armed forces; a standing *Bundestag* defense committee with special investigatory powers; and, finally, an ombudsman who investigates and reports about the condition of the troops. In addition to these three specific powers, the *Bundestag* has general powers of investigation, which allow it to require members of government to

[53] Official statement of the German minister for foreign affairs, Josef Fischer, on September 15, 1999, http://www.auswaertiges-amt.de/6_archiv/99/p/p990915a.htm.

prepare a report on a particular matter or appear before a parliamentary committee for questioning. Finally, public opinion and the press are perhaps the most important safeguards to ensure civilian control over the military.

Civilian control of the military acting under international auspices

The same constitutional rules apply for the use of the military under international auspices. German military personnel not only act upon orders from their immediate German military supervisor but also operate within UN, NATO, or other international chains of command. These international forms of command, however, have not been interpreted as encompassing what is called "full command" in NATO terminology. So far, existing international forms of command have not exceeded the threshold of "operational control" and "operational command" (NATO terminology), meaning limited and revocable forms of command.

German military forces that are integrated into multinational units are subject to command structures which can be used both in peacetime and for military operations. There are four kinds of command structures.[54] The first is the one used for the standing forces of NATO, the "model of permanent or temporary subordination." These units are directly integrated into the command structures of NATO. Another model is the so-called "lead-nation model," according to which the nation that deploys the major part of the unit also possesses the command authority over the whole unit. This model is used for multinational units outside NATO structures. According to the "framework model," one participating nation provides the logistics functions and headquarters and fills out the majority of the strategic command posts. Finally, according to the model of "advanced integration," the functions in command structures are equally shared between the participating nations. The command over the unit is held by the participating nations following a rotation schedule, including Germans. The German command structure itself does not differ substantially from that of other western nations.

Civilian responsibility

So far, the question of civilian responsibility for military operations has not been tested. The general rules of political and criminal responsibility apply. The chancellor and his government can be dismissed by a parliamentary vote of no-confidence. The parliamentary defense committee has the powers of a court when it undertakes investigations.

[54] Bundesministerium der Verteidigung (ed.), *Multinationalität* (Bonn, 1999), p. 9.

The specific structure of the German armed forces is an important aspect that affects the democratic accountability of authorizations to use military forces under international auspices. In contrast to other NATO members such as France, the United Kingdom, and the United States, Germany still practices the draft, and it has not fully professionalized its armed forces. However, so far, only volunteers among those drafted have been sent to participate in military operations under international auspices.

It is hard to predict what form of expression civilian discontent with the military might assume, if German troops were to suffer heavy casualties. This lack of experience makes it difficult to take a firm position on Karen Mingst's plausible hypothesis, according to which the greater the risk of casualties, the more likely it is that there will be legislative and popular concern.[55] As long as the *Bundeswehr* operates together with troops from other democracies, however, and risks are perceived as equitably shared, that concern will probably remain within manageable bounds. The voters can replace the government, and thereby punish the responsible civilians, only at the general federal elections, which take place every four years. Informally, however, the elections in the different German *Länder* play an important role as a yardstick for the public's appraisal of the federal government's performance. Since the timing of state elections varies, they provide an opportunity to measure public reaction throughout a legislative period.

Military responsibility

The question of military responsibility can be subdivided into the areas of self-protection and of the protection of others. The issue of ensuring the safety of the soldiers in the field is more than a practical operational matter. Specific rules of engagement have been issued by the Ministry of Defense to ensure the self-protection of the armed forces. Such rules of engagement, however, also contain rules with respect to the treatment of persons who pose a danger to public safety. Since KFOR (Kosovo Force), for example, is responsible for public safety in Kosovo, rules of engagement have been issued by the minister of defense, according to which the armed forces may arrest persons who are about to commit or are suspected of having committed a "serious crime" (*schwerwiegende Straftat*).

According to these rules, suspects must be treated in a humane manner, meaning they must not be tortured or subjected to discriminatory

[55] See chapter 3, above.

treatment. They should be housed under hygienic and healthy conditions, fed well, and provided with proper clothing and medical assistance, if necessary. German troops have repeatedly performed such police functions.

The most important question of military responsibility is how to ensure compliance with international humanitarian law. No violations of international humanitarian law by German armed forces have occurred or even been alleged since the end of the Second World War. The Ministry of Defense has issued general rules nos. 208 and 211, which order compliance with the same standards of international humanitarian law in international and intra-state conflicts, including during UN peacekeeping missions.[56] All German soldiers receive instructions in international humanitarian law, both in general courses and specifically before they are sent on a mission. Infractions would be sanctioned by criminal and disciplinary proceedings.

Finally, a feature of German military law and doctrine serves to ensure military responsibility through the concept of "Innere Führung." This is a general doctrine according to which soldiers are encouraged to act as "citizens in uniform." Although expected to follow orders (as long as they are not manifestly illegal), they are also expected to reflect upon the actual working of the military, to safeguard their rights, and to contribute to the well-functioning of the armed forces by their independent thinking. Superiors are trained to lead by example and persuasion, and to respect soldiers as responsible contributors to the military mission.

The question of democratic accountability: general conclusions

It is too early to draw any firm conclusions in terms of democratic accountability from the legal structure set out by the *Bundesverfassungsgericht* in 1994. Since then, German troops have been authorized to participate in the Bosnia, Kosovo, and Macedonia operations. The moral issue in those cases was largely uncontroversial and no casualties from combat have (so far) occurred. Therefore, neither the constitutional framework nor the new political culture of openness in military operations abroad has been seriously tested.

Still, it is certain that this new political culture has not superseded Nazi aggression and the Second World War as reference points for German foreign and military policy. It still appears likely that the future role of the *Bundeswehr* will be debated domestically with references reminiscent

[56] See, for a helpful commentary, C. Greenwood, *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford, Oxford University Press, 1999). These rules resemble Department of Defense Directive 5100.77 in the United States.

of the rearmament debate of the 1950s, especially if the humanitarian motives of an operation can seriously be doubted. In addition, precisely because of the historical legacy, German foreign policy makers are likely, for the foreseeable future, to be more mindful than their colleagues in other countries of the perceptions that others have of German motives for participating in military operations. Interestingly, after the September 11, 2001 terror attacks against the United States, Chancellor Schroeder has pronounced that the special post-war attitude with respect to the use of the German armed forces is now over and that Germany must fully participate in NATO operations and other operations to defend against terrorism.[57] It is submitted that this statement is premature.

Despite these caveats, the case of Kosovo permits a first (politico-legal) hypothesis that the requirement of parliamentary approval by a single majoritarian vote for every armed deployment contributes to a more earnest and responsible debate by MPs about the question of war and peace than if they only had the right to discuss the issue. The flip-side of this, however, is that deputies are more reluctant to express the reservations that still exist among large numbers of voters. Although the Kosovo debate in the *Bundestag* in October 1998 was deep and complex, it was clearly an elitist debate, concentrating in particular on whether the UN Charter's prohibition against the use of force should or could be infringed. There was little discussion of the military risks involved.

This leads to a second hypothesis: when a parliamentary body decides on a military operation, since it cannot make meaningful determinations concerning the scope, methods, or tactics of the operation involved, its role is necessarily restricted to providing an initial legitimizing function. It is unlikely, however, that this initial vote of the *Bundestag* can irrevocably legitimize an executive's decision to employ the military, if the operation should develop unsatisfactorily. Such a power would only exist if the legislature had the right to recall the troops. In a parliamentary system like the German one, the legislature always retains the power to elect another government, and it can use this threat to influence the conduct of operations. The influence and cohesiveness of party structures, however, renders this possibility unlikely.

This leads to a third hypothesis: should operations run into difficulties and the question of accountability arise, voters and public opinion in Germany (and similar parliamentary systems) will probably hold the government responsible and not the individual deputies who have voted in favor of a particular operation. This is all the more plausible since deputies in the *Bundestag* are more dependent on their parties to be nominated

[57] *International Herald Tribune*, October 16, 2001 and *New York Times*, October 14, 2001.

and elected than are members of the US Congress, for example. From this perspective, if the opposition parties in a parliamentary system agree to authorize a deployment of the armed forces, this adds additional legitimacy to a military operation. This happened in the *Bundestag* in August 2001, when the *Bundeswehr* was authorized to join NATO's weapons-collection mission (Essential Harvest) in Macedonia.

German attitudes toward the use of armed forces seem to be becoming more like those of other western societies. On the other hand, it is also possible that those societies will develop stronger requirements for parliamentary approval of the executive's decision to use the armed forces. The specific German problem with regard to the legitimacy of the use of force makes it questionable, however, whether the German example can be seen as part of a general trend, as Lori Damrosch suggests,[58] toward greater legislative involvement leading to greater democratic accountability. The German political experience seems to show that a requirement that the legislature approve the deployment of forces, in a parliamentary system dominated by national parties, does not fundamentally change the question of democratic accountability for the use of armed forces under international auspices. With regard to the actual conduct of operations, the most important factor will always remain public opinion, which must remain especially vigorous and critical of the government's decisions in times of war.

[58] See chapter 2, above.

Part V

Permanent members of the UN Security Council

11 Russian Federation: the pendulum of powers and accountability

Bakhtiyar Tuzmukhamedov

Introduction

The first time that Soviet servicemen joined a military mission under international auspices was in November 1973, when thirty-six officers became part of the United Nations Truce Supervision Organization (UNTSO). It was after "the Governments of the United States and of the Soviet Union, in a joint approach to the Secretary-General [of the United Nations], offered to make available observers from their countries for service with UNTSO . . . The Secretary-General accepted these offers with the informal concurrence of the Security Council."[1] Thirty-six US officers were also assigned to UNTSO.[2]

In early 1975, while a student of international law at the Moscow Institute of International Relations, I discovered this fact. I was writing a paper for a joint conference with officer-students of the Military Institute, and in the process I came across a UN publication about the world body's efforts to maintain peace in the Middle East. It contained a picture of a Soviet army captain with his French counterpart somewhere in the middle of a desert.

Little was known to the general public in the former Soviet Union about such assignments of the military until 1992, when the Russian Federation dispatched a whole unit, rather than individual officers, to the UN Protection Force (UNPROFOR) in the former Yugoslavia. Even an enlightened outside observer was unlikely to gain access to documents that would have shed light on the decision-making process resulting in Soviet servicemen leaving their home bases, donning blue berets and landing, in the words of a popular song, in "far-away places with strange-sounding names." In the USSR, there was no legislation that established domestic procedures for assigning members of the armed forces to missions under international

[1] United Nations, *The Blue Helmets, A Review of United Nations Peace-Keeping* (3rd edn., New York, United Nations, 1996), p. 29.

[2] See Appendix B, "Country participation in international operations, 1945–2000" for information on Russia's contribution.

auspices, nor for defining their status, compensation, and so on. These legislative lacunae were partly filled in the early 1990s and now seem to have disappeared for good. There is a particular provision in the Russian Constitution that has so far been used solely for the purpose of providing legal grounds for sending military personnel to international operations. There is dedicated legislation and practice, which is sufficient for analysis. There is even some judicial experience, albeit limited and somewhat controversial. This chapter will examine all these aspects.

Since the focus of the study is on the use of military forces under international auspices, this chapter will not consider instances when civilians, including civilian police, are assigned to missions as civil affairs officers, UN civilian police, election observers, civil engineers, and the like. Also outside the scope of this chapter are cases when servicemen – for example, truck drivers – are assigned to an international mission to perform exclusively civilian tasks, such as delivery of humanitarian aid, and cases when the Soviet Union made a contribution such as airlifts to the UN Operation in the Congo (ONUC) and the second UN Emergency Force (UNEF II). For obvious reasons, unilateral engagements (the USSR in Afghanistan) and bilateral arrangements (military advisers, instructors) will not be considered, either. This chapter will focus on domestic regulations and procedures affecting domestic accountability.

Historical overview

The power of the government to dispose of its military forces,[3] as defined by the early Soviet Constitutions of 1918, 1924, and 1936, as well as the original version of the Constitution of the USSR of 1977, did not include authority to use the armed forces under international auspices. The Constitution of 1936 and the original version of the Constitution of 1977 authorized the Presidium of the Supreme Soviet – a permanent body of the legislature acting when the Supreme Soviet was not in session – to declare a state of war "in case of a military attack against the USSR or the need to fulfill international treaty obligations on mutual defense against aggression" (respectively, article 49(m)[4] and article 121(17)[5]).

[3] See B. Tuzmukhamedov, "Russian Forces in the Commonwealth of Independent States" in Dieter Fleck (ed.), *The Handbook on the Law of Visiting Forces* (Oxford, Oxford University Press, 2001), pp. 417–41.

[4] *Konstitutziya Obshchenarodnogo Gosudarstva* [The Constitution of the All-Peoples State] (hereafter KOG), Moscow, 1978, at p. 232. Hereinafter, Cyrillic-lettered paragraphs of legislative acts will be replaced by corresponding Latin letters in alphabetical order. For example, a paragraph identified as "в" in the original text will become paragraph "c," or as in this case, paragraph "н" in the Russian text will be identified as "m."

[5] KOG, at p. 135.

The powers of the executive branch, that is, the Council of Ministers, under both constitutions were formally limited to supervision of the development of the armed forces and the setting of annual draft quotas (respectively, article 68(e)[6] and article 131(5)[7]).

In reality, the decision-making took place in neither the executive nor the legislative branch, but in the highest echelons of the Communist Party of the Soviet Union (CPSU), its Central Committee, and the ruling body thereof, the Politburo. Any significant military and foreign-policy action required a decision of the Politburo. The constitutional grounds for that real "supremacy" appeared in article 6 of the Constitution of 1977, which named the CPSU, "the guiding and leading force of Soviet society, the nucleus of its political system, its government and public organizations."[8]

The decision to deploy Soviet servicemen to UNTSO illustrates the pattern. The Ministry of Defense and/or the Ministry of Foreign Affairs would file, either jointly or separately, a memorandum with the Politburo, which then would issue a decision based on draft recommendations attached to the note. That decision assigned specific tasks to these ministries (in fact, the ministries would task themselves through the Politburo), and, as appropriate, to the Ministry of Finance (if funding was required) and the Ministry of Civil Aviation (if personnel were to be airlifted to the deployment area by the state-owned airline).

The decision of the Politburo gave a green light to the Council of Ministers to pass an order which was followed, first, by the directive of the minister of defense and then by the directive of the chief of the General Staff. Those acts identified the mission and area of deployment, units of the armed forces that were to loan their officers, details of those officers, provisions for their per diem, allowances, and compensations, and other specifics.

It may be safely assumed that most, if not all, decisions in the former USSR regarding military contributions to international missions were taken in this fashion. As for accountability, it was restricted to the chain "Politburo/Central Committee – respective ministries" with no participation of parliament, let alone the general public.

The legislative transformation and preparation for the fundamental constitutional reform launched in the 1980s when Mikhail Gorbachev was in power affected that area as well. The reinstatement of the national representative body, the Congress of People's Deputies, and the introduction of the office of the president of the USSR resulted in redistribution of authority among branches of the government, primarily the president and the Supreme Soviet. Much of this was achieved by a single amendment to

[6] KOG, at p. 234. [7] KOG, at p. 137. [8] KOG, at p. 113.

the Constitution, adopted by Law No. 1360-I of March 14, 1990.[9] This provided for the office of the president, described its powers, and significantly modified the powers of the legislature. The same law amended article 6, which no longer provided constitutional justification for the exclusive powers of the CPSU. It stated that the Communist Party, along with other political parties and movements, "through their representatives elected to the Soviet of People's Deputies and by other means shall participate in the development of the policy of the Soviet state, in the management of state and public affairs."[10]

A new and noteworthy provision in article 113(14), introduced by the same amendment, authorized the Supreme Soviet "to decide on the use of contingents of the armed forces of the USSR to fulfill international treaty obligations on the maintenance of peace and security."[11]

Analysis of the letter of those amendments reveals, first, that the Communist Party apparatus was to be excluded from the decision-making process regarding placing Soviet servicemen under international auspices. Secondly, although the president was made the supreme commander-in-chief of the armed forces of the USSR, the Supreme Soviet, that is the parliament, was made the ultimate decision-making body with regard to a deployment of forces not related to war fought by the nation. Of course, in the case of an armed attack against the USSR, the power to use military force was vested in the president.

The amendment referred to "international treaty obligations," and one might wonder whether the Constitution should have been interpreted narrowly, thus allowing only treaty-based foreign deployments of Soviet forces. Alternatively, a broad interpretation was possible, allowing for that amendment to be invoked if the UN Security Council were to pass a binding resolution. Since the UN Charter is a treaty, it could be argued that it was embraced by the language of article 113(14).

This reform could have opened the way for parliamentary debate of foreign deployments of Soviet military personnel. The wounds of the Afghan campaign were fresh, and the nation was exposed in the late 1980s and early 1990s to revelations of how secret decisions to intervene

[9] (1990) 12 *Vedomosti S'yezda Narodnikh Deputatov i Verkhovnogo Soveta SSSR* [The Bulletin of the Congress of People's Deputies and the Supreme Soviet of the USSR], article 189.

[10] KOG, at p. 113.

[11] Article 113(14). On September 17, 1987, Pravda published an article by Mikhail Gorbachev which supported using "the institution of UN military observers and UN peacekeeping forces" for the "disengagement of the forces of warring parties" and "verification of cease-fire and armistice agreements." Fourteen months later, in his December 7, 1988 speech to the UN General Assembly, Gorbachev proposed sending "a contingent of UN peacekeeping forces" to Afghanistan. (1988) 24 *Vestnik Ministerstva Inostrannykh Del SSSR* [Bulletin of the Ministry of Foreign Affairs of the USSR] 5.

had been taken. The new legislators who joined the "Old Guard" of the Supreme Soviet had yet to grow a protective shell that would make them less sensitive to the needs and wants of their voters. Hence, they were likely to reflect the mood of their constituents.

However, that provision of the Soviet Constitution was never put to the test. On the one hand, there were no new deployments in the brief period during which it was part of the law. On the other, the pace of reforms initiated by Gorbachev slowed down by the turn of the decade, and they became history with the break-up of the Soviet Union. New and rather confused legislative reform became part of the process of Russia asserting itself as an independent state, and that reform became even more muddled with the 1993 confrontation between President Boris Yeltsin and the parliament. The confusion was reflected in the final edition of the Russian Constitution, originally adopted in 1978 as a modified version of the 1977 Soviet Constitution. By 1993, with a patchwork of numerous amendments, the Constitution bore little resemblance to the original text.

The 1978 Constitution of the Russian Federation did not contain any provision similar to article 113(14) of the Soviet Constitution. Until September 24, 1992 there was no legislation to cover the gap. Before adoption of a regulating act, Russia had to meet the challenge of authorizing the deployment of its forces abroad under international auspices. On March 6, 1992, the Supreme Soviet of the Russian Federation authorized the deployment of 900 officers and ranks with the UN Protection Force (UNPROFOR) to the former Socialist Federal Republic of Yugoslavia. In the absence of any established and formalized procedure, the two branches – that is, the president and the legislature – had to improvise.

The president requested that the Supreme Soviet consent to deployment of one infantry battalion.[12] By Resolution No. 2462-I of March 6, 1992, the parliament decided to "give consent to detail the requested military contingent."[13] It referred to the request of the president, Russian obligations under the UN Charter, the resolution of the UN Security Council (UNSC), an appeal from the UN Secretary-General, and its desire "to contribute by practical steps to the early restoration of peace and stability in Yugoslavia." By the same resolution, the Supreme Soviet asked the Council of Ministers (the executive branch) to deal with all issues relating to the deployment of the unit.

[12] To the best of my knowledge, texts of the president's requests have never been made public.

[13] (1992) 12 *Vedomosti S'yezda Narodnikh Deputatov i Verkhovnogo Soveta Rossiyskoy Federatsii* [The Bulletin of the Congress of People's Deputies and the Supreme Soviet of the Russian Federation], art. 619.

As for accountability, the parliament requested that the Council of Ministers inform it on a regular basis about the Russian unit in the operation. The Supreme Soviet also tasked its own committees on foreign affairs and foreign economic relations, and on defense and security, to oversee the unit's participation in the mission. The general public was informed of the decision to deploy Russian forces abroad by the media and by promulgation of the parliamentary action, as required by law.

Four months later, responding to a request by the president to reinforce the unit, which in turn had been prompted by an appeal by the UN Secretary-General and a UNSC resolution, the Supreme Soviet acted again. It consented to an additional deployment of 400 more servicemen "to participate in the UN operation to provide the necessary conditions for unhampered delivery of humanitarian aid to Bosnia and Herzegovina."[14] That Resolution, No. 3336-I of July 17, 1992, reaffirmed provisions of the preceding document regarding the mandate parliament gave to the Council of Ministers.[15]

The parliament was also debating the draft Law on Defense, which was finally enacted on September 24, 1992 as Law No. 3531-I. It had a provision that resembled article 113(14) of the Soviet Constitution, but the broader Russian version authorized the Supreme Soviet "to decide on the use of the Armed Forces of the Russian Federation beyond the boundaries of the Russian Federation according to its international obligations."[16] As will be recalled, the power of the USSR's Supreme Soviet was limited to instances when military units were to be used "to fulfill international treaty obligations regarding the maintenance of peace and security."

A general remark may be appropriate here. The Russian Constitution of 1978, as amended, established a balance between the president, who was, according to its article 121/1, "the supreme official of the Russian Federation and the head of the executive power,"[17] and the Congress

[14] (1992) 31 *Vedomosti S'yezda Narodnikh Deputatov i Verkhovnogo Soveta Rossiyskoy Federatsii*, art. 1839.

[15] At that time, emotions ran high in parliament over alleged violations of the rights of ethnic Russians in the newly independent Baltic states, and the Supreme Soviet added an odd "rider" to the Resolution, ordering the Council of Ministers "to inform the UN Secretary-General" of Russian concerns "over massive violations of human rights" there. On the same day, July 17, 1992, the Supreme Soviet also passed a strongly worded Declaration on Human Rights in the Baltic States ((1992) 30 *Vedomosti S'yezda Narodnikh Deputatov i Verkhovnogo Soveta Rossiyskoy Federatsii*, art. 1807).

[16] (1992) 42 *Vedomosti S'yezda Narodnikh Deputatov i Verkhovnogo Soveta Rossiyskoy Federatsii*, art. 2331.

[17] *Konstitutziya (Osnovnoy Zakon) Rossiyskoy Federatzii* [Constitution (Fundamental Law) of the Russian Federation] Moscow, 1993, at p. 62.

of People's Deputies and the Supreme Soviet. The Congress, being the supreme body of power, under article 104 could decide on any matter under the authority of the Russian Federation. The president's power (article 121/5(5)) to appoint ministers was restrained by the power of the Supreme Soviet (article 109(3)) to approve appointments of ministers of foreign affairs, defense, security, and internal affairs.

Similar to the Constitution of the USSR, the Russian Constitution in article 121/5(16) named the president the supreme commander-in-chief of the armed forces. He could appoint and relieve senior commanders and confer senior military ranks, but he had to do this according to procedures set by a relevant law. The Law on Military Duty and Military Service of 1993, in articles 42(1) and 46(2), provided that, prior to such action, the president had to consult with appropriate bodies of the Russian Supreme Soviet.[18]

In real life, the balance between the two branches of government was a tug-of-war that kept escalating, and ultimately reached its violent climax when the president suspended the representative bodies by his Decree No. 1400 of September 21, 1993.[19] He used the military and security forces to enforce that suspension, and brought an abrupt end to the second constitutional reform. No competing power could now prevent the president and his supporters from adopting a new Constitution, thus launching the third constitutional reform in less than ten years. However, even during that brief period, the competing branches of government had been able to develop and test certain decision-making methods that would be embodied in legislative acts soon to be adopted.

Current regulation

The Constitution

Even a quick look at the distribution of authority among the branches of government under the 1993 Constitution of the Russian Federation of 1993 and relevant laws demonstrates a striking imbalance, especially with regard to foreign affairs and the use of military power. The Constitution vests the bulk of those powers in the president, who is the head of state and the supreme commander-in-chief. As to foreign affairs, the president both defines guidelines for the nation's foreign policy and supervises its

[18] (1993) 9 *Vedomosti S'yezda Narodnikh Deputatov i Verkhovnogo Soveta Rossiyskoy Federatsii*, art. 325.

[19] (1993) 39 *Sobraniye Aktov Preszidenta i Pravitelstva Rossiyskoy Federatsii* [Collection of the Acts of the President and the Government of the Russian Federation], art. 3597.

execution. He represents the country in international relations; he negotiates and signs international treaties and instruments of ratification; and he appoints and recalls ambassadors. To exercise the latter prerogative, he does not need the advice and consent of legislators, who are limited to "consultations with appropriate committees and commissions of the chambers of the Federal Assembly."[20]

Of course, the Federal Assembly, which is the bicameral parliament, has an important role in ratification of international treaties. Both chambers share that authority. The State Duma bears primary responsibility for the adoption of laws.[21] The laws are then submitted to the Federation Council, which, acting at its own discretion, may approve them either by an affirmative vote of more than half its members or by failing to act within a required fourteen-day period.[22] However, under article 106, there are six categories of laws that must be considered by the Council.[23] They include ratification and denunciation of international treaties, the status and protection of the Russian Federation border, and war and peace. These laws take effect when signed by the president.[24]

As the supreme commander-in-chief, the president is authorized to introduce martial law in the case of aggression or imminent threat of aggression against Russia. The president also approves the military doctrine of the Russian Federation. He appoints senior military officers who compose the supreme command of the armed forces and relieves them of their posts. He may do so without even consulting legislators. The president also appoints and chairs the Security Council of the Russian Federation,[25] which advises the president, and drafts his decisions on national security matters.

The president's authority with regard to foreign affairs and military power is augmented by his direct control over respective departments of the executive branch, although this is not reflected in the Constitution. The ministries of foreign affairs and defense, although parts of the cabinet, are directly subordinate to the president. So are the ministries of internal affairs (internal security), and civil defense and emergency management, the Federal Security Service (counterintelligence), the Foreign Intelligence Service, the Federal Border Service and several other agencies and departments. The cabinet merely coordinates the activities of those executive departments, which report directly to the president in his role as supreme commander-in-chief and chair of the Security Council. This was originally provided for by the Decree of the

[20] *Konstitutziya Rossiyskoy Federatsii* [Constitution of the Russian Federation] (hereafter KRF), art. 83(l).
[21] KRF, art. 105(1). [22] KRF, art. 105(4). [23] KRF, art. 106(d).
[24] KRF, art. 86(c). [25] KRF, art. 83(g).

President of the Russian Federation No. 66 of January 10, 1994, "The Structure of the Federal Organs of Executive Power,"[26] which was superseded by a succession of decrees under the same title, and decrees amending those decrees. This structure is now embodied in article 32 of the Federal Constitutional Law, "On the Government of the Russian Federation" of December 17, 1997,[27] as amended, and Decree No. 867 of May 17, 2000,[28] which President Vladimir Putin signed soon after he was sworn in.

The powers of the legislative branch, distributed between the two chambers of the Federal Assembly, are rather modest. Of course, they have the power of the purse. The two chambers share the power to ratify and denounce international treaties, as well as to pass laws "on questions of war and peace."[29] Most relevant to this study, article 102 of the Constitution delegates to the Federation Council the power of "making decisions on the possibility of the use of the Armed Forces of the Russian Federation outside the territory of the Russian Federation."[30]

As of the time of writing, article 102 had only been invoked to authorize deployments (or extensions of deployments) of Russian forces participating in operations under international auspices. Some commentators assume that it may, apart from such operations, also be invoked in case of aggression against the Russian Federation or the need to fulfill international treaty obligations,[31] while others use broad terms such as "military and other actions."[32]

In my opinion, article 102(1d) may be invoked in situations less dramatic than an armed attack against the nation. If such an attack were to occur, the president would exercise his powers as supreme commander-in-chief and, unilaterally, without referring to parliament for lack of time, order troops into battle. He would also introduce martial law either nationwide or in certain areas, by a decree which he must immediately send to both chambers of the Federal Assembly.[33] The Constitution requires that the decree introducing martial law be approved by the Federation Council.[34]

Article 102(1d) applies to circumstances other than a sudden armed attack on the nation. The text of that provision also allows for the possibility

[26] (1994) 3 *Sobraniye Actov Prezidenta i Pravitelstva Rossiyskoy Federatzii*, art. 90.
[27] (1997) 51 *Sobraniye Zakonodatel'stva Rossiyskoy Federatsii* [Collection of Legislation of the Russian Federation] (hereafter SZ RF), art. 5712.
[28] (2000) 21 SZ RF, art. 2168. [29] KRF, art. 106(f). [30] KRF, art. 102(1d).
[31] Yu. Kudriavtsev (ed.), *Kommentariy k Konstitutzii Rossiyskoy Federatzii* [Commentary to the Constitution of the Russian Federation] (Moscow, 1996), p. 425.
[32] L. Okun'kov (ed.), *Kommentariy k Konstitutzii Rossiyskoy Federatzii* [Commentary to the Constitution of the Russian Federation] (Moscow, 1996), p. 433.
[33] KRF, art. 87(2). [34] KRF, art. 102(1b).

of a decision not to deploy. As stated in article 166(2) of the Rules of the Federation Council, if the motion to approve the decision has not been voted for by the majority of the members of that chamber, "the Armed Forces of the Russian Federation may not be used beyond the territorial bounds of the Russian Federation."[35]

An important question, which cannot be answered by way of literal interpretation of the text of the Constitution, is the definition of the phrase, "use of the Armed Forces." For example, if a naval battle group deploys beyond the Russian territorial sea, or a long-range bomber flies over international waters, would that qualify as "use of the Armed Forces"? If it would, then each single "use" of that sort would require a parliamentary authorization, which is impracticable.

The meaning of article 102(1d) may be clarified by subsequent practice, or by judicial interpretation of that provision of the Constitution. The latter would be done by the Constitutional Court of the Russian Federation, which is the only authority that can give official and binding interpretation of the Constitution.[36]

The Constitutional Court

On June 15, 1995 the Federation Council voted to file a petition with the Constitutional Court in which it requested an interpretation of article 102(1d) of the Constitution.[37] The petition revealed, first, a narrow interpretation by the petitioner of the options of lawful uses of the armed forces and, secondly, the inclination of the Council to restrict its own role in authorizing their use.[38] The legal grounds for the use of the armed forces under article 102(1d), listed in the petition, were reduced to those found in treaties. Moreover, the Federation Council found its participation unnecessary whenever there was a ratified treaty, considering that by its positive vote during the ratification it gave full discretionary power of indefinite duration to the president and cabinet.

Specific cases of the employment of the armed forces, such as traditional peacekeeping operations and enforcement measures under Chapter VII of the UN Charter, and similar regional arrangements provided

[35] (1996) 7 SZ RF, art. 655. Article 166 is part of Chapter 17 of the Rules of the Federation Council, which prescribe the procedure for deciding on the question of the possibility of using the armed forces of the Russian Federation abroad.

[36] KRF, art. 125(5) and art. 106 of the Federal Constitutional Law No. 1-FKZ of July 21, 1994 "On the Constitutional Court of the Russian Federation" ((1994) 13 SZ RF, art. 1447).

[37] (1995) 26 SZ RF, art. 2412.

[38] Text of petition was not published, but is on file with the author.

for in Chapter VIII and in regional treaties, were not specifically discussed in the petition. It did not mention cases of collective and individual self-defense under Article 51 of the UN Charter that are not based on any specific treaty, other than the Charter itself.

The petition seemed to ignore the fact that, while the Federation Council voted to request an interpretation of article 102(1d), the other chamber of the Federal Assembly was about to vote on two laws of immediate relevance to the petition, the Law on International Treaties of the Russian Federation[39] and the Law on the Procedure for the Provision by the Russian Federation of Military and Civilian Personnel for Participation in Activities for the Maintenance and Restoration of International Peace and Security.[40] The latter is discussed elsewhere in this chapter. Both laws provided answers to several questions raised in the petition.[41]

Its deficiencies notwithstanding, the petition attempted to raise broad issues of article 102(1d), rather than confining its scope to peacekeeping (or peace-enforcement, for that matter) operations. That was done by the Constitutional Court, which chose not to look beyond that particular mode of the use of the armed forces.

The petition caused a lively debate amongst the sixteen judges of the Court.[42] Some argued that the petition did not deserve to be considered because the issues it raised had been resolved by subsequent legislation. Their opponents found that argument inappropriate, and, echoing US Chief Justice John Marshall's famous "it is a constitution we are expounding,"[43] stated that having been asked to interpret the Constitution, they ought not to downgrade it to an ordinary law. Others insisted that the petition should be admitted because it brought to light the issue of "delineation of foreign affairs authority between the head of state and the legislature . . . on which the Constitution was not sufficiently clear."[44] Still others argued that it would be unbecoming of the supreme body of constitutional review to reject a petition from the legislature requesting interpretation of the Constitution.

[39] (1995) 29 SZ RF, art. 2757. [40] (1995) 26 SZ RF, art. 2401.

[41] The Federation Council passed the resolution to petition the Court during the same session in which it decided to consider the Law on the Provision of Personnel submitted to it by the State Duma; however, it never considered that law. (*Sovet Federatsii Federal'nogo Sobraniya. Zasedaniye Dvadtsat' Vtoroye, Byulleten'* 2(72) [Records of the 22nd Meeting of the Federation Council, Official Record 2(72)] at pp. 6, 44, 45.)

[42] See *Protokoli i Stenogrammi Plenarnikh Zasedaniy i Soveshchaniy Sudey Konstitutzionnogo Suda RF* [Protocols and Verbatim Records of Plenary Sessions and Conferences of Judges of the Constitutional Court of the Russian Federation], file #20, vols. 18, 21, 22.

[43] *McCulloch* v. *Maryland* 17 US (4 Wheat) 316 (1819).

[44] *Protokoli i Stenogrammi*, vol. 22, p. 2.

Ultimately, the Constitutional Court, by a majority of eleven to five, decided not to consider the petition on its merits. In its Order of December 4, 1995,[45] the Court stated that "issues raised by the Petitioner have in principle been settled by the Federal Law of June 23, 1995, 'On the Procedure for the Provision by the Russian Federation of Military and Civilian Personnel for Participation in Activities for the Maintenance and Restoration of International Peace and Security.' " The Court concluded that "the consideration by the Constitutional Court of the Russian Federation of the merits of the petition of the Federation Council to interpret article 102(1d) of the Constitution of the Russian Federation would amount to a review of the constitutionality of [the said Law] in an improper procedure, whereas the petitioner did not challenge the constitutionality of that Law neither in its form, nor in substance."

In effect, the Constitutional Court exploited deficiencies of the petition to avoid taking sides in a politically charged debate. It could be convincingly argued that the Court should not reject petitions to interpret the Constitution, especially when asked to explain the meaning of an important prerogative of the government, on which the Constitution and laws are quite terse. It should be recalled, though, that the petition was filed with the Court in 1995, only three months after it resumed its activities, having been suspended in October 1993, when the government crisis reached its violent peak.

Earlier in 1995, the Court had decided a case about the constitutionality of several acts of the president and government pertaining to military action in Chechnya.[46] Opponents of the government's action in that mutinous region in the south of Russia sharply criticized the ruling in the "Chechnya case," since they interpreted it as vindicating the president's large-scale use of military force to put down the insurrection. One of the parties that had challenged the government was the Federation Council.

In the petition of the Federation Council on article 102(1d), its willingness to put most of the burden of the decision to use the armed forces on the president and government was barely concealed. The Constitutional Court, had it decided to consider the case on its merits, could hardly have avoided taking one side in the dispute, thus identifying itself either with the president or the Federation Council, and would have gotten involved in a new confrontation between the president and at least one chamber of the legislature. In rejecting the petition, the Court might have been

[45] Text was not published, but is on file with the author.
[46] See (1995) 33 SZ RF, art. 3424.

driven by the self-preservation instinct, while developing criteria limiting its own involvement in the political process.

The statute

The special law dealing with the employment of Russian forces abroad has a rather lengthy name: "On the Procedure for the Provision by the Russian Federation of Military and Civilian Personnel for Participation in Activities for the Maintenance and Restoration of International Peace and Security."

The law had a rough start. As originally drafted in fall 1992, it was to become a resolution of the Supreme Soviet of the Russian Federation "On the Procedure of Participation of Military and Civilian Personnel in Operations of the United Nations, the Conference on Security and Cooperation in Europe, and the Commonwealth of Independent States for the Maintenance of Peace."[47] As the draft matured, a remarkable phrase was added to its title: "and on provision of military contingents to the UN Security Council in accordance with Article 43 of the UN Charter."[48] In retrospect, it might look as if legislators tried to provide for the remote contingency of activation of a dormant provision of the Charter. Shortly afterwards, the draft resolution was transformed into a draft law, "On the Procedure for the Provision of Military and Civilian Personnel of the Russian Federation for Participation in Operations of the United Nations for the Maintenance or Restoration of International Peace and Security," which the Supreme Soviet began reading in June 1993.[49]

After the new Federal Assembly replaced the old parliament, it took the State Duma nearly one year to pass the Bill into law, its title and contents changing along the way. It was passed on March 16, 1994, in the first reading, as the draft law "On the Procedure for the Provision of Military and Civilian Personnel of the Russian Federation for Participation in Operations for the Maintenance or Restoration of International Peace and Security and Other Kinds of Peacekeeping Activity."[50] It was passed again on January 25, 1995, in the second reading;[51] and finally, on March 24, 1995, as the Federal Law "On the Procedure for the Provision

[47] (1992) 45 *Vedomosti S'yezda Narodnikh Deputatov i Verkhovnogo Soveta Rossiyskoy Federatsii*, art. 2564.
[48] (1992) 21 *Sobraniye Actov Prezidenta i Pravitelstva Rossiyskoy Federatzii*, art. 1824.
[49] (1993) 28 *Vedomosti S'yezda Narodnikh Deputatov i Verkhovnogo Soveta Rossiyskoy Federatsii*, art. 1085.
[50] (1994) 3 *Vedomosti Federal'nogo Sobraniya Rossiyskoy Federatsii* [Bulletin of the Federal Assembly of the Russian Federation], art. 151.
[51] (1995) 6 SZ RF, art. 466.

by the Russian Federation of Military and Civilian Personnel for Participation in Peacekeeping Activity for the Maintenance of International Peace and Security,"[52] it was forwarded to the Federation Council. The Law was approved by the Federation Council,[53] but not by the president, who rejected it and offered his own version. It did not take too long for the State Duma to accept proposed amendments and to adopt the Law, which was signed by the president on June 23, 1995.

Comprising only eighteen articles, it is a rather concise piece of legislation. Chapter I (articles 1–5) contains general terms and definitions; Chapter II (articles 6–9) specifies procedures for the provision of personnel for peacekeeping operations, while Chapter III (articles 10–12) deals with such procedures in cases of international enforcement measures involving armed forces. Chapter IV (articles 13–15) sets general rules for training, supply, and support of personnel involved in peacekeeping and international enforcement operations. Finally, Chapter V (articles 16–18) requests the executive branch to report annually to both chambers of parliament on Russian participation in activities for the maintenance or restoration of international peace and security.

Article 2 defines such activities as:

> operations for the maintenance of peace and other measures undertaken by the Security Council of the United Nations under the UN Charter, by regional agencies, or under regional arrangements or agreements of the Russian Federation, or under bilateral and multilateral international treaties of the Russian Federation, which are not enforcement measures in the meaning of the UN Charter [hereinafter – peacekeeping activity], as well as international enforcement measures involving the use of armed forces employed in accordance with the decision of the UN Security Council, made under the UN Charter, to remove any threat to the peace, breach of the peace, or act of aggression.[54]

By covering situations in which Russian personnel, both military and civilian, are to be dispatched to operations that are not enforcement measures undertaken in accordance with Chapter VII of the UN Charter, the law adds to the legitimacy of the whole concept of UN peacekeeping operations, which is the product of a rather liberal interpretation of the Charter. Thus, it may be said that the Russian law adheres to the theory of "Chapter Six-and-a-Half" operations – that is, actions that go beyond

[52] (1995) 14 SZ RF, art. 1236.

[53] According to article 105(4) of the Constitution, "a federal law shall be deemed to have been approved by the Federation Council if more than half of the total membership of the chamber have voted for it or if it has not been considered by the Federation Council within 14 days." In other words, the Council may consider laws enacted by the other chamber at its own discretion. But that does not apply to the six categories of laws enumerated in article 106, which the Council is obliged to consider.

[54] (1995) 26 SZ RF, art. 2401.

purely diplomatic measures, but stop short of enforcement by military means.

On the other hand, when it deals with peace enforcement measures, the law is somewhat ambiguous. It refers to "international enforcement measures involving the use of armed forces employed in accordance with the decision of the UN Security Council," but it remains unclear whether that provision applies to regional arrangements as well.

As for the procedure established by the law, the authority to send individual servicemen to participate in peacekeeping operations, or to recall them, rests solely with the president. The decision to send civilians is taken by the cabinet.

The procedure is more elaborate if entire units are being assigned to an operation. In that case, the president files a proposal to deploy troops with the Federation Council of the Federal Assembly. The proposal should contain details of the area of deployment, description of mission, numerical strength and composition of the unit, subordination (chain of command), duration of deployment, and procedures for rotation and withdrawal, as well as salaries, allowances, benefits, and compensation for servicemen and their families. The Federation Council must vote on the proposal, and, if it approves it, the president issues a decree ordering the deployment.

It is interesting to note that the Law on the Provision of Personnel does not refer to operations authorized by the UN General Assembly under the "Uniting for Peace" Resolution.[55] It is unclear whether drafters of the law were influenced by traditionally negative Soviet attitudes toward the Uniting for Peace Resolution,[56] or were simply unaware of its existence.

Finally, the Russian Law on the Provision of Personnel contains language that potentially conflicts with the UN Charter's Article 43 provisions to make available to the UNSC military forces of member states by special agreement. The Law on the Provision of Personnel sets the general rule that the Russian Federation shall decide whether to take part in an operation on a case-by-case basis. Article 5, paragraph 2, states that the "Russian Federation, autonomously and taking into consideration its obligations under the UN Charter and other international

[55] UNGA Res. 377(V), November 1, 1950.

[56] V. N. Fedorov, *OON i Problemi Voyni i Mira* [The UN and Problems of War and Peace] (Moscow, International Relations, 1988), pp. 72–3; V. K. Sobakin, *Kollektivnaya Bezopasnost' – Garantiya Mirnogo Suschestvovaniya* [Collective Security – the Guarantee of Peaceful Coexistence] (Moscow, International Relations, 1962), pp. 185–92 and 252–60; G. I. Tunkin, *Teoriya Mezhdunarodnogo Prava* [Theory of International Law] (Moscow, International Relations, 1970), pp. 426–9.

treaties, shall define the appropriateness of its participation in activities for the maintenance or restoration of international peace and security." Despite a reference in the law to obligations under the UN Charter and other international treaties, these obligations are only to be "taken into consideration" while the final decision is being worked out. Should Article 43 ever be activated, Russia would either have to act in accordance with its national law or give priority to its international obligations. The Russian Constitution allows only the second option, in its provision that "if an international treaty of the Russian Federation establishes rules other than those established by the law, the rules of the international treaty shall be applied."[57]

The Law on the Provision of Personnel sets basic procedural rules, but, with the exception of several definitions, it does not contribute to the development of a Russian concept of participation in UN and other combined operations under international auspices. That gap is partially covered by recent doctrinal documents released by Russian authorities.

Official doctrine

When Vladimir Putin became acting president and then president of the Russian Federation, the work on several essential doctrinal documents relating to national security received a fresh impetus. On January 10, 2000, the acting president signed a Decree promulgating an amended version of the National Security Doctrine of the Russian Federation.[58] On April 21, 2000, Putin, still acting president, approved the Military Doctrine of the Russian Federation,[59] thus performing the constitutional duty of the president.[60] Finally, on July 11, 2000, the Russian government officially published "The Concept of the Foreign Policy of the Russian Federation."[61] Each of these documents refers to peacekeeping activities, which justifies at least a brief review of their respective provisions.

The National Security Doctrine sets, amongst primary foreign-policy objectives, the "promotion of settlement of conflicts, including peacekeeping activity under the auspices of the UN and other international organizations." It also tasks the armed forces "to provide for the participation by the Russian Federation in peacekeeping activity."

[57] KRF, art. 15(4).
[58] (2000) 2 SZ RF, art. 170. The original version was promulgated by Decree No. 1300 of December 17, 1997, signed by Putin's predecessor, Boris Yeltsin, and published in (1997) 52 SZ RF, art. 5909. The January 2000 document is referred to as a new edition of the old one, but it contains substantial changes.
[59] (2000) 17 SZ RF, art. 1852. [60] KRF, art. 83(h).
[61] *Rossiyskaya Gazeta*, July 11, 2000.

"The Concept of Russian Foreign Policy" underscores the importance of international peacekeeping as an "effective tool of settlement of armed conflicts," and states that Russia supports "strengthening its legal foundations in strict accordance with the principles of the UN Charter." The Concept emphasizes Russia's determination to "continue its participation in peacekeeping operations under UN auspices, as well as in specific cases under the auspices of regional and sub-regional organizations." As if echoing the wording of article 5, paragraph 2, of the Law on the Provision of Personnel, discussed above, the Concept clearly indicates that Russian participation in those activities will be commensurate with its national interests and international obligations. The document stresses that the UN Security Council has the exclusive power to authorize the use of force as an enforcement measure.

The Military Doctrine of the Russian Federation is the most elaborate of the three doctrinal documents with regard to the military component of what it refers to as "operations for the maintenance and restoration of peace." It places such operations among five main types of deployment of the armed forces and identifies major objectives that Russian units are to attain while engaged in those operations. The latter include: disengagement of warring factions; ensuring delivery of humanitarian aid to civilian populations and evacuation of civilians from the zone of conflict; isolation of the area of conflict to enforce international sanctions; and promotion of a political settlement.

According to the Military Doctrine, the Russian armed forces will carry out tasks assigned to them as part of operations for the maintenance and restoration of peace. However, that provision is somewhat misleading, since increasing numbers of uniformed officers of the Ministry of Internal Affairs and of the Federal Border Service are being assigned to peacekeeping missions.

As to the military *per se* (that is, uniformed personnel of the Ministry of Defense), the Military Doctrine specifies that, within the armed forces, specially designated units should undergo regular combat training augmented by training in particular skills and knowledge required in peace operations. According to Order No. 333, signed by the minister of defense on May 25, 1999, "legal education and the study of norms of international humanitarian law shall be an integral part of combat training." Russia, as a successor to the USSR, is party to the 1949 Geneva Conventions and both Protocols additional thereto. In fact, the armed forces of the Russian Federation are still bound by Order No. 75, signed by the Soviet defense minister on February 16, 1990, which required the military to observe the Geneva Conventions and Protocols.[62]

[62] Text of Order No. 333, on file with the author.

The Military Doctrine adapts article 5, paragraph 2, of the Law on the Provision of Personnel to the needs of the armed forces. It states that Russian units, their foreign deployment notwithstanding, remain part of the armed forces, "and act in accordance with established regulations, with due consideration of the UN Charter, UN Security Council resolutions, and bilateral and multilateral treaties of the Russian Federation."

Surprisingly, none of the three documents mentions enforcement measures, only "peacekeeping activity" or "operations for the maintenance or restoration of peace." It should be recalled, however, that the Law on the Provision of Personnel envisages both peacekeeping and enforcement operations.

Practice of authorization of foreign deployments

As discussed above, the power to decide on "the possibility of the use of the Armed Forces of the Russian Federation outside the territory of the Russian Federation" is vested in the Federation Council – that is, the chamber of the Federal Assembly in which each of the eighty-nine constituent entities of Russia is represented by two delegates. Less than half the size of the State Duma, the Federation Council is more manageable and not as much a debating society.

Of course, the State Duma passes the budget and may influence decisions on the amount of funding allocated for foreign deployments. It also passes laws on ratification of international treaties, which may provide for such deployments. It may occasionally vote on nonbinding resolutions stating its position on current missions. For example, at least twice when the mandate of the Collective Forces for the Maintenance of Peace in Abkhazia, Republic of Georgia, was about to expire, the State Duma adopted resolutions appealing to the president and the Federation Council to initiate an extension of the mandate.[63]

None the less, it is the Federation Council with which the President is obligated to share the decision to send forces abroad. As already mentioned, under the Law on the Provision of Personnel, the authority to send individual servicemen to international missions rests solely with the president. For example, on October 7, 1994, President Boris Yeltsin signed a directive authorizing Russian officers to join the UN Observer Mission in Georgia.[64] By the presidential directive of July 5, 1999, Russian servicemen were assigned to the UN Mission in East Timor

[63] (1997) 27 SZ RF, art. 3176; (1998) 30 SZ RF, art. 3726.
[64] (1994) 24 SZ RF, art. 2635.

(UNAMET) to serve as liaison officers to the Indonesian military.[65] The Federation Council plays a role only when the decision concerns the deployment of self-contained units.

The Rules of the Federation Council provide for closed deliberations on the question of the possibility of using the armed forces of the Russian Federation abroad, unless the chamber decides otherwise.[66] Minutes of such meetings, as well as results of voting, are not made public, and only the text of the resolution is released. The Council held a closed session on June 25, 1999, when it was deciding on the initial deployment of Russian units to Kosovo as part of KFOR.[67] That notwithstanding, usually the Federation Council has held open sessions to decide on foreign deployments.

As a rule, when the president files a request with the Federation Council to decide on sending Russian forces to an international mission, or to extend their mandate, he issues a separate directive by which he orders senior officials from the Ministries of Foreign Affairs and Defense to represent him during deliberations of the Council. The ministers themselves have done so, when the Council was debating the initial deployment to Kosovo; the deputy foreign minister and chief of staff of the airborne forces (decision to extend the mandate of Russia's SFOR brigade, July 25, 2000) the deputy foreign minister and chief of army aviation (decision on deployment to Sierra Leone, June 7, 2000), and the deputy foreign minister alone (decision to extend the mandate of the Russian contingent in Abkhazia, Republic of Georgia, March 28, 2000) have also represented the president.

The parliamentary history, albeit not extensive, so far indicates that more substantive, as well as heated, discussion is likely to occur when the Federation Council is deciding on an initial deployment of Russian forces. When considering the extension of mandates, the willingness of deputies to raise and debate issues seems to wane and decisions are taken almost automatically.

In Council discussions, anticipated dangers and possible threats to the lives of Russian servicemen have not been major issues. Although a deputy will occasionally raise a question of casualties sustained by Russian units, that has never resulted in a prolonged discussion, nor has the issue jeopardized the authorization by the Federation Council of any foreign deployment.

[65] (1999) 29 SZ RF, art. 3723.

[66] Article 165(2) of the Rules of the Federation Council: (1996) 7 SZ RF, art. 655.

[67] *Sovet Federatsii Federalnogo Sobraniya, Bulleten'* No. 166–8 [The Federation Council of the Federal Assembly, Official Record No. 166–8], p. 5. The Resolution was later published in: (1999) 27 SZ RF, art. 3190.

On January 5, 1996, as the Council was debating whether a Russian brigade should join what was then IFOR in Bosnia, the deputies first heard statements from senior representatives of the Ministry of Foreign Affairs and General Staff, and then subjected them to careful scrutiny. Among concerns voiced by members of the Council, two major ones were Russia's uneasy relationship with NATO and sources of funding for Russian participation in the mission. The deputies accepted, some reluctantly, the argument that the Russian brigade would not come under the direct military command of the North Atlantic Alliance. With regard to funding, they finally agreed to refer the issue to the cabinet.

The decisive argument in favor of participation was the need to "show the flag," to demonstrate Russia's acute interest in the Balkans, to project the image of a European power. Some deputies appealed to "Slavic brotherhood," although in not as strong words as their brethren in the State Duma or their predecessors in the Russian Supreme Soviet.

That notion of "Slavic brotherhood" backfired three-and-a-half years later, when the Federation Council was asked to decide on Russian participation in KFOR. Although the debate was held behind closed doors, it soon became known that deputies from at least one constituent entity of the Russian Federation demonstratively opposed the decision. Less than two weeks after the Council approved the dispatch of troops, the State Council of the Republic of Tatarstan (where a large part of the population is of Turkic origin, and many profess Islam) adopted a declaration in which it criticized the action of federal authorities, barely concealing the ethnic motives of that criticism, and supported its own representatives, who had opposed the decision of the Council. The declaration stated that "the participation of citizens of the multinational Republic of Tatarstan in the units of the armed forces of the Russian Federation in Kosovo would be unacceptable."[68]

So far this has been an isolated episode. A year later, on June 7, 2000, it took the Federation Council just a few minutes to approve the extension of the KFOR mandate, with no discussion at all, and no "nays" or abstentions.

When deciding on deploying Russian armed forces to an operation under international auspices, the Federation Council will occasionally request its own Committee on Security Matters and Defense "to analyze and summarize the practice of using the armed forces of the Russian

[68] (1999) 135 *Respublika Tatarstan*. Under article 71(j) and (l) of the Constitution, foreign policy and defense fall within the exclusive jurisdiction of the Federation. Constituent entities are involved in the process through the Federation Council, but they do not have troops; the Federation does.

Federation outside Russia."[69] It has never asked the president or Ministries of Foreign Affairs and Defense formally to notify the Council of any developments affecting Russian units deployed abroad.

As to the president, he bears final responsibility for the decision to deploy troops abroad. Should the Federation Council reject the president's request, but he proceeds to deploy troops, that deployment would be unconstitutional. The Council may not force the president to send troops to an international peacekeeping mission. It may happen that, after the president files a request and the Council approves the deployment, some change of circumstances will cause the president to decide against deployment. That decision is within his authority, but so far this situation has not occurred.

Many presidential decrees ordering a deployment have preambles that refer to a resolution of the Federation Council and, as in the case of SFOR and KFOR, to a decision of the UN Security Council. It may be argued that the president deems it appropriate to cite as authority for his action both a national and an international mandate. The practice of the President acting after the Federation Council has given its consent to deployment has so far been rather uneven.

With regard to participation of Russian units in the Collective Peacekeeping Forces in Abkhazia, Republic of Georgia, the President signed Decree No. 1178 on June 9, 1994, which, in paragraph 1, authorized Russian participation in a CIS operation in that region.[70] The decree did not specify the duration of Russian participation in the operation, making it contingent on further action of the CIS Council of the Heads of State. It also provided, in paragraph 3, that deployment could only commence after the Federation Council had given its consent in accordance with article 102(1d) of the Constitution. (It should be recalled that the Law on the Provision of Personnel would not be adopted until a year later, so the president and the Council were developing rules to be written into a statute.)

The wording of the original decree implied that it would suffice for deployment, pending a CIS decision on continuation of the operation. The president filed a request with the Federation Council each time the CIS decided to extend the mandate of the Collective Forces. When the CIS failed to do so on time, so did the Russian president. As a result, there have been several periods when Russian units were operating in the area with no international or national mandates. Up to 2001, all Russian forces deployed abroad had an appropriate national mandate.

[69] (1996) 2 SZ RF, art. 57. [70] (1994) 7 SZ RF, art. 690.

The president often acts with a long delay after the Federation Council has authorized a new deployment or an extension of an on-going deployment, with no apparent reason for procrastination. For example, on July 17, 1998, the Council gave consent to a new term for the Russian SFOR brigade.[71] It took the president more than five months to sign a decree ordering the Russian forces to stay on in Bosnia.[72] Strictly speaking, during that period, the brigade had been in the Balkans without orders from the supreme commander-in-chief. Theoretically, in the absence of such authorization, the Ministry of Finance could claim to be unable to release funds for a mission, leaving servicemen without their salaries and hardware without proper maintenance.

In terms of accountability, it should be mentioned that the president may choose not to make his decree public. According to a source known to me, on September 23, 1999, President Boris Yeltsin signed a decree relative to SFOR's mandate extension which, for some reason, has never been published.

Concluding remarks

So far, the Federation Council has never refused to give consent to a request for authorization of a foreign deployment. It agreed to Russian units joining KFOR, despite objections voiced by some influential deputies who were angry with the president and military for keeping them ignorant of the decision to rush an airborne company from Bosnia to seize control of Pristina airport on June 12, 1999. It is hard to predict what might cause the Council to refuse consent or to withdraw it once given – imminent danger or actual loss of lives of Russian servicemen? Scarce funding? Worsening relations with NATO, which some deputies would regard as making Russian participation in SFOR, KFOR, or a similar operation totally inappropriate? Or could such participation fall prey to a new confrontation between the president and parliament?

As a general conclusion, it may be said that parliamentary involvement in decisions to use armed forces in combined operations under international auspices was unthinkable in the former USSR at the time of the first Soviet deployment in 1973. The Soviet Constitution was revised to permit such operations, but was never used before the collapse of the USSR in 1991.

In the brief period between that collapse and the violent resolution of the Russian government crisis in late 1993, the Russian parliament

[71] (1998) 30 SZ RF, art. 3662; date of mandate corrected by amendment in (1998) 37 SZ RF, art. 4563.

[72] Decree No. 1615, December 21, 1998: (1998) 52 SZ RF, art. 6392.

was very active politically. It aspired to have a decisive voice in foreign affairs and national security, as well as to be the predominant branch of government, in general. At that time the Constitution in effect provided adequate legal grounds for that aspiration, but its successor deprived the parliament of most of the powers that the parliament's predecessor had enjoyed or claimed.

Vladimir Lukin, deputy chair of the State Duma and former ambassador to the United States, was asked about parliamentary control over the executive branch in foreign affairs and national security matters. He said, "Russia is not yet used to a parliament. Our bureaucracy treats it according to an old rule: we don't care, but those foreigners would not understand us . . . Functions of our parliament are limited. It cannot control the executive."[73]

[73] (2000) 7 *Nezavisimoye Voyennoye Obozreniye* [Independent Military Review].

12 France: Security Council legitimacy and executive primacy

Yves Boyer, Serge Sur, and Olivier Fleurence

Introduction

France has always had a specific approach to the question of the legitimacy of international institutions using force, which can be explained by its historical experience, its place in the UN system as a permanent member of the United Nations Security Council (UNSC), its status as a member of the nuclear club, and its constitutional system. These characteristics are reflected in the meaning generally given by the French to the notion of "accountability." The word itself cannot be exactly translated into French: it is not "responsabilité" or "évaluation," but something in between. Democratic accountability in France may be understood as follows: it is the process by which the legitimacy, on the one hand, and the effectiveness, on the other, of a public policy can be assessed.

Understanding accountability requires establishing a distinction between two different levels, the international one and the national (or domestic) one. At the international level, "accountability" means that one must address the legitimacy and the legality of decisions made by international institutions, as well as their ability to deal properly with the challenges involved, and the effectiveness of the corresponding measures and means used to deal with a given situation. At the domestic level, democratic accountability must be assessed with regard to constitutional provisions and practices related to the use of national military forces. In this respect, the Constitution of the Fifth Republic does not make a specific distinction between the unilateral use of French military forces and their use under international mandate or auspices.

Since the new international situation deriving from the end of the Cold War has made much more frequent the use of force internationally, the French were led to devise a specific typology describing the various uses of force internationally. Such categories as peacekeeping,

The opinions expressed are those of the authors and do not represent those of the organizations with which they are affiliated.

peacemaking, peace building, and peace enforcement, mentioned in the Western European Union's (WEU) Petersberg declaration of 1992, needed to be distinguished from each other. Even if it is somewhat artificial, as it is in fact a continuum, a threefold distinction based on the nature and intensity of the force required may be established, as follows.

(1) The deployment of military forces without the right or capability of using force (except for individual self-defense), in order to prevent violence, perhaps to monitor a cease-fire, and without identifying a specific enemy. Such an action implies *passive neutrality* on the part of the forces deployed.
(2) A limited right and related capacity to use force, in order to enforce a given mission against any obstacle, whatever its origin – for instance, the disarmament of conflicting factions, the protection of civilians against attack, perhaps the arrest of individuals suspected of international crimes. It presupposes *active neutrality* on the part of the international force.
(3) The use of force against a specific enemy, internationally designated, in order to compel him to comply with international obligations and requirements. In this respect, different sets of coercive means can be used, if necessary, to obtain full and complete military victory. This involves *active engagement* against a specific enemy on the part of the forces of the contributing states.

In that respect, the conclusion drawn by Karen Mingst in her chapter on political culture as a factor in international commitment does not apply to the French case. While other countries might consider their involvement in light of the degree of force likely to be used, France has a "unitary" vision of peacekeeping operations. Whatever its initial mandate, a peacekeeping operation may evolve from one type into another. What started as a traditional peacekeeping operation, without any predictable use of force, outside very limited self-defense, can evolve into a peace-building operation, or even into peace enforcement. Hence the importance placed by Paris on getting the proper authority from the inception of the operation and the emphasis put by France on the UN Security Council. That will be developed later in this chapter.

Accordingly, the two organizing concepts stressed by France when contemplating the use of force internationally are *legitimacy* and *effectiveness*. Legitimacy refers to the decision-making leading to actions to be implemented. Effectiveness deals with the suitability of the means and the results of the actions undertaken. It is a matter of democratic evaluation of a public policy. Within that framework, one can identify four specific characteristics of the French approach to the use of force under

international auspices:
(1) an evolution from hesitancy to full participation in international military operations;
(2) the emphasis put on the unique legitimacy of the UNSC to decide and to direct the use of force;
(3) at the domestic level, freedom of action of the executive branch; and
(4) efforts to promote the European Union as an actor in international military operations.

Using force internationally: from hesitancy to full participation

If one looks to the three reasons identified by Karen Mingst as explaining a country's motivation for participating in peacekeeping operations, one can certainly apply two of them to France, namely the community of values and the importance of the historical experience. The development of peacekeeping operations, not only in their number, but also in the scope of the missions entrusted to them, certainly finds echoes in French society. This is particularly striking when one looks at French influence in extending the mandate of peacekeeping operations to deal with human rights violations through humanitarian intervention. From a historical perspective, one can certainly say that France has a long-standing, although somewhat equivocal, tradition of involvement in peacekeeping operations.[1]

An initial ambiguity

France's experience during the Second World War greatly influenced its position in the UN. The battle fought by Charles de Gaulle in 1944–5 to get France a permanent seat on the Security Council, despite US opposition, underlines the importance Paris places on its responsibility for collective security. France felt that it should not be left only to the four countries foreseen in the original scheme proposed by US President Franklin Roosevelt.

In practical terms, France had an early involvement in peacekeeping operations. In 1948, under UN auspices in UNTSO, Paris sent observers to Jerusalem. Their number grew from 21 in 1948 to 125 in 1949. Despite this early commitment, France was nevertheless reluctant to participate directly in operations under the supervision of international

[1] See Appendix B, "Country participation in international operations, 1945–2000" for information on France's contribution.

organizations. This attitude was largely a by-product of decolonization. From 1945 to 1961, France was entangled in wars in Indochina and Algeria, with no desire to see international organizations get involved in what were considered internal affairs by Paris. Elsewhere, particularly in Africa, where France remains heavily involved in its former colonies, the policy of the Fifth Republic was to act alone on the basis of specific bilateral defense agreements. This approach was also consistent with the tacit agreement during the Cold War that no permanent member of the Security Council should take an active part in a peacekeeping operation.

It must also be recalled that, on two occasions, France was dissatisfied with the conduct of UN peacekeeping. One of the first peacekeeping operations was UNEF, established in 1956 in Egypt in the wake of a British–French military intervention to capture the Suez Canal, and a war between Israel and Egypt. UNEF was a way out of the dangerous split among the Atlantic Allies that resulted from US opposition to the Anglo-French use of armed force to settle their dispute with Egypt over nationalization of the Suez Canal Company. The second occasion of French discontent was the UN Operation in the Congo (ONUC), in 1960 and the following years. In this case, a peacekeeping operation was transformed into a military intervention, with UN soldiers fighting against the secession of Katanga province. France approved neither the basis nor the evolution of this action, specifically questioning the role played by UN Secretary-General Dag Hammarskjöld.

A growing involvement

The first shift in the French position regarding multilateral intervention occurred in the 1970s, specifically concerning UNEF II in 1973. Five years later, in 1978, France sent its first blue helmets to participate in the UN operation in Lebanon (UNIFIL), aimed at monitoring the withdrawal of Israeli forces from southern Lebanon. Since then, France has regularly provided troops under the UN flag in various parts of the world. It became, in the mid-1990s, one of the most important providers of blue helmets. French involvement has been particularly important in Cambodia, where military observers were sent to participate in the UN Advance Mission in Cambodia (UNAMIC), set up in 1991 to guarantee the cease-fire prior to the establishment and deployment of the UN Transitional Authority in Cambodia (UNTAC). From November 1991 to March 1992, the senior military liaison officer was French, and Paris provided an air transport unit to the UN operation as a contribution in kind in December 1991. Between May 1993 and March 1994, France also took part in UNOSOM II in Somalia.

The most important UN operations to which France contributed military forces remain the various forces dispatched, between 1992 and 1996, to the former Yugoslavia.The UN Protection Force (UNPROFOR) was under French command between June 1993 and March 1995, when it was reorganized into three different components (UNPROFOR in Bosnia, UNCRO in Croatia, and UNPREDEP in Macedonia). French troops took part in the two missions in Bosnia and Croatia, while French military observers and civilian police were sent to Macedonia. General Bernard Janvier remained the theater force commander with the UN Protection Force at the Joint Headquarters in Zagreb until January 1996.

Now widely recognized as one of the major troop-contributing countries – it was even the leading one in 1995, with some 9,300 individuals serving in UN operations – France also began to play a more important role within the UN decision-making process. France spared no diplomatic efforts to get Bernard Miyet, a French national, appointed as Under-Secretary General for Peacekeeping, replacing Kofi Annan at the head of the Department of Peacekeeping Operations (DPKO). This involvement continued, with the appointment of Jean-Marie Guehenno, another French national, to succeed Miyet at the head of DPKO.

Another aspect of French involvement in peacekeeping relates to its financial commitment, which is quite substantial. Resources allocated to peacekeeping have increased exponentially, especially during the 1991–2000 period, partly as a consequence of the new missions entrusted to peacekeeping operations. Extended mandates were voted for, with active French support, especially in the humanitarian field, which inevitably led to increased expenses. At a time of continual UN financial crisis and scarce resources, the financial burden imposed on troop-contributing countries increased, as payment by the UN of expenses incurred by member states was at best late, at times illusory.

Moreover, the United Nations bases payments to contributing countries on the theoretical monthly cost of a soldier. This amount is, however, estimated at only 10–30 percent of the actual cost of a professional soldier belonging to modern armed forces. This imposes a heavy financial burden on the developed contributing states.[2] It is, for example, estimated that the cost of French forces in KFOR amounted to FF 2.8 billion in 2000. In addition to the issue of costs, the relatively small number of

[2] Thierry Paulmier, *L'Armée française et les opérations de maintien de la paix* (Paris, LGDJ, 1997), pp. 141–2; and Yves Daudet, "Les Aspects juridiques, budgétaires et financiers" in Brigitte Stern (ed.), *La Vision française des opérations de maintien de la paix* (Paris, Montchrestien, 1997), pp. 113–14; Stern's book was also published in English as *United Nations Peace-keeping Operations: A Guide to French Policies* (Tokyo, United Nations University Press, 1998) (the Daudet chapter appears at pp. 40–73).

ground forces available in modern professional armies (about 120,000 in Britain and 160,000 in France in 2000) compelled French blue helmets to deploy for longer periods. This may create, in the long run, weariness and resentment, and require a change in traditional phases of training, deployment, and rest. This phenomenon is also felt in the UK military and to a certain extent in the United States.

A flexible doctrine

France has never officially formulated a doctrine regarding the different cases in which force could be used under international auspices. There is no equivalent in France to Presidential Decision Directive 25 (PDD-25) in the United States. This is mainly due to two reasons. On the one hand, the primacy of the French executive in the area of foreign and defense policy does not require it to report to the legislature (see below). On the other hand, the specific circumstances of each crisis make it difficult to develop a rigid doctrine. What seems to be lost in terms of democratic accountability is gained in responsiveness and adaptability, in both political and military terms.

The unique international legitimacy of the Security Council

As a permanent member of the UNSC, France plays a very active role in shaping the use of military forces under UN auspices or with UN authorization. France stresses in this respect the unique position of the UNSC, not only at the legal level, but also at the practical one.

French posture in the Security Council

Three main reasons can be identified for French activism in the Security Council. First, its historical legacy as a colonial power with a very active global military policy matters to France. This was once an impediment to French support for UN peacekeeping, since one of the main goals of French diplomacy in the 1950s and early 1960s was to prevent the UN from intervening in French colonial questions. From this past, however, France retains specific interests and knowledge, particularly in Africa (although this legacy seems to be eroding).

Furthermore, the role of French forces permanently stationed in African countries should not be underestimated. Forces can be rapidly dispatched to the field or entrusted with new missions to implement decisions adopted by French leaders. One must, however, be careful in

using forces that have been performing certain tasks, in the framework of bilateral defense agreements, for international operations. Misunderstandings appear when troops have their role changed overnight from defense to peacekeeping operations.

An example of this difficulty can be found in the case of the French intervention in Rwanda in 1994, named *Opération Turquoise*. Although the humanitarian and neutral nature of this operation was made clear by French authorities, difficulties arose, mainly due to the fact that *Turquoise* included some of the troops previously stationed in Rwanda to train Rwandan government forces. The French military stressed the inconsistency in asking the same officers to first train the Rwandan forces to fight the Rwandan Patriotic Front (RPF), and then to participate in *Turquoise* on the basis of impartiality.[3]

Beyond their potential as intervention forces, French troops prepositioned in African countries can also prove very useful in helping to develop a regional response to threats to peace and security. This is at the center of proposals put forward by France, under the concept of RECAMP (Renforcement des Capacités Africaines de Maintien de la Paix), to help develop regional peacekeeping forces in Africa under the aegis of either the UN or the African Union (formerly the Organization of African Unity, the OAU). The promotion of this new concept, in which France (however, not exclusively) may provide logistics and other types of military support to African peacekeepers, also involves the French in various military exercises with their African counterparts, as well as British and US forces.

The second reason for France's activism in the Security Council is that its permanent membership requires that it play an active role in UN peace and security activities. It is also required to stress the unique legitimacy of the Security Council. Neither the General Assembly nor NATO is entitled to decide the use of military forces. France deems a mandate or an authorization by the Security Council necessary. In practice, such a decision, or even a recommendation, by the UN Security Council is sufficient to undertake or participate in a specific action. UNSC authorization is more important to France than any authorization given by the national legislature. This was explicitly stated in the 1994 White Paper on Defense, which stressed that French security and defense policy should reinforce the authority of the UN Security Council in peacekeeping.[4]

This position is not new. French diplomacy in the UN has always attempted to avoid any undermining of the role of the Security Council

[3] Answer to the parliamentary Information Commission, in *Le Monde*, Supplement, December 17, 1998, p. xii (unofficial translation).

[4] *Livre Blanc sur la Défense* (Union Générale d'Editions 10/18, Paris, 1994), pp. 73–4.

in the maintenance of international peace and security.[5] French opposition to ONUC, the UN operation in the Congo in the early 1960s, and Paris's subsequent refusal to pay the related expenses, were not linked to the particular mission, but rather to the process that led to the creation of the operation. France reluctantly voted for the "Uniting for Peace" Resolution in 1950 and always questioned the legitimacy and legality of the General Assembly establishing peacekeeping operations.

The third reason for France's activism is its opposition to any kind of domination or hegemony of the world scene by a single state; France has a preference for multipolarity, of which the Security Council is an institutional component and safeguard. The UNSC remains the only international institution able to legitimize the use of force. In the Kosovo crisis, for instance, France was keen to find a legal basis for action by NATO in the previous resolutions of the Security Council, even if this justification was difficult to sustain. When urgency prevents such authorization beforehand, France still insists on having the Security Council ratify *a posteriori* an intervention. The continuous efforts made by France to get the UNSC involved in the Kosovo crisis, after the military intervention started in the spring of 1999, derived directly from this opposition to ad hoc multipolarity.

Even when, as in 2001, the French president and prime minister come from different political parties, this commitment to the Security Council is a guiding principle of French foreign policy and is fully supported by the two heads of the executive branch. French efforts led to the recognition of the primary role of the UNSC in the maintenance of peace and security in NATO's new Strategic Concept, adopted in Washington in April 1999. The text dealing with crisis management expressly refers to Article 7 of the North Atlantic Treaty, which recognized the primary responsibility of the UN Security Council in the maintenance of international peace and security. French policy contributed to the adoption in June 1999 of UNSC Resolution 1244, that again brought the Security Council to the forefront of the Kosovo crisis, even if this resolution did not take a position on the previous use of armed force by NATO member states.

France also has a great deal of interest at the conceptual and normative level in improving international military capabilities, as appropriate, at both the global (UN) and regional levels. One such initiative was to propose the UN's perfecting a system of standby units and setting up rapid reaction units. Even if the number of forces was more symbolic than militarily significant, it indicated the possible future implementation of Article 43 of the UN Charter.

[5] Daudet, "Les Aspects juridiques, budgétaires et financiers," pp. 63–115.

The unique features of the Security Council

The legitimacy of the Security Council derives from the UN Charter; democracy has little relevance to its structure and work. The UNSC's membership is based on considerations of effectiveness, and not on democracy. From a French viewpoint, the Council has three specific qualities: effectiveness, authority, and indispensability.

Effectiveness The legitimacy of the Council has been and still is challenged on the basis that it does not represent the diversity of UN membership. This issue has especially been raised with regard to the permanent members. While supporting the membership of Germany as a new permanent member of the UNSC, France favors only a limited enlargement of their number in order to improve not only the Council's legitimacy, but also its effectiveness. Only the current permanent members have the full-fledged means and willingness to act politically and militarily on a global scale.

Authority The UNSC is not only legitimate but is also a source of legitimacy. A debate exists about whether decisions of the UN Security Council are subject to review by another organ, such as the International Court of Justice (ICJ). France does not support the idea of such control by any international body. On the basis of the Charter, the Security Council acts with full authority, and its decisions cannot be invalidated by any international tribunal. A judicial body would have no capability, responsibility, or even accountability in this respect. The political responsibility remains with the UNSC exclusively.

France supports a broad interpretation of the competence of the UNSC. For instance, it approved UNSC Resolution 687, putting permanent and heavy obligations on Iraq, and Resolution 1244, allowing the UN fully to control the rebuilding of the legal system of Kosovo. Paris also supported the Rome Statute that created international criminal tribunals as a means to restore peace and security. While the UNSC does not have standing armed forces at its disposal, it can nevertheless authorize the use of force by member states or coalitions of the willing. This was the case with UNSC Resolution 678, that authorized member states to take action against Iraq for the liberation of Kuwait.

Indispensability The UNSC is the only organ of the UN entitled to authorize the use of force; the General Assembly cannot do so. Furthermore, no member state is allowed to use force without the

authorization of the UNSC, with the sole exception of self-defense under Article 51 of the Charter. There is no substitute for the UNSC in maintaining international peace and security – not the General Assembly, not NATO.

Member states cannot unilaterally interpret the Security Council's resolutions in order to legitimate a unilateral use of force. For this reason, France objected to the bombing of Iraq by the United States and the United Kingdom in the framework of Operation Desert Fox.

The central authorizing role of the Security Council does not, however, translate into a centralized implementation system. France, for example, supports the idea of a regional peacekeeping force in Africa. French military cooperation with African countries has been redefined towards achieving a greater capability of these countries for regional peace operations. Making use of the military cooperation missions that exist and of French troops already in place in different African countries, the RECAMP concept has been developed to implement this new policy. It also provides for prepositioned equipment guarded by French troops that can be made available to African troops for peacekeeping operations.

The domestic dimension: an unfettered executive

The internal political context and constitutional framework is highly favorable to the use of French armed forces abroad. Public opinion supports and even requests this kind of intervention, particularly if it seems to be justified by humanitarian imperatives. Casualties are not perceived as a valid reason for the withdrawal of troops and do not cause political repercussions. The relative lack of public debate is partially compensated by a vast network of proactive NGOs, which advocate military involvement, especially for humanitarian reasons. The constitutional framework gives to the executive branch, and especially to the president, the main responsibility for deployment of forces abroad.

A key international role for the president

Adopted in 1958, the Constitution of the Fifth Republic recognizes the key international role of the president.

The use of force The key role of the president is especially obvious when it comes to the question of the use of force. The broad powers given to the president mainly derive from two articles of the Constitution:

article 5 and article 15.[6] According to article 5, he "shall be the guarantor of national independence, the integrity of the territory and observance of Community agreements and of treaties." This special responsibility in ensuring the fulfillment of international treaties is reinforced by article 15, which makes him the commander of the armed forces.

The president is the cornerstone of French institutions. Diplomacy and defense are the two areas where he exercises the most discretion. Although the president always enjoys wide powers in these areas, the extent of his power may vary, depending on whether he is also leading the majority party in the National Assembly or has to "cohabit" with a prime minister from a different political majority.

The president as commander-in-chief The president nominates the prime minister, who forms the government and chooses his or her ministers from the majority party (or parties) in the National Assembly. The president is the head of state, and in the area of defense and foreign affairs initiates the policies that are then implemented by the government. He presides over the Defense Council, where key decisions are made regarding defense, and has the upper hand on all issues relating to external relations and defense.

In recent history, the most striking example of this was the role played by President François Mitterrand during the 1990–1 Gulf War. During the entire crisis, the president acted as commander-in-chief of the armed forces on the advice of his personal military adviser. He informed public opinion through his various interventions in the media. The government (of the same party, not a "cohabiting" one) implemented and supported his decisions before the National Assembly. This support did not allow any dissenting opinion, and when the minister of defense publicly disagreed with the president, he had to resign.

In the same period, an attack by the Rwandan Patriotic Front (RPF) in October 1990 also led to unilateral executive decisions. While visiting Riyadh, Saudi Arabia, President Mitterrand convened an emergency meeting of the French Defense Council and decided to send two infantry companies to Kigali. This started *Opération Noroit*, which lasted three years and was aimed at protecting French and European nationals, as well as French assets, against attack by RPF troops. According to the

[6] Article 5: "Le Président de la République veille au respect de la Constitution. Il assure, par son arbitrage, le fonctionnement régulier des pouvoirs publics ainsi que la continuité de l'Etat. Il est le garant de l'indépendance nationale, de l'intégrité du territoire, du respect des accords de Communauté et des traités."

Article 15: "Le Président de la République est le chef des armées. Il préside les conseils et comités supérieurs de la Défense Nationale."

report of the Information Commission set up by the National Assembly to examine French policy in Rwanda, President Mitterrand's 1990 decision to dispatch troops led to a growing French involvement there without any public or legislative discussion.[7]

In 1995, the key role played by President Jacques Chirac and its impact on French policy was also made clear in the former Yugoslavia. Shortly after his election, President Chirac decided to implement a much stronger policy in Bosnia. Under his leadership, France reacted to Serbian provocations by deploying a rapid reaction force joined by the British and the Dutch, leading the newspapers to write about the "Chirac effect" on UNPROFOR.

This demonstrates another of Karen Mingst's points, namely that timing in the use of force is important. For the Gulf crisis in the early 1990s, and later for the intervention in Yugoslavia, the timing of the intervention played an important role in its acceptance by public opinion. As did other coalition leaders, President Mitterrand used the six months after the invasion of Kuwait by Saddam Hussein until the launching of Desert Storm not only to build up the military apparatus, but also to prepare French public opinion for the coming war. Frequent television interventions, reminiscent of the style favored by General de Gaulle, enabled him to personify the French response to the invasion and build the support necessary for the operation.

Cohabitation The balance of power between the president and the government is particularly important when they do not come from the same political majority. This "cohabitation" has occurred three times in French political life since 1986.

An unusual characteristic of the French political system is the existence of an executive branch with two heads, the president and the prime minister. In case of a change in the parliamentary majority before the end of the presidential term, the prime minister, who always comes from the majority in parliament, can be from a different political party than the president. This situation, which represents a real change in the institutional balance envisioned by the constitution of the Fifth Republic, first occurred between 1986 and 1988, then again from 1993 to 1995. From 1997 to 2002, a Socialist prime minister, Lionel Jospin, has cohabited with the Gaullist President Chirac. Under such circumstances, the question of the respective powers of the two heads of the executive arises.

[7] *Le Monde*, Supplement, December 17, 1998, p. iv.

According to article 20 of the Constitution,[8] the government is entitled to develop, decide on, and implement national policies. To this end, it utilizes the administration and the armed forces. This provision gives the government a role in the implementation of the use of force. The prime minister, as head of government, should thus be an important actor. In practice, however, prime ministers have usually had a very limited influence on the decision to use force internationally.

During the first cohabitation, when Jacques Chirac was prime minister, President Mitterrand withdrew from the domestic political scene to focus on external relations. To preserve a smooth cohabitation (which the Constitution had not envisaged, leaving the politicians forced to deal with it to find their way), the prime minister then refrained from intervening in this field and left the president enjoying vast powers. This practice set a precedent that greatly influenced the following periods of cohabitation. Thus, power in the area of foreign policy and defense still lies with the president, with an important role also played by the minister of foreign affairs.

In the decision-making process, the link between the president and the Quai d'Orsay becomes crucial. In time of crisis, interministerial meetings are regularly organized to consider every aspect of a crisis with all the departments concerned. This was particularly clear with the intervention in Rwanda in 1994. *Turquoise* resulted from the collaboration of the Socialist president and the Gaullist minister of foreign affairs, despite the lack of support from the Gaullist prime minister.

French decision-making in time of crisis

In time of crisis, the French decision-making apparatus involves a small group, including the president and the "reduced cabinet" (*le Conseil restreint*): the prime minister and a few ministers, such as those in charge of foreign affairs, defense, interior (home) affairs (to deal with terrorism), and finance.

The chief of the General Staff (*chef d'Etat-Major des Armées*, CEMA), as the military counselor of the president, deals with the crisis from a military viewpoint, advising an interministerial crisis committee tasked to evaluate the overall situation and to make a proposal to the *Conseil restreint*. The CEMA has at his disposal the Military Intelligence Directorate (*Direction du Renseignement Militaire,* DRM), which will use various assets to collect

[8] Article 20: "Le Gouvernement détermine et conduit la politique de la Nation.
Il dispose de l'administration et de la force armée.
Il est responsable devant le Parlement dans les conditions et suivant les procédures prévues aux articles 49 et 50."

information, notably the Helios A and B reconnaissance satellites that proved to be extremely valuable in the crisis in the former Yugoslavia.

Four types of crisis may require the use of military forces:

- The first category is emergency relief operations, where the military component is acting in support of other types of organizations (at home with the Interior Ministry and Red Cross, for example; abroad with many NGOs).
- The second category is peace support operations, divided into three sub-components (which, incidentally, cover the Petersberg tasks defined by the WEU in 1992): support to preventive diplomacy, peacekeeping, and peacemaking.
- A third category, *Opérations de Sécurité* ("security operations") involves extraction operations of French or western citizens from dangerous areas. This type of operation has been quite frequent in the last few years, including *Isard* (March 1997) in Zaire, with fifteen civilians evacuated; *Harmonium* (March 1997) in Albania (thirty-nine civilians); *Espadon* (May–June 1997) in Sierra Leone (998); *Pelican* (June 1997) in Congo (5,666); *Antilope* (October–November 1997) in Congo (85); *Iroko* (June 1998) in Guinea Bissau (271); and *Malachite* (August–October 1998) in Congo (245).
- The last category of military intervention in the French classification is war, an attack on France and/or the NATO area, as defined by Article 5 and other relevant articles of the 1949 North Atlantic (Washington) Treaty.

Having been tasked to prepare the deployment and use of French forces, the CEMA will ask a Joint Headquarters (*l'Etat-Major Inter-Armées,* EMIA) to plan the military operation (implementation planning). If the green light is given by the president, after a meeting of the *Conseil restreint*, the operation will be turned over to an operational commander (COMANFOR).

In the case of a multinational operation, arrangements are made for French forces to serve as part of the operation or as lead nation. More and more, this kind of operation will be handled in the framework of the ESDP (European Security and Defense Policy). At Helsinki in December 1999, the EU's members set the goal of creating by 2003 an EU rapid reaction force able to deploy 60,000 personnel and sustain them for a year, supported by air and maritime components. Britain and France have agreed to be lead nations in providing the command structures for any EU operation. France expects to provide 20 percent of the manpower envisaged for the EU force.[9]

[9] Alain Richard, minister of defense, National Assembly, October 25, 2000.

A limited role for the parliament

The use of force internationally does not require a formal declaration of war by the legislature as provided for in article 35 of the Fifth Republic's Constitution.[10] When the executive consults the legislature it is because of concern for public opinion. Even with declarations of war,[11] the powers of the National Assembly and Senate have eroded to become more of a historical vestige than a real codecisional power on questions concerning the commitment of French troops. This is especially true since legislative authorization is not required for the implementation of existing international obligations.

Once again, this was made extremely clear during the Gulf War of 1990–1. On December 12, 1990, some deputies asserted in the National Assembly that, since French armed forces had been sent to a potential combat zone, article 35 applied. They maintained that a UN Security Council Resolution was, in fact, "a modern declaration of war."[12] This interpretation was rejected by Prime Minister Michel Rocard, who stressed that an action based on Chapter VII of the UN Charter came under the sole authority of the president. The vote that followed this legislative debate was thus not based on article 35, but was merely a vote of confidence to express support for the government.

One means of control by the legislature should be its undisputed competence in the budgetary process. This gives it the opportunity to require accountability for military operations through oversight of government spending on them. For 1998, the cost overruns associated with military operations totaled FF 2.1 billion, the majority of which was due to operations under international auspices, but outside the United Nations, such as the Joint Force operation in Bosnia.[13]

In reality, though, the National Assembly and the Senate have limited control. This is because these operations are mainly decided in response to an emergency situation and are not provided for in the regular defense budget. Additional costs are thus presented to the legislature for its approval after the operations have been decided and, most of the time, fully implemented. If some control could be exercised at this stage, it would merely be *a posteriori* and would not carry great influence on the

[10] Article 35: "La déclaration de guerre est autorisée par le Parlement."

[11] See Michel Voelckel, "Faut-il encore déclarer la guerre?" (1991) AFDI 7–24.

[12] *Journal Officiel*, Session of December 12, 1990, p. 6748.

[13] This type of operation represents the main source of cost overrun, with FF 1.28 billion, while operations under UN auspices account for only FF 160 million, ranking third, after unilateral interventions, mostly in African countries (FF 260 million). See François Lamy, "Report to the Defense Commission on November 25, 1998" (1998) *Assemblée Nationale, Commission de la Défense Nationale et des Forces Armées, Compte rendu No. 15.*

actual decision to commit troops. Although some progress has been made, especially in providing information to the legislature on external operations conducted by the Ministry of Defense, deputies still have a very small margin of influence when reviewing the budget submitted by the government.

The legislature has several other means at its disposal for monitoring and evaluating, if it deems necessary, public policies. Control can be exercised through parliamentary questions asked of the government and, in theory, through the establishment of Inquiry Commissions, although these have rarely been used. With regard to the decision to intervene in Rwanda, the National Assembly established a Commission to look at the development of French policy in this case. It was not, however, an Inquiry Commission, but an Information Commission with more limited investigating powers.

Nevertheless, this Information Commission heard all the key actors and published a report in December 1998, large extracts of which were reproduced in the press.[14] This process also enabled Commission members to voice their desire for greater legislative involvement in the decision-making process concerning external interventions. Some stressed that parliamentary debate could help the public better understand the potential human cost of external interventions, and that French forces would be in a better position if they knew they had the support of the nation as expressed through its elected representatives.[15] In spite of this rhetoric about building national support through legislative involvement, in fact, the exact opposite happens. Once a decision has been made by the executive to send French troops into potentially dangerous situations, the legislature has always felt obliged to show support for the troops.

However, since the late 1990s, under the leadership of its president, Paul Quilès, the Defense Commission of the National Assembly has tried to assert a role for the legislature to make recommendations to the executive. Following the publication of its report on French policy in Rwanda, and once again under the strong leadership of its president, the Defense Commission in early 1999 took up the issue of NATO's proposed Strategic Concept.[16] This was somewhat unusual, since a parliamentary

[14] See *Le Monde*, Supplement, December 17, 1998, p. iv.

[15] See the intervention by Paul Quilès on October 13, 1998, when the Defense Commission was hearing the head of the armed forces on the 1999 Budget, and his introduction on January 27, 1999, when the Defense Commission was hearing the defense minister on the question of NATO's Strategic Concept.

[16] North Atlantic Treaty Organization, "The Alliance's Strategic Concept" (April 23, 1999). See also the report presented by Paul Quilès to the Commission on March 24, 1999 (*Compte rendu No. 24*).

commission has rarely been involved in on-going negotiations related to defense issues.

Furthermore, during this process, the Commission heard several key actors, including the ministers of defense and of foreign affairs.[17] Its report on NATO's Strategic Concept was designed to show that members of the National Assembly were willing to propose guidelines to the executive in matters relating to defense and security, usually characterized by a lack of public debate.[18] Although this initiative received the support of a number of members of the Commission, the report was carefully worded in order to avoid any conflict with constitutional provisions and the separation of powers.

The subsequent proposal to have the National Assembly consulted before any military intervention is ordered by the executive was, however, strongly opposed by some deputies as being unconstitutional. This leads to the conclusion that the interpretation of the Constitution that prevailed during the 1991 Gulf War is still the dominant one. The National Assembly, for instance, was not asked to approve the use of military force in the Kosovo crisis during the spring of 1999. The executive does, however, keep the National Assembly and the Senate informed of on-going operations. The legislature has developed a role in informing the public and building public support for military operations.

The relative weakness of the legislative branch in France, with regard to parliamentary oversight, should not be understood as a lack of democratic control. The president is directly elected by the people, which gives him a legitimacy like that of the US president. When both the president and the prime minister, whose government has a majority in the National Assembly, agree, then it may be assumed that, as individuals and as party leaders, they have the support of French voters.

Promoting the European Union as an actor in international military operations

In her final comments, Karen Mingst stressed the importance of the international organization determining and implementing the use of force. Although, as has been shown throughout this chapter, France emphasizes the leading role of the United Nations Security Council, it is now

[17] The head of the armed forces and the directors of strategic affairs in both the Ministry of Defense and of Foreign Affairs were also heard. Members of the Commission traveled to London, Washington, Brussels, and Bonn to meet with over sixty persons at various levels. See *Assemblée Nationale, Commission de la Défense Nationale et des Forces Armées, Compte rendu No. 22*, March 10, 1999.

[18] Presentation by Paul Quilès of the report concerning negotiation of NATO's Strategic Concept, March 10, 1999, *Compte rendu No. 22.*

working with other members of the European Union to develop an EU military capacity for peacekeeping missions. There is no contradiction between the two. The UNSC has the primary responsibility, according to the Charter, and is entitled to authorize the international use of military force. But the implementation of UNSC authorizations can be by UN member states or coalitions of member states.

After completion of the common European currency, European defense has, indeed, become number one on the EU agenda. It assumed a new prominence with the St. Malo meeting between French President Jacques Chirac and British Prime Minister Tony Blair in December 1998. Since then, the momentum regarding the development of a European Security and Defense Policy has accelerated. In that respect, one must draw a distinction between the European Security and Defense Identity (ESDI), which is part of NATO's transformation, and ESDP, which encompasses ESDI, but has far-reaching goals: to provide the European Union with a military capacity of its own.

The decisions taken by the European Union regarding ESDP, particularly at the Helsinki (December 1999), Feira (June 2000), and Nice (December 2000) EU summits, have opened new perspectives regarding the use of military forces under the auspices of the European Union. New decision-making, action-oriented political and military bodies have been created in Brussels. A political and security committee, a military committee, an EU military staff, a "situation center" and a committee for civilian crisis management will enable the European Union to intervene quickly and credibly in the management of international crises. Most notably, the EU in 1999 created the new position of Secretary General of the Council and High Representative for the Common Foreign and Security Policy (CFSP). NATO Secretary General Javier Solana moved downtown from the Alliance's headquarters on the outskirts of Brussels to assume the new EU position.

As mentioned above, the European Union has also announced its intention to establish by 2003 a rapid reaction force of 60,000 troops for international conflict prevention and crisis-management operations, with the requisite air and naval support, for deployment to a theater of conflict within sixty days for a period of at least one year. With the creation of a decision-making process, a crisis assessment and planning apparatus, and a rapid reaction force, the European Union will have military forces available for the maintenance of international peace and security. The resulting dynamic will in the coming years modify and alter the role and function of each member of the Union. The question of accountability for the use of force will be dramatically modified accordingly.

Indeed, peacekeeping, strengthening international security, and defending human rights are the central principles underpinning the European Union's foreign policy.[19] Recent crises on Europe's doorstep have convinced Europeans that they cannot remain idle when these fundamental principles are being violated. In this regard, the European Union has given priority to peacekeeping. For the EU, the Brahimi report[20] presents useful recommendations on the mandates of peacekeeping operations, operational planning in New York, and deployment. Representing a unique opportunity to strengthen the UN's capacity for peace operations, the European Union will actively participate in examination of these recommendations.

In addition to its military resources, it will develop civilian intervention capabilities, including a corps of civilian police to contribute to peacekeeping. In this connection, the member states have set themselves the goal of being able, by 2003, to provide up to 5,000 police officers, 1,000 of whom will be deployment-ready within thirty days.

These activities are in compliance with the principles of the UN Charter, and the European Union has, in the years ahead, to establish working ties with the UN. In order to initiate such cooperation, the EU troika will discuss this issue for the first time with the UN Secretary-General.

Conclusion

From an initial reluctance to support peacekeeping operations, France has become an active participant in these operations. This role stems from the emphasis put by France on the necessity for decision-making legitimacy and the unique authority of the UN Security Council in this respect.

Accountability at the international level is seen as requiring the involvement of the UN Security Council. At the domestic level, it is mainly a question of balance between president and prime minister, the two heads of the executive branch. Contrary to some of the countries discussed in this book, the question of democratic accountability in France is not principally one of legislative involvement. Nevertheless, there is a growing perception that the legislature should be adequately informed and able to evaluate external military operations. But that evaluation is more to

[19] On the French rationale for ESDP, see Jacques Chirac, "Discours du President de la République devant le comité des Présidents de l'Assemblée Parlementaire de l'UEO et les auditeurs de l'IHEDN" (Palais de l'Elysée, May 30, 2000.)

[20] Report of the "Groupe d'Etude sur les Opérations de Paix," under the chairmanship of Lakhdar Brahimi, United Nations, New York, August 17, 2000.

assess the effectiveness of operations, as well as the adequacy of means, purposes, and results, than to criticize their cost, either in monetary terms or in terms of casualties.

The key accountability question for France is therefore that of international legitimacy. The constant effort to channel decision-making through the appropriate institutions at the international level is a fundamental characteristic of the French position on peacekeeping operations. The central role played by the UN Security Council is at the heart of this policy. However, this search for a legitimate source for the authorization of the use of force can also be found in French attempts to empower other institutions, especially at the European level in ESDP. Such a regionalization of collective security and/or cooperative security implies a cooperative EU relationship with the UN Security Council. France's concept of future peace operations is based on the capacity of the European Union to control its own military forces in order to implement mandates or authorizations given by the Security Council.

13 The United Kingdom: increasing commitment requires greater parliamentary involvement

Nigel D. White

The UK Constitution and military action

The use of military force by democratic states causes considerable tension between the mechanisms of democratic accountability and the traditional sovereign power of a state, through its government, to commit its armed forces overseas. In the United Kingdom, one of the oldest democracies, this tension is becoming increasingly apparent, though the weight of constitutional practice still concedes considerable latitude to the executive in making such decisions. While the existence of a mandate granted by an international organization to use armed force does not change this position in formal terms, the increased use of internationally sanctioned forces in nondefensive actions has brought the tension to a head.

In the United Kingdom, the fulcrum of the executive is the cabinet, headed by the prime minister. Major policy, including decisions on military operations and foreign policy, is hammered out in the cabinet and in various standing and ad hoc cabinet committees. Decision-making on issues of foreign affairs and the deployment of armed forces are within the prerogative power of the Crown.[1] This signifies that executive action can be taken by virtue of the prerogative "without the authority of an Act of Parliament."[2] As prerogative powers, both foreign affairs and the deployment of armed forces are exercised on the authority of the cabinet or of ministers, particularly the prime minister, the secretary of state for foreign and Commonwealth affairs, and the secretary of state for defence.

The prerogative power has two serious consequences for the rule of law and democratic accountability. First: "while Parliamentary approval is not generally needed before action is taken, Ministers are responsible to

My thanks to Dr. Alastair Mowbray, School of Law, the University of Nottingham, for reading through an earlier draft of this essay and for his invaluable comments on the constitutional aspects.

[1] Lord Lester and D. Oliver (eds.), *Constitutional Law and Human Rights* (London, Butterworths, 1997), pp. 465–6, 476.

[2] A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn., London, Macmillan, 1959), pp. 424–5.

Parliament for their policies and decisions."[3] Secondly, the courts have no power to review the decisions of the Crown on the disposition and use of the UK's armed forces,[4] although there is a discernible trend to review the prerogative in other areas.[5] Thus it seems more prescriptive than descriptive for leading UK constitutional lawyers to state that "[i]n the interests of constitutional government and the rule of law, the exercise of the physical might of the modern state must be subject to democratic control."[6]

The reality of the exercise of prerogative powers in the areas of foreign affairs and the disposition of armed forces is shown by the exchange in the House of Commons in 1982, when negotiations were taking place for the settlement of the Falklands conflict. The leader of the Opposition claimed that "the House of Commons has the right to make judgment on this matter before any decision is taken by the Government that would enlarge the conflict." In response, Prime Minister Margaret Thatcher declared that "it is an inherent jurisdiction of the government to negotiate and reach decisions. Afterwards the House of Commons can pass judgment on the government."[7]

How the lower house passes judgment on the government can vary. Recent governments have opted to use unamendable adjournment motions to debate their decisions to use force.[8] Substantive motions enable the lower house to vote on the United Kingdom's involvement; adjournment motions rarely do.[9] While the Kosovo conflict was the subject of much more debate than usual in the lower house, it was never subject to a substantive vote, thereby reducing the chances of the government's decisions being challenged.

Parliamentary debates take place primarily in the House of Commons, though limited discussion also takes place in the House of Lords. Ministers are also questioned before the Defence Select Committee or Select Committee on Foreign Affairs of the House of Commons. However, it

[3] A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law* (12th edn., London, Longman, 1997), p. 352.

[4] *China Navigation Co. Ltd* v. *Attorney General* [1932] 2 KB 197 (Court of Appeal); *Chandler* v. *Director of Public Prosecutions* [1964] AC 736 (House of Lords). P. Rowe, *Defence: The Legal Implications* (London, Brassey's, 1987), p. 3.

[5] Lester and Oliver, *Constitutional Law*, p. 250.

[6] Bradley and Ewing, *Constitutional*, p. 373.

[7] HC Deb., vol. 23, ser. 6, cols. 597–8, May 11, 1982.

[8] HC Foreign Affairs Committee, Fourth Report, June 7, 2000, para. 166. Recent parliamentary publications (from 1998 onwards) are drawn from the electronic version of *Hansard* found at http://www.parliament.the-stationery-office.co.uk. Hence there are no volume numbers for these references.

[9] D. Limon and W. R. McKay, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (22th edn., London, Butterworths, 1997), p. 276.

is questionable whether these operate as robust controls on the cabinet, where crucial decisions have already been made. Nevertheless, ministers may modify their decisions if they believe there will be an adverse reaction of the House of Commons or the relevant Select Committee in the near future.

In extreme cases, for example, if a minister had sanctioned a war crime or a crime against humanity, he could be forced from office, although there has been no instance of this in the United Kingdom.[10] Independent commissions of inquiry have been established in instances of violence committed by UK troops (the 1972 Widgery Inquiry into the Bloody Sunday Massacres in Belfast, and the 1998 Saville Inquiry), and issues of foreign affairs (the Scott Inquiry into arms to Iraq).[11] There are also legal, as well as political, avenues of accountability. The jurisdiction of the International Criminal Tribunal for the Former Yugoslavia (ICTY) extends to possible NATO crimes in Yugoslavia. Article 7 of the tribunal's statute states that a political leader can be held individually responsible "if he knew or had reason to know that the subordinate was about to commit such actions."[12]

At a lower level, British military personnel serving under an international mandate, as well as being potentially subject to the jurisdiction of international criminal tribunals are subject to the relevant norms of international law, as reviewed by Robert Siekmann in chapter 5 of this volume. Military discipline and punishment for unlawful conduct by British troops are under the control of the British contingent's commander and British Courts Martial operating under UK legislation, principally the Army Act 1955, Air Force Act 1955, and Naval Discipline Act 1957.[13]

The War Cabinet

The gap between theoretical accountability to parliament and the reality of government is shown by the committal of armed forces to combat. A. W. Bradley and K. D. Ewing state that "[l]ike other branches of central government, the armed forces are placed under the control of the ministers of the Crown, who are in turn responsible to Parliament."[14] In reality,

[10] Israeli Defense Minister Ariel Sharon was forced to resign for having indirect responsibility for the 1982 Sabra and Shatila Palestinian camp massacres, following an independent Commission of Inquiry report. See The Kahan Report (1983) 22 *ILM* 473.

[11] D. Oliver, "The Scott Report" (1996) *Public Law* 357.

[12] See also Article 28 of the Rome Statute of the International Criminal Court (1998) 37 *ILM* 1002.

[13] H. McCoubrey and N. D. White, *The Blue Helmets: The Legal Regulation of United Nations Operations* (Dartmouth, Aldershot, 1996), pp. 178–84.

[14] Bradley and Ewing, *Constitutional*, p. 375.

the authorization and control of military operations are both undertaken by the cabinet. Normally, military operations are run by an inner cabinet known as the War Cabinet, a mechanism that seems to have been accepted in UK constitutional practice. In relation to the prosecution of wars, "the chain of political authority – from [inner] Cabinet to Cabinet, party, Parliament and public" becomes distorted. The prime minister, heading the War Cabinet, sees keeping "the Cabinet happy" as essential; "the party important; Parliament as a whole, useful but not essential; and the public? Well, the day of reckoning at the next general election would be some way off."[15]

These inner War Cabinets are almost always ad hoc arrangements established at the behest of the prime minister, bypassing the standing cabinet committees. The only exception in the post-Second World War period was the Korean War, when the existing Cabinet Defence Committee ran the British contribution to the war. It has been suggested that Prime Minister "Attlee had least need to consider forming an ad hoc committee," since the United Kingdom was not "running" the Korean War, a UN authorized operation under unified (US) command.[16]

British involvement in the 1991 Gulf War was coordinated by an ad hoc War Cabinet consisting of the prime minister, the chancellor of the Exchequer, and the secretaries of state for foreign affairs, defence, and energy. The British contribution to the NATO-sanctioned Kosovo operation in 1999 was directed by an even looser inner cabinet. Prime Minister "Blair ha[d] no formal War Cabinet, but supervise[d] the campaign through daily face-to-face meetings with Chief of Defence Staff, General Sir Charles Guthrie, [Defence Secretary] George Robertson, Foreign Secretary Robin Cook and trusted officials."[17] Further informality is evident in the committal and running of British contributions to UN peacekeeping forces.

The deployment and use of military forces are clearly among the gravest issues in politics, and for democracies to exclude wider political debate and input seems perverse. Indeed, the emergence of War Cabinets has two consequences that increase the democratic deficit in these situations – "[t]he dangers of *tunnel vision* among the decision makers, and the dangers of *military professionals dominating the politicians*."[18] By excluding all extraneous political factors from its decision-making, the War Cabinet is

[15] C. Seymour-Ure, "War Cabinets in Limited Wars: Korea, Suez and the Falklands" (1984) 62 *Public Administration* 181 at 182.
[16] *Ibid.*, p. 188.
[17] A. McSmith and P. Beaver, "Commander Blair Goes it Alone," *The Observer*, April 18, 1999, p. 14.
[18] Seymour-Ure, "War Cabinets," pp. 194–5 (emphasis added).

in danger of becoming obsessed with the successful prosecution of the war – in effect this becomes the War Cabinet's *raison d'être*. This is compounded by the fact that ministers only receive input from the military in the shape of the chiefs of staff under the chief of defence staff.

The absence of cabinet papers in relation to the Gulf and Kosovo conflicts makes a detailed analysis of the inner workings of the executive difficult. Focusing on Kosovo for a moment, though, it is interesting to note how the conduct of British military operations was centered in the hands of Prime Minister Blair and Defence Secretary Robertson, with orders "ultimately com[ing] from Downing Street."[19] This seems to show a high level of UK political control of British forces over Yugoslavia, though clearly there had to be coordination of British operations with those of its allies within NATO's integrated command structure, under the political authority of the North Atlantic Council.

The origins of the War Cabinet, at least in the modern sense, derive from Prime Minister Churchill's War Cabinet during the Second World War. In such a total war of survival, "politics generally is subordinated to military considerations."[20] However, in the case of more limited wars, including Korea, the Gulf, and Kosovo, the government should be considering the war in relation to all its other policies and goals. "It seems at least questionable whether the War Cabinet system provides a good method of resolving this," since the "War Cabinet gets more and more involved in short term goals, and with means more than ends."[21] The bypassing of the cabinet and parliament is a serious shortcoming when looking at the accountability of ministers prosecuting the war.

The United Kingdom and UN peace operations

The United Kingdom was an original signatory of the UN Charter on June 26, 1945. Indeed, it was a major force in the drafting of the Charter. Prime Minister Churchill was vociferous in his support for greater regionalism within a universal framework. His belief was that "it was only the countries whose interests were directly affected by a dispute [that] could be expected to apply themselves with sufficient vigour to secure a settlement." He envisaged three regional Councils, but he also emphasized that "the last word would remain with the Supreme World Council."[22] Although there was no recognition of specific regional structures in the Charter, a relationship between regionalism and universalism was built

[19] McSmith and Beaver, "Commander Blair," p. 14.
[20] Seymour-Ure, "War Cabinets," p. 198. [21] *Ibid.*
[22] R. B. Russell and J. B. Muther, *A History of the United Nations Charter: The Role of the United States, 1940–1945* (Washington, DC, Brookings Institute, 1958), p. 107.

into Chapter VIII, with the UN Security Council having ultimate authority (Article 53) over enforcement action. The limits of regional autonomy have been tested on many occasions, the latest and possibly most significant of which was the NATO bombing of Yugoslavia in 1999.

In accordance with UK constitutional practice,[23] the UN Charter as a treaty was presented to the House of Commons for approval on August 22, 1945. In introducing it to the House, Prime Minister Attlee stated that "the Charter was voted and discussed in accordance with the best traditions of democracy." He was referring to the debates at San Francisco, not the one he was opening in parliament, where formal approval for ratification was sought and duly granted.[24] In 1946, the UK parliament passed the United Nations Act, which was a limited statute enabling effect to be given to measures ordered by the Security Council under Article 41 of the UN Charter.

The United Kingdom's record at the UN has been fashioned by its permanent seat in the Security Council, and, within the context of a reform debate begun in the 1990s, its express desire to maintain that status, despite its position as a middle-ranking power. Although paying its dues on time, the United Kingdom has not, until recently, been a significant contributor to consensual peacekeeping operations.[25] Ironically, it was the UK's (and France's) flawed 1956 military action in Suez that precipitated the development of such forces. British and French vetoes in the Security Council did not prevent the Uniting for Peace procedure (which the United Kingdom had supported in the 1950 Korean War) transferring the matter to the General Assembly, where UNEF I was duly authorized.[26] The United Kingdom abstained in the vote on the crucial Assembly Resolution establishing UNEF I, reluctantly conceding that its "police" action was to be replaced by an international one.[27]

The United Kingdom's grudging acceptance of UN peacekeeping, combined with the tacit agreement during the Cold War that no permanent Security Council member should participate in consensual peacekeeping, limited UK involvement mainly to the occasional logistics support operation, such as an airlift of Ghanaian troops at the beginning of the 1960 UN Operation in the Congo (ONUC). The one exception to this non-involvement was Cyprus in 1964, due to the "singular historical

[23] Lester and Oliver, *Constitutional Law*, p. 466.
[24] HC Deb., vol. 413, ser. 5, cols. 660, 950, August 22, 1945.
[25] See Appendix B, "Country participation in international operations, 1945–2000," for information on the United Kingdom's contribution.
[26] SC Resolution 119, October 31, 1956. GA Resolutions 998–1001 (1956).
[27] GA 563rd Plenary Meeting, November 3, 1956, paras. 292–3.

circumstances of the Cyprus case."[28] The UK placed its troops "under the exclusive command of the United Nations at all times" in UNFICYP, and the force commander was "appointed by and exclusively responsible to the Secretary-General."[29]

The end of the Cold War saw an increased level of UK contributions to observation, monitoring, and traditional peacekeeping, as well as peacekeeping plus state-building. The United Kingdom since 1990 has been at the forefront of contributions to several UN-authorized enforcement operations, both to combat aggression and to enforce international mandates – the Gulf, the aborted mission in Zaire, IFOR/SFOR in Bosnia, KFOR in Kosovo, and the multinational force sent to East Timor in September 1999. This culminated in June 1999, with the government signing a memorandum of understanding with the Secretary-General, giving the UN access to rapidly deployable troops. This represented an addition to the UK's commitments under the UN standby arrangements made in 1994. However, the final decision to commit UK troops to UN operations remains with the government.[30]

Chapter VII operations authorized by the Security Council are, in essence, the delegation of power to states to take military action.[31] Once given that authorization, states generally have limited accountability to and limited control by the UNSC.[32] This contrasts with consensual UN peacekeeping forces, where command and control is normally with the UN, and the force is kept within a tightly controlled renewable mandate. Under Chapter VII provisions, with no agreements arrived at under Article 43 of the Charter, there is no question of the Security Council obliging member states to supply troops for military operations. Instead, as the Korean precedent established, states volunteer for such operations, and command and control is vested in the participating state or states, based on political and military considerations.

Thus, the important element in considering the legitimacy of Chapter VII operations is the enabling resolution and the debate surrounding it. At this stage, other members of the Security Council can challenge the legality and necessity of the proposed military action, and, if in sufficient number or a permanent member, block it. Once the

[28] R. Higgins, *United Nations Peacekeeping: Documents and Commentary, Vol. IV Europe 1946–1979* (Oxford, Oxford University Press, 1981), p.161.

[29] UN Doc. S/5950 (1964).

[30] See http://www.fco.gov.uk/news/newstext.asp?2591

[31] D. 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), pp. 167–74.

[32] N. D. White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (2nd edn., Manchester, Manchester University Press, 1997), pp. 115–28.

resolution has passed, there is very little that member states can do to halt the prosecution of the action. There is no Charter requirement that approval be sought from the General Assembly, although the legitimacy of the operation is increased if such approval is achieved. In many of the Chapter VII operations to date, the General Assembly has adopted a supportive resolution, but only after the use of force has commenced.[33]

Thus, there are parallels with the domestic situation, at least in the United Kingdom, where the executive, or, rather, a small part of it, makes the decisions committing British forces to combat. Cabinet and parliamentary support will only be sought after that. At the UN level, the executive organ, the Security Council, or rather the P-3 (France, the United Kingdom, and the United States) or P-5 (all five permanent members), will make a decision on the deployment of forces that will later be endorsed by the full Security Council and then possibly by the plenary body, the General Assembly. At the international level, there is the possibility of veto in the executive body, which is not present except in theory at the domestic level. Increased control of the executive, both at the national and international levels, seems desirable, reflecting the need to develop a "mixed system" of accountability in this area, discussed by Ku and Jacobson in chapter 15 of this volume.

The United Kingdom and NATO

As well as supporting a strengthened world body after the Second World War, Britain was also forcefully behind the development of a strong collective defense entity. Indeed, the formation of NATO "was a response to the demonstrated incapacity of the United Nations to deal with the fundamental cleavage of the post-war period." Post-war reality led to the negotiation and signing of the North Atlantic Treaty in Washington on April 4, 1949. However, while "the United Nations was, and is, a tribute to the ideal and NATO a response to reality, the ideal lived on."[34] The issue in the post-Cold War era is to redefine the relationship between the ideal and the real, between the UN and NATO.

While western Europe is still militarily dependent on the United States, the NATO bombing of Yugoslavia in 1999 and the subsequent KFOR deployment have given impetus to the attempt by western Europe, and Britain in particular, to rebalance the relationship in NATO between the United States and Europe. The initial Kosovo campaign witnessed an

[33] N. D. White, "From Korea to Kuwait: The Legal Basis of United Nations' Military Action" (1998) 20 *International History Review* 600.

[34] G. L. Goodwin, *Britain and the United Nations* (Oxford, Oxford University Press, 1957), pp. 57–8.

overt move by NATO from Article 5 (mutual defense) to non-Article 5 operations to combat, *inter alia*, threats to the peace. Bruno Simma points to a problem of "democratic legitimacy of such re-invention" in relation to Germany, where parliamentary consent was given when the Federal Republic acceded to the 1949 treaty, but not to its radical development by subsequent practice.[35]

It is doubtful whether this is such a great problem for the United Kingdom, with its more fluid constitution. In March 1949, in response to a request for a debate before the North Atlantic Treaty was signed, the government minister stated that "proper British Parliamentary practice" would be followed, namely "that the Government take their responsibility in entering into a treaty and the House of Commons has its perfectly free responsibility to approve or not approve of what the Government has done."[36] It was over a month after the signing of the treaty before there was overwhelming approval in the House of Commons of what the government had done.[37]

Given the legality of the government undertaking international obligations without prior parliamentary approval, there appears little doubt that it can agree with its NATO partners to expand the nature of the North Atlantic Treaty, without seeking prior parliamentary approval. Of course, the House of Commons can express its disapproval retrospectively of what the government has done, but this is unlikely, since "the House of Commons is enmeshed with and supports the Government of the day."[38] Even if such an event were to occur, the legal obligations undertaken by the United Kingdom on the international plane would not be undone, unless it led to the government withdrawing from the treaty.[39]

The 1999 House of Commons debates on Kosovo, after the start of NATO bombing operations, amounted to tacit approval of non-Article 5 operations. Express approval was given by the House of Commons Defence Select Committee in its Third Report of March 31, 1999 on the Challenges facing NATO at the forthcoming Washington Summit. The report supported non-Article 5 action, and furthermore declared that, "[i]nsistence on a UN Security Council mandate for such operations would be unnecessary as well as covertly giving Russia a veto over Alliance action. All 19 Allies act in accordance with the principles of

[35] B. Simma, "NATO, the UN and the Use of Force: Legal Aspects" (1999) 10 *European Journal of International Law* 1 at 18–19.
[36] HC Deb., vol. 464, ser. 5, col. 2292, March 17, 1949 (Morrison).
[37] HC Deb., vol. 464, ser. 5, cols. 2011–131, May 12, 1949.
[38] J. P. Mackintosh, *People and Parliament* (Farnborough, Saxon House, 1978), p. 210.
[39] S. de Smith and R. Brazier, *Constitutional and Administrative Law* (8th edn., London, Penguin, 1998), p. 147.

international law and we are secure in our assertion that the necessity of unanimous agreement for any action will ensure its legality."[40]

In complete contrast, the Foreign Affairs Select Committee, in its more considered review of the Kosovo crisis published a year later on June 7, 2000, accepted the view that "the North Atlantic Treaty gives NATO no authority to act for humanitarian purposes." The Committee strongly recommended the adoption of a new legal instrument by NATO.[41] Thus, the future of non-Article 5 operations seems a great deal less clear, at least from the UK's perspective, than it did during the bombings and in their immediate aftermath.

The role of parliament

Peacekeeping

In contrast to enforcement action, which, as shall be seen, is debated quite thoroughly in parliament, there is much less parliamentary scrutiny of the United Kingdom's involvement in consensual peacekeeping operations, whether observation and monitoring, traditional peacekeeping, or the more ambitious use of peacekeeping plus state-building. This can partly be explained by the less intrusive nature of peacekeeping – in theory it should not involve UK troops in combat situations. However, events in the Congo, and more recently in Bosnia and Somalia, show that peacekeeping can be as dangerous as enforcement for troops,[42] perhaps more so, since they are lightly armed.

This dearth of scrutiny of peacekeeping operations on the domestic plane is in a sense reversed on the international plane, where there is regular review of the operation by the Secretary-General and the Security Council. In contrast, while enforcement actions to ensure compliance and deal with threats to the peace provoke more debate at the domestic level, there is much less scrutiny and control at the UN level. In a sense, then, a "mixed system" of accountability, as discussed by Ku and Jacobson in chapter 15, is balanced as between the national and international levels. However, this is not to accept the "system" that has emerged. Scrutiny has to be increased at both levels for all types of military operation.

One significant factor, which perhaps in part explains the limited domestic scrutiny of consensual peacekeeping, is that it involves fewer international legal problems than do enforcement operations. A consensual peacekeeping operation, which follows established UN principles of

[40] Select Committee on Defence, Third Report, March 31, 1999, para. 176.
[41] HC Foreign Affairs Select Committee Fourth Report, June 7, 2000, para. 135.
[42] See *R.* v. *Ministry of Defence, ex parte Walker* [1999] 3 All ER 935.

non-aggression and impartiality, can legally be undertaken by an organization or a state without any UN authorization, for it breaches neither Article 2(4) nor Article 53 of the UN Charter. The United Kingdom's role in establishing a Commonwealth military component in the transition from Southern Rhodesia to Zimbabwe in 1979–80, an early example of peacekeeping plus state-building, is illustrative in this regard.

Once the United Kingdom has committed its troops to a peacekeeping force, it becomes increasingly difficult to extract them from a continuing operation. UNPROFOR, which at least initially operated under traditional peacekeeping principles, was deployed by the UN on February 21, 1992. Britain contributed infantry to it from November 1992 to its termination in December 1995. The gap between UN deployment and UK contribution enabled a Commons' debate in September 1992 on a government proposal to send 1,800 troops.[43]

While it was clear that the decision to deploy had already been made,[44] the UK's commitment to UNPROFOR did perhaps show greater signs of parliamentary scrutiny. There was a full debate before deployment and response to questions before the Commons Defence Select Committee. One of the main reasons for the higher level of debate seems to have been fear of a large number of British casualties.[45] However, despite greater initial parliamentary scrutiny, there was only a limited amount thereafter.

Enforcement actions to combat aggression

In the United Kingdom's response to aggression under a UN mandate, the pattern is for the executive to decide and for parliament to have several lengthy debates during the course of an operation, particularly after there has been a new development. Aggression is a clear breach of Article 2(4) of the UN Charter, and there is generally little doubt that it has occurred. Ability to respond to such aggression is seen by the UK as a minimum condition for the continued existence of the UN.

On June 27, 1950, Prime Minister Attlee interrupted a Commons' debate to state that the UK representative on the Security Council was "authorised to support" the proposed resolution (83), which recommended assistance to South Korea. The first full House of Commons debate on Korea was held on July 5, 1950. The prime minister requested the support of the House for the action taken by the government under the Charter.[46] The government position was that Korea was a UN action, not an action in collective self-defense.[47] This was made clear by the prime

[43] HC Deb., vol. 212, ser. 6, col. 123, September 22, 1992 (Hurd).
[44] *Ibid.*, col. 186 (Rifkind). [45] *Ibid.*, cols. 143–5 (King).
[46] HC Deb., vol. 477, ser. 5, col. 485, July 5, 1950.
[47] White, "From Korea to Kuwait," p. 614.

minister's reliance on UNSC Resolution 83 and his explanation that Soviet absence from the Council did not invalidate it. The debate ended with the Commons resolving that it "fully supports the action taken by [the] Government in conformity with their obligations under the United Nations Charter, in helping to resist the unprovoked aggression against the Republic of Korea."[48]

There were further full debates, for instance on the Chinese intervention.[49] However, all the major decisions of the war were made by the responding states, the most important of which was the United States. Nevertheless, the UK government did play a significant part in the Korean enforcement action. After the Soviet Union returned to the Security Council in August 1950, the British sponsored General Assembly Resolution 376, on October 7, 1950, that authorized UN forces to cross the 38th parallel. The decision by the UK to support this resolution, and thereby widen the war, was not subject to parliamentary scrutiny.

In relation to the Gulf crisis, UN authority for the use of military force was not forthcoming until several months after the Iraqi invasion of Kuwait on August 2, 1990. This period of time gave the House of Commons some room for debate on the question of whether there was a need for such authority, or whether, as the government insisted, the gathering of US and UK troops in the region, and their future use against Iraq, was justifiable collective defense of Kuwait. Some British troops were deployed to the region before the debates occurred in the House of Commons on September 6 and 7, 1990, but there had been no final decision committing them to action. Thus, there was a greater opportunity for prior parliamentary debate than there was in Korea.

Prime Minister Thatcher opened the debate by expressing the UK's support for the UN measures demanding a cease-fire and imposing economic sanctions, while informing the House on the deployment of British troops at the request of various Gulf rulers. While supporting the need for a firm response to Iraqi aggression, the leader of the Opposition, Neil Kinnock, pressed the case for allowing sanctions some time to work and then, if these failed, seeking a Security Council mandate for a forceful eviction of Iraq from Kuwait. While not disagreeing with the prime minister's "technical" interpretation of the right of self-defense, he thought that it would be politically wiser to obtain Security Council authority.

Kinnock pointed to the need for a UNSC Resolution (665) to legitimate the maritime blockade in the Gulf.[50] The UK government, however, had stated in the Security Council that Resolution 665 simply provided an

[48] HC Deb., vol. 477, ser. 5, cols. 485–90, 492–3, 502, 596, July 5, 1950.
[49] HC Deb., vol. 484, ser. 5, col. 41, February 12, 1951.
[50] HC Deb., vol. 177, ser. 6, cols. 746–9, September 6, 1990.

"additional" legal basis for the maritime action.[51] Although the government, with considerable bipartisan support, was not subject to concerted parliamentary dissent on this matter, it came around to the view that politically, if not legally, a UN resolution was necessary to sanction the use of force against Iraq.

Security Council Resolution 678 (November 20, 1990) gave Iraq until January 15, 1991 to withdraw from Kuwait before it contemplated any "necessary means" to enforce withdrawal. This provided further opportunity for parliamentary debate. Significantly, there was a vote by the House of Commons on January 15, 1991, on a motion to adjourn, which amounted to a vote on whether the United Kingdom should join in the military action against Iraq once the deadline ran out. The government won the vote convincingly, 534 to 57.[52] Hostilities began on January 17, 1991, and shortly afterwards, on January 21, the government easily won a substantive vote, 563 to 34, in the Commons on a government motion that "This House expresses its full support for British forces in the Gulf and their contribution to the implementation of United Nations resolutions by the multinational force, as authorised by United Nations Security Council Resolution 678."[53]

Although there was a high level of scrutiny and debate of the government's decision to utilize forces in the Gulf in the period leading up to, and immediately after, the outbreak of war, the level of accountability to parliament during the conflict and at its termination was minimal. The end of the hostilities was announced in the lower house,[54] but there was little discussion of Security Council Resolutions 686 and 687, the breach of the latter being used as a justification for subsequent UK bombing of Iraq, most notably in January 1993 (with France and the United States), and again in December 1998 (with the United States).

The argument put forward by the UK government for these air strikes was based primarily on UNSC Resolution 678 of November 1990. The contention was that this original resolution authorizing the use of force against Iraq was reactivated if the resolution ending the war, Resolution 687 of April 1991, was breached.[55] Such an interpretation is, to say the least, controversial.[56] Given the lack of clear legal authority for these and previous air strikes, and given that air strikes have continued against Iraq

[51] SC 2938 Meeting, August 25, 1990.
[52] HC Deb., vol. 183, ser. 6, col. 183, January 15, 1991.
[53] HC Deb., vol. 184, ser. 6, cols. 24, 109, January 21, 1991.
[54] HC Deb., vol. 188, ser. 6, col. 156, March 19, 1991 (King).
[55] M. Binyon, "Britain Says No New Resolution is Required," *The Times*, February 19, 1998, p. 5.
[56] N. D. White and R. Cryer, "Unilateral Enforcement of Resolution 687: A Threat too Far?" (1999) 29 *California Western International Law Journal* 272.

on a regular basis since, the level of critical parliamentary scrutiny was clearly deficient.

Situations where force is used to ensure compliance with international mandates

Military enforcement action taken to combat threats to the peace can have diverse aims, depending on the nature of the threat (extreme violence, anarchy, starvation, or outflows of refugees) and, of course, the nature of the mandate given to the force. The potential danger to which mandates authorizing offensive military action expose British troops suggests the need for greater parliamentary scrutiny of such operations, to prevent, *inter alia*, those troops being placed indefinitely in dangerous situations where there are no clear peaceful outcomes. However, in the case of Bosnia, there was little difference between the level of scrutiny of British involvement in IFOR and that in UNPROFOR.

It may be that the House of Commons was satisfied with the agreement ending a particularly brutal conflict and, in general terms, the deployment of British troops to police it, but this should not prevent clarification in the House of the precise role, duration, and dangers of such an operation.

Interestingly, the proposed operation in response to the humanitarian and refugee crisis in eastern Zaire in 1996 did provoke more debate, though by no means a full one, mainly because of the perceived need to explain British involvement in such a distant situation. On November 14, the secretary of state for defence explained the British response to the UNSC Resolution 1078, of November 9, calling for the creation of a multinational force. He stated:

> The House will rightly ask why Britain should become involved in a place far from our country and where no vital interest is engaged. It is because we are a civilised nation. We can see that people are about to die in their thousands, and we are one of the few nations on earth that has the military capability to help at least some of them. We recognise our humanitarian obligation. We take pride in our permanent membership of the United Nations Security Council, but it carries with it clear duties. Some of our leading allies in NATO are willing to assist, and our place is with them.[57]

While applauding the humanitarian motivations that led to the UK's initial response to Zaire, the weaknesses of both the UN and parliament are revealed. Neither mechanism could call into question the UK government's later decision, along with its allies, not to intervene. Nevertheless, Zaire revealed a developing commitment by the UK, acting under

[57] HC Deb., vol. 285, ser. 6, cols. 487–9, November 14, 1996 (Portillo).

international authority, to the deployment of British forces to deal with humanitarian crises under a nonconsensual mandate. The memory of Rwanda in 1994, but more specifically Srebrenica in 1995, provoked a more forceful response to the crisis in Kosovo in 1998–9.

The incremental involvement of NATO in Kosovo, first through threats of force and then on March 23, 1999 by the use of force, meant that there was perhaps a greater opportunity for parliamentary involvement. On October 13, 1998, the North Atlantic Council authorized Activation Orders for air strikes, coercing the government in Belgrade to withdraw forces from Kosovo, and to comply with Security Council Resolution 1199. In the House of Commons, the foreign secretary, Robin Cook, made a statement regarding this on October 19.

Interestingly, the government first spelled out its legal justifications for NATO's threats of force on November 16, 1998 in the House of Lords. The government minister stated that, although there was "no general doctrine of humanitarian necessity in international law," there were cases where limited uses of force were justifiable "in support of purposes laid down by the Security Council but without the Council's express authorisation when that was the only means to avert an overwhelming humanitarian catastrophe."[58]

On February 24, 1999, the foreign secretary reported on the parlous state of the negotiations concluded at Rambouillet, which gave both sides until March 15 to conclude an agreement. In so doing, he stated that the NATO threat of force remained in place and that use of force would become a reality if there were major violations of the cease-fire by Belgrade.[59] At this stage, there were limited criticisms in the lower House of the lack of Security Council authorization, the government's desire to maintain the credibility of NATO, and the effectiveness of the proposed bombing.[60] On March 23, 1999, with the talks in Belgrade failing, Prime Minister Blair prepared the Commons for air strikes and expressed satisfaction at the support he received, saying that "it is important that we in this House take a united view." The launch of air strikes was announced to the House on March 24, 1999, by Deputy Prime Minister John Prescott.

The presence of Security Council Resolutions 1109 and 1203, which clearly indicated that the situation was a threat to the peace, and the consensus in NATO on the use of force, were the two international institutional pillars on which the government built this new form of

[58] HL Deb., col. WA (written answer) 140, November 16, 1998 (Symons). See also HL Deb., col. 904, May 6, 1999.
[59] HC Deb., col. 409, February 24, 1999. See also col. 412.
[60] *Ibid.*, cols. 409 (Benn), 412 (Dalyell).

intervention. The Opposition again gave "full support" to the action.[61] Although there were criticisms by a number of individual members,[62] the overall view was that moral considerations outweighed any contrary legal arguments.[63]

However, dissent grew rapidly. In the debate on the following day, the foreign secretary, when pressed again on the legality of the bombing, stated more generally that "we are acting on the legal principle that the action is justified to halt a humanitarian catastrophe."[64] Although there was insufficient dissent in the House to allow for a vote on the matter, it is noticeable that the level of criticism in the House was substantial, reflecting a move away from the traditional uncritical stance to issues of military deployment overseas.

These debates reveal the importance of two factors for the UK government in taking its decision to bomb Yugoslavia as part of a NATO operation. First, that the action is taken, or is at least represented as being taken, on behalf of the "international community." This concept's rebirth was necessitated by the reliance on a form of humanitarian intervention "in support of" UN resolutions. The unanimity of NATO was combined with the edicts of the Security Council, and later the G8, to claim that the military action had the necessary support of the international community.

Although the government attempted to portray the action as having a cast-iron legal basis, the reality is that the bombings were a context-breaking action, the context being a strict interpretation of Article 2(4) of the UN Charter, which prohibits the threat or use of force in international relations. A precedent for this new form of humanitarian intervention could have been drawn from the western intervention in northern Iraq in 1991, taken in support of, but not authorized by, Security Council Resolution 688.[65] This was categorized as an instance of humanitarian intervention by the UK government at the time.[66] Nevertheless, the government in the Kosovo crisis had difficulty in answering charges of selectivity, except by falling back on realist justifications of national, or more widely European, interest, thereby contradicting its international support arguments. One question after Kosovo is whether the government has committed the United Kingdom, in principle, to such actions beyond the European theater.

[61] HC Deb., col. 486, March 24, 1999 (Lilley).
[62] HC Deb., cols. 487 (Benn), 489 (Hogg), 490 (Dalyell), 491 (Galloway), 492 (Smyth). HC Deb., 25 March 1999, col. 574 (Clark), March 24, 1999.
[63] *Ibid.*, col. 489 (George). [64] HC Deb., col. 541, March 25, 1999 (Cook).
[65] HC Deb., col. 553, March 25, 1999 (King).
[66] Statement by UK Foreign Secretary Douglas Hurd in M. Weller (ed.), *Iraq and Kuwait: The Hostilities and their Aftermath* (Cambridge, Grotius, 1993), pp. 723–4.

Secondly, the action, at least initially, had the almost unanimous support of the House of Commons. There was a much greater effort on this occasion than in earlier conflicts to inform the House and to ensure its support. There was dissent on the legal basis, and criticism of the strategy,[67] but the government managed to carry sufficient support in the House for the duration of the war.

Thus, although the United Kingdom's contribution to the war was conducted and led by the executive, it still relied on a measure of parliamentary support for its actions. The government's claims as to the amount of degradation being caused to the Yugoslav army were clearly important in keeping the House on its side. The defence secretary claimed in the House that on May 22, 1999, twelve tanks were destroyed, and on May 25, five tanks were destroyed, as part of a "very effective air campaign."[68] The evidence after the Yugoslav army retreat suggests that these were clearly exaggerated assessments, although they may have been honestly made.[69]

In terms of democratic accountability, the House of Commons was not simply a rubber stamp for the executive's actions. Indeed, it seemed to be informed in a way not seen before in times of war. It debated the issue regularly during the bombing and questioned the prime minister, foreign secretary and defence secretary fairly closely. By May 18, 1999, there had been three full debates in the Commons on NATO military action and five statements to the House.[70]

Furthermore, the government was not only held accountable before the House, but also before the Foreign Affairs Select Committee of the House, which on April 14, 1999, questioned the secretary of state for foreign affairs very closely on NATO errors, legality, lack of preparation for the influx of refugees, and the lack of preparation for a ground force which might be necessary if the bombing failed. The chairman of the Select Committee claimed, with some justification, that the questioning of the foreign secretary had "been a most helpful exercise in democratic accountability at a critical time."[71] Nevertheless, there is some truth in the criticism that parliament was being treated as some kind of "press conference," in which MPs could ask questions but could not alter the course of the war, nor influence government strategy.[72]

[67] HC Deb., col. 21, April 13, 1999 (Hague). Also col. 23 (Ashdown). HC Deb., col. 583, April 19, 1999 (Howard). HC Deb., col. 24, April 26, 1999 (Hague). HC Deb., col. 891, May 18, 1999 (Howard).
[68] HC Deb., col. 355, May 26, 1999 (Robertson).
[69] S. Castle, "Doubts Still Linger over NATO's War Evidence," *The Independent*, September 17, 1999, p. 16.
[70] HC Deb., col. 965, May 18, 1999 (Robertson).
[71] Foreign Affairs Select Committee, April 14, 1999, para. 168.
[72] HC Deb., col. 579, April 19, 1999 (Benn).

The schisms that were beginning to open in parliament were closed early in June when Yugoslav authorities agreed to withdraw from Kosovo and accept NATO's conditions after eleven weeks of bombing. The prime minister's report to the House on these developments and the imminent embodiment of the peace plan in a Security Council resolution,[73] including KFOR operating under Chapter VII of the Charter, was welcomed by the Opposition, which also supported continued bombing until the verified withdrawal of Serb forces.[74] In a sense, the debate then started over again, revolving around the role of British troops in KFOR, although with a Security Council mandate, dissent was less vociferous. The clear international legal basis of KFOR seems to have reduced the critical attitude that the House had begun to adopt towards the bombing. However, in the longer term, debate ensued in the lower house as to the "precedential" nature of the initial bombings.[75] Further detailed scrutiny of the UK's role in the Kosovo crisis ensued before the House of Commons Select Committees on International Development, Defence, and Foreign Affairs. Of particular interest to the current project are the reports of the latter two.

The Foreign Affairs Committee produced a very full report on June 7, 2000, after seeking evidence from a number of witnesses, including leading international lawyers. The report can be seen as a necessary democratic counterweight to the use of prerogative powers by the executive.[76] Its longer-term impact is difficult to gauge, but issued a year after the bombing campaign, it does not seem to have caught the attention of the public or, more importantly, the media, with only isolated articles realizing its significance.[77]

Interestingly, the report contradicts some of the positions taken by the government during the bombings, positions that had the support of parliament at the time. The report ranged from the period before the conflict to 2000 and contains many critical findings. Concentrating here on its review of the legality of Operation Allied Force, the Committee noted that while the government was confidently asserting the certainty of its international legal basis, the Committee's view was that the Operation was contrary to the UN Charter, having been based on no authorization from the Security Council or recommendation from the General Assembly. Furthermore, it concluded that "at the very least, the doctrine of humanitarian intervention has a tenuous basis in current

[73] SC Res. 1244, June 10, 1999. [74] HC Deb., cols. 464–6, June 8, 1999.
[75] HC Deb., col. 372, November 22, 1999 (Maples).
[76] HC Deb., col. 594, June 17, 1999 (Maples). See also Defence Committee Report, *Lessons of Kosovo*, October 24, 2000, HC 347–I, paras. 291–344.
[77] I. Hilton, "NATO's Shame," *The Guardian*, June 8, 2000, p. 23.

customary international law, and that this renders NATO action legally questionable."

This serious criticism was balanced by the finding that in the face of the threat of Russian and Chinese vetoes, "the NATO allies did all that they could to make the military intervention in Kosovo as compliant with the tenets of international law as possible." However, given the other statements made in the Committee's report, it is clear that NATO did not go far enough in this regard. The report concluded that "NATO's military action, if of dubious legality in the current state of international law, was justified on moral grounds." The Committee thus advocated that the United Kingdom argue for and support new principles, hopefully to be adopted by the UN, governing humanitarian intervention.[78]

The Committee's report was very different from the position taken by the vast majority of MPs during Operation Allied Force, bearing in mind that Select Committees are drawn from the membership of the House of Commons. The absence of strict party-political control over the Select Committee may have a great deal to do with this divergence in opinion.[79] While a more critical appraisal of the government's actions is welcome, it seems to be a weakness in the UK's system of accountability that this critique comes too late to affect the military operation in question, though its effects may be felt in the future. By the time the Foreign Affairs Select Committee adopted its report in June 2000, the United Kingdom had already committed troops to combat threats to the peace in East Timor and Sierra Leone.

A return to a less significant level of parliamentary scrutiny was evidenced in relation to the United Kingdom's contribution to the Australian-led INTERFET force in East Timor in September 1999. The UK had contributed to the small UNAMET team, which organized and conducted the referendum on independence under UNSC Resolution 1246, of June 11, 1999, notably by providing the head of mission. Despite the precarious position of the mission, there was very little parliamentary discussion of the continuing violence in the run-up to the referendum. The government simply expressed "cause for concern" at the security situation in East Timor, and then only in the upper House.[80]

The entirely predictable collapse of security that followed the referendum of August 30, 1999, eventually led to the establishment of a "coalition of the willing," which arrived in East Timor on September 20, 1999. The force was established by UNSC Resolution 1264, of

[78] HC Foreign Affairs Select Committee, Fourth Report, June 7, 2000, paras. 124–44.
[79] C. Turpin, *British Government and the Constitution* (4th edn., London, Butterworths, 1999), p. 449.
[80] HL Deb., col. WA118, July 22, 1999.

September 15, 1999, under Chapter VII of the UN Charter, and had the consent of the Indonesian government. Its main function was to secure peace and security in East Timor. With the various armed groups on the island, this was an extremely dangerous operation.

In these circumstances, it is surprising that the government's decision to send 275 troops (mainly Gurkhas based in Brunei) in the first wave was subject to such limited parliamentary scrutiny.[81] This cannot simply be explained by the much lower level of UK force contributions, compared to Kosovo. The lack of parliamentary time dedicated to East Timor is more a reflection of the lack of public concern with the issue on the one hand, and parliament's support for the government's decision, on the other. The clear Security Council mandate, combined with the consent of the Indonesian government, may well have persuaded parliament that there was no need for the type of scrutiny applied to the Kosovo campaign.

A contrast can be drawn with the UK's response to the escalating crisis in Sierra Leone in May 2000. The lack of a clear Security Council mandate for the government's dispatch of 700 troops to the country on May 8 appears to have led again to more debate in parliament. The initial lack of clarity as to the function of the military operation, in particular whether it was intended to shore up the ailing UN peacekeeping operation (UNAMSIL) or merely to evacuate British nationals, led to a sharp exchange in the Commons, with the Opposition making clear its objections to a wider use of the troops, and claiming that the British public would only support a rescue of nationals.[82] "Mission creep" did occur, however, despite continued criticism in parliament.[83] With the public largely indifferent, the government's large majority again enabled it to weather the storm of protest put up by the Opposition.

Concluding remarks

When it comes to the use of force, the system of political accountability in the United Kingdom is quite weak, with no requirement of prior parliamentary approval for government actions. One justification for not requiring parliamentary approval at the decision-making stage, apart from historical constitutional practice, is the perceived need for a rapid, efficient military response. This may be necessary when the life of the nation is threatened by an act of aggression against the United

[81] HL Deb., col. WA127, October 21, 1999; HL Deb., col. 1252, November 9, 1999; HC Deb., col. 115W, November 24, 1999; HC Deb., col. 284W, December 2, 1999.
[82] M. Evans, "Forces Pull Out all Stops to Clear Freetown," *The Times*, May 9, 2000, pp. 1, 4. HC Deb., col. 250, May 8, 2000 (Maples).
[83] HL Deb., col. 1890, May 12, 2000 (Attlee).

Kingdom. However, it does not seem a sufficient justification when the UK is faced with the decision of whether to contribute to an internationally sanctioned military operation, especially when the operation is taken to ensure compliance, rather than to respond to aggression. It would not be that difficult to seek (and normally gain) rapid parliamentary approval for military deployment, whether the action was to be taken under international auspices or not. The question, though, would still remain as to whether this approval would constitute sufficient democratic accountability, given the government's majority in the House of Commons.

Looking at the actual deployment of troops under the auspices of an international organization, the level of parliamentary debate and input depends on the nature of the conflict, the type of response envisaged by the organization, the legal basis of the operation, and the timing and nature of the mandate given by the institution. Although the domestic factors identified by Karen Mingst in chapter 3 of this volume clearly operate upon decision-makers, there is evidence that legal factors also play a significant role.

In Korea, the UN responded rapidly to a clear case of aggression, leading to a quick response by the UK government. Although innovative, the response was not legally controversial, at least from the UK's point of view. Parliamentary debate was thus marginalized. In the Gulf, although another instance of a surprise attack, the UN's initial response was not in the form of military action. This led to greater parliamentary input into the UK's response, mainly over the issue of the legal basis of the operation. The government had already committed troops and indicated that they would be used to free Kuwait and defend Saudi Arabia, whether there was a UN resolution or not. Nevertheless, the gap between Iraqi attack and UN-authorized response allowed parliament a greater role.

In Kosovo, the circumstances were such that there was a high level of parliamentary involvement. This was because of the gradual build-up to the bombings by NATO, and the fact that there was no clear UN authority for that action. This meant that there was not only a greater opportunity for parliamentary debate, but a political need for the government to have the House of Commons behind it at all times to compensate for doubts about the international legal basis of the operation. To some extent, this was a risky strategy for the government, given that there were signs of greater dissent, as the bombing campaign appeared to be counter-productive and prolonged.

Although there does appear to be a slow trend towards greater parliamentary scrutiny and accountability, it is by no means uniform, as the deficient scrutiny of the UK contribution to INTERFET showed. This, in turn, can be contrasted with the higher level of debate over the

deployment of British paratroopers and marines to Sierra Leone. The higher level of scrutiny seems to correspond to the lack of clear Security Council authority for such deployments, although there are numerous domestic political reasons that also play a role. Government responsiveness to public concern is a factor in the greater scrutiny of some operations (for example, Kosovo). The Opposition also may provoke a debate to see if the public responds to its point of view (for example, on Sierra Leone).

Recent events show more of a departure from the traditional parliamentary mentality of rallying around the flag whenever there are military deployments. This has resulted in an upward trend in *debate* in parliament, though there is still a substantial deficiency in proper *scrutiny* of the executive. Increased public concern over the greater international commitments made by the UK government, the expense of these operations, and the danger to British military personnel, also require that parliamentary scrutiny of the executive be increased.

The lack of prior parliamentary approval and subsequent regular review at the domestic level in the United Kingdom is matched at UN level. There, the executive organ, the Security Council, approves of a military action which is perhaps subsequently supported by the legislative organ, the General Assembly. Only in the case of consensual UN peacekeeping is there normally regular review and renewal of the mandate, at least at the international level. It appears that similar pressures operate at the national and international level when considering military enforcement action, whether it is undertaken to combat aggression or to enforce an international mandate.

At both levels, constitutional controls on the executive are very sparse and are further weakened by practice, thereby leading to an unacceptable lack of accountability. At least from the British perspective, the fulcrum at both the international and national levels is the government. The UK government appears, in both national and international fora, unwilling to be transparent and accountable when it decides to commit UK forces to internationally authorized military enforcement actions.

There has been a recent encouraging trend at the national level to expose executive decision-making to greater parliamentary scrutiny – if only after the fact. However, the development of an effective "mixed system" of accountability at both national and international levels, as discussed by Ku and Jacobson, will require a significant increase in the involvement of the national and international legislative and plenary bodies. These bodies will in turn need to be more responsive to national and international public opinion.

During the Kosovo campaign, it was argued in parliament that the ending of hostilities might bring pressure for a change in the constitutional

procedures under which the United Kingdom commits its troops. Senior MPs maintained that parliamentary approval should be sought before war was launched, and also that select committees of parliament, "which hardly function when fighting begins," should be much more rigorously involved in the questioning and investigation of the executive's decisions.[84] Despite lengthy debates in parliament and the episode of questioning by the Foreign Affairs Select Committee, parliamentary involvement was essentially to debate decisions already made by the War Cabinet.

The Foreign Affairs Select Committee report on Kosovo did not purport to recommend a change in the prerogative powers of the executive to deploy troops. It did recommend, however, that the government "should take a substantive motion in the House of Commons at the earliest opportunity after the commitment of troops to armed conflict allowing the House to express its view, and allowing Members to table amendments." The requirement that the government should win the argument over contrary proposals in the lower House and gain a positive vote would give "extra democratic legitimacy to military action."[85] Indeed, no substantive vote was taken on the Kosovo campaign, in contrast to some of the earlier deployments in Korea and the Gulf.

This is perhaps indicative that the increased level of debate and scrutiny of the executive before parliament in the case of Kosovo was more apparent than real. The Foreign Affairs Select Committee's report seems to recognize this, by identifying the need for proper parliamentary approval of military action, even if it has received authority from an international organization. The post-Kosovo discussion may encourage a more critical attitude by parliament towards the government's actions. Nevertheless, there is still a considerable distance to be covered before there is proper accountability in the use of force, since the executive has a strong interest in maintaining its freedom of action.

[84] McSmith and Beaver, "Commander Blair," p. 14.
[85] HC Foreign Affairs Select Committee Fourth Report, June 7, 2000, paras. 165–6.

14 The United States: democracy, hegemony, and accountability

Michael J. Glennon

To the proverbial Martian who steps out of a flying saucer and asks what American law is concerning the use of force, the United States would represent a conundrum. Although its legal regime in this area is among the most elaborate on the planet, its political culture seems out of step with that regime. Its Constitution provides that war shall be declared by Congress – yet armed force has been used well over 200 times throughout its history, and in only five conflicts has Congress declared war. A law enacted following the Vietnam War, the War Powers Resolution, was aimed at restoring the "partnership" between Congress and the president in decisions to use armed force – yet armed force has been used even more frequently since its enactment, with Congress having approved such use only once, in connection with the Gulf War in 1991. The United States was one of the prime movers in establishing the United Nations and its collective security regime – and yet it led a massive bombing campaign at the end of the twentieth century that flouted that regime. What, the Martian might ask, is going on in this country?

The law governing use of force by the United States

The introduction of United States armed forces into hostilities is governed by a complicated mix of constitutional and statutory provisions. That regime is designed in part to render those who order and direct the use of force accountable to democratic control. Dissatisfaction with that regime has surfaced regularly, and proposals for enhanced accountability have been periodically advanced. From 1945 through the end of the Cold War, proponents of enhanced accountability focused periodically on the possibility that units of the armed forces could be committed to combat automatically upon the order of an international organization – the United Nations or a military alliance. During the Vietnam War and afterwards, the domestic political debate focused on the extent to which presidential power to make war should be reined in; that is, under what circumstances prior congressional approval should be required for the

use of force internationally. During the post-Cold War period, concern shifted to issues of delegation and unanimity. American concern about accountability focused increasingly on the decision-making structure of international organizations. The question now was whether the effective use of military force by the United States was compromised by foreign officials, whether in the United Nations or NATO, capable of exercising a veto over American decisions.

The Constitution

Two constitutional provisions predominate: the declaration of war clause, and the commander-in-chief clause. Also, the treaty clause raises the question whether a treaty, such as the North Atlantic Treaty, can automatically commit the United States to use its armed forces.

The Constitution empowers Congress to declare war in article 1, section 8. This article also grants Congress other war-related powers, including the power to lay and collect taxes, provide for the common defense, define and punish offenses against the law of nations, raise and support armies, provide and maintain a navy, make rules for the government and regulation of land and naval forces, and provide for calling forth the militia. The Constitution also grants to Congress "all legislative Powers necessary and proper for carrying into execution . . . all . . . Powers vested by this Constitution in the government of the United States."

How far the president can go without invading the congressional war power has been a subject of continual debate. The intent of the framers is often relied upon for the view that the president is possessed only of a narrow, emergency power. It is pointed out, for example, that the word "declare" was substituted for the word "make" so as to make clear that the executive was to have the "power to repel sudden attacks." "Those who are to make a war," James Madison wrote, "cannot in the nature of things, be the proper or safe judges, whether a war ought to be commenced, continued or concluded."[1]

Proponents of a broad presidential war-making power respond that custom has long been regarded as a valid source of constitutional interpretation, and that presidents have, for 200 years, introduced the armed forces into hostilities without congressional authorization. Well over 200 such cases can be identified, including the Korean War.[2] On the other hand,

[1] James Madison, *Writinop of James Madison*, ed. Gaillard Hunt (1906), vol. VI, p. 148.
[2] Thomas M. Franck and Michael J. Glennon, *United States Foreign Relations and National Security Law* (2nd edn., St. Paul, MN, West Pub. Co., 1993).

many of these involved minor uses of force not directed at significant adversaries, nor risking substantial casualties or large-scale hostilities over a prolonged duration.[3]

The commander-in-chief clause is the principal source of the president's war-making power. Article 2, section 2 of the Constitution provides that "the President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several states." However, the legislative history suggests that the framers intended a narrowly circumscribed power, with the commander-in-chief clause conferring minimal policy-making authority. Alexander Hamilton, a proponent of broad presidential power, argued that the president's authority "would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy."[4]

The constitutionality of any treaty committing the United States to use armed force would be doubtful. "A treaty may not declare war," the Senate Foreign Relations Committee said in its report on the Panama Canal Treaties, "because the unique legislative history of the declaration-of-war clause . . . clearly indicates that that power was intended to reside jointly in the House of Representatives and the Senate."[5] The events to which the committee referred are recorded in Madison's notes of the Philadelphia Convention. Hamilton and Charles Pinckney submitted a plan that would have empowered the executive "to make war or peace, with the advice of the Senate,"[6] but sentiment against it was overwhelming. Oliver Ellsworth and George Mason argued that the concurrence of both Houses of Congress should be required to declare war because only the Senate's approval was required for peace treaties, and it should be easier to get out of war than into it.[7] Nine years later, as a member of the House of Representatives, Madison said, "Congress [the House], in case the President and Senate should enter into an alliance for war, would be nothing more than the mere heralds for proclaiming it."[8]

In sum, the framers explicitly decided not to confer upon the Senate and the president alone, without the House of Representatives, the power to commit the nation to war. And treaty makers have never done so. As Louis Henkin has written, "no treaty has ever been designed to put the

[3] Michael J. Glennon, "The Gulf War and the Constitution" (1991) 70 *Foreign Affairs* 84.
[4] M. Farrand (ed.), *The Records of the Federal Convention of 1787* (4 vols., New Haven, Yale University Press, 1966), p. 300.
[5] S. Exec. Rep. No. 12, 95th Cong., 2nd Sess. 65 (1978).
[6] Farrand, *Records of the Federal Convention of 1787*, p. 300. [7] *Ibid.*, p. 318.
[8] Thomas Hart Benton, *Abridgment of the Debates of Congress, from 1789 to 1856* (New York, D. Appleton & Co., 1857), pp. 650–1.

United States into a state of war without a declaration by Congress."[9] In its report on the Panama Canal Treaties, the Senate Foreign Relations Committee said:

> All such treaties implicitly reserve to the United States a right of choice in each individual situation to act, militarily, as it deems appropriate under the circumstances. Any treaty which did not do so would, in the Committee's opinion, unconstitutionally divest the House of Representatives of its share of the war-making power and would, unconstitutionally, delegate to the President the power to place the United States at war.[10]

Finally, a number of constitutional principles and doctrines bear upon these issues. One is the separation of powers doctrine, which divides power among the executive, legislative, and judicial branches of the federal government. It prohibits one branch from encroaching upon, impermissibly undermining, or interfering with the functions constitutionally assigned to another branch. Related to it are three subsidiary constitutional requirements.

First, the appointments clause requires that any person exercising significant authority under the laws of the United States as an officer of the United States be appointed by the president with Senate advice and consent. The clause does permit Congress to vest the appointment of "inferior officers" in department heads – but "inferior officers," the Supreme Court held recently, "are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate."[11]

Second, the faithful execution clause identifies the president as the official who must "take care that the laws be faithfully executed." The faithful execution clause raises the question whether an international agreement empowering an official of an international organization to execute the laws would not "shatter the unity" of the chief executive that the clause requires.

Third, the delegation doctrine, like the appointments clause, has the broad purpose of safeguarding citizen access to decision-makers and ensuring accountability. It prohibits the "standardless" delegation of legislative power; in other words, it prohibits Congress from making a law that allows another individual or group to make a law. The delegation doctrine has not been used to invalidate a statute for over sixty-five years, and it has been held to have lesser application in the realm of foreign

[9] L. Henkin, *Foreign Affairs and the Constitution* (Mineola, NY, Foundation Press, 1972), p. 160.

[10] S. Exec. Rep. No. 12, 95th Cong., 2nd Sess. 74 (1978). See also S. Rep. No. 7, 96th Cong., 1st Sess. 31 (1979) (Taiwan Enabling Act).

[11] *Edmond* v. *United States* 520 US 651 (1997).

affairs.[12] But in recent years a number of justices have argued for its revival, and a resurrection some day should surprise no one.

The War Powers Resolution

The War Powers Resolution was enacted in 1973, as American armed forces withdrew from South Vietnam. Its central and most controversial provision, section 5(b), imposes a sixty-day limit on the engagement of the armed forces in hostilities without congressional authorization. The courts have never ruled on the constitutionality of this limitation, although several efforts have been mounted to seek judicial enforcement. These included a 1999 suit brought by Congressman Tom Campbell (Republican – California) that sought to compel the termination of United States participation in the NATO air strikes against Yugoslavia. Like other efforts, Campbell's action was dismissed as nonjusticiable by the courts.[13]

A second provision of the Resolution, section 5(c), applies a "legislative veto" to the use of the armed forces in hostilities without congressional approval. This provision permits Congress to compel the termination of such use with the adoption of a concurrent resolution – that is, a resolution adopted by both houses of Congress but not presented to the president for veto or signature. In *INS* v. *Chadha* (1983),[14] the Supreme Court held the legislative veto to be unconstitutional, although disagreement persists as to whether the Court's opinion applies to the arguably different legislative veto included in the War Powers Resolution.

A little-noticed provision of the Resolution makes it clear that treaties and statutes cannot be construed as conferring power on the president to introduce the armed forces into hostilities. According to section 8(a), such authority "shall not be inferred from any provision of law (whether or not in effect before the date of the enactment of this joint resolution)," or from "any treaty heretofore or hereafter ratified . . ."[15] Interpretation of laws, including the 1945 United Nations Participation Act (UNPA), is governed by this section.

No provision of the UNPA "specifically authorizes" the introduction of the armed forces into hostilities. Nor is there any provision of the UNPA that "states that it is intended to constitute specific statutory authorization within the meaning of" the War Powers Resolution. Thus, no authority

[12] *United States* v. *Curtiss-Wright Export Corp.*, 299 US 304 (1936).
[13] *Campbell* v. *Clinton*, 203 F 3d 19 (DC Cir. 2000); *Campbell* v. *Clinton*, 52 F Supp. 2d 34 (DDC 1999).
[14] 462 US 919 (1983).
[15] War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 USC §§1541–8 (1988)).

to introduce the armed forces into hostilities may be inferred from the UNPA. Only a special agreement under Article 43 of the Charter, which under the UNPA must be approved by Congress, could provide such authorization. Neither the Charter nor the North Atlantic Treaty has been "implemented by legislation specifically authorizing" the introduction of the armed forces into hostilities.

It has been contended that at least the first of these nonsupersession provisions is invalid,[16] but the argument is unpersuasive.[17] It has also been suggested that the force of this section is vitiated by a later provision in the Resolution,[18] section 8(d)(1), which provides that "[n]othing in this joint resolution . . . is intended to alter . . . the provisions of existing treaties." But no mere statute could do that: the terms of a treaty cannot be altered unilaterally, without the consent of the other party.[19] No explanation is given as to the meaning of the cryptic indication of intent not to alter the provisions of existing treaties.

Section 8(d)(1) must therefore have some other meaning, which its background unveils. The provision originated in the Senate version of the Resolution,[20] which provided that "[n]o treaty in force at the time of the enactment of this Act shall be construed as specific statutory authorization for, or a specific exemption permitting, the introduction of the Armed Forces of the United States into hostilities . . ."[21] The Senate Foreign Relations Committee's understanding of "existing" treaty commitments was that "[t]reaties are not self-executing. They do not contain authority . . . to go to war."[22]

Given this background, the most reasonable interpretation of section 8 is that the provision was intended to make clear that no treaty may require an automatic introduction of US armed forces into hostilities. This limitation should be construed as applying to all treaties, ratified both before and after the 1973 enactment of the War Powers Resolution. To construe the provision as exempting the UN Charter or "existing"

[16] War Powers, Libya, and State-Sponsored Terrorism: Hearings Before the Subcomm. on Arms Control, International Security and Science of the House Comm. on Foreign Affairs, 99th Cong., 2nd Sess. 10, 18 (1986) (testimony of State Department Legal Adviser Abraham D. Sofaer).

[17] John Hart Ely, "Suppose Congress Wanted a War Powers Act That Worked?" (1988) 88 *Columbia Law Review* 1379 at 1418–19; Michael J. Glennon, "Mr. Sofaer's War Powers 'Partnership' " (1986) 80 *American Journal of International Law* 584.

[18] A Review of the Operation and Effectiveness of the War Powers Resolution: Hearings Before the Senate Comm. on Foreign Relations, 95th Cong., 1st Sess. 76 (1977) (statement of Legal Adviser Monroe Leigh).

[19] Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, Art. 39, 1155 UNTS 331.

[20] S. 440, 93rd Cong., 1st Sess. (1973).

[21] S. 440, 93rd Cong., 1st Sess. (1973), sec. 3(4).

[22] S. Rep. No. 220, 93rd Cong., 1st Sess. 26 (1973). S. 440, 93rd Cong., 1st Sess. (1973).

mutual security treaties, such as the North Atlantic Treaty, would be to create a confused, two-tiered system of security treaties. Such a result is without support in the legislative history. The apparently inconsistent reference in section 8(d)(1) to the "provisions" of "existing" treaties can in fact be read as a straightforward (if infelicitous) attempt to state the congressional understanding that neither the UN Charter nor the North Atlantic Treaty is altered by the War Powers Resolution, because no existing treaty does provide authority of the sort that the Resolution rules out. This is, in fact, how the treaties were understood by both the Ford[23] and Carter[24] administrations.

The political dimension

In the United States as elsewhere, politics and law are inseparable. Particularly is this true with rules that are "open-textured," that is, rules that contain words or formulations of words that admit of more than one reasonable interpretation. The constitutional provisions governing the use of force are an example. The commander-in-chief clause and the declaration-of-war clause are sufficiently ambiguous to justify Edward S. Corwin's observation that the Constitution presents Congress and the president with an "invitation to struggle" for control of the nation's foreign policy – a struggle that has often reflected itself in political struggles between the nation's two political parties.[25]

Party politics

The Second World War began an era of bipartisanship with respect to the use of force by the United States. Senator Arthur Vandenberg, Republican chairman of the Senate Foreign Relations Committee, joined with the Democratic Truman administration to pursue a policy of containment of the Soviet Union. The mutual security treaties entered into by the United States during this period received the advice and consent of the Senate by overwhelming margins, with no perceptible party-line divisions. These votes followed, and were no doubt influenced by, the approval of the United Nations Charter in the Senate by a huge bipartisan majority in 1945. The oft-voiced idea on both sides of the aisle during this period was that "politics stops at the water's edge." This approach was no

[23] Letter from Robert J. McCloskey, assistant secretary of state, to Senator Dick Clark (March 1, 1976) (on file with author).

[24] Letter from Douglas J. Bennet, Jr., assistant secretary for congressional relations, to Senator George McGovern (June 2, 1977) (on file with author).

[25] Edward S. Corwin, *The President: Office and Powers: 1787–1951* (4th rev. edn., New York, New York University Press, 1957), p. 127.

doubt engendered by the widespread perception that Congress needed to work with the president in meeting the threat of Soviet communism, as it had during the Second World War, and had failed to do in 1919–20, when the Senate rejected President Wilson's League of Nations.

The earliest signs of post-war partisanship began to appear during the Korean War – "Truman's War," his critics increasingly called it – which had never been declared by Congress. It was not until the Vietnam War, however, that party politics emerged as a significant factor in decisions concerning the use of armed force. Ironically, during the Democratic administration of Lyndon Johnson, opposition to the war came chiefly from his own party, with Republicans in Congress largely supportive. The only two votes against the 1964 Gulf of Tonkin resolution, which was regarded by the Johnson and Nixon administrations as authority to prosecute the war in Vietnam, were cast by Democratic senators (Wayne Morse of Oregon and Gaylord Nelson of Wisconsin). During the following years, the Senate Foreign Relations Committee, chaired by Senator J. William Fulbright (Democrat – Arkansas) became the center of congressional opposition to the war. In a series of televised hearings, its members engaged in increasingly heated clashes with spokesmen of the State and Defense Departments and offered a series of measures that would have terminated or reduced American involvement in the war. Except for a few Republicans, opposition to the use of force in Vietnam remained largely centered within the Democratic Party throughout the Johnson and, later, the Nixon and Ford administrations.

During the Vietnam War, efforts to enact framework legislation to place limits on presidential use of force without congressional approval came, again, largely from Democratic members of Congress. To be sure, some Republican senators were active in the effort to place statutory restraints on the use of force, but votes on the floor of the House and Senate on the War Powers Resolution, and in the committees that reported it, reflected sharp party divisions. In November 1973, when President Nixon vetoed the War Powers Resolution, the successful vote overriding that veto was possible only because of overwhelming Democratic control of both the House and the Senate.

Congressional Democrats continued to align largely against the use of force abroad during the presidencies of Republicans Ronald Reagan and George H. W. Bush. Criticism of executive actions, such as the introduction of United States marines into Lebanon in 1982, the 1986 bombing of Libya, and the invasions of Grenada and Panama, came almost exclusively from Democrats. When in 1988, for example, 145 members of the House of Representatives brought a legal action (*Lowry* v. *Reagan*[26])

[26] 676 F Supp. 333 (DDC 1987).

alleging violation of the War Powers Resolution in connection with the Kuwaiti tanker escort operation, not a single Republican joined as a plaintiff. Opposition to the January 12, 1991 joint resolution authorizing the use of US armed forces to liberate Kuwait came largely from the Democratic side of the aisle. Another legal action, *Dellums* v. *Bush*,[27] brought prior to the commencement of the Gulf War, was sponsored exclusively by Democrats. For more than two decades, even when control of the White House changed parties, congressional alignments concerning the use of force that first formed during the Vietnam War remained largely intact.

With the election of Democrat Bill Clinton to the presidency in 1992, however, these patterns began to change. For the first time, congressional Democrats began to emerge as supporters of the use of force. Nevertheless, the introduction of US armed forces into hostilities in Somalia (which had begun during the first Bush administration), Haiti, Iraq, and Kosovo were all carried out without prior congressional approval, as were the 1998 air strikes against targets in Sudan and Afghanistan.

In 1995, Congress declined to approve an indefinite IFOR deployment to Bosnia, but it also resisted efforts to cut off funding. Opposition in the House to the Bosnia deployment reached a peak with the passage of a measure (by a vote of 243 to 171 on November 17, 1995)[28] that would have barred the use of funds for troops in Bosnia unless Congress specifically authorized the mission. (The Senate defeated the measure 22 to 77.[29]) When IFOR became SFOR, efforts were again made – by congressional Republicans – to cut off funding, but none succeeded. Representative John Kasich (Republican – Ohio) introduced a bill, H.R. 1172, on March 20, 1997, with 145 co-sponsors, that would have required the complete withdrawal of all US forces by September 30, 1997. It did not make it out of committee.[30]

Presidents have complied with the Resolution's requirement that they file a report with Congress when the armed forces are introduced into hostilities or imminent hostilities. (The Kuwaiti tanker escort operation arguably constituted a prominent exception.) In every case but one – Kosovo – hostilities ceased before the sixty-day period set by the Resolution expired. As noted above, a legal action (*Campbell* v. *Clinton*) was brought – for the first time by a Republican member of

[27] 752 F Supp. 1141 (DDC 1990).

[28] Pat Towell and Donna Cassara, "House Votes to Block Clinton from Sending Peacekeepers" (1995) *Congressional Quarterly* 3549.

[29] Pat Towell and Donna Cassara, "Congress Takes Symbolic Stand on Troop Deployment" (1995) *Congressional Quarterly* 3817.

[30] As noted in Thomas Moore and James Anderson, *International Peacekeeping* (Washington, DC, Heritage Foundation Reports, 1998).

Congress – seeking to enforce the restraints of the War Powers Resolution, but it was dismissed as nonjusticiable.[31]

A flurry of votes in the House on April 28, 1999 probably reflected accurately the ambivalence of the public on the Kosovo air war. First, the House deadlocked 213 to 213 on a measure to give formal backing to Operation Allied Force (S. Con. Res. 21).[32] Secondly, the House voted down a declaration of war 427 to 2 (H.J. Res. 44).[33] On the other hand, it also voted down a resolution that would have required US withdrawal from the air war (H. Con. Res. 82).[34] Finally, the House sought to require that the president seek congressional approval for the use of ground forces (H.R. 1569).[35]

Since the Kosovo War, the role of party politics in decisions to use force has become less clear. Immediately preceding the capitulation of the Yugoslav government in June 1999, criticism of the conduct of the war had begun to emerge in both parties, but traditional patterns of alignment continued to be confounded. Republicans (at least in the House), aroused by the impeachment of President Clinton, opposed the use of force, while a coalition of liberal Democrats and conservative Republicans in the Senate not only supported air strikes but also favored the introduction of ground troops.

Neither party raised any significant concern about the circumvention of the UN Security Council by NATO. Indeed, to the extent that any criticism was heard with respect to the role of international institutions, it was directed at the requirement of unanimity in NATO decision-making and the difficulty of "running a war by committee." During the first Clinton administration, congressional Republicans had already raised concerns about the placement of American military units under foreign command, with some blaming the UN for the death of eighteen American servicemen in Somalia after the crash of a black hawk helicopter.[36] Perhaps because both the executive and legislative branches were dissatisfied with the complexity of managing the multilateral use of force, the United States showed little inclination to intervene in East Timor a few months later, although American diplomats did bring pressure to bear on the Indonesian government to cooperate with nations participating in relief operations.

Public opinion

These party alignments developed against the backdrop of continuously shifting public attitudes concerning international engagement and

[31] 203 F 3d 19 (DC Cir. 2000); 52 F Supp. 2d 34 (DDC 1999).
[32] Pat Towell, "Congress Set to Provide Money but no Guidance for Kosovo Mission" (1999) 57 *Congressional Quarterly* 18.
[33] *Ibid.* [34] *Ibid.* [35] *Ibid.* [36] 107 Stat. 1475–7 (1993).

unilateral military intervention. Public support for an active international role for the United States stood at 71 percent in 1956, but moved to an all-time low of 54 percent in 1982. By 1991, 92 percent of those surveyed favored an active US role in world affairs. Support for American military activism was substantially lower, however. Only 52 percent agreed with the statement, "The best way to insure peace is through military strength," while 45 percent disagreed. Americans in the early 1990s were far more supportive of multilateral military action than of unilateral military action. In 1992, 87 percent agreed that the "United States should commit its troops only as a part of a United Nations operation," and 73 percent believed the US should fight "only with other allies." The percentage of Americans willing to support US military action "on its own in some cases" dropped to 62 percent.

Some 80 percent agreed with the statement: "When faced with future problems involving aggression, the United Nations should take the lead." Only 17 percent responded that "the United States should lead." If the UN refused to act, 40 percent believed that the United States should continue to wait for others to act or "stay out of it." Curiously, this reluctance to use military force unilaterally came in the face of increasingly favorable public attitudes towards the military. After 1980, public opinion toward the military was generally in the 70 to 75 percent approval range, shooting up to 85 percent during the Gulf War. Still, in 1992, 31 percent of Americans favored major cuts in military spending, versus 39 percent who did not.[37]

It is not yet clear what effect the Kosovo conflict had on long-term American attitudes toward the UN, peacekeeping, the use of force, and the US role in the world. Pre-Kosovo polling data on those issues revealed a consistent pattern of support for multilateralism in general and the UN in particular, albeit tempered with a concern about equitable burden-sharing. Americans are averse to the notion that the United States should be the world's policeman.[38] They do not desire that the United States take on a hegemonic role internationally.[39] They support American involvement in UN peacekeeping operations,[40] preferring multilateral uses of force to unilateral ones.[41] They even support the creation of a standing

[37] Statistics from Catherine M. Kelleher, "Security in the New Order: Presidents, Polls, and Use of Force" in D. Yankelovich and I. Destler (eds.), *Beyond the Beltway: Engaging the Public in U.S. Foreign Policy* (New York, W. W. Norton, 1994), pp. 225, 234–9.

[38] Steven Kull and I. M. Destler, *Misreading the Public: The Myth of a New Isolationism* (Washington, DC, Brookings Institution Press, 1999), p. 45.

[39] *Ibid.*, p. 46.

[40] In an April 1996 poll, 71 percent said they would be more likely to vote for a presidential candidate who would strengthen the UN, and 19 percent said they would be more likely to vote for one who would weaken it. Kull and Destler, *Misreading the Public*, p. 71.

[41] *Ibid.*, p. 147.

UN peacekeeping force.[42] But they do believe that the United States does more than its fair share and that other countries, particularly rich ones, should do more.[43]

Most importantly, Americans are not "casualty averse" if the cause is important.[44] Even shortly after eighteen US rangers died in Mogadishu in October 1993, 71 percent favored contributing US troops to UN peacekeeping operations.[45] In July 1994, respondents were asked, "If genocidal situations occur, do you think that the UN, including the US, should intervene with whatever force is necessary to stop acts of genocide?" They were given four response options. Sixty-five percent said "always" or "in most cases," while 23 percent said "only when American interests are also involved." A mere 6 percent said "never." Asked how they would feel if the UN determined that genocide was occurring in Bosnia or Rwanda, 80 percent said they would favor US military intervention in both cases.[46] In a 1995 poll, 66 percent of those surveyed agreed that "when innocent civilians are suffering or being killed, and a UN peace operation is organized to try to address the problem, in most cases the US should be willing to contribute some troops, whether or not it serves the national interest."[47]

Use of military forces under international institutions

Since George Washington's Farewell Address, Americans have been wary of military alliances with other nations. For much of the twentieth century, their concerns were directed at the possibility that an international organization of which the United States was a member could oblige it to use armed force without its consent. Thus, the United States declined to join the League of Nations and joined the UN, NATO, and other alliances only after making it clear that it reserved the right to decide for itself when to use armed force, and that in no circumstances would it automatically be required to do so.[48]

[42] *Ibid.*, p. 74.

[43] In June 1996, 80 percent agreed with this statement: "All of the industrialized countries benefit from efforts to maintain order and security in the world. Therefore all the industrialized countries should spend about the same percentage of a national income or GNP on defense." Kull and Destler, *Misreading the Public*, p. 146.

[44] As demonstrated by the widespread and sustained support for President George W. Bush and the war in Afghanistan following September 11, 2000.

[45] *Ibid.*, p. 98. [46] *Ibid.*, p. 95. [47] *Ibid.*, p. 51.

[48] Michael J. Glennon, "The Constitution and Chapter VII of the UN Charter" (1991) 85 *American Journal of International Law* 74; Michael J. Glennon, "United States Mutual Security Treaties: The Commitment Myth" (1986) 24 *Columbia Journal of Transnational Law* 509.

The process by which the United States decides to participate in international operations involving the use of force is a subset of the process by which it decides whether to use force at all. This larger process was described above, in the outline of the US legal regime. There is no domestic legal requirement that the use of force be authorized by any international organization, although political considerations often make international authorization or the participation of other countries desirable. The United States, for political rather than legal reasons, welcomed the initial Security Council authorization of enforcement, and later initiated General Assembly action under the "Uniting for Peace" Resolution, with respect to the Korean War. It also supported UNEF I in the Middle East, ONUC in the Congo, the UNSC authorization of Chapter VII enforcement action to liberate Kuwait, and UN missions in Somalia and the former Yugoslavia.[49]

It is important to note, however, that the United States has used its military forces independently from the UN or NATO on numerous occasions since 1945, including the 1962 Cuban naval quarantine, the 1964 invasion of the Dominican Republic, the Vietnam War, the 1983 invasion of Grenada, and the 1988 invasion of Panama. None of these operations was authorized by the Security Council, and, with the exception of the Vietnam War, all were ordered by the president without prior congressional approval.

Military force structure, doctrine, and capability

The Constitution ensures that the military will be under civilian direction by designating a civilian, the president, as commander-in-chief. No active-duty military officer has ever been elected president. A number of former general officers have served as chief executive, most notably George Washington, Ulysses Grant, and Dwight Eisenhower, but their administrations were not particularly pro-military. Indeed, it was Eisenhower who coined the term "military-industrial complex" and warned against its influence.

In recent years, the danger has not been disproportionate influence by the military over civilian decision-makers, but rather, as Eisenhower suggested, disproportionate influence by a consortium of military *and* civilian interest groups, compounded by destructive inter-service rivalry. The 1986 Goldwater–Nichols reforms, in part a reaction to those rivalries, were thus directed not so much at enhancing civilian control as

[49] See Appendix B, "Country participation in international operations, 1945–2000," for information on the United States' contribution.

enhancing effectiveness and efficiency by promoting joint programs, enhancing the authority of the chairman of the Joint Chiefs of Staff, and improving management of the Defense Department.[50] The perceived problem was not accountability, but better coordination between the armed services, uniformed officers and DOD civilians, and the private defense industrial sector.

At the end of the twentieth century, the capacity of the United States to project military power was unique in history. With a vast two-ocean navy, advanced air-mobile units and highly trained ground forces, it was able to deploy significant air, naval, and ground forces in short order to virtually any spot on the globe. Not since British domination following the defeat of Napoleon had the world seen a hegemon that so towered above its potential adversaries. American dominance was attributable largely to its relative economic strength; since the 1980s the United States has accounted for more than one-fifth of the world's total economic output.[51] Its military budget almost surpassed those of all other NATO countries combined, even though, as a percentage of gross national product, the amount of federal spending on the military in the 1990s was roughly half what it was during the Vietnam War.

The military benefited from American economic and technological dominance. Prior to the Gulf War, the armed forces of Iraq were ranked by some observers as the fifth most powerful in the world. These forces were subdued following an intense aerial bombing campaign using the latest technology in cruise missiles and smart bombs. Similarly, well over half of all NATO air sorties in the 1999 Kosovo War were flown by the United States. After eleven weeks of high-tech aerial bombardment, with no NATO casualties and no introduction of combat ground troops, Yugoslavia surrendered.

The force structure behind these operations was initially developed during the 1960s, based on doctrines that made assumptions concerning the extent to which US forces needed to be prepared to fight simultaneous conflicts. A "worst-case" scenario that envisioned the emergence of multiple threats at the same time prevailed during the Cold War. Accordingly, the US developed capabilities to fight simultaneously a major land war in Europe, a major land war in Asia, and a brush-fire war somewhere in the southern hemisphere.

In recent years, American critics of involvement in multiple peacekeeping operations have claimed that they result in American forces being

[50] Dennis J. Quinn (ed.) *The Goldwater–Nichols DOD Reorganization Act: A Ten-year Retrospective* (Washington, DC, National Defense University Press, 1999).

[51] Bob Catley, "Hegemonic America: The Arrogance of Power" (1999) 21 *Contemporary Southeast Asia* 157.

spread too thin. A shortage of resources was cited as one reason for the American withdrawal from Haiti. During the Kosovo War, the United States reportedly began to run short of cruise missiles, in part because that conflict came on the heels of air strikes against Iraq that also required substantial depletions of that inventory. Beneath the criticism of peacekeeping is a pervasive belief that "burden-sharing" needs to be taken more seriously by America's allies, and that the United States does more than its fair share militarily.

Congressional critics have faulted the executive for not insisting upon a more equitable sharing of the defense burden and, in effect, contributing to the so-called "free-rider" problem – states doing less than their fair share because the United States does more.[52] Congress was dissatisfied with the disparity between the US contribution to the Kosovo campaign and that of most allies. Of the 1,092 military aircraft deployed by NATO members, 815, or 75 percent, were American.[53] (More than half of the remaining 277 came from Britain and France.[54]) The US flew over 60 percent of all sorties, over 80 percent of all strike sorties, over 90 percent of the advanced intelligence and reconnaissance missions, and over 90 percent of electronic warfare missions. Over 80 percent of precision-guided weapons and 95 percent of cruise missiles were fired by the United States.[55]

This disproportionality was not unprecedented. Operation Deliberate Force, the NATO air operations over Bosnia in summer 1995, had "illustrated that a sustained NATO combat expedition is impossible without U.S. muscle. The satellite intelligence, electronic jamming, and other technological contributions were virtually all American, and the United States flew two-thirds of all aircraft sorties."[56] The lack of burden-sharing influences American attitudes toward involvement in international organizations, from NATO to the UN.

Three attitudinal clusters are particularly pertinent to future American participation in multilateral operations. First, while the United States is often criticized abroad for inadequate consultation with its allies and an over-willingness to go it alone, some members of Congress question why nations that do not bear a greater share of the military burden should

[52] Mancur Olson and Richard Zekhauser, "An Economic Theory of Alliances" (1966) 48 *Review of Economics and Statistics* 266–79.

[53] Craig R. Whitney, "Hey, Allies, Follow Me. I've Got All the New Toys," *The New York Times*, May 30, 1999, section 4, p. 5, col. 1.

[54] *Ibid.*

[55] Anthony H. Cordesman, *Lessons and Non-lessons of the Air and Missile Campaign in Kosovo* (Westport, CN, Praego, 2001), p. 9.

[56] Rick Atkinson, "With Deliberate Force in Bosnia," *Washington Post National Weekly Edition*, November 27–December 3, 1995, p. 6.

have a significant role in directing military actions involving US forces. Secondly, some US military planners believe that, given the capabilities gap between the US and its allies, multilateral operations are dysfunctional, more useful for political appearance than for military success. Finally, when the US is denounced for pursuing "casualty-free" battlefield strategies by nations unwilling to invest in modern battlefield technologies, or inefficient at doing so, the criticism makes little impression on American decision-makers, civilian or military.

Thus, while the United States has unique military capabilities to participate in peace operations worldwide, American policy makers in both the executive and legislative branches are often reluctant to do so. This reluctance is consistent with long-standing American opposition to arrangements that would automatically put US forces at the disposal of international organizations.

Requisitioning of forces

American concern that a collective security agreement might require the United States to furnish armed forces without its consent predates the founding of the UN.[57] Originally, it wanted to limit American force contributions outside the western hemisphere to air and naval forces. Franklin Roosevelt did not favor a force agreement that would bind the United States to send troops to Europe,[58] nor did he support an accord that would provide for a permanent international police force.[59] Rather, he envisioned that member states would maintain forces available for joint action, when necessary, and the State Department assured Roosevelt that draft plans for the UN were compatible with his wishes.[60]

When the UN Charter came before the Senate Foreign Relations Committee, most of the public testimony urged rapid and unreserved

[57] Cordell Hull, "Memorandum by the Secretary of State to President Roosevelt (29 December 1943)," reprinted in *United States Department of State, Foreign Relations of the United States* (1944), p. 621.

[58] William Emerson, "Franklin Roosevelt as Commander in Chief in World War II" (1958–9) *Military Affairs* 202–3, and "Record of Informal Meeting with Diplomatic Representatives of Certain American Republics" in Washington, DC (February 5, 1945), in *United States Department of State, Foreign Relations of the United States* (1945), p. 46.

[59] President Franklin D. Roosevelt, Statement to the Press, "Department of State Bulletin" (June 15, 1944), reprinted in *United States Department of State* (1944), pp. 642–3.

[60] "[United States] Tentative Proposals for a General International Organization," chapter X in *Postwar Foreign Policy Preparation, 1939–1945*, US Department of State Publication 3580 (General Foreign Policy Series 15) (Washington, DC, US Department of State, 1949).

ratification of the Charter.[61] Several senators, however, expressed concern over the power vested in the president's representative to the Security Council to activate troops under an Article 43 force agreement.[62] A proposed reservation to the Charter would have required legislative reauthorization of specific force commitments as a check on presidential power.[63] But Charter advocates objected that this reservation would violate the Charter's spirit[64] and impinge on the president's constitutional right to use US forces for national defense without congressional approval.[65] The Senate ultimately approved the Charter by 89 to 2, and both houses of Congress approved the United Nations Participation Act on December 20, 1945. The UNPA clarified one issue still unresolved from Senate discussions of the Charter: the Congress required that the president seek statutory approval of any Article 43 force agreement that might be negotiated.[66]

Although the United States was willing to enter into agreements obliging it to produce forces for Security Council use under Article 43, it insisted upon important conditions: maintaining separate forces for traditional deployments, and reserving the right through the veto to determine when the Council could call upon American forces.[67] Since the veto would prevent their use against any of the permanent members, Article 43 forces (and the American force obligation) could thus be kept modest. In short, in endorsing the Article 43 framework, American negotiators did not anticipate providing US forces upon any UNSC request or giving the Council complete freedom to utilize American troops.

The United States has never voted for (and the Security Council has never approved) a resolution requiring the use of armed force by the United States. UNSC Resolution 83, of June 27, 1950, recommended "that the Members of the United Nations furnish such assistance to the

[61] Ruth B. Russell and J. B. Muther, *A History of the United Nations Charter: The Role of the United States, 1940–1945* (Washington, DC, Brookings Institution Press, 1958), pp. 936–9.

[62] *Ibid.*; William S. White, "Senate Will Open its Hearings Today on World Charter," *The New York Times*, July 9, 1945, p. 1.

[63] Russell and Muther, *A History of the United Nations Charter*, p. 943; Hearings Before the Senate Committee on Foreign Relations, 79th Cong., 1st Sess. 298 (1945) (hereinafter, Charter Hearings).

[64] Russell and Muther, *A History of the United Nations Charter*, pp. 943–4; Charter Hearings, pp. 298–9; James B. Reston, "Senators Oppose Congress Control of Security Troops," *The New York Times*, July 17, 1945, p. 1; "Foreign Relations Committee's Report Urging Ratification of the United Nations Charter," *The New York Times*, July 17, 1945, p. 4.

[65] Russell and Muther, *A History of the United Nations Charter*, p. 943; Charter Hearings, pp. 299–300 and pp. 654–5.

[66] United Nations Participation Act, 22 USC §§ 287–287(e) (1988).

[67] Russell and Muther, *A History of the United Nations Charter*, p. 943.

Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area."[68] It was adopted under Chapter VII, Article 39, which permits the Security Council to make recommendations.

Korea stood alone in United Nations practice until August 25, 1990. On that date, UNSC Resolution 665 responded to the Iraqi invasion of Kuwait by:

> Call[ing] upon those Member States . . . which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary . . . to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions . . . laid down in resolution 661 (1990).[69]

This resolution might appear to oblige the United States to use armed force, but it did not. Neither it nor any previous UNSC resolution required a member state to deploy "maritime forces to the area." Even if a state became subject to the resolution by doing so, it retained full discretion to determine which measures, if any, were "commensurate to the specific circumstances," and "necessary." Neither the US nor any other UN member was required by the Security Council to use armed force.

However, three years later, in August 1993, the Clinton administration indicated that it was considering revising US policy to allow US forces to serve on a regular basis under UN command.[70] Republican and Democratic members of Congress, especially conservative members of both parties who believed that this would weaken the nation's ability to defend its own interests,[71] were quick to criticize Clinton's proposals to provide troops for UN-led compliance and enforcement actions.[72]

One result of this debate was a 1999 Republican-sponsored measure, section 724 of the FY00-01 Department of State Authorization Act,[73] which required of the executive fifteen days' advance notification of any new UN peacekeeping operation and a description of cost estimates and any expected reprogramming of funds. The Congress also put the same

[68] SC Res. 83 (June 27, 1950).

[69] SC Res. 665 (August 25, 1990). SC Resolution 661, adopted on August 6, 1990, ordered the trade and financial boycott of Iraq and occupied Kuwait.

[70] USIA Foreign Press Center Briefing, August 18, 1993, available in LEXIS, News Library, Federal News Service file.

[71] David Forte, "Bill Clinton, Boutros Boutros-Ghali, and the Unmaking of American Foreign Policy" in his *Essays on Our Time* (Washington, DC, Free Congress Foundation, 1993).

[72] Ronald A. Taylor, "Foreign Command of U.S. Peacekeepers Debated," *Washington Times*, August 19, 1993, p: A3; "Plan for U.N. Command of U.S. Troops Riles Congress," *Chicago Tribune*, August 19, 1993, p. 4.

[73] Pub. L. 106–13, 113 Stat. 1501A–405, 465 (1999).

restrictions on the use of funds in the existing "Contributions for International Peacekeeping Activities" account for any "new or expanded UN peacekeeping mission." In "an emergency," notification must be "as far in advance as possible," or can be waived for "exceptional circumstances."[74]

In May 1994, the president signed Presidential Decision Directive 25 (PDD-25), setting conditions that had to be met prior to US participation in UN operations. It distinguished between command and operational control, as described by the US ambassador to the UN, Madeleine Albright, in congressional testimony:

> [C]ommand is the constitutional authority that flows from the president to the lowest U.S. commander in the field . . . This authority is something the president will never relinquish. Operational control is a subset of command. It is simply the authority to direct already deployed forces assigned to a specific mission to accomplish a specific task.[75]

Albright maintained that the United States had in previous conflicts given operational control, but never command, over its troops to others: "The U.S. does not support a standing U.N. army, nor will it earmark specific U.S. military units for participation in U.N. operations. It is not U.S. policy to seek to expand either the number of U.N. peace operations or U.S. involvement in such operations."[76] Her statement reflected the earlier testimony of Secretary of State Warren Christopher, who said that "[w]e do not exclude the possibility down the road of an Article 43 kind of force, but I must say at this point it seems quite remote."[77]

Changing attitudes towards Article 43 agreements

The American position regarding the desirability of making available US forces for use by the Security Council has remained ambiguous since the early days of the UN. Interest in Article 43 agreements reached an early peak during Senate debates on the UN Charter and the North Atlantic Treaty, but faded during the Cold War. It peaked again in 1990–1, with the Gulf War, but virtually disappeared three years later, after the death of eighteen American servicemen on a UN mission in Somalia. Congressional support for the participation of US troops in UN-led military

[74] Pub. L. 106–13, 113 Stat. 1501A-41-42 (1999).

[75] Testimony of Madeleine Albright, US permanent representative to the UN, before the Subcomm. on Foreign Operations of the House Appropriations Commitee May 5, 1994, available in LEXIS, News library, Curnws file.

[76] Cited in "Withdrawal Symptoms," *The Guardian*, May 7, 1994, available in LEXIS, News library, Curnws file.

[77] Hearing Before the Senate Foreign Relations Committee; Foreign Policy Overview, February 23, 1994, available in LEXIS, News library, Federal News Service file.

operations faded, despite polls that indicated continuing public approval of the Somalia effort (an example of the tendency of American policy makers, particularly in Congress, to underestimate public support for international engagement).[78]

Since that time, congressional opposition has focused on ensuring that the control of units of the US armed forces remain under UN commanders. Section 609 of the FY 2000 Commerce, Justice, State Appropriations Act provided that "none of the funds made available by this Act" could be used for any UN peacekeeping mission that would place US forces under the "command or operational control of a foreign national," if the president's military advisers "have not submitted to the President a recommendation that such involvement is in the national security interests of the United States and the President has not submitted to the Congress such a recommendation."[79]

Outside of Congress, scholarly attention has focused on possible constitutional obstacles to US involvement in a multilateral unified command structure. As described above, delegation problems could arise if the president's commander-in-chief power were assigned to a foreign national. Issues could also arise under the appointments clause if such an individual were permitted to carry out activities under American law without going through the appointment process spelled out in the Constitution. As a result, in the first half of 2001, executive–legislative support for an Article 43 agreement remained unlikely, despite the long-standing UNPA provisions that make one possible.

NATO

In 1949, the Senate's principal concern during its consideration of the North Atlantic Treaty was that the executive might commit the United States to war without congressional approval. In Article 5, the twelve signatories had agreed that "an armed attack against one or more of them in Europe or North America shall be considered an attack against them all," and that, "if such an armed attack occurs, each of them . . . will assist the Party or Parties so attacked" by taking "such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area." Article 11 provided that the treaty be "carried out by the Parties in accordance with their respective constitutional processes."

[78] Kull and Destler, *Misreading the Public*.
[79] Pub. L. 106–13, 113 Stat. 1501A-53 (1999).

As the Senate Foreign Relations Committee reported, "[N]othing in the Treaty . . . increases or decreases the constitutional powers of either the President or the Congress or changes the relationship between them." Such concerns regarding the North Atlantic Treaty faded over the years, and in 1999, NATO enlargement took place with virtually no public or congressional attention focused on issues of automaticity.

American concerns with NATO peace operations focused instead on delegation and unanimity requirements. The broad delegation question is whether a power assigned by the Constitution to a governmental entity within the United States can be assigned by US ratification of an international agreement to an international organization. The specific delegation issue concerning NATO is whether the president's commander-in-chief power can constitutionally be assigned to its Secretary General. The issue arose just before the start of the Kosovo air campaign, in February 1999, when the president's national security adviser said in an interview that the (then) sixteen member countries of NATO had voted "to authorize the Secretary General, Mr. Solana, to have the authority to use air power against Serbia."[80]

Related to the delegation issue is concern about NATO's unanimity requirement. The Kosovo War was overseen by the North Atlantic Council (NAC), established by Article 9 of the North Atlantic Treaty "to consider matters concerning [its] implementation." Unlike the UNSC, no vote is taken in the NAC, but it operates on the basis of unanimous (if frequently silent) consent of all NATO members. As a result, during the first days of the war, decisions on targets were subject to the "veto" of any one of the (by then) nineteen NATO members, but that was changed to permit a veto only by the members carrying out the military effort.[81] Especially in the United States, which played the largest role by far in the air war, resentment arose of the other allies' influence on operational decisions. (The European allies, meanwhile, complained of the *lack* of such influence.)

These concerns over unanimity and delegation have not been limited to NATO. The American preference to handle the Kosovo crisis in the NAC was based on the assumption that the Chinese or Russian veto in the Security Council would preclude UN action. Throughout the war, the United States sought to counter any perception that negotiating authority had been delegated to the UN Secretary-General. Memories of

[80] Interview by Jim Lehrer with Samuel (Sandy) Berger, National Security Adviser, on PBS *The Newshour with Jim Lehrer* (February 23, 1999), available in LEXIS, News Library, Newshr File.

[81] *The New York Times*, May 31, 1999.

Somalia, perhaps, and of the failed UNPROFOR–NATO "double-key" operation in Bosnia made the executive branch especially sensitive to potential public and congressional criticism of deference to the United Nations.

Conclusion

Only four times in the twentieth century did Congress approve the use of force before US troops went to war – the two world wars, Vietnam, and the Gulf. If anything, the trend in the United States has been toward less accountability of the executive to the legislature, not more. In the 1990s, the US used its forces in combat more often, and accepted a greater number of significant long-term commitments of its armed forces, than it did from 1945 to 1990. Yet none of those deployments was authorized by Congress. The disparity between war powers granted to Congress under the Constitution, and the war power that it has actually exercised, is striking.

When the United States uses military force under international auspices, only in the most limited sense does the decision-making process mix domestic and international elements. Both its constitutional system and political culture have led the US to refuse to participate in any international regime that would permit the requisitioning of troops. A mandate from an international organization is no substitute for congressional approval if the president lacks constitutional power to proceed alone. The United States has reserved the right to use military force unilaterally, without international authorization, and has done so with increased frequency since the end of the Cold War.

The Kosovo air strikes did involve officials from other NATO countries in day-to-day decisions governing the US military in a manner that, while enhancing domestic and international legitimacy of the war, undercut operational efficiency. For that reason, future US participation in such arrangements is likely to be rare. The US decision-making process concerning *whether* force should be used remains exclusively domestic, but decisions concerning *how* force should be used have become, on rare occasions, internationalized.

Societal influences weigh heavily in that domestic decision-making process. Americans prefer the multilateral, not unilateral, use of force. They do not want the United States to be the world's policeman. The greater the risk of casualties in a given operation, the greater the pressure from Congress for prior legislative approval, but a greater risk of casualties does not necessarily mean greater public or legislative opposition.

More important, at least to the public, is the reason force is used. All available data show that stopping genocide is more important to the American public than avoiding US casualties. Americans continue to define the national interest broadly. On the one hand, this enhances the likelihood of US participation in multilateral use of force operations for humanitarian purposes. On the other, it means that the United States will continue to act unilaterally for purposes it deems necessary, even if its international partners do not agree.

Part VI

Conclusion

15 Toward a mixed system of democratic accountability

Charlotte Ku and Harold K. Jacobson

Two fundamental trends characterized political developments in the twentieth century. One was the growth in the number and authority of international institutions. As part of this trend, states agreed that international institutions should be given the capacity to authorize the use of military forces for collective purposes. The other trend was democratization: the broad acceptance of basic concepts of human rights, the deepening of democracy in countries that had democratic characteristics at the beginning of the century, and the growth in the number of democracies. As the preceding chapters demonstrate, these two trends intersect.

Robert A. Dahl ended his book *On Democracy* by identifying a number of challenges to democracy. One of these was internationalization. Dahl wrote: "from a democratic perspective, the challenge posed by internationalization is to make sure that the costs to democracy are fully taken into account when decisions are shifted to international levels, and to strengthen the means for holding political and bureaucratic elites accountable for their decisions."[1]

This challenge is particularly acute in the important area of the use of military forces. Outlawing their unilateral and unrestrained use was an important success of the first half of the twentieth century, finally achieved with the United Nations Charter in 1945. After the Second World War, states largely came to accept the norm that the unilateral use of military force against the territorial integrity of another state violated international law and could legitimately be opposed by a collective response of the international community.

Acting through international institutions, states made progress in using military forces for collective purposes. While the League of Nations and the United Nations were given the power to authorize the use of military forces, they were not provided direct means to carry out their decisions. Nevertheless, since the Second World War, states individually

[1] Robert A. Dahl, *On Democracy* (New Haven, CT, Yale University Press, 1998), p. 183.

or in concert with others have been willing to have their military forces used within frameworks established by international institutions for a variety of purposes. These range from monitoring and observing a truce to enforcement using large-scale military operations.

The growing international commitment of states to the protection and promotion of individual human rights, first as an aspiration and then as a body of law with a full set of institutions charged with its development, monitoring, and implementation, has been an equally prominent trend. The international human rights system includes both a global regime through UN institutions and regional regimes that are most developed in Europe and the western hemisphere. If restraining the use of force can be regarded as the achievement of the first half of the twentieth century, wide acceptance of human rights norms was surely an achievement of the second half of the century. Democracy, both as a concept and as a form of government, was shaped to fit territories of varying sizes and social and cultural complexity. Some international lawyers have even argued that there is an emerging right to democratic governance, a democratic entitlement.[2]

The increasing international commitment to the promotion and protection of human rights had another consequence. As the twentieth century drew to a close, military forces were increasingly used under the auspices of international institutions in situations, not of transborder aggression, but where violent civil conflicts raged or human rights were seriously violated. The legal status of these humanitarian interventions has been contested. They pose a new problem of maintaining democratic accountability when forces are used under the auspices of international institutions, in situations endangering soldiers far from home, in a conflict not immediately affecting their nation's interests.

The evolution of the present security system has created a potential gap between legitimacy and effectiveness. Legitimacy is widely accepted as requiring some multilateral authorization, preferably by the United Nations Security Council. Yet the effectiveness of decisions taken by international institutions depends on implementation by individual states or coalitions of willing states. This gap can be widest when a humanitarian intervention rests on uncertain international legal grounds.

This chapter summarizes and analyzes the national experiences discussed in the preceding chapters and addresses the broad issues that are involved.

[2] See Thomas M. Franck, "The Emerging Right to Democratic Governance" (1992) 86(1) *American Journal of International Law* 46–91.

The record: steps toward establishing democratic accountability

As states have used force under the auspices of international institutions, they have begun to identify concepts and procedures that deal with issues of democratic accountability. A mixed system of accountability has begun to evolve, including procedures and actions at both international and national levels. Some international and national practices have been firmly established; others are still being formed. In some areas, the practices accord with the tenets of democratic accountability, but in other areas they fall short. Whether these practices facilitate the effective use of military forces is another issue.

The five categories of international military operations – monitoring and observation, traditional peacekeeping, peacekeeping plus state-building, force to ensure compliance, and enforcement – form a spectrum along which military forces have been used. The preceding country studies revealed that a spectrum of processes also exists to ensure accountability within the nine democracies examined. These processes of accountability are both formal (constitutional and legislative provisions) and informal (media and public opinion). Since each country will assess how and if it will take part, assuming it has the means to do so, fielding an international operation is inevitably complex.

Legitimacy and accountability may have to be established more than once at various stages of an operation, depending on its complexity and novelty. These stages can be seen as a series of questions: Is the international decision-making body the appropriate one to call for a particular action? How much freedom is allowed to individual states to participate (or not) in operations? How much latitude is allowed states to define the conditions of their involvement? What standards of responsibility and accountability are needed to fulfill domestic requirements? Is there sufficient international and domestic political will to sustain the action?

Different uses of military forces raise issues of accountability in different ways. The greater the risks associated with military actions, the vaguer the immediate interests of the states providing military forces, and the greater the ambiguity of the international legal basis for action, the greater the attention that will be paid domestically to issues of democratic accountability. This is particularly true when international institutions themselves are not regarded as providing adequate opportunity for debate and democratic decision-making.

There has been little controversy surrounding consensual monitoring or observation operations, since they involve minimal risk to the personnel deployed and rest on widely accepted law and practice. Furthermore,

since the founding of the UN several states have closely identified their national interests and international role with participation in such consent-based operations. At the other extreme, there are usually extensive questions concerning the use of military forces in enforcement and compliance actions. As practice particularly since the end of the Cold War has demonstrated, the international legal basis may be disputed or uncertain; by definition, there is no consent of the government in control of the territory; and military personnel face a high level of risk. This was the case with NATO's Operation Allied Force in 1999.

The nine states analyzed in the preceding chapters have given various and sometimes opposing answers to the questions raised in the framework presented by Table 1.2 (above, chapter 1, p. 29). Few of the issues are firmly settled, but a start has been made in each of the nine to establish or expand democratic accountability when the country's military forces are used under the auspices of international institutions. Much of what has evolved since the Second World War derives from established domestic practices, norms created and accepted under the UN Charter with respect to the unilateral use of military forces, and norms created by the Geneva Conventions and Protocols for the conduct of war. Humanitarian interventions, however, have raised new issues not covered by existing law or for which existing law may not be appropriate. This chapter examines each of the issues of accountability separately.

International authorization to use military forces

The United Nations is at the apex of the international political and legal structure. There is no other organization that has universal membership and a mandate to deal with issues of war and peace. Democratic states clearly prefer to have the Security Council's authorization when they use military forces. It bestows a legitimacy that cannot be gained in any other way. This legitimacy can be crucial on the international plane, but is also important legally and politically to democratic states' domestic decision-making.

The UN Charter established the framework for judging whether decisions or actions have been taken in accordance with the rule of law, one of two essential components of democratic accountability. The intent of the Charter was to centralize authority concerning the use of force in the Security Council. Under Article 39, "the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or

restore international peace and security." Under Article 42, the Security Council may authorize the use of military force.

Under Article 51, states can individually or collectively take military action in their own self-defense, but this action "shall be immediately reported to the Security Council," and the authorization was limited until the Security Council had taken action. Under Chapter VIII, Article 53, of the Charter, regional organizations may use force, but only with the authorization of the Security Council. The voting arrangements in the Security Council were intended to ensure that military action would have broad international support and that effective action would be feasible; that is, action would be taken only with the consent of the five permanent members, the states that at the end of the Second World War were assumed to have the greatest capacity to enforce the peace.

In practice, when military forces have been used under the auspices of international institutions – as they were in about half of the inter-state conflicts and a third of the intra-state conflicts that occurred between 1945 and 2000 – the Security Council has largely performed its intended role of authorizing their use. The UNSC authorized seventy-four of the seventy-seven uses of force considered in this study, or 96 percent of them. In three of the seventy-seven, two recommendations of the UN General Assembly and one North Atlantic Council decision provided a basis for the use of military forces. Whether or not they or any institution other than the Security Council can legitimately provide such authorization, however, remains contested by several states, notably France and China.

Generally, decisions involving monitoring and observation missions have not been controversial. The practice became well established in the early years of the UN, and the League of Nations had undertaken similar tasks. Since such missions have the consent of host states, they remain within the standards of non-interference provided for in the Charter under Article 2(7). The UN Security Council authorized all of the nineteen monitoring and observation missions between 1945 and 2000, and they were conducted under UN command.

The UNSC authorized fifty-five of the fifty-eight uses of military forces in the other four categories. There were only three instances when the Security Council did not authorize the initial deployment of military forces. The General Assembly, acting under the "Uniting for Peace" Resolution, recommended UNEF I (1956), a traditional peacekeeping operation, and the United Nations Security Force (UNSF, 1962) in West New Guinea (West Irian), a peacekeeping plus state-building operation. NATO's North Atlantic Council (NAC) authorized Operation Allied Force (1999) against Yugoslavia, a force to ensure compliance operation. Although the Security Council authorized the initial deployment of

UN forces to Korea in 1950, subsequent decisions about the operation were taken by the General Assembly under the Uniting for Peace Resolution. This was also true in the case of the 1960 UN Operation in the Congo (ONUC).

The United States and the United Kingdom have from time to time maintained that when an actual or expected veto prevents a Security Council decision, the General Assembly or the North Atlantic Council constitute legitimate authority for the use of military forces. The United States and the United Kingdom were co-sponsors of the 1950 Uniting for Peace Resolution, which allowed the General Assembly to make recommendations on the use of force when the five UNSC permanent members could not agree. British support waned when the Uniting for Peace Resolution was used to set up UNEF I in 1956. France, the People's Republic of China, and the Soviet Union/Russia have consistently opposed allowing the General Assembly to recommend military operations. India abstained from voting on the Uniting for Peace Resolution, but voted in the UNGA to authorize UNEF I and UNSF. Japan's peacekeeping law explicitly accepts General Assembly recommendations, and Canada, Germany, and Norway all accept their legitimacy.

The legal grounds for authorizing military action have included Chapter VI of the UN Charter (pacific settlement of disputes), Chapter VII (threats to the peace), and the necessity of preventing genocide and violations of humanitarian law. Of the seventy-four UNSC resolutions authorizing the use of force, only twenty-nine included a reference to Chapter VII. All but one of those resolutions were voted after 1990, the one exception being UNSC Resolution 50 (1948) creating the UN Truce Supervision Organization (UNTSO). Forty-two years later, in 1990, the Council recommended actions under Chapter VII designed to reverse Iraq's conquest of Kuwait.

These twenty-eight references to Chapter VII constituted 50 percent of the fifty-six resolutions authorizing the use of force that the Security Council adopted from 1990 to 2000. They included one monitoring and observation mission, one traditional peacekeeping operation, six peacekeeping plus state-building operations, nineteen compliance actions, and the Gulf War enforcement action. The Council only authorized two compliance actions without mentioning Chapter VII, Resolution 688 (1990), concerning safe havens for Iraqi civilians, and Resolution 743 (1992), creating UNPROFOR. Table 15.1 reviews the use of UN Charter Chapter VII as the basis for UN-authorized operations. It is noteworthy that for the more robust uses of force – force to ensure compliance and enforcement – Chapter VII was used as a basis in virtually all instances.

Table 15.1. *Mention of Chapter VII in UN Security Council authorizations, 1990–2000*

Forms of use of military forces	Total number of authorizations	Number of Security Council Resolutions in which Chapter VII was mentioned	Percentage of authorizations that mentioned Chapter VII
Monitoring and observation	9	1	11.1
Traditional peacekeeping	2	1	50.0
Peacekeeping plus state-building	23	6	26.1
Force to ensure compliance	21	19	90.5
Enforcement	1	1	100.0
Total	56	28	

When Article 39 of the UN Charter and Article 5 of the North Atlantic Treaty were drafted, threats to peace were generally conceived as cross-border military attacks. The 1950 North Korean attack on South Korea and the 1990 Iraqi attack on Kuwait involved clear violations of Article 2(4) of the Charter. The legal bases of the other seventy-five uses of force were less clear and occasionally contested. The deployment on humanitarian grounds of troops to intra-state conflicts without any authorization by the Security Council has raised the most difficult questions, as NATO's 1999 Kosovo intervention, Operation Allied Force, demonstrated.

The Security Council authorized the use of military forces twenty-nine times based on Chapter VII, but only six of those cases involved a clear inter-state conflict. Although Article 2(7) of the Charter states that the principle of non-intervention in "matters essentially within the domestic jurisdiction" of a state "shall not prejudice the application of enforcement measures under Chapter VII," humanitarian interventions challenge a key assumption of international law – that states are sovereign within their own territory.

If international law prohibiting genocide and providing for human rights protection appears to overcome, or even requires overcoming, the principle of non-intervention, then new standards and procedures are needed to keep international relations from reverting to the unilateral great-power interventions of the nineteenth century. The debates taking

place within states on their level of commitment to humanitarian operations may provide a basis for building an international consensus on the purpose and scope of these operations.[3] One major effort to establish guidelines is the work of the International Commission on Intervention and State Sovereignty, chaired by Gareth Evans and Mohamed Sahnoun. This Commission has sought to shift the terms of the debate, arguing that the issue is "a responsibility to protect" in cases of humanitarian crises, not intervention.[4]

The controversy surrounding NATO's out-of-area operations demonstrates the complexities of this problem. The central question is whether NATO can legitimately take decisions to use military forces in non-Article 5 operations without authorization by the UN Security Council. NATO's deployment of the Implementation Force (IFOR) and the Stabilization Force (SFOR) to Bosnia in 1995 and 1996, and the Kosovo Force (KFOR) in 1999, were all taken within a framework provided by Security Council resolutions. Operation Allied Force, the air war against Yugoslavia, did not have explicit Security Council authorization. Like the UN's enlargement of the concept of "threats to the peace" from repelling cross-border aggression to intra-state emergencies, NATO's out-of-area operations represent a change from its original mandate of defense of the North Atlantic area.[5]

France, Germany, and Italy initially maintained that explicit authorization by the UN Security Council would be required for the NAC to authorize any out-of-area military operation. Russia, China, India, and other non-NATO countries have maintained this consistently. The United Kingdom felt that the circumstances in the former Yugoslavia warranted action even if the law was unclear.[6] The United States assumed adequate authority from UNSC Resolution 1199, in which the Council, acting under Chapter VII, demanded that all parties in Kosovo "cease hostilities." The lack of a common legal basis is reflected in the range of arguments being developed in the cases filed against the NATO countries by Yugoslavia.[7]

[3] See Lori Fisler Damrosch, chapter 2, above.

[4] Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa, International Development Research Centre, 2001).

[5] North Atlantic Treaty Organization, "The Alliance's Strategic Concept," Approved by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington, DC (April 23 and 24, 1999).

[6] See UK Foreign and Commonwealth Office note, October 1998 in Adam Roberts, "NATO's "Humanitarian War" Over Kosovo" (1999) *Survival* 106.

[7] See International Court of Justice, General List Nos. 105 to 113, Legality of Use of Force (*Yugoslavia* v. *Belgium*, *Yugoslavia* v. *Canada*, *Yugoslavia* v. *France*, *Yugoslavia* v. *Germany*, *Yugoslavia* v. *Italy*, *Yugoslavia* v. *Netherlands*, *Yugoslavia* v. *Portugal*, *Yugoslavia* v. *United Kingdom*).

At its fiftieth anniversary summit in April 1999, as Operation Allied Force was under way, NATO adopted the Alliance's Strategic Concept. The allies agreed to make "full use of every opportunity to help build an undivided continent by promoting and fostering the vision of a Europe whole and free."[8] This suggested that they might undertake an operation like Allied Force in the future. By the end of the bombing campaign in June 1999, however, it was unclear whether NATO could ever again achieve the political consensus required to repeat such an operation.

In 1999, in the aftermath of Operation Allied Force, UN Secretary-General Kofi Annan wrote:

> To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might say: leave Kosovo aside for a moment, and think about Rwanda. Imagine for one moment that, in those dark days and hours leading up to the genocide, there had been a coalition of states ready and willing to act in defence of the Tutsi population, but the council had refused or delayed giving the green light. Should such a coalition then have stood idly by while the horror unfolded?
>
> To those for whom the Kosovo action heralded a new era when states and groups of states can take military action outside the established mechanisms for enforcing international law, one might equally ask: Is there not a danger of such interventions undermining the imperfect, yet resilient security system created after the second world war, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances?[9]

The dilemma the Secretary-General posed is acute. A rigid requirement of Security Council authorization for military forces to be used legitimately could preclude their use when morality and international law would seem to require it. On the other hand, authorization of the use of military forces on an ad hoc basis by bodies other than the UNSC puts at risk the constitutional structure of the present world order. New claims to be a legitimate source of authorization have already been made, notably in 2000 by the Economic Community of West African States (ECOWAS), which adopted a protocol explicitly stating that the ECOWAS Council could authorize the use of military forces even without a Security Council mandate.[10]

If the Kosovo question had been brought to a vote in the Security Council, and China or the Russian Federation had opposed action, the matter could have been taken up by the General Assembly under the Uniting for Peace Resolution. France, the United Kingdom, and the

[8] North Atlantic Treaty Organization, "The Alliance's Strategic Concept."
[9] Kofi Annan, "Two Concepts of Sovereignty," *The Economist*, issue 8137, p. 49 (September 18, 1999).
[10] As reprinted in (2000) 5(2) *Journal of Conflict & Security Law* 231–59.

United States did not choose this course. France has always opposed use of the Uniting for Peace procedures. The United Kingdom and, especially, the United States were considerably less enthusiastic in 1998 about the General Assembly and its 185 members than they had been in 1950, when it included only 60.

The Security Council was designed to provide an effective response to threats to the peace by those states that had defeated the Axis powers. In 1945, they had the greatest interest in maintaining international peace and security and the military capabilities needed to deter or thwart aggression. The UN Charter modified the unanimity requirement of the League Covenant and gave the veto only to the five permanent members (P-5) of the Security Council. With their concurrence (or abstention) nine of fifteen UNSC members can authorize the use of force. Nevertheless, there is growing resistance to the blocking power given to the P-5, since the bases on which they were given the special privilege and responsibility of the veto have eroded. But there is no consensus on enlarging the UNSC or modifying its voting rules through Charter amendment.

The UN was never designed to meet the standard of one person, one vote as a criterion of democratic accountability. Its voting is based on the sovereign equality of states in the General Assembly, and on modified sovereign equality, for the reasons discussed above, in the Security Council. In its composition, the Council also fails the accountability test of equitable regional representation. Europe is overrepresented and Asia is underrepresented, based on population and economic strength. Making the UNSC more representative is an important factor in maintaining its legitimacy,[11] but there is no consensus on which criteria to use or, among the P-5, on the need to do so. For example, if primary reliance is placed on democratic government as a means of ensuring democratic accountability within international institutions, more than a third of the UN's 190 member states would fail this test since their governments, even under the most lenient interpretation, are not democratic.

The Security Council has other deficiencies from the point of view of democratic accountability as well. Article 32 of the Charter requires that parties to a dispute be represented (without vote) in the Security Council. Troop-contributing countries do not have a similar privilege. Unless it happens to be a UNSC member, a country that contributes forces or financial resources to UN operations has no vote in deciding how to use them. Among the countries in this study, this issue has been of particular concern to Canada and India. In the late 1990s, almost

[11] Ramesh Thakur (ed.), *What is Equitable Geographic Representation in the Twenty-first Century?* (Tokyo, the United Nations University, 1999).

two-thirds of the military personnel involved in operations under UN command came from countries that were not members of the Security Council. They have no say in the initial mandate and rules of engagement, nor are they present if the Council modifies the mission in the course of a military operation.

This is not a rare occurrence. In February 1961, the Security Council adopted Resolution 161, authorizing ONUC to use force to prevent civil war. This was a dramatic change from ONUC's earlier mission to provide for the orderly withdrawal of Belgian troops. It also changed the mission of the United Nations Protection Force (UNPROFOR), created in February 1992 as a traditional peacekeeping operation. In June 1992, UNSC Resolution 761 authorized the Secretary-General to deploy UNPROFOR "to ensure the security and functioning of the Sarajevo airport and the delivery of humanitarian assistance," in effect transforming its mission into a compliance action. The Council later gave additional tasks to UNPROFOR, including the disastrous requirement to protect Srebrenica, Tuzla, Zepa, Goradze, and Bihac as "safe areas."

Another change of mission after deployment took place in Somalia, with far-reaching consequences. The UN operation began in early 1992 when UNSC Resolution 751 created UNOSOM I, a peacekeeping plus state-building mission with a mandate to deliver humanitarian aid. The violent conflict among Somali factions made the execution of this mission impossible. The Security Council then accepted the offer of the United States to use its military forces to establish a secure environment, and created, in Resolution 794 (1992), UNITAF (the Unified Task Force). After this US-led force established a secure environment, UNSC Resolution 814 (1993) established UNOSOM II to take over UNITAF's force protection role and continue the humanitarian mission of UNOSOM I. But when this proved impossible because of a continuing hostile environment, the Council adopted Resolution 837 (1993), authorizing all necessary measures to arrest, detain, prosecute, and punish those who incited attacks against UN peacekeepers. The muddle of "mission creep" in Somalia left many member states skeptical of contributing to future UN peace operations, most critically, perhaps, the United States.

The Security Council's proceedings are frequently not transparent. Those who do not participate in its deliberations cannot be certain about the grounds for decisions that are taken or not taken. This was particularly a problem with respect to the transformation of the mandates of UNPROFOR and UNOSOM II. It was also a problem with respect to the United Nations Observer Mission in Uganda–Rwanda (UNOMUR), when, in the face of increased killing, the Security Council refused to

Table 15.2. *Forms of international authorization regarded as legitimate*

State	Form of authorization or basis for action		
	UN Security Council	UN General Assembly	North Atlantic Council
Canada	Yes	Yes	Yes
France	Yes	No	Yes
Germany	Yes	Yes	Yes
India	Yes	Yes	No
Japan	Yes	Yes	No
Norway	Yes	Yes	Yes
Russian Federation	Yes	No	No
United Kingdom	Yes	Yes	Yes
United States	Yes	Yes	Yes

expand the mission and instead reduced its size. Lack of transparency confounds democratic accountability by limiting possibilities for understanding the bases and purposes of UN-authorized military operations. This precludes informed debate.

The issue of transparency also arises in another way. In twenty-two of the cases in which the Security Council authorized the use of military forces, it simply authorized individual states or groups of states to take action. The UN did not command these operations, which included most of the more robust uses of military forces. The Council asked states conducting the operations to report on their actions, but the frequency of such reports and the extent of detail included in them have varied greatly. In most cases, the reports have been perfunctory.[12]

There is, as noted above, no consensus on whether any institution other than the UN Security Council can authorize the deployment of military forces. Legitimate grounds for intervention are also unresolved.[13] Table 15.2 shows the positions that the nine countries examined in this study have taken on the issue of international authorization.

Making the Security Council more representative of the world's population would be one way to enhance its authority. It is also an essential condition for moving the Council and its procedures toward conformity

[12] See Danesh 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).

[13] See the debate in *Foreign Affairs*: Michael J. Glennon, "The New Interventionism" (1999) 78(3) *Foreign Affairs* 2–7; Thomas M. Franck, Edward C. Luck, et al., "Sidelined in Kosovo? The United Nations' Demise has been Exaggerated" (1999) 78(4) *Foreign Affairs* 116–22.

with democratic tenets. Even modest steps, such as making its proceedings more transparent and providing greater access for troop-contributing countries, would enhance the Security Council's democratic legitimacy and authority.

National authorization to use military forces

The concept involved in Article 43 of the United Nations Charter was that military forces made available to the UN under these agreements "for the purpose of maintaining international peace and security" would be committed to UN operations without further national authorization. However, Article 43 agreements were never put into place. The armed forces of the NATO countries are, by definition, wholly or in large part stationed in the territory covered by Article 5 of the North Atlantic Treaty, but until September 11, 2001, there had never been an Article 5 attack on the North Atlantic area. In any case, as Michael Glennon discussed in chapter 14, there is no automaticity in the North Atlantic Treaty.

National decisions have therefore been required every time that the UN or NATO has decided that military forces should be used. Because of this, maintaining democratic accountability involves procedures at both the international and national level. Democratic accountability depends on how well these procedures work and how well they fit together. The nine countries in this study have handled the issue of national authorization in different ways, but in all of them both procedural and substantive issues have arisen.

In all nine countries the debate at the national level has been deeper and more extensive the larger and riskier the military operation and the murkier the international legal basis for action. Some of the nine have developed explicit formal guidelines. Norway and Japan have enacted laws that govern their participation in military operations conducted under UN auspices. The United States has enunciated policies in executive documents such as PDD-25, discussed below. While the others have not done this, their actions have followed implicit guidelines. The extent to which the legislature has been involved in decisions to contribute military forces to international operations has varied across the nine countries and with the type of operation.

Monitoring and observation missions have been handled relatively simply, except in Japan and Germany. The executive acting on its own authority has routinely assigned military personnel to such missions. Frequently, however, governments have only felt free to assign those personnel that volunteered for these missions. Until the passage of the Peacekeeping Law in 1992, Japan's government felt that it could not assign Japanese

Self-Defense Forces (SDF) personnel outside Japan. The same was true for Germany, until the question of deploying *Bundeswehr* personnel outside the NATO area was resolved by the 1994 Constitutional Court ruling discussed by Georg Nolte. (Already in the 1980s, however, the West German government had assigned members of the Federal Border Police to UN monitoring and observation missions.)

Traditional peacekeeping has also been relatively unproblematic. The number of personnel required in traditional peacekeeping has generally been modest. In Norway, the legislature gave the executive the authority to assign up to a certain number of military personnel to traditional UN peacekeeping operations, though this was limited to personnel who volunteered for such missions. In Canada and India, the executive branch routinely assigned personnel to traditional peacekeeping missions without parliamentary involvement. The United States regularly provided transport and logistics support to traditional peacekeeping missions, and the president felt no need to request congressional authorization. UK practice has been similar to that of the United States. Since all five traditional peacekeeping missions predated their decision to take part in international military operations, neither Germany nor Japan participated in them.

The other three types of operations, where the costs and potential risks are greater, have been more complicated. Because they are closest to the classical use of military forces, it is useful to start with enforcement operations. Almost 1 million military personnel were involved in the Korean War coalition, and more than 800,000 in the Gulf War, vastly greater numbers than in any of the other military operations conducted under the UN or NATO. As a result, especially in the United States and the United Kingdom, there was extensive oversight of the government's political and military decisions. Since US military resources make it the essential participant in any large-scale enforcement action, the American political process concerns all contributors to such an operation.

In 1950, President Truman believed that he had the authority to commit US forces in Korea without formal congressional authorization,[14] although he did consult with the congressional leadership. Since the

[14] USA, Senate, "Memorandum of July 3, 1950, prepared by the US Department of State on the Authority of the President to Repel the Attack in Korea" in Military Situation in the Far East: Hearings Before the Senate Committee on Armed Services and the Committee on Foreign Relations, 82nd Cong., 1st Sess., Pt. 5 (Washington, DC, Government Printing Office, 1950) pp. 3373–81. Whether this case constituted a precedent for future authorizations to deploy US military forces has been debated at length. See, for instance: Louis Fisher, "The Korean War: On What Legal Basis did Truman Act?" (1995) 89(1) *American Journal of International Law* 21–39.

Table 15.3. *Legislative authorization for enforcement actions*

	Legislative authorization given for enforcement action	
State	Korea	Kuwait
Canada	No	Yes
France	No	Yes
Germany	N/a	N/a
India	N/a	N/a
Japan	N/a	N/a
Norway	No	No
Russian Federation	N/a	N/a
United Kingdom	Yes	Yes
United States	No	Yes

Korean War, the ability of the executive to act without formal congressional authorization has become problematic, politically if not legally. Congress insisted that it had to authorize the use of US forces in the Gulf, although all presidents since 1973 have disputed the constitutionality of the War Powers Resolution. The British parliament, the French Assemblée nationale, and the Canadian parliament, like their US counterpart, all adopted resolutions authorizing or approving the executive's decision to deploy national military forces to liberate Kuwait, in accordance with Security Council Resolution 678 (November 29, 1990). Table 15.3 shows the difference between the involvement of legislatures in the Korean and Kuwait operations.

In the run-up to the Gulf War, a Republican president faced a Democratically controlled Congress in the United States, and the outcome of the vote was in question until the last minute. In the other three countries, the outcome of the vote was never in question, since each government had a majority in parliament. In all four of the countries, however, the involvement of the legislature was seen as a useful instrument in mobilizing popular support for the operation. Legislative support, in turn, was easier to obtain because of the recognition accorded to the UN Security Council as a legitimate authorizer of the use of force.

In the case of the United States, the precedent established by seeking a congressional vote on Operation Desert Storm makes it likely that the president will have to seek congressional support for US participation in any future enforcement action. As the number of instances in which military forces were used under international institutions increased in the 1990s, both the executive and legislative branches took steps seeking to

define the cases in which the United States would participate in such military actions. The Clinton administration's views were embodied in Presidential Decision Directive 25 (PDD-25), signed in May 1994,[15] but the issues have not yet been revisited by the Bush administration inaugurated in January 2001.

PDD-25 specified that the United States would vote for a UN resolution deploying military forces under Chapter VII of the Charter only if there were a significant threat to peace and security. It would support the use of military forces under Chapter VI of the Charter only if a cease-fire were in place. PDD-25 directed that the United States participate in a UN operation only if it advanced US interests, if US participation was essential to the success of the operation, and if it had an identifiable end point.

Starting in the mid-1990s, Congress demanded that it be informed before the United States voted in the Security Council for the use of military forces under UN auspices. In part, this was a direct reaction to the UN operations in Somalia, particularly UNOSOM II, and in Croatia and Bosnia, particularly UNPROFOR. Congress was concerned by the changing mandates of these operations, by the danger of "mission creep," as discussed above. Since 1998, the acts authorizing State and Defense Department budgets have required that the executive branch notify Congress fifteen days before a UNSC vote on the deployment of military forces.

In Operation Allied Force, the 1999 Kosovo air war, Congress refused to give the president broader authority "to use all necessary force and other means, in concert with United States allies, to accomplish United States and North Atlantic Treaty Organization objectives in the Federal Republic of Yugoslavia (Serbia and Montenegro)."[16] The president acted on his own authority. Congress did, however, authorize the participation of US forces in IFOR, SFOR, and KFOR.

The US legal position with regard to military operations under international auspices may be summarized as follows. First, the debate about Kosovo did not affect the authority of the president as commander-in-chief, and under the UN Participation Act, to deploy a limited number of military forces. Many constitutional lawyers believe that deployment of substantial US forces would require specific congressional authorization, as evidenced by a letter signed by more than 100 law professors

[15] For discussion of Presidential Decision Directive 25 see Ivo H. Daalder, "Knowing When to Say No: The Development of US Policy for Peacekeeping" in William J. Durch (ed.), *UN Peacekeeping, American Policy and the Uncivil Wars of the 1990s* (New York, St. Martins Press, 1996), pp. 35–68.

[16] United States of America, Congress, Senate, *Congressional Record*, May 4, 1999, SJ Res. 20, p. S4611.

and submitted to the Senate at the time of the Gulf War.[17] US practice with respect to Operation Desert Storm and IFOR, SFOR, and KFOR was in accord with this view. The War Powers Resolution applies to US forces in multilateral military operations as well as to unilateral deployments, but executive/legislative disagreements over its constitutionality remain.[18]

Beyond the legal position, however, a clear thread in the American political debate has been that US military forces should be deployed only when US national interests are at stake. The question is, of course, what those interests are and who defines them. Upholding international humanitarian law has never provided a sufficient basis for either the executive or the legislative branch. In the Gulf War, protecting access to petroleum resources and thwarting classical aggression were also important.

The "struggle" between the legislature and the executive has gone on in other countries as well. In parliamentary systems, the debates and the legislative history have been less complex, since by definition the government has a legislative majority. But in all the countries in this study, there have been parliamentary discussions about the use of military forces under the auspices of international institutions. Often these discussions have ended with a resolution taking note of or approving government policy.

In Canada, India, and Norway, there was historically a strong national consensus in favor of participating in international military operations that tended to limit parliamentary debate and dissent. But this consensus began to change as international military operations became more robust and even on occasion departed from the honorable and humanitarian political culture of peacekeeping. For Canada, India, and Norway, traditional UN peacekeeping had been consistent with the national interest, shaped by such factors as political culture (Norway) and leadership (Pearson in Canada, Nehru in India), described in chapter 3 by Karen Mingst. Media and public reaction to international military operations have played an important role in questioning a country's extended involvement in operations that lack clear purposes. This was evident in the debates in Canada and Norway on their participation in Operation Allied Force.

In general, legislatures have become more interested in UN military operations as the number of these operations has increased and as national

[17] See letter signed by 127 law professors that Senator Edward Kennedy introduced during the Persian Gulf debate. United States of America, Congress, *Congressional Record*, January 3, 1991, p. 13.

[18] Michael J. Glennon, "The War Powers Resolution Ten Years Later: More Politics Than Law" (1984) 78 *American Journal of International Law* 571–81.

military establishments have been reduced after the end of the Cold War and in response to budgetary pressures. There has been an increase in the demand for military forces to serve under international auspices and a decrease in the forces available for such service. This contradiction has heightened legislative concern.

In Japan, Germany, and Russia, policy changes adopted in the 1990s allowed them to participate in UN military operations, but legislative approval is required in all three countries for the deployment of troops.[19] The German Constitutional Court concluded that deployments outside the NATO area are permissible as long as they receive specific "constitutive approval" from the *Bundestag* for each deployment. This carefully crafted formula enabled all political parties in Germany to accept the overall concept of overseas deployment of German forces by assuring them that they would all have a voice in the decision to deploy before any commitment is made.

While enhancing domestic democratic accountability, the practices that have evolved and the legislation adopted in many countries have hollowed out the automatic commitment to use military forces for collective action envisaged in the doctrine of collective security. Nevertheless, in legislative debates in the United States, the United Kingdom, France, Canada, and Norway, the question of whether the UN had authorized a military operation was an important one. For many legislators, UN authorization was essential for them to consent to the use of national military forces.

Some states have specified conditions under which they will commit their military forces to an international operation. The Japanese Peacekeeping Law establishes the most stringent conditions. The SDF may only be deployed if a cease-fire has been established and if the host country gives its consent. In addition, SDF rules of engagement permit the use of deadly force only in response to direct attacks upon Japanese peacekeepers. They may not use deadly force to defend the forces of another country. In effect, the Japanese Peacekeeping Law precludes the deployment of the SDF in enforcement and compliance operations.

Table 15.4 shows conditions under which the nine countries in this study will allow their military forces to be deployed in international operations.

As of July 1, 2000, eighty-eight countries, including all those involved in this study, except Japan, had indicated a willingness to participate in standby arrangements with the UN. Sixty-six of these eighty-eight, again

[19] Law Concerning Cooperation in UN Peacekeeping and Other Operations, Law No. 79 (June 19, 1992), 1011 Juriusto 33 (1992). For an unofficial English translation from the Japanese, see (1993) 32 ILM 215. Federal Republic of Germany, Federal Constitutional Court, *International Military Operations (German Participation) Case* (Case Nos. 2BvE3/92, 5/93, 7/93 and 8/93) in (1997) 106 *International Law Reports*.

Table 15.4. *Conditions under which countries are willing to allow their military forces to be deployed in international operations*

	Conditions			
State	Cease-fire in place	Host country approval granted	Other	Rules of engagement limited to self-defense
Canada	No	No	No	No
France	No	No	No	No
Germany	No	Yes	No	No
India	No	Yes	No	No
Japan	Yes	Yes	No	Yes
Norway	No	No	No	No
Russian Federation	No	No	No	No
United Kingdom	No	No	No	No
United States	No	No	Yes	No

including all the states in this study but Japan, have provided information about the types of military forces and equipment they can make available. The United Kingdom and Germany are among the thirty-three states that have signed memoranda of understanding with the UN. Standby arrangements are for planning purposes; they do not involve an automatic commitment to provide forces if the UN requests them. The national government decides case by case whether to deploy its forces.

Decisions about the use of military forces in international operations have been shaped by national constitutions and traditions. Legislative approval when the governing party controls a parliamentary majority may be pro forma, but it is an important instrument for gaining popular legitimacy and support. Traditionally, the executive has had considerable freedom to use military forces, particularly in parliamentary systems. The separation of powers in the US Constitution gives the Congress a role different than that of other countries' legislatures, but it has not put much of a brake on executive freedom of action.

In chapter 3, Karen Mingst pointed out that democratic accountability is more nuanced than it may appear through formal legal or constitutional structures. It includes indirect accountability through the political culture.[20] The question is whether both forms of accountability can operate effectively when a country's military forces are used under the auspices of international institutions. How do the national and international processes fit together? Do national decisions to use military forces under the auspices of the UN and NATO meet tenets of democratic accountability?

[20] See Karen Mingst, above, chapter 3.

Several things are clear. Five of the nine countries – France, India, Russia, the United Kingdom and the United States – have used their military forces unilaterally since the Second World War. In terms of democratic accountability, in the long-standing democracies, decisions to deploy military forces unilaterally or collectively have been taken by roughly the same procedures. (The use of military force by Russia is governed by quite different procedures than was the USSR's, given the historically dominant decision-making role of the Communist Party in the Soviet Union.) For France, the UK, and the US, two crucial tests of democratic accountability were the Gulf War and Kosovo. The nearly six months between the Desert Shield deployment and the start of Operation Desert Storm, in the one case, and the NATO Activation Order and the first air strikes, in the other, allowed ample time to create what Dahl terms "enlightened public understanding."

UNPROFOR (Bosnia), UNOSOM II (Somalia), and UNOMUR (Rwanda) were different. There was very little public awareness and debate with respect to these operations. In part, this was due to the lack of transparency of Security Council proceedings. In February 1994, the Council rebuffed and quietly buried Belgium's request to strengthen UNOMUR.[21] In these cases, national and international procedures did not fit together in ways that facilitated democratic accountability and an effective international response. Given the nature of international institutions, Dahl's criteria of effective participation, voting equality, control of the agenda, and inclusion of adults can only be met at the national level.

Participation in enforcement or compliance operations is unlikely to be as automatic as the doctrine of collective security envisioned. Their risk means that individual states or coalitions of the willing want to retain control of them, as they did in twenty-three of the cases examined in this study. The Security Council authorized twenty-two of them; the North Atlantic Council authorized one, Operation Allied Force. Both enforcement actions, in Korea and the Gulf, and nineteen of twenty-four (83 percent) compliance operations were carried out by coalitions of the willing. Several of the missions in the former Yugoslavia and the UN-authorized Multinational Force in East Timor were organized on a regional, rather than a universal, basis. When more robust military action is required, states have generally been unwilling to put their military forces under UN command.

Four compliance operations were under UN command: the United Nations Operation in the Congo, the United Nations Protection Force,

[21] Alan J. Kuperman, *The Limits of Humanitarian Intervention: Genocide in Rwanda*, (Washington, DC, Brookings, 2001), p. 110.

the United Nations Operation in Somalia II, and the United Nations Transitional Administration in East Timor. Three of these, ONUC, UNPROFOR and UNOSOM II, became controversial because the nature of the mission was changed by the Security Council without public or national legislative debate. France and the Soviet Union developed strong objections to ONUC's mission and refused to pay the amount that they had been assessed to fund its operations. This created a financial crisis for the UN and led to an Advisory Opinion on Certain Expenses of the United Nations from the International Court of Justice.[22]

This may have been a factor leading the UN to delegate the more robust military operations to individual states or coalitions of states that are responsible for funding them. The conclusion that the United Nations generally cannot and should not command robust military actions has gained a considerable measure of acceptance. The Panel on United Nations Peace Operations put in succinctly in its report:

> The Panel recognizes that the United Nations does not wage war. When enforcement action is required, it has consistently been entrusted to coalitions of willing States, with the authorization of the Security Council acting under Chapter VII of the Charter.[23]

The United States is the only UN member with the global reach to sustain the most robust enforcement actions, but the United States also has one of the most complicated political cultures and constitutional structures for committing its armed forces to international operations, and its reliance on high-technology weaponry makes its war fighting expensive. Thus, the tension between the US and the UN that broke through the surface so frequently during the 1990s is likely to be a continuing issue. National and international democratic accountability is a key factor in this tension, since the US Congress, concerned with "mission creep," has threatened not to fund executive branch commitments to deploy US forces under UN auspices.

Civilian control, civilian responsibility, military responsibility

Civilian control, civilian responsibility to the military, and military responsibility to act in accordance with international norms are essential features of democratic systems of government even though many non-democratic governments may also feature civilian control. These issues

[22] International Court of Justice, Advisory Opinion on Certain Expenses of the United Nations, July 20, 1962.

[23] UN Doc. A/55/305, SC/2000/809, "Report of the Panel on United Nations Peace Operations" (August 21, 2000), p. 10, para. 53.

further occur in international operations. They have been dealt with on an ad hoc basis, but there is a need for operational accountability comprised of new international standards and practices related to the conduct of operations using military forces.[24]

Civilian control The UN has commanded fifty-five military operations – all of the monitoring and observation, traditional peacekeeping, and peacekeeping plus state-building operations, and four of the use of force to ensure compliance operations. In those cases, military commanders appointed by the UN Secretary-General reported to him and through him to the Security Council. In the other twenty-two operations when military forces were used under the auspices of international institutions, clear national or regional chains of command existed, although there was sometimes a conflict between the two. The dispute between the Supreme Allied Commander, Europe (SACEUR) and one of his UK subordinate commanders over Pristina airport, as KFOR deployed in 1999, reflected the tension between NATO and national chains of command. In both enforcement actions (the Korean War and the Gulf War), a US-led coalition operated under a broad authorization given by the Security Council, but military forces reported to their own civilian authorities.

The situation, however, is more complicated than this description. Both a special representative of the Secretary-General and a military force commander typically lead UN missions. Depending on the mission, there may also be other high-ranking officials, such as a police commissioner and heads of substantive and administrative components. The relationship among these officials has not always been clearly specified or harmonious. In the former Yugoslavia in 1994–5, UNPROFOR operated on the ground while NATO conducted air strikes under Operation Deny Flight and Operation Deliberate Force. Both the UN and NATO had to agree to the air strikes. In 1993 the United States dispatched Delta Force commandos, army rangers, and a helicopter detachment to Mogadishu to act in support of UNOSOM II. These forces operated under separate US command.[25] Indian and British leaders disagreed about operational control in Sierra Leone in 2000. Such disputes make the conduct of military operations extremely difficult.

Although the nine states involved in this study have been willing to place their military forces under the operational control of an international

[24] See also John Hillen, *Blue Helmets: The Strategy of UN Military Operations* (Washington, DC, Brassey's, 2000).

[25] John L. Hirsch and Robert B. Oakley, *Somalia and Operation Restore Hope: Reflections on Peacemaking and Peacekeeping* (Washington, DC, United States Institute of Peace Press, 1995), p. 122.

institution, they have never given up command of their forces. In addition to reporting through an international chain of command, commanders of national contingents have maintained regular contact with their own national authorities. It is highly unlikely that these commanders have ever followed an order given in the international chain of command to which their national authorities have not at least acquiesced. There are indications that certain operations were modified or never conducted because national contingents operating on the instructions of their national authorities would not participate. In one explicit illustration of this issue, Japanese Self-Defense Forces are forbidden to follow an order of an international commander that would have them use deadly force other than for their own self-defense.

Both international and national institutions have taken steps to maintain civilian control. During the Korean War, it was President Truman who dismissed General MacArthur, not the UN Secretary-General or Security Council. Targets in Operation Allied Force were chosen by civilian authorities of the participating NATO allies. A plan to interdict oil bound for Yugoslavia advocated by SACEUR was put on hold because of civilian concerns as to its legality.[26]

Civilian control has been maintained in military operations conducted under the auspices of international institutions, but the dual national–international system complicates military operations and can inhibit military effectiveness. Although combined operations have always raised such issues, notably in General Eisenhower's experience as commander of the Allied Expeditionary Force in the Second World War, the sporadic nature of today's operations may not provide a broad and continuous base of operational experience on which to build and modify command relationships. NATO is perhaps the most advanced organization in this regard, but it was still not able to avoid the Pristina airport dispute during its KFOR deployment.

Another issue arose during Operation Allied Force. United States forces conducted more than four-fifths of the sorties, yet initially all members of NATO and its Secretary General were involved in target selection. As Michael Glennon discussed in chapter 14, this led to disquiet in the US Congress. Several members felt that when US forces were bearing such a large share of the risks, other countries should not have a voice in operational decisions.

When national authorities are in charge of implementing UN mandates, their interpretation of the authorizing mandate becomes a key

[26] See Frederic L. Kirgis, "NATO Interdiction of Oil Tankers Bound for Yugoslavia" (1999) ASIL *Insight* (http://www.asil.org/insigh33.htm) and Phillippe Sands, "Oil Blockage Threatens International Law of the Sea" (1999) ASIL *Insight* (http://www.asil.org/insigh34.htm).

issue. The United States and the United Kingdom argue that in using military force against Iraq to enforce a no-fly zone they are operating within the framework of UN Security Council resolutions, a position that other countries contest.[27] When the UN asks individual states or coalitions of states to undertake military actions, reporting arrangements are generally extremely loose and the UN's ability to influence implementation limited.

Civilian responsibility Only national mechanisms exist to ensure that civilians who decide to deploy military personnel do not subject the personnel to unnecessary risks. There are no mechanisms within the UN or NATO to call officials to account for irresponsibility in this area – although the fact that the NATO International Staff is largely made up of civil servants seconded from their home bureaucracies means that they may eventually be held accountable at the national level. When UNPROFOR was given the mandate to protect "safe areas" in Bosnia, but the UN Security Council and the Department of Peacekeeping Operations did not provide sufficient personnel and equipment to carry out the mission, there were cries that someone should be held accountable. As yet, though, there is no such accountability within the UN, and establishing responsibility in the way that it is established in democracies proved impossible.[28]

The UN Security Council is deficient as a responsible civilian authority in several respects. First, it can easily ignore military advice. Secondly, even when it pays attention to military advice, it does not always have reliable information about the military implications and consequences of its decisions. To the extent that the Security Council has information, it is almost always provided voluntarily by member states and may not be adequate or timely for informed decision-making. Thirdly, the Council has no way to command the financial and military resources required to carry out its mandate.

The "Report of the Panel on United Nations Peace Operations" stated that the secretariat did not always provide the Security Council with realistic assessments of the risks involved in peace operations.[29] The

[27] For a description of the legal positions, see Frederic L. Kirgis, "The Legal Background on the Use of Force to Induce Iraq to Comply with Security Council Resolutions" (1997) ASIL *Insight* (http://www.asil.org/insigh12.htm).

[28] See "Report of the Secretary-General pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica (1998)," A/54/549 (November 15, 1999). See also UN Doc. A/55/305, SC/2000/809, "Report of the Panel on United Nations Peace Operations" (August 21, 2000).

[29] See also UN Doc. A/55/305, SC/2000/809, "Report of the Panel on United Nations Peace Operations" (August 21, 2000), pp. 9–10.

panel warned the secretariat not to base planning on best-case scenarios. UNPROFOR's failure to prevent the tragedy at Srebrenica appears to have been attributable to these flaws.[30] The special report on Srebrenica concluded:

> Peacekeepers must never again be told that they must use their peacekeeping tools – lightly armed soldiers in scattered positions – to impose the ill-defined wishes of the international community on one or another of the belligerents by military means. If the necessary resources are not provided – and the necessary political, military and moral judgements are not made – the job simply cannot be done.[31]

When military forces operating under the auspices of the UN are put in situations of high risk because they do not have adequate military equipment, a clear mandate, or other support, resolving operational issues and affixing responsibility becomes difficult, if not impossible. National and international officials can easily engage in blame shifting. As one UN official put it in private conversation, the UN is a system designed to obscure responsibility. The lack of transparency complicates the efforts of the media and non-governmental organizations to ensure some measure of democratic accountability.

Military responsibility In chapter 5, Robert Siekmann identified three bodies of law as bases for responsibility and accountability for military personnel:

- The local law of the area of operations – that is, the national law of the receiving or host state.
- The law of the intergovernmental organization under the auspices of which the personnel operate. UN law is of particular relevance. There are two bodies of UN law – general and specific. The best examples of general legislation are the UN Convention on the Safety of United Nations and Associated Personnel (adopted in 1994 in response to the killing of Belgian soldiers in Rwanda), which makes attacks on UN personnel criminal offences that all states have a duty to punish,[32] and the UN Model status-of-forces agreement for peacekeeping operations.[33] Specific law includes rules and guidelines adopted for

[30] See UN Doc. A/54/549, "The Fall of Srebrenica." [31] See *ibid.*, p. 20.

[32] The Convention of December 4, 1994 is reprinted in (1995) 34 ILM 482; see also: Robert Siekmann, "The Convention on the Safety of United Nations and Associated Personnel: Its Scope of Application" in E. Denters and N. Schrijver (eds.), *Reflections on International Law from the Low Countries – In Honour of Paul de Waart* (The Hague, Boston, and London, Kluwer Law International, 1998), pp. 315–23, and the literature mentioned there in note 1.

[33] UN Doc. A/45/594.

each operation, including its mandate, terms of reference, and rules of engagement.

- The law of the sending or participating state (troop-contributing state) is relevant as the domestic, municipal law of the personnel. National institutions have been important in ensuring that military personnel conduct themselves in accordance with established norms. Since states do not give up command of their forces, they are ultimately responsible for their conduct. There were major national inquiries into the conduct of Dutch forces in Srebrenica and Canadian forces in Somalia. Following the release of a government-commissioned inquiry into the actions of the Dutch soldiers at Srebrenica, the Dutch government resigned in April 2002 as a step towards accepting responsibility. Canadian military personnel were prosecuted under Canadian military law. Beyond these national controls, there are embryonic international controls developing through international tribunals.

Prior to 1999, efforts to develop rules of conduct for military personnel operating under UN command assumed that personnel would be engaged in monitoring and observation or traditional peacekeeping missions. Since the only legitimate use of force would be for self-defense, such rules have not been useful when force has been used in compliance operations. The situation for forces under UN command with respect to the applicability of established international norms and laws of war in actions to ensure compliance and enforcement was unclear. In 1999, the UN Secretary-General declared that, henceforth, "general conventions applicable to the conduct of military personnel" would bind military forces operating under UN commands, but that this did not "replace the national laws by which military personnel remain bound throughout the operation."[34]

International tribunals, where they exist, could provide a measure of international accountability for decisions made and actions taken by individuals in military operations, and supplement national systems of investigation and prosecution for violations of humanitarian law if national systems fail to act. The International Tribunals for the Former Yugoslavia and for Rwanda have jurisdiction over all military forces operating in the respective areas, and the International Criminal Court's jurisdiction would include military forces operating under the auspices of international institutions. As of 2000, no international tribunal had indicted military personnel operating under a UN or NATO mandate.[35]

[34] UN/ST/SGB/1999/13.

[35] See International Criminal Tribunal for the Former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia (June 2000) (http://www.un.org/icty/pressreal/nato061300.htm).

The responsibility to ensure that military forces operating under the auspices of international institutions conduct themselves in accord with national and international legal requirements thus rests primarily with national authorities, though this may change. Table 15.5 shows the obligations with respect to humanitarian law that the nine states in this study have accepted.

An evolving mixed system

Table 15.6 summarizes the ways in which the international community and the nine countries analyzed in this study have attempted to deal with questions of democratic accountability when using military forces under the auspices of international institutions.

The first and second columns show how issues of international and national authorization have been dealt with in the seventy-seven uses of such forces from 1946 through 2000. The two columns depict a mixed, interlocking system. There are important differences in the nine countries' attitudes, policies, and practices. During the second half of the twentieth century in the democracies, international authorization gained growing acceptance as a condition for using military forces. Whether the United Nations Security Council was the only body that could legitimately give this authorization was, however, contested.

International authorization, in any case, was never sufficient; national authorization was also always required. Increasingly, legislative bodies became involved in national authorization procedures, and the more robust the operation, the more likely it was that legislatures would play a role. The more robust the operation, the more important media and public opinion became.

The remaining three columns show whether issues of civilian control, civilian responsibility, and military responsibility to comply with norms are dealt with at a national or international level or through a combination of the two. It is striking that only civilian responsibility remains exclusively national. International mechanisms to deal with military responsibility to comply with norms were introduced only in the 1990s.

Table 15.6 confirms the hypothesis that the greater the risks associated with military actions, the vaguer the immediate interests of the states providing military forces, and the greater the ambiguity of the legal basis for action, the greater the attention that will be paid to issues of democratic accountability at the national level. This is particularly true when international institutions themselves are not regarded as providing adequate opportunity for debate and democratic decision-making.

Table 15.6 presents a static picture; it does not show levels of satisfaction with existing arrangements or the dynamic forces at work that may

Table 15.5. *Acceptance of norms regarding military operations*

State	International norms				
	UNESCO Convention on the Protection of Cultural Property in the Event of Armed Conflict 1954	Geneva Conventions of 1949	Protocols to the Geneva Convention 1977		Statute for the International Criminal Court 1999
			I	II	
Canada	P	P	P	P	S/R
France	P	P	—	P	S/R
Germany	P	P	P	P	S/R
India	P	P	—	—	—
Japan	P	P	—	—	—
Norway	P	P	P	P	S/R
Russian Federation	P	P	P	P	S
United Kingdom	—	P	P	P	S/R
United States	—	P	—	—	S

As of April 11, 2002.
S: Signed
P: Party
R: Ratified

Table 15.6. *Uses of military forces and forms of authorization and responsibility*

	Forms of authorization and responsibility				
Forms of uses of military forces	International authorization	National authorization	Civilian control	Civilian responsibility to military	Responsibility to comply with norms
Monitoring and observation	UN Security Council	Executive (and legislature: Germany, Japan, and Russia)	Mixed international and national	National	Mixed international and national
Traditional peacekeeping	UN Security Council and General Assembly (France and Russia: UNSC only)	Executive (and legislature: Germany Japan, and Russia)	Mixed international and national	National	Mixed international and national
Peacekeeping plus state-building	UN Security Council and General Assembly (France and Russia: UNSC only)	Executive (and legislature: Germany, Japan, and Russia)	Mixed international and national	National	Mixed international and national
Force to ensure compliance	UN Security Council and NATO Council (India and Russia: UNSC only)	Executive (and legislature: Germany, Japan, and Russia) and public opinion	Mixed international and national	National	Mixed international and national
Enforcement	UN Security Council	Executive, legislature, and public opinion	Primarily national	National	Mixed international and national

alter these arrangements. It can be used as a basis for making judgments about the extent to which existing practices meet tenets of democratic accountability, but it does not in itself constitute a judgment. In the mid-1990s, as UNPROFOR and UNOSOM II encountered difficulties and the UN failed to act in Rwanda, there was considerable dissatisfaction with both the efficiency and effectiveness of UN operations and the extent to which tenets of democratic accountability were (not) met. This dissatisfaction led to changes in procedures and to three UN reports that recommended further changes.[36] The system described in this book is in evolution.

Key participants in this system, particularly the UN Secretary-General, are pragmatic. They want to develop procedures that can accomplish the goals that the international community seeks to achieve. They know that those procedures will have to respect tenets of democratic accountability if they are to have the support that they require.

The procedures in place in 2001 were not perfect in this respect. There was no consensus on a key issue of the rule of law – whether or not only the UN Security Council can legitimately authorize the use of military forces. The international legal bases for intervening in states to prevent genocide or protect human rights were not clearly developed. The composition of the Security Council and its opaque procedures complicated meeting tenets of democratic accountability at both international and national levels. Instruments for maintaining civilian control were in place, but cumbersome. Ensuring the accountability of international officials who make decisions regarding the use of military forces was problematic. Clearly, there is work to be done.

Constructing a new order for maintaining democratic accountability while using military forces under international auspices

Multiple shifts took place in established practices and assumptions of international relations in the last decade of the twentieth century:

- International institutions gained authority to authorize the use of military forces, although the principal institutions for ensuring democratic accountability were domestic (elected executives, legislatures, media, and public opinion).
- The purposes for which military forces are used expanded to include, in addition to thwarting cross-border aggression and maintaining the

[36] See UN Doc. A/54/549, "The Fall of Srebrenica"; "Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda," copy on file with the author; UN Doc. A/55/305, S/2000/809, "Report of the Panel on United Nations Peace Operations."

territorial integrity of existing states, the protection of individuals against gross violations of their human rights.

- The status of the individual in international law changed. Individuals increasingly could invoke their right to protection of the international community through international institutions. Individuals also became increasingly responsible to the international community for their own actions and accountable for them through institutions such as international tribunals.
- The role of the military changed as the Cold War ended and as the nine countries included in this study reduced their military expenditures. These factors led to efforts to redefine the role of the military in a world without the superpower rivalry.

These shifts have taken place within a legal and institutional framework that is guided by classical principles of territorial integrity as the focus for the collective use of military forces and in which only national-level institutions meet criteria of democratic accountability. Adapting to and channeling these changes in the international system in a way that ensures democratic accountability is a particularly important challenge for democracies in constructing the world order of the new century.

The international community has become considerably more sophisticated about using military forces under international institutions than it was when Woodrow Wilson and others first sought to give effect to the doctrine of collective security in the early years of the twentieth century. Practice has demonstrated that there is a range of ways in which military forces can be used under international institutions, from monitoring and observation through enforcement. The doctrine of collective self-defense was developed as a supplement to collective security.

In the closing years of the twentieth century, states began to struggle with the question of using military forces to ensure the physical safety of populations within states and the protection of their human rights. In several cases states decided that military forces could be deployed to pacify intra-state as well as inter-state conflicts, thus crossing the barrier of territorial sovereignty. But this issue is far from settled, and it involves much more than defining the national interests of democracies. There is deep disquiet about possible interference in their internal affairs among members of the Non-Aligned Movement. The work of the International Commission on Intervention and State Sovereignty may help the process of establishing a consensus on guidelines that will ease the controversy.

States have also taken steps to expand the idea of democratic accountability beyond the relatively simplistic notions that were involved in the stylized theory of collective security. Accountability was assumed to flow

from acceptance of an international agreement that set out the conditions and circumstances for action and specified possible responses. Acceptance of these obligations, it was assumed, meant that all domestic political considerations had been adequately addressed. The experience of the past fifty years demonstrates that they were not. The more sophisticated and complicated forms of using military forces under international auspices require the parallel development of domestic acceptance and practice. This process in turn contributes to shaping both the practice and scope of international action.

This process is not new. Such domestic debates have occurred throughout the development of an international framework for using force. The failure of the League of Nations to be a successful guardian of the peace compelled political leaders in the United States, the United Kingdom, France, and other states to seek actively through political consensus the acceptance of the UN Charter's collective security obligations, and later of the North Atlantic Treaty. Debates about fulfilling Article 43 obligations, and then the Korean and Gulf Wars, tested and reshaped this consensus. The deployment of military forces for monitoring and observation and traditional peacekeeping tasks was broadly accepted during the Cold War. As the UN and NATO have since undertaken more complex, more risky, and more costly interventionist operations that do not always have the consent of the receiving state, the consensus has been tested and reshaped again. The debate about a change in how a country's military forces are used, and about the national interest in such deployments, is perhaps itself a sign of vibrant democratic accountability.

Many of the most important steps to amplify the structures and procedures for using military forces under international institutions were taken in the 1990s, the first decade after the end of the Cold War. These institutional steps were frequently taken ad hoc and in response to acute crises, unlike the institution-building that followed the First and Second World Wars. Then, national leaders drew on an immense store of specially prepared intellectual capital on the future of the international system that had been debated and digested.[37] NATO's Operation Allied Force triggered debate about its implications for the international system, but only after the NAC had authorized the use of force and the operation was completed.

[37] The accumulation of intellectual capital began even before the Westphalian system was fully in place. See especially John Sylvester Hemleben, *Plans for World Peace Through Six Centuries* (Chicago, University of Chicago Press, 1943) and Elizabeth V. Souleyman, *The Vision of World Peace in Seventeenth and Eighteenth Century France* (New York, NY, Putnam, 1941).

The democratic and capitalist states that triumphed in the Cold War did not have a clear vision about the international institutions necessary to a new global order. Although the end of four decades of Cold War, and of economic and social change and technological development, would seem to have warranted a reconsideration of the roles and purposes of international institutions, including the system to ensure peace and security, this did not happen. Leaders and commentators alike assumed that the institutional vision of the end of the Second World War, "Big 5" cooperation in the Security Council to safeguard the territorial integrity and political independence of states, could simply be reactivated. Many seemed to regard the Cold War as a temporary delay in implementing fully the post-Second World War security system that Roosevelt had envisioned. But the character of issues that required international attention had changed in the decades after the Second World War. The absence of any concerted post-Cold War planning and setting of goals created a vacuum of direction, public awareness, and interest in the institutions and tasks that will be required to deal with world-order problems in the twenty-first century.

The structure and procedures set up in 1945 to use military forces under international auspices were designed to control a particular use of force and to respond when a violation occurred. Many of the problems of the twenty-first century are likely to involve conflict within states and thus may go beyond the bounds of the existing legal framework. The nine democracies whose experience is analyzed in this study have evolved ways of protecting democratic accountability through domestic legal and political systems when military forces are used under the auspices of international institutions. However, as expectations change about how and where military forces will be used, there are increasing expectations of democratic accountability at the international level, as well. The character of decision-making in many international organizations erodes the legitimacy of their decisions, particularly when they go beyond accepted practice and law.

International institutions are seeking to act in the name of human rights and self-determination – two cornerstones of democracy. To refute Dahl's skepticism about making international decisions and actions democratically accountable will require innovations that transform preference to policy without sacrificing effectiveness for legitimacy.[38] Democratic systems have accomplished that domestically; they now face the same challenge at the international level.

[38] Takashi Inoguchi, Edward Newman, and John Keane, "Introduction: The Changing Nature of Democracy" in Takashi Inoguchi, Edward Newman, and John Keane (eds.), *The Changing Nature of Democracy* (Tokyo, United Nations University Press, 1998), p. 4.

There are responses to Dahl. While international institutions have gained authority over, if not a monopoly on, the use of military forces, the decision actually to deploy forces has been held at the national level, where established mechanisms for democratic accountability exist. Informed public debate did occur in the 1990s about the most robust uses of military forces, Operation Desert Storm and Operation Allied Force. But procedures at the international level did not always fit well with procedures at the national level, UNPROFOR, UNOSOM, and UNAMUR being the most egregious cases. Dahl's skepticism cannot be dismissed, but given the innovations required by these international operations, one should perhaps not be too hasty to judge the adequacy of these first efforts as an indicator of the long term. The international use of military forces is a work in progress.

Some commentators have suggested that the ideal solution would be the creation of a global parliament with broad oversight authority.[39] We do not see this as a likely step. We do not see how democratic elections for a global parliament could be organized in non-democratic states. And we share Dahl's skepticism that the public's interest would be seriously engaged in such international elections. Other proposals would give special authority to institutions that group democracies together.[40] As a practical matter, the only organization with robust military capabilities and comprised of democracies is NATO. (The future of the European Union's Common Security and Defense Policy remains to be seen.) The criticism of Operation Allied Force by non-NATO members foretells the difficulties in giving NATO broad enforcement responsibilities. The only feasible route that we see is incremental change in existing institutions, improving the UN, and enhancing the congruence between UN procedures and those at the national level.[41]

States developed behavioral habits in the course of the twentieth century that make a return to previous practices unlikely. One is the habit of multilateral consultation, seeking multilateral support for and participation in any use of force. Increasingly, even the most powerful states are hesitant to use military forces without some international authorization, at a minimum requiring consultation and some multilateral consensus. Protracted consensus-building may not provide for a speedy response,

[39] Richard Falk and Andrew Strauss, "Toward a Global Parliament" (2001) 80(1) *Foreign Affairs* 212–20.

[40] John Rawls, *The Law of Peoples* (Cambridge, MA, Harvard University Press, 1999).

[41] Other commentators have reached a similar conclusion. See Robert O. Keohane, "Governance in a Partially Globalized World: Presidential Address, American Political Science Association" (2001) 95(1) *American Political Science Review* 1–13 and Joseph S. Nye, Jr., "Globalization's Democratic Deficit" (2001) 80 *Foreign Affairs* 4.

but it allows time to consider a measured response, to consult national parliaments, and to initiate public debate. It provides a measure of protection against abuse by any one militarily powerful state.[42] Citizens of democracies are slowly coming to accept that their countries may have a national interest in using military force not only to defend the territorial integrity of other states, but also to prevent gross abuses of human rights within national borders. Popular acceptance of this concept of national interest is the ultimate basis in democracies for the collective use of military forces.

Until there is a consensus on legitimate grounds for intervention and procedures for making such decisions, the international system's problem will remain one of avoiding the alternatives of "ad hoc opportunism" by strong military powers or inaction:[43] the one recalls the weakness of the pre-1914 international system, the other the weakness of the League of Nations in the 1919–39 inter-war years. International law shapes the question of whether force can and should be used by making clear what present treaty and customary law permits. In the future, as in the past, international law and its application will grow out of states' experience. That experience now includes more than fifty years of an evolving political process designed to make the use of force democratically accountable at both the national and international levels.

[42] See, for example, conclusion of Leonard Meeker, former legal adviser of the US Department of State, that "While the assertion of an international-law right to intervene to stop genocide would not have the backing of a competent United Nations body, it would signify, being made by NATO, that the air war was not being prosecuted on the decision of the United States alone, but with the concurrence of all 19 members of NATO. This would give the claim some multilateral character, however incomplete": unpublished remarks, LAWS group, April 29, 1999.

[43] Michael J. Glennon, "Sovereignty and Community after Haiti: Rethinking the Collective Use of Force" (1995) 89(1) *American Journal of International Law* 70–4 at 74.

Appendix A

Table A.1. *Uses of military forces under the auspices of the United Nations and NATO*

	Mission acronym or name	Location	Start date	Initial international authorization (* indicates where authorization contested)	Chapter VII mentioned in resolution	Command	Form of use of military forces (** indicates form or purpose changed during mission)
1	United Nations Truce Supervision Organization (UNTSO)	Egypt, Israel, Jordan, Lebanon, Syria	1948	UNSC 50	Yes	UN	M&O
2	United Nations Military Observer Group in India and Pakistan (UNMOGIP)	India, Pakistan	1949	UNSC 47	No	UN	M&O
3	Korean War	Korea	1950	UNSC 83 & 84	No	USA: Coalition of willing states	** Enforcement[1]
4	First United Nations Emergency Force (UNEF I)	Egypt	1956	UNGA 1000 (ES-I)	No	UN	Peacekeeping
5	United Nations Observer Group in Lebanon (UNOGIL)	Lebanon	1958	UNSC 128	No	UN	M&O

6	United Nations Operation in the Congo (UNOC or ONUC)	Congo	1960	UNSC 143	No	UN	** Force to ensure[2]
7	United Nations Security Force in West New Guinea (West Irian) (UNSF)	West New Guinea (West Irian)	1962	UNGA 1752	No	UN	PK plus
8	United Nations Yemen Observation Mission (UNYOM)	Yemen	1963	UNSC 179	No	UN	M&O
9	United Nations Peacekeeping Force in Cyprus (UNFICYP)	Cyprus	1964	UNSC 186	No	UN	Peacekeeping
10	Mission of the Representative of the Secretary-General in the Dominican Republic (DOMREP)	Dominican Republic	1965	UNSC 203	No		M&O
11	United Nations India–Pakistan Observation Mission (UNIPOM)	India, Pakistan	1965	UNSC 211	No	UN	M&O
12	Southern Rhodesia	Southern Rhodesia (Zimbabwe)	1966	UNSC 221	* No[3]	UK	Force to ensure
13	Second United Nations Emergency Force (UNEF II)	Suez Canal, Sinai	1973	UNSC 340	No	UN	Peacekeeping
14	United Nations Disengagement Observer Force (UNDOF)	Syria	1974	UNSC 350	No	UN	Peacekeeping

Table A.1. (*cont.*)

	Mission acronym or name	Location	Start date	Initial international authorization (* indicates where authorization contested)	Chapter VII mentioned in resolution	Command	Form of use of military forces (** indicates form or purpose changed during mission)
15	United Nations Interim Force in Lebanon (UNIFIL)	Lebanon	1978	UNSC 425	No	UN	Peacekeeping
16	United Nations Iran–Iraq Military Observer Group (UNIIMOG)	Iran, Iraq	1988	UNSC 619	No	UN	M&O
17	United Nations Good Offices Mission in Afghanistan and Pakistan (UNGOMAP)	Afghanistan, Pakistan	1988	UNSC 622	No	UN	M&O
18	United Nations Angola Verification Mission I (UNAVEM I)	Angola	1988	UNSC 626	No	UN	M&O
19	United Nations Observer Group in Central America (ONUCA)	Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua	1989	UNSC 644	No	UN	PK plus
20	United Nations Transition Assistance Group (UNTAG)	Namibia, Angola	1989	UNSC 632	No	UN	PK plus

21	Naval interdiction enforcement of economic sanctions of UNSC 661	Persian Gulf	1990	UNSC 665	Yes	Coalition of willing states	Force to ensure
22	Gulf War – Operation Desert Storm	Kuwait, Iraq	1990	UNSC 678	Yes	USA: Coalition of willing states	Enforcement
23	United Nations Iraq–Kuwait Observation Mission (UNIKOM)	Iraq, Kuwait	1991	UNSC 687	Yes	UN	Peacekeeping
24	Safe havens for Iraqi civilian population – Operation Provide Comfort	Iraq	1991	* UNSC 688[4]	No	Coalition of willing states	Force to ensure
25	United Nations Mission for the Referendum in Western Sahara (MINURSO)	Western Sahara	1991	UNSC 690	No	UN	PK plus
26	United Nations Observer Mission in El Salvador (ONUSAL)	El Salvador	1991	UNSC 693	No	UN	PK plus
27	United Nations Angola Verification Mission II (UNAVEM II)	Angola	1991	UNSC 696	No	UN	PK plus
28	United Nations Advance Mission in Cambodia (UNAMIC)	Cambodia	1991	UNSC 717	No	UN	PK plus

Table A.1. (*cont.*)

	Mission acronym or name	Location	Start date	Initial international authorization (* indicates where authorization contested)	Chapter VII mentioned in resolution	Command	Form of use of military forces (** indicates form or purpose changed during mission)
29	United Nations Protection Force (UNPROFOR)	Bosnia and Herzegovina, Croatia, Yugoslavia, Macedonia	1992	UNSC 743	No	UN	** Force to ensure[5]
30	United Nations Transitional Authority in Cambodia (UNTAC)	Cambodia	1992	UNSC 745	No	UN	PK plus
31	United Nations Operation in Somalia I (UNOSOM I)	Somalia	1992	UNSC 751	No	UN	PK plus
32	Protection of deliveries of humanitarian assistance	Bosnia and Herzegovina	1992	UNSC 770	Yes	NATO	Force to ensure
33	Operation Sharp Guard (Enforcement of economic sanctions of UNSC 713 & 757)	Adriatic Sea	1992	UNSC 787	Yes	NATO	Force to ensure
34	Unified Task Force (UNITAF – Operation Restore Hope)	Somalia	1992	UNSC 794	Yes	USA: Coalition of willing states	Force to ensure

35	UN Operation in Mozambique (ONUMOZ)	Mozambique	1992	UNSC 797	No	UN	PK plus
36	United Nations Operation in Somalia II (UNOSOM II)	Somalia	1993	UNSC 814	Yes	UN (USA elements under USA)	** Force to ensure[6]
37	Operation Deny Flight ("No-fly zone" enforcement)	Bosnia and Herzegovina	1993	UNSC 816	Yes	NATO	Force to ensure
38	Operation Deliberate Force ("Safe areas" support of UNSC 819)	Bosnia and Herzegovina	1993	UNSC 836	Yes	NATO	Force to ensure
39	United Nations Observer Mission in Uganda–Rwanda (UNOMUR)	Rwanda	1993	UNSC 846	No	UN	M&O
40	United Nations Observer Mission in Georgia (UNOMIG)	Georgia	1993	UNSC 858	No	UN	M&O
41	United Nations Observer Mission in Liberia (UNOMIL)	Liberia	1993	UNSC 866	No	UN	M&O
42	United Nations Mission in Haiti (UNMIH)	Haiti	1993	UNSC 867	No	UN	PK plus
43	United Nations Assistance Mission for Rwanda (UNAMIR)	Rwanda	1993	UNSC 872	No	UN	PK plus
44	Naval enforcement of oil and arms embargo of UNSC 873	Caribbean Sea	1993	UNSC 875	Yes	Coalition of willing states	Force to ensure

Table A.1. (*cont.*)

	Mission acronym or name	Location	Start date	Initial international authorization (* indicates where authorization contested)	Chapter VII mentioned in resolution	Command	Form of use of military forces (** indicates form or purpose changed during mission)
45	United Nations Aouzou Strip Observer Group (UNASOG)	Aouzou Strip (Chad, Libya)	1994	UNSC 915	Yes	UN	M&O
46	Naval interdiction of all shipping to Haiti	Caribbean Sea	1994	UNSC 917	Yes	Coalition of willing states	Force to ensure
47	Operation Turquoise	Rwanda	1994	UNSC 929	Yes	France	Force to ensure
48	Multinational Force in Haiti	Haiti	1994	UNSC 940	Yes	USA, OAS	Force to ensure
49	United Nations Mission of Observers in Tajikistan (UNMOT)	Tajikistan	1994	UNSC 968	No	UN	M&O
50	United Nations Angola Verification Mission III (UNAVEM III)	Angola	1995	UNSC 976	No	UN	PK plus
51	United Nations Confidence Restoration Operation (UNCRO)	Croatia	1995	UNSC 981	Yes	UN	PK plus
52	United Nations Preventive Deployment Force (UNPREDEP)	Macedonia	1995	UNSC 983	No	UN	Peacekeeping

53	Implementation Force (IFOR)	Bosnia and Herzegovina	1995	UNSC 1031	Yes	NATO	Force to ensure
54	United Nations Mission in Bosnia and Herzegovina (UNMIBH)	Bosnia and Herzegovina	1995	UNSC 1035	No	UN	PK plus
55	United Nations Transitional Administration for Eastern Slavonia, Baranja, and Western Sirmium (UNTAES)	Eastern Slavonia, Baranja, Western Sirmium (Croatia)	1996	UNSC 1037	Yes	UN	PK plus
56	United Nations Mission of Observers in Prevlaka (UNMOP)	Prevlaka peninsula, Croatia	1996	UNSC 1038	No	UN	M&O
57	United Nations Support Mission in Haiti (UNSMIH)	Haiti	1996	UNSC 1063	No	UN	PK plus
58	Multinational Force in Eastern Zaire	Zaire	1996	UNSC 1080	Yes	Coalition of willing OAU states	Force to ensure
59	Stabilization Force (SFOR)	Bosnia and Herzegovina	1996	UNSC 1088	Yes	NATO	Force to ensure
60	United Nations Verification Mission in Guatemala (MINUGUA)	Guatemala	1997	UNSC 1094	No	UN	M&O
61	Multinational Protection Force (MPF)	Albania	1997	UNSC 1101	Yes	Italy	Force to ensure
62	United Nations Observer Mission in Angola (MONUA)	Angola	1997	UNSC 1118	No	UN	PK plus

Table A.1. (*cont.*)

	Mission acronym or name	Location	Start date	Initial international authorization (* indicates where authorization contested)	Chapter VII mentioned in resolution	Command	Form of use of military forces (** indicates form or purpose changed during mission)
63	United Nations Transition Mission in Haiti (UNTMIH)	Haiti	1997	UNSC 1123	No	UN	PK plus
64	Mission to Monitor the Implementation of the Bangui Agreements (MISAB)	Central African Republic	1997	UNSC 1125	Yes	Coalition of willing of African states	Force to ensure
65	United Nations Civilian Police Mission in Haiti (MIPONUH)	Haiti	1997	UNSC 1141	No	UN	PK plus
66	United Nations Civilian Police Support Group (UNPSG)	Croatia	1997	UNSC 1145	No	UN	PK plus
67	United Nations Mission in the Central African Republic (MINURCA)	Central Africa Republic	1998	UNSC 1159	Yes	UN	PK plus
68	United Nations Observer Mission in Sierra Leone (UNOMSIL)	Sierra Leone	1998	UNSC 1181	No	UN	M&O
69	Operation Allied Force	Kosovo	1999	North Atlantic Council	No	NATO	Force to ensure

70	United Nations Interim Administration Mission in Kosovo (UNMIK)	Kosovo	1999	UNSC 1244	Yes	UN	PK plus
71	Kosovo Force (KFOR)	Kosovo	1999	UNSC 1244	Yes	NATO	Force to ensure
72	United Nations Mission in East Timor (UNAMET)	East Timor	1999	UNSC 1246	No	UN	M&O
73	Multinational Force	East Timor	1999	UNSC 1264	Yes	Australia and coalition of willing states	Force to ensure
74	United Nations Mission in Sierra Leone (UNAMSIL)	Sierra Leone	1999	UNSC 1270	Yes	UN	PK plus
75	United Nations Transitional Administration in East Timor (UNTAET)	East Timor	1999	UNSC 1272	Yes	UN	Force to ensure
76	United Nations Organization Mission in the Democratic Republic of the Congo (MONUC)	Congo	1999	UNSC 1279	No	UN	PK plus
77	United Nations Mission in Ethiopia and Eritrea (UNMEE)	Ethiopia and Eritrea	2000	UNSC 1320	Yes	UN	PK plus

[1] UNSC Resolutions 83 and 84 (June 27, 1950) recommended that member states of the United Nations "furnish such assistance as may be necessary to the Republic of Korea to repel the armed attack and to restore international peace and security to the area" and that members providing such assistance "make such forces and other assistance available to a unified command under the United States of America." United Nations General Assembly Resolution 376 (V) (October 7, 1950) recommended that "All appropriate steps be taken to ensure conditions of stability throughout Korea" and that "All constituent acts be taken, including the holding of elections, under the auspices of the United Nations, for the establishment of a unified,

Notes to Table A.1. (*cont.*)

independent and democratic government in the sovereign State of Korea." Both the two Security Council resolutions and the General Assembly resolution provided bases for enforcement actions. The purpose of the two Security Council resolutions, however, was merely to restore the status quo ante bellum. The General Assembly resolution recommended using military forces to unify the Korean peninsula. On the same day that the General Assembly resolution passed, the United States forces crossed the 38th parallel. The "Uniting for Peace" Resolution, 377 (V), which established procedures for the General Assembly taking action when the Security Council (because of the lack of unanimity of the permanent members) failed to take action to deal with a threat to peace, was adopted on November 3, 1950, almost a month after the adoption of Resolution 376 (V).

[2] UNSC Resolution 143 (July 14, 1960) authorized ONUC to help the Congolese government restore law and order to oversee the withdrawal of Belgian forces. UNSC Resolution 161 (February 21, 1961) authorized ONUC to use military force to prevent civil war. UNSC Resolution 169 (November 24, 1960) authorized ONUC to use military force to remove from the Congo all foreign military personnel and mercenaries not under UN command. UNSC Resolution 143 created a peacekeeping plus state-building mission, Resolutions 161 and 169 added force to ensure compliance with international mandates responsibilities.

[3] UNSC Resolution 221 (April 9, 1966) determined "that the resulting situation constitutes a threat to the peace" and was understood to authorize use of force under Chapter VII even though Chapter VII was not explicitly mentioned. See Sally Morphet, "Resolutions and Vetoes in the Security Council: Their Relevance and Significance" (1990) 16 *Review of International Studies* 341–59.

[4] In announcing the operation, President George H. W. Bush said that the operation was undertaken under the auspices of UN Security Council Resolution 688. Somewhat later, the UK Foreign Office stated that Resolution 688 did not specifically mandate Operation Provide Comfort. The UK Foreign Office justified the operation under the customary international law principle of humanitarian intervention. (See Christopher Greenwood, "International Law and the NATO Intervention in Kosovo," Memorandum Submitted to the Foreign Affairs Committee of the House of Commons reprinted in (2000) *International and Comparative Law Quarterly* 929–30.) The military forces of thirteen countries, the UNHCR, and several NGOs participated in Operation Provide Comfort I. Operation Provide Comfort II was primarily a show of force through air power to deter Iraqi attacks on the Kurds. More than 60 percent of the sorties were conducted by the United States. Operation Provide Comfort II had very limited humanitarian aspects.

[5] UNSC Resolution 743 (February 21, 1992) created UNPROFOR as a traditional peacekeeping operation. Resolution 743 did not mention Chapter VII. The Security Council subsequently adopted several resolutions that substantially expanded the size and mission of UNPROFOR. Resolution 757 (May 30, 1992) determined that the situation in Bosnia and Herzegovina "constitutes a threat to international peace and security" and ordered economic sanctions against Yugoslavia. In Resolution 761 (June 29, 1992) the Security Council authorized the Secretary-General to deploy UNPROFOR "to ensure the security and functioning of Sarajevo airport and the delivery of humanitarian assistance." Additional tasks for UNPROFOR were added in numerous resolutions adopted thereafter. Perhaps the resolutions relating to safe areas were the most notable of these. Resolution 819 (April 16, 1993) declared Srebrenica a "safe area" and requested the Secretary-General to increase the presence of UNPROFOR to protect Srebrenica. Resolution 824 (May 6, 1993) declared that Tuzla, Zepa, Goradze, and Bihac and their surroundings would also be safe areas. Resolution 836 (June 4, 1993) extended UNPROFOR's mandate to enable it "to deter attacks against the safe areas, to monitor the cease-fire, to

promote the withdrawal of military units other than those of the Bosnian Government and to occupy some key points on the ground." It authorized UNPROFOR "to take necessary measures, including the use of force, in reply to bombardment against the safe areas or to armed incursion into them or in the event of any deliberate obstruction to the freedom of movement of UNPROFOR or of protected humanitarian convoys."

[6] Although UNSC Resolution 814 creating UNOSOM II placed the operation in our Force to Ensure Compliance with International Mandates category, the nature of the mission changed considerably when the Security Council adopted Resolution 837 (June 6, 1993). Resolution 814 requested the Secretary-General "to direct the Force Commander of UNOSOM II to assume responsibility for the consolidation, expansion and maintenance of a security environment throughout Somalia, taking into account the particular circumstances in each locality, on an expedited basis." Resolution 837 condemned "premeditated armed attacks launched by forces apparently belonging to the United Somali Congress (USC/SNA) against personnel of the United Nations Operation in Somalia (UNOSOM II) on 5 June 1993." It then stated that the Secretary-General was "authorized under Resolution 814 (1993) to take all necessary measures against all those responsible for the armed attacks referred to in paragraph 1 above, including against those responsible for publicly inciting such attacks, to establish the effective authority of UNOSOM II throughout Somalia, including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment." Resolution 837 directed UNOSOM II to take action against a specific Somali faction.

Key:

M&O Monitoring and observation.

PK plus Peacekeeping plus state-building.

Sources: United Nations, *The Blue Helmets: A Review of United Nations Peace-keeping* (3rd edn., New York, United Nations, 1996); United Nations, *50 Years, 1948–1998, UN Peacekeeping* (New York, United Nations Department of Public Information, 1998); http://www.un.org/Depts/dpko; Sydney D. Bailey and Sam Daws, *The Procedure of the UN Security Council* (3rd edn., Oxford, Oxford University Press, 1998); Adam Roberts, "From San Francisco to Sarajevo: The UN and the Use of Force" (1995–6) 37(4) *Survival* 7–28; and Danesh 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).

Table A.2. *Uses of military forces under the UN and NATO classified by conflict and locale*

	Conflict	Number of missions	Mission acronym	Type of conflict	Start date	Active (A) or completed (C) as of March 2001
1	Former Palestine Mandate	1	UNTSO	Inter-state	1948	A
		2	UNEF I	Inter-state	1956	C
		3	UNOGIL	Inter-state	1958	C
		4	UNEF II	Inter-state	1973	C
		5	UNDOF	Inter-state	1974	A
		6	UNIFIL	Inter-state	1978	A
2	India–Pakistan	1	UNMOGIP	Inter-state	1949	A
		2	UNIPOM	Inter-state	1965	C
3	Korea	1	Korean War	Inter-state	1950	C
4	Congo (Zaire)	1	ONUC	Intra-state	1960	C
		2	Multinational Force in Eastern Zaire	Intra-state	1996	Not undertaken
		3	MONUC	Intra-state	1999	A
5	West New Guinea (West Irian)	1	UNSF	Intra-state	1962	C
6	Yemen	1	UNYOM	Intra-state	1963	C
7	Cyprus	1	UNFICYP	Intra-state	1964	A
8	Dominican Republic	1	DOMREP	Intra-state	1965	C
9	Southern Rhodesia	1	Southern Rhodesia	Intra-state	1966	C
10	Iran–Iraq	1	UNIIMOG	Inter-state	1988	C
11	Afghanistan–Pakistan	1	UNGOMAP	Inter-state	1988	C
12	Angola	1	UNAVEM I	Intra-state	1988	C
		2	UNAVEM II	Intra-state	1991	C
		3	UNAVEM III	Intra-state	1995	C
		4	MONUA	Intra-state	1997	C
13	Central America	1	ONUCA	Inter-state	1989	C
14	Namibia	1	UNTAG	Intra-state	1989	C

Table A.2. (*cont.*)

	Conflict	Number of missions	Mission acronym	Type of conflict	Start date	Active (A) or completed (C) as of March 2001
15	Iraq–Kuwait	1	Naval Interdiction	Inter-state	1990	C
		2	Gulf War	Inter-state	1991	C
		3	UNIKOM	Inter-state	1991	A
		4	Safe havens	Inter-state	1991	A
16	Western Sahara	1	MINURSO	Intra-state	1991	A
17	El Salvador	1	ONUSAL	Intra-state	1991	C
18	Cambodia	1	UNAMIC	Intra-state	1991	C
19	Former Yugoslavia	1	UNPROFOR	Intra-state	1991	C
		2	Protection of deliveries of humanitarian assistance	Intra-state	1992	C
		3	Operation Sharp Guard	Intra-state	1992	C
		4	Operation Deny Flight	Intra-state	1993	C
		5	Operation Deliberate Force	Intra-state	1992	C
		6	UNCRO	Intra-state	1995	C
		7	UNPREDEP	Intra-state	1995	C
		8	IFOR	Intra-state	1995	C
		9	UNMIBH	Intra-state	1995	A
		10	UNTAES	Intra-state	1996	C
		11	UNMOP	Intra-state	1996	A
		12	SFOR	Intra-state	1996	A
		13	UNPSG	Intra-state	1998	C
		14	Allied Force	Intra-state	1999	C
		15	UNMIK	Intra-state	1999	A
		16	KFOR	Intra-state	1999	A
20	Somalia	1	UNOSOM I	Intra-state	1992	C
		2	UNITAF	Intra-state	1992	C
		3	UNOSOM II	Intra-state	1993	C
21	Mozambique	1	ONUMOZ	Intra-state	1992	C

Table A.2. (*cont.*)

	Conflict	Number of missions	Mission acronym	Type of conflict	Start date	Active (A) or completed (C) as of March 2001
22	Rwanda	1	UNOMUR	Intra-state	1993	C
		2	UNAMIR	Intra-state	1993	C
		3	Opération Turquoise	Intra-state	1994	C
23	Former Soviet Union	1	UNOMIG	Intra-state	1993	A
		2	UNMOT	Intra-state	1994	C
24	Liberia	1	UNOMIL	Intra-state	1993	C
25	Haiti	1	UNMIH	Intra-state	1993	C
		2	Naval enforcement of oil and arms embargo	Intra-state	1993	C
		3	Naval interdiction of all shipping to Haiti	Intra-state	1994	C
		4	Multinational Force in Haiti	Intra-state	1994	C
		5	UNSMIH	Intra-state	1996	C
		6	UNTMIH	Intra-state	1996	C
		7	MIPONUH	Intra-state	1997	C
26	Chad–Libya	1	UNASOG	Intra-state	1994	C
27	Guatemala	1	MINUGUA	Intra-state	1997	C
28	Albania	1	MPF	Intra-state	1997	C
29	Central African Republic	1	MISAB	Intra-state	1997	C
30	Sierra Leone	1	UNOMSIL	Intra-state	1998	C
		2	UNAMSIL	Intra-state	1999	A
31	East Timor	1	UNAMET	Intra-state	1999	C
		2	Multinational Force	Intra-state	1999	A
		3	UNTAET	Intra-state	1999	A
32	Ethiopia–Eriteria	1	UNMEE	Inter-state	2000	A

Appendix B

Table B.1. *Country participation in international operations, 1945–2000*

This table is neither comprehensive nor exhaustive. The information is designed to complement the author's discussion in the relevant chapter, and to show broadly the nature and extent of a country's participation in international operations.

Operation (duration)	Type	Maximum contribution in personnel								
		Canada	Norway	India	Japan	Germany	Russia	France	UK	US
United Nations Temporary Commission in Korea (UNTCOK) (1947–8)		2								
United Nations Special Commission on the Balkans (Greece) (UNSCOB) (1947)			1							
NNRC (Korea) (1950–4)				6,112 including commander						
United Nations Truce Supervision Organization (UNTSO) (1948–)	1	10	11				36	15		Observers; aircraft

Table B.1. (*cont.*)

Operation (duration)	Type	Maximum contribution in personnel								
		Canada	Norway	India	Japan	Germany	Russia	France	UK	US
United Nations Military Observer Group in India and Pakistan (UNMOGIP) (1949–)	1	39	140							Observers
Korean War (1950–3)	5	6,146	623						16,500	302,483
International Commission for Supervision and Control (Indochina) (1954–74)		133		7,269						
First United Nations Emergency Force (UNEF I) (1956–67)	2	1,007	Total: 10,984	Total: 13,585 including commander						Airlift
United Nations Observer Group in Lebanon (UNOGIL) (1958)	1	77	54	71						
United Nations Operation in the Congo (UNOC or ONUC) (1960–4)	4	airlift 421	1,172	Total: 12,222 including commander			Airlift		Airlift	Airlift

United Nations Security Force in West New Guinea (West Irian) (UNSF) (1962–3)	3	aircraft 13					Aircraft
United Nations Yemen Observation Mission (UNYOM) (1963–4)	1	36	7	20 including commander			
United Nations Peacekeeping Force in Cyprus (UNFICYP) (1964–)	2	1,200	Commander			1,300	Airlift
Mission of the Representative of the Secretary General in the Dominican Republic (DOMREP) (1965–6)	1	1					
United Nations India–Pakistan Observation Mission (UNIPOM) (1965–6)	1	112	2				
Observer Team Nigeria (OTN) (1968–70)		2					

Table B.1. (*cont.*)

Operation (duration)	Type	Maximum contribution in personnel								
		Canada	Norway	India	Japan	Germany	Russia	France	UK	US
International Commission for Control and Supervision (Vietnam) (1973–4)		248								
Southern Rhodesia (1966–75)	4								6 ships	
Second United Nations Emergency Force (UNEF II) (1973–9)	2	1,145	Airlift			Airlift	Airlift		Airlift	Airlift
United Nations Disengagement Observer Force (UNDOF) (1974–)	2	Logistics 191			Logistics 45					
United Nations Interim Force in Lebanon (UNIFIL) (1978–)	2	117	723	Total: 1,440		Airlift		257 airlift		Airlift
Commonwealth Monitoring Force (Rhodesia)	3								1,000	
Multinational Force and Observers, Sinai (MFO) (1982–)	1	28	5					17		860

Grenada (1983)										8,000
United Nations Iran–Iraq Military Observer Group (UNIIMOG) (1988–90)	1	525		35	31 including commander			Airlift		
United Nations Good Offices Mission in Afghanistan and Pakistan (UNGOMAP) (1988–90)	1	5								
United Nations Angola Verification Mission I (UNAVEM I) (1991–3)	1			23	12					
Panama (1989)										13,000
United Nations Observer Group in Central America (ONUCA) (1989–92)	4	174			20		Medical personnel			
United Nations Transition Assistance Group Namibia (UNTAG) (1989–90)	4	301	x		20 including commander	Election supervisors	Police, election supervisors	Election supervisors	170	Airlift
United Nations Observer Group for the Verification of Elections in Haiti (ONUVEH) (1990–1)	1	11								

Table B.1. (*cont.*)

Operation (duration)	Type	Maximum contribution in personnel								
		Canada	Norway	India	Japan	Germany	Russia	France	UK	US
Office of the Secretary-General in Afghanistan and Pakistan (OSGAP) (1990–95)	1	1								
Naval interdiction enforcement of economic sanctions of UNSC 661 (1990)	4									
Gulf War – Operation Desert Storm (1990)	5	Air, naval, medical units	350						35,000	470,000
United Nations Special Commission (UNSCOM) (1991–9)		100								
United Nations Iraq–Kuwait Observation Mission (UNIKOM) (1991–8)	2	5	169	12		Civilian medical unit	11	165[1]	11	19
Safe havens for Iraq civilian population (Operation Provide Comfort) (1991–)	4								1,200 troops, 12 aircraft[2]	

United Nations Mission for the Referendum in Western Sahara (MINURSO) (1991–)	3	35	Police				Police	24	25	15	15
United Nations Observer Mission in El Salvador (ONUSAL) (1991–5)	3	55	1	7	15				Police		
United Nations Angola Verification Mission II (UNAVEM II) (1991–5)	3	30	23	33	3						
United Nations Advance Mission in Cambodia (UNAMIC) (1991–2)	3	7		Observers			Observers	Observers	Observers	Observers	Observers
United Nations Protection Force (UNPROFOR) (1992–5)	4	Total: 1,600 including deputy commander	Total: 4,401	2 including commander			1,730	Troops, observers, in-kind	Police, troops, observers	3,500	Troops
United Nations Transitional Authority in Cambodia (UNTAC) (1992–3)	3	240	police	Total: 1,375	674		Police, troops, observers	Troops, observers	Police, troops observers	121	Troops, observers
United Nations Committee of Experts (UNCOE) (1992–4)		7									

Table B.1. (*cont.*)

Operation (duration)	Type	Maximum contribution in personnel								
		Canada	Norway	India	Japan	Germany	Russia	France	UK	US
United Nations Operation in Somalia I (UNOSOM I) (1992–3)	3	HQ staff	Troops							Airlift
Protection of deliveries of humanitarian assistance (1992)	4									28,000
Operation Sharp Guard (Enforcement of economic sanctions & of UNSC 713 & 757) (1992–6)	4	1 frigate				Vessels, aircraft			Ship, aircraft	
Unified Task Force (UNITAF – Operation Restore Hope) (1992–3)	4	1,250								
United Nations Operation in Mozambique (ONUMOZ) (1992–4)	3	4	Police	Total: 1,063	63		Observers		4	Troops

European Community Monitoring Mission in the Former Yugoslavia (1992–5)		48		954						
United Nations Operation in Somalia (UNOSOM II) (1993–5)	4	9	Troops	5,018		Troops		Troops		Troops
("No-fly zone" enforcement) (1993–5)		AWACS				484				
Maritime Interdiction Force Arabian Gulf (MIF) (1997–9)		1 vessel								
Operation Deliberate Force ("Safe areas" support of UNSC 819)									Aircraft	
United Nations Observer Mission in Uganda–Rwanda (UNOMUR) (1993–4)	1	3								
United Nations Observer Mission in Georgia (UNOMIG) (1994–)	1					11	3	3	7	2

Table B.1. (*cont.*)

Operation (duration)	Type	Maximum contribution in personnel								
		Canada	Norway	India	Japan	Germany	Russia	France	UK	US
United Nations Observer Mission in Liberia (UNOMIL) (1993–7)	1			11			Observers			
United Nations Mission in Haiti (UNMIH) (1993–6)	4	615		Troops				x		Troops
United Nations Assistance Mission for Rwanda (UNAMIR) (1993–6)	3	112		Total: 982		Police	Observers		600	
Canadian Humanitarian Aid to Rwanda (1994)		247								
Military Observer Group Dominican Republic (1994)	1	15								
Sarajevo Airlift (1992–6)		48								
United Nations Aouzou Strip Observer Group (UNASOG) (1994)	1									

Rwanda Refugees Relief Operation					400						
Naval interdiction of all shipping to Haiti (1994)	4	250									
Opération Turquoise (1994)	4							x			
Multinational Force in Haiti (1994)	4										Committed but not deployed: 20,000
United Nations Mission of Observers in Tajikistan (UNMOT) (1994–)	1										
United Nations Angola Verification Mission III (UNAVEM III) (1995–7)	3			23	Total: 1,148			Troops, observers	Police, observers	650	
United Nations Confidence Restoration Operation (UNCRO) (1995–)	3	x		x			x	Troops, observers, in-kind	Police, troops observers	Troops, observers	Troops
United Nations Preventive Deployment Force (UNPREDEP) (1995–9)	2		1	808				x	Police, observers	Observers	Troops

Table B.1. (*cont.*)

Operation (duration)	Type	Maximum contribution in personnel								
		Canada	Norway	India	Japan	Germany	Russia	France	UK	US
NATO-led Implementation Force (IFOR) (1995–6)	4	1,029	1,777			4,000			10,800	20,000
NATO Extraction Force		55								
United Nations Mission in Bosnia and Herzegovina (UNMIBH) (1995–2000)	3	2	4	x		x	1	116 police	x	x
United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES) (1996–8)	3	Troops, observers	16				Troops observers	Observers, police	Observers	x
United Nations Mission of Observers in Prevlaka (UNMOP) (1996–)	1	1	5				1	x	x	
United Nations Support Mission Haiti (UNSMIH) (1996–7)	3	750		x				x		x

Multinational force in Eastern Zaire (1996)	4	354									
Stabilization Force (SFOR) (1996–8)		112	3,650			3,800		3,028	3,529		9,000
Bosnia-Herzegovina (1998)		14-person fighter support control center		1							
United Nations Verification Mission in Guatemala (MINUGUA) (1997)	1	15	3			x	x			x	
Multinational protection force (MPF) (Albania) (1997)	4		8								
United Nations Observer Mission in Angola (MONUA) (1997–)	3		8	13			x	x			
United Nations Transition Mission in Haiti (UNTMIH) (1997)	3	650 including commander		x				x		x	
Mission to Monitor the Implementation of the Bangui Agreements (MISAB)	4										

Table B.1. (*cont.*)

Operation (duration)	Type	Maximum contribution in personnel								
		Canada	Norway	India	Japan	Germany	Russia	France	UK	US
United Nations Civilian Police Mission in Haiti (MIPONUH) (1997–)	3	Transport		x				24 police		x
OSCE Election Monitoring					30			57		
United Nations Civilian Police Support Group (UNPSG)	3		Police				Police			Police
United Nations Observer Mission in Central African Republic (MINURCA) (1998–9)	3	Signal unit						x		
United Nations Observer Mission in Sierra Leone (UNOMSIL) (1998–)	1	5		x			x		21 under UN command; 700–800 to support UN force	
Kosovo Diplomatic Observer Mission/ Verification Mission (KDOM/KVM) (1998–9)	1	23								
Operation Allied Force (1999)	4	x	250						26 aircraft	7,500

United Nations Mine Action Coordination Centre in Kosovo (UNMACC) (1999)		4							
United Nations Interim Administration Mission in Kosovo (UNMIK) (1999–)	3		3					73 police head of UNMIK	
Kosovo Force (KFOR)	4	800	2,500		8,500	3,600	5,705	10,700	5,400
United Nations Mission in East Timor (UNAMET) (1999–)	1								
Multinational Force (East Timor) (1999–)	4								
United Nations Mission in Sierra Leone (UNAMSIL) (1999–)	3	x	5	1,676 including commander		128	2	24	
International Force in East Timor (INTERFET) (1999–2000)		650	6				3	275	
United Nations Transitional Administration in East Timor (UNTAET) (1999–)	4	Police	Total: 12		4	Observers, police	3	4	3
United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) (1999–)	3	6		20		10	3	6	

Table B.1. (*cont.*)

Operation (duration)	Type	Maximum contribution in personnel								
		Canada	Norway	India	Japan	Germany	Russia	France	UK	US
United Nations Mission in Ethiopia and Eritrea (UNMEE) (2000–)	3	6	5	1,328			6	x		x

Key
Type column:
1: Monitoring and observation
2: Traditional peacekeeping
3: Peacekeeping plus state-building
4: Force to ensure compliance
5: Enforcement
Total Cumulative contribution for entire operation
x Participated.

[1] Under Operation Southern Watch.

[2] *Note by Nigel White*: The United Kingdom has contributed to Coalitions of the Willing which have not received a clear international mandate either from the UN or another organization – for example, Operation Provide Comfort in Northern Iraq in 1991, when the United Kingdom contributed 1,200 military personnel. It has also kept on average about twelve military aircraft in the area to help to patrol the no-fly zones in northern Iraq. Security Council Resolution 688 does not have a clear legal basis for these operations. Air strikes that have occurred against Iraq in 1993, 1996, and regularly since December 1998 also do not have a clear legal basis in Security Council resolutions. There is no NATO authority for these operations.

Sources: Information provided by country authors and United Nations, *The Blue Helmets: A Review of United Nations Peace-keeping* (3rd edn., New York, United Nations, 1996); United Nations, *50 Years, 1948–1998, UN Peacekeeping* (New York, United Nations Department of Public Information, 1998); http://www/in.org/Depts/dpko; International Institute for Strategic Studies, *The Military Balance, 2001–2002* (Oxford, Oxford University Press, 2001); Japan – Ministry of Foreign Affairs Official Web Site, http://www.mota.go.jp; Bundesministerium der Verteidigung (ed.), *Einsaetze der Bundeswehr im Ausland* (Bonn, 2000); Assemblée Nationale, *Avis de M. François Lamy, sur le project de loi de finances rectificative pour 2000 (Commission de la Défense)*, No. 2764, November 29, 2000; Edward Gordon et al., "International Law and the United States Action in Grenada: A Report" (1984)18 *International Lawyer* 331–80; Karin von Hippel, "Democracy by Force: Renewed Commitment to Nation-Building" (2000) *Washington Quarterly* 95; "Post Cold War Interventions," *Congressional Quarterly*, March 27, 1999.

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