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NATO'S ROLE IN PEACE OPERATIONS: REEXAMINING THE TREATY AFTER BOSNIA AND KOSOVO

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I. Introduction

The North Atlantic Treaty² contains no provisions that allow its members to participate in peace operations³ under Chapter VIII of the United Nations (UN) Charter.⁴ Nevertheless, in 1993, the North Atlantic Treaty Organization (NATO) began flying missions over Bosnia⁵ to protect UN

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2. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 [hereinafter North Atlantic Treaty].

3. The term "peace operations" needs to be defined up front because scholars, diplomats, and military planners tend to expand or contract the concept to fit their own conceptual framework. For purposes of this article the term is to be given the comprehensive scope contained in U.S. DEP'T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS 2 (Dec. 1994) [hereinafter FM 100-23]. The manual definition of peace operations includes support to diplomacy, peacekeeping, and peace enforcement.

peacekeeping forces and to monitor the so-called safe havens declared by

4. U.N. CHARTER arts. 52-54. Chapter VIII states:

Article 52:

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.
2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.
3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.
4. This Article in no way impairs the application of Articles 34 and 35.

Article 53:

1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken Under regional arrangements or by regional agencies without the authorization of the Security council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.
2. The term enemy state as used in paragraph 1 of this Article applies to any state, which during the Second World War has been an enemy of any signatory of the present Charter.

Article 54:

The Security council shall at all times be kept fully informed of activities undertaken or in contemplation Under regional arrangements or by regional agencies for the maintenance of international peace and security.

Id.

5. *NATO's Role in Bringing Peace to the Former Yugoslavia*, NATO Basic Factsheet No. 4 (last modified Mar. 1997) <<http://www.nato.int/docu/facts/bpfy.htm>> [hereinafter NATO Factsheet No. 4]. Flying in support of the UN, NATO fired its first shot ever in anger shooting down four aircraft violating the no-fly zone declared by the Security Council. *Id.* at 3.

the Security Council.⁶ At the same time, NATO naval forces were the primary component enforcing the UN arms embargo imposed on the warring factions within the Federal Republic of Yugoslavia.⁷ By December 1995, mediators negotiated an unlikely cease-fire and an unprecedented agreement to hand off UN peacekeeping duties to a multinational force under NATO's command and control.⁸

The Bosnia mission was the first of its kind by NATO. As events in Kosovo have demonstrated, however, it is not its last.⁹ The end of the Cold War significantly reduced the chances of super-power confrontation; however, lower nuclear tension frequently masks increased regional violence grounded in historical ethnic, cultural, and religious differences.¹⁰ The

6. S.C. Res. 819, U.N. SCOR, 48th Sess., 3199th mtg., U.N. Doc. S/RES/819 (1993). After repeated cease-fire violations by both sides, but in particular the Bosnian Serbs, the Security Council attempted to create safe areas in and around major cities, which were to be off-limits to attack. When the sanctity of these areas was not honored, the Security Council, in what was a radical departure from their time-honored philosophy of peacekeeping, authorized use of force to protect the safe havens. See S.C. Res. 836, U.N. SCOR, 48th Sess., 3228th mtg., U.N. Doc. S/RES/836 (1993).

7. Steven R. Rader, *NATO, in CHALLENGES FOR THE NEW PEACEKEEPERS* 142 (Trevor Findlay ed., 1996). NATO began monitoring compliance with UN sanctions against the factions of the Federal Republic of Yugoslavia (FRY) in July 1992 in conjunction with a provisional West European Union (WEU) naval task force in the Adriatic. In November 1992, NATO and the WEU decided to enforce the embargo. The two organizations merged into a single chain of command, essentially the NATO military structure, in June 1993 (Operation Sharp Guard). *Id.* at 146. Between 22 November 1992 and 18 June 1996, Operation Sharp Guard forces challenged over 74,000 merchant vessels, boarded and inspected nearly 6000 of those vessels, and spent almost 20,000 ship days at sea. See *Operation Sharp Guard*, Allied Forces Southern Europe Fact Sheet (visited Mar. 18, 1998) <<http://www.fas.org/man/dod-101/docs/SharpGuardFactSheet.htm>>.

8. General Framework Agreement for Peace in Bosnia and Herzegovina-Croatia, Yugoslavia, December 14, 1995, 35 I.L.M. 75 (1996). The pertinent military aspects are contained in Annex I-A. The General Framework Agreement for Peace "invited" the UN Security Council to adopt a resolution authorizing a multinational force with the understanding that all forces, NATO and non-NATO, would operate "under the authority and subject to the direction and political control of the North Atlantic Council . . . through the NATO chain of command." The UN quickly accepted the invitation. See S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg., U.N. Doc. S/RES/1031 (1995). Acting under Chapter VII, the Security Council directed the parties to cooperate with the multinational force. It "welcomes the willingness of the Member States acting through or in cooperation with the organization referred to in Annex 1-A of the Peace Agreement to assist the parties to the Peace Agreement by deploying a multinational implementation force." *Id.* para. 12. It then authorized the implementation force (IFOR) "under unified command and control in order to fulfill the role specified in Annex 1-A and Annex 2 of the Peace Agreement." *Id.* para. 14. The IFOR (NATO) was further authorized to "take all necessary measures" including enforcement actions. *Id.* para. 15. The UN acknowledged this arrangement was as had been agreed in the General Framework Agreement for Peace. *Id.* paras. 15, 17.

conflicts in Bosnia and Kosovo are prime examples, but there are many others simmering within Europe and on its periphery. An incomplete list of recent examples includes near civil war in Albania,¹¹ continuing friction between Greece and Turkey,¹² and religious and political violence in Algeria.¹³ Meanwhile, the UN is spread thin attending to disturbances around the globe.¹⁴

For a variety of reasons, the UN will not be able to keep pace with the growing cycle of violence. Political disagreements have disrupted the

9. As this article was prepared for publication, NATO was negotiating for peace in Kosovo between the Muslim majority and the FRY. NATO members envisioned that up to 28,000 NATO troops would help implement the deal on the ground. See, e.g., William Claiborne, *United States Kosovo Plan Faces 2-Front Fight*, WASH. POST, Mar. 11, 1999, at A23. When the Yugoslavian Government proved intransigent and instead escalated its attacks on its own Albanian Kosovar population, NATO began air operations to compel the government to sign a deal protecting the human rights of their Muslim members. NATO envisions a political settlement that will in time enable the Kosovo region to operate autonomously. See Secretary General Javier Solana, Statement by the NATO Secretary-General on Ordering Air Strikes, Mar. 23, 1999, available at <http://www.abcnews.go.com/sections/world/Daily_News/solana_transcript.html>.

10. See, e.g., Ralph Peters, *After the Revolution*, PARAMETERS, Summer 1995, at 7; Robert D. Kaplan, *The Coming Anarchy*, ATLANTIC MONTHLY, Feb. 1994, at 44; ALVIN & HEIDI TOFFLER, *WAR AND ANTI-WAR: SURVIVAL AT THE DAWN OF THE 21ST CENTURY* (1995); Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFF., Summer 1993, at 22.

11. *No Plans for WEU Intervention in Albania: Bonn*, XINHUA ENGLISH NEWSWIRE, Mar. 14, 1997, available in 1997 WL 3750650. A pyramid scheme collapsed leading to riots across Albania. The government requested peacekeeping troops from both WEU and NATO, but the request was rejected. See Kevin Done, *Albania Declares State of Emergency over Riots*, FIN. TIMES, Mar. 3, 1997, available in 1997 WL 3777226 (quoting President Berisha that conditions threatened "to engulf Albania in a civil war"). By July 1997 a semblance of order returned to Albania allowing special elections. Western countries reportedly are keeping an eye on the situation for fear that further unrest would spark more refugees. See *A New Government Awaits Albania*, STAR-TRIB. (Minneapolis-St. Paul), July 1, 1997, at A7.

12. The two NATO countries nearly went to war in January 1996 over an uninhabited 10-acre islet in the Aegean Sea after journalists from both sides planted flags there. In 1987, they nearly fought over mineral rights in the Aegean. They did fight in 1974 when Turkey invaded Cyprus to support Turkish Cypriots against Greece. Patrick Quinn, *War For a Pile of Rocks? Greece, Turkey Rattle Sabers*, N. N.J. RECORD, Jan. 31, 1996, at A9. Due to these and other disputes over territorial waters, airspace, and islands, the two countries continued arms build-up while most of Europe has downsized. Mike Theodoulou, *Saving Greece and Turkey from War Keeps United States Busy*, CHRISTIAN SCI. MONITOR, Feb. 8, 1996, at 7. Tensions again increased recently after Turkey was excluded from the European Union. The Turks were also insulted when the European Union decided to open talks with Cyprus instead. See, e.g., *Face-off in Aegean*, PITTSBURGH POST-GAZETTE, Jan. 3, 1998, at A4 (reporting challenges between Turkish and Greek naval vessels in the Aegean).

Security Council almost from the beginning.¹⁵ “Peacekeeping was discovered like penicillin . . . [by accident],”¹⁶ because super-power competition during the Cold War blocked the Security Council from effectively performing its intended peace-enforcement role.¹⁷ Many heralded the end of the Cold War as the renaissance of collective security.¹⁸ Conflicts such as those in Rwanda, Somalia, Bosnia, and Kosovo seem to demonstrate that these predictions were unfounded. For example, off and on since the Gulf War, Security Council members have been at loggerheads over measures against Iraq. Their political differences often encourage Saddam Hussein to defy the UN.¹⁹

Financial and technical shortcomings also limit the UN’s ability to respond effectively. As its peacekeeping activities expanded, the UN’s peacekeeping budget increased almost fifteen times.²⁰ The Secretary General sharply criticized the member states in his *Supplement to An Agenda for Peace*, released in early 1995, for their failure to provide funding for UN peace operations.²¹ He warned that many operations could not be pur-

13. Geneive Abdo, *Militant’s Threaten Algeria Regime’s Grip*, DALLAS MORNING NEWS, Oct. 30, 1994, at A1. When Islamic fundamentalists won majorities in local elections in 1991, a joint military-civilian junta canceled the next year’s national elections and outlawed the main Islamic party, the Islamic Salvation Front (FIS). The FIS spawned several groups that try to intimidate the government by using terrorist methods. The government reputedly responds in kind. By 1994, the official death toll was about ten thousand. Unofficial sources estimated thirty thousand deaths. *Id.* For further information on the background to the Algerian Civil War, see *Algeria: Background to a Civil War*, JANE’S DEF. WKLY., Dec. 1, 1994, at 3. The cycle of violence continues to grow. A 1998 report set the death toll at 75,000. The violence on Europe’s doorstep, coupled with the fear that terrorism will spread across the Mediterranean into Europe along with Algerian refugees prompted a recent visit by an European Union fact-finding mission. See Charles Trueheart, *European Mission to Algeria Cites Mixed Success*, WASH. POST, Jan. 21, 1998, at A17.

14. *Supplement to an Agenda For Peace: Position Paper Of Secretary Boutros-Ghali On The Occasion Of The Fiftieth Anniversary Of The United Nations*, U.N. GAOR, 50th Sess., U.N. Doc. A/50/60 (1995), U.N. Sales No. E.95.I.15 (1995) [hereinafter *Supplement to an Agenda for Peace*]. The Secretary General provided eye-opening statistics in his report showing that the number of peace operations conducted under UN authority grew from five in January 1988 to seventeen in December 1994. During the same period the number of troops deployed increased from less than 10,000 to almost 74,000. *Id.*

15. Sir Brian Urquhart, former UN Under-Secretary General with peacekeeping responsibilities, quoted in Alan K. Henrikson, *The United Nations and Regional Organizations: “King-Links” of a “Global Chain,”* 7 DUKE J. COMP. & INT’L L. 35, 46 (1996).

16. *Id.*

17. *Id.*

18. See generally, Patrick Reilly, *Comment: While the United Nations Slept: Missed Opportunities in the New World Order*, 17 LOY. L.A. INT’L & COMP. L.J. 951 (1995) and the sources cited therein.

sued or, if pursued, could not be performed “to the standard expected.”²² Nevertheless, some major contributors, including the United States, continually refuse to pay their assessments.²³

19. Robert H. Reid, *United States Fails to Persuade Russia to Back Wider Iraq Sanctions*, SUN-SENTINEL, (Ft. Lauderdale, Fla.), Oct. 22, 1997, at A18. In October 1997, Russia blocked initiatives backed by the United States and the United Kingdom to impose new sanctions on Iraq. Along with France, Russia reportedly has agreements with Iraq, which will enable it to profit on newly released oil when the sanctions are lifted. Apparently emboldened by the discord, Saddam Hussein's government moved to have the sanctions lifted entirely. Later, Iraq blocked UN weapons inspectors from sites around the country. It demanded a change in the composition of the team and pushed to have the sanctions lifted. Russia stepped in to negotiate. After it promised to support Iraqi demands, Saddam Hussein allowed the monitors back into Iraq. Although China backed the Russian initiative, none of the other Security Council members did. See Anne Penketh, *U.N. Security Council Meets after Russia Fails on Iraq Agenda*, AGENCE FRANCE-PRESSE, NOV. 22, 1997, available in 1997 WL 13439725. However, it quickly became apparent that Iraq intended to bar the inspectors from important sites. The United States and Britain began to lobby for the right to use force to compel Iraq to permit the inspectors to do their job. Russia, initially supported by France, insisted force was not an option. See Anne Swardson, *France, Russia Urge Diplomacy in Iraqi Impasse*, WASH. POST, Jan. 29, 1998, at A23. Although France later indicated it might support use of force under some conditions, the likelihood that Russia and China would veto any action by the Security Council left the United States hinting that it might take unilateral action. See Barton Gellman, *Paris Lends Support to United States on Iraq*, WASH. POST, Jan. 30, 1998, at A1. Finally, in December 1998, the United States and the United Kingdom launched a series of strikes on Iraq after UN reports revealed Iraqi violations and Iraq again refused to cooperate with UN inspectors. See *Timeline of the Iraqi Crisis: Road to the Brink*, BBC NEWS SERVICE, Dec. 21, 1998, available at <http://news2.thdo.bbc.co.uk/hi/english/events/crisis_in_the_gulf/road_to_the_brink/newsid_216000/216264.stm>.

20. See *Supplement to an Agenda For Peace*, supra note 14, para. 11. The budget grew from 230 million dollars in 1988 to 3.6 billion dollars in 1994. *Id.*

21. *Id.* para. 97.

22. *Id.*

The failure of Member States to pay their assessed contributions for activities they themselves have voted into being makes it impossible to carry out those activities to the standard expected. It also calls in question the credibility of those who have willed the ends but not the means - and who then criticize the United Nations for its failures.

Id.

23. By late 1996, the UN reported over \$700 million in outstanding contributions. *U.N. Secretariat, Status of Contributions as at 30 September 1996*, at 9, U.N. Doc. ST/ADM/SER.B/499 (1996). The United States portion continued to rise. In 1997, United States domestic political infighting led the Congress to delete funds that had been intended to help pay for United States delinquent dues. The UN warned of possible bankruptcy by the end of 1998. Of delinquencies, the United States owed about 61%. John M. Goshko, *United States Refusal to Pay Debt Alarms U.N.*, WASH. POST, Nov. 15, 1997, at A1.

Command and control of forces engaged in UN peace operations are a continual source of friction between the Security Council and the troop-contributing nations. The Secretary General contends operational and strategic control of the forces belongs to the UN alone.²⁴ This position is unacceptable to many nations, especially the United States.²⁵

To survive the systemic problems, the UN has increasingly turned to regional organizations for help. This is a marked evolution for the UN. The drafters of the UN Charter very nearly did not recognize the rights of regional organizations. Chapter VIII and the self-defense measures of Article 51 were included only after the Latin American states insisted.²⁶ European members who feared a re-emergent Germany joined them.²⁷ After the Charter's ratification, the role of regional organizations was ill defined and often distrusted, as in the intervention of the Organization of American States in the Dominican Republic.²⁸ Recent developments in Liberia, Bosnia, and Haiti, however, reflect the trend toward cooperation between the UN and regional organizations.²⁹

The political and military importance of NATO makes it an attractive partner to the UN. The UN's move toward regional cooperation has met

24. See *Supplement to an Agenda For Peace*, *supra* note 14, paras. 38-42. The Secretary General identifies three fields where he admits the UN system is lacking: (1) command and control, (2) troop availability, and (3) communications problems. As to command and control, he argues strongly that the troop-supplying nations have to butt out and that he will consult and dialogue with the Security Council and member nations so that all are informed of the current status of deployments. *Id.*

25. See *infra* note 114 and accompanying text for a discussion of the Constitutional and practical issues associated with command and control.

26. Anthony Clark Arend, *The United Nations, Regional Organizations, and Military Operations: The Past and the Present*, 7 DUKE J. COMP. & INT'L L. 3, 5-18 (1996).

27. U.N. CHARTER art. 51.

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 measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id. See generally Arend, *supra* note 26, at 3, 5-18 (providing detailed background of the Dumbarton Oaks and San Francisco Conferences that led to the ratification of the UN Treaty).

NATO's willingness to take on a role in peace operations.³⁰ This is a development for NATO as well.

For almost five decades, NATO members insisted that the Alliance was not a Chapter VIII regional organization.³¹ Instead, the members carefully tied NATO's mission to collective self-defense.³² The North Atlantic Council's motive for limiting its agreement was partially driven by the fear that operating under Chapter VIII would give the UN Security Council an opportunity to meddle in the alliance's affairs.³³ The North Atlantic Coun-

28. LINDA B. MILLER, *WORLD ORDER AND LOCAL DISORDER* 159 (1967). Many within the UN saw this as a power grab by the United States and called for UN involvement. The United States contended no UN involvement or approval was required because this was not an "enforcement action" under Article 52. The United States also argued that UN involvement would result in "two international organizations doing the same thing in the same place at the same time." *Id.* The UN proved especially wary whenever one of the Cold War powers was involved. For example, the same concerns were reflected when the United States invaded Grenada after the Organization of Eastern Caribbean States (OECS) invited intervention. See John Norton Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145, 153 (1984). On 2 November 1983 "the UN General Assembly voted, by a larger majority than in the condemnation of the Soviet invasion of Afghanistan, to condemn the mission as a violation of international law . . ." *Id.*

29. See *infra* notes 270 to 368 and accompanying text.

30. *Final Communiqué Issued by the North Atlantic Council in Ministerial Session*, NATO PRESS COMMUNIQUÉ M-NAC-1 (92) 51, para. 11, June 4, 1992 [hereinafter Oslo Declaration].

31. See Jane E. Stromseth, *The North Atlantic Treaty and European Security after the Cold War*, 24 CORNELL INT'L L.J. 479, 482 (1991) (detailing these historical reasons for distinguishing NATO from a Chapter VIII regional organization). See also Jane A. Meyer, *Collective Self-Defense and Regional Security: Necessary Exceptions to a Globalist Doctrine*, 11 B.U. INT'L L.J. 391, 423-4 (1993).

32. The North Atlantic Treaty, *supra* note 2, art. 5. Article 5 states in part:

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 consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, 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, to restore and maintain the security of the North Atlantic area.

33. See, e.g., Meyer, *supra* note 31, at 423-4. See also Stromseth, *supra* note 31, at 479, 482; Christopher J. Borgen, *The Theory and Practice of Regional Organization Intervention in Civil Wars*, 26 N.Y.U. J. INT'L L. & POL. 797 (1994) (asserting the purpose was to intentionally avoid oversight by the UN).

cil particularly wanted to avoid the possibility of a Soviet veto over NATO initiatives.

Ironically, the abrupt collapse of the Soviet Union left NATO without a focus for its overarching mission. North Atlantic Treaty Organization tried to justify its continued viability in the face of arguments that other European mechanisms were more appropriate.³⁴ Rather than agreeing to disband, NATO took the initiative and declared in 1992 that it was willing to support peace operations conceived by the Conference on Security and Cooperation in Europe³⁵ on a case-by-case basis.³⁶ The following year, NATO extended the same pledge to the UN.³⁷ The Partnership for Peace initiative and the concept of NATO expansion occurred at substantially the same time.³⁸

These ambitions could be aptly characterized as a full employment guarantee for NATO. The events in Bosnia quickly demonstrated that the existing European security structure was incapable of handling the crisis without the presence of United States armed forces.³⁹ NATO moved to fill the gap. The recent addition of Hungary, the Czech Republic, and Poland to the alliance, perhaps with others to follow, will risk NATO involvement in the traditional ethnic or religious conflicts and border disputes, which have characterized the region. The same is true concerning the Partnership

34. James B. Steinberg, *International Involvement in the Yugoslavia Conflict*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 27, 60-61 (Lori Fisler Damrosch ed., 1993). For example, France has been particularly insistent that Europe should conduct most military operations through the WEU. *Id.*

35. Now called the Organization for Security and Cooperation in Europe (OSCE).

36. See Rader, *supra* note 7, at 143. This was the so-called "Oslo Declaration" of 1992. Interestingly, this initiative received almost no attention in the strategic concept document released less than a year before. The communiqué released after the Rome conference in 1991 reflected the alliance's traditional emphasis on collective self-defense. See NATO Communiqué, *The Alliance's New Strategic Concept* (last modified Nov. 8, 1991) <<http://www.nato.int/docu/comm/c911107a.htm>> [hereinafter *The Alliance's New Strategic Concept*].

37. See Rader, *supra* note 7, at 143.

38. The Partnership for Peace movement had its origins in the liberation of Central Europe. NATO invited the Central Europeans to "dialogue" on security and related issues. The North Atlantic Cooperative Council grew out of these efforts. Following the dissolution of the Soviet Union, the number of NACC members swiftly grew. The original NACC structure proved inadequate to the members' needs. Additionally, the Central Europeans felt their interests were inappropriately lumped with the former Soviet members and sought entry into NATO. As a compromise, NATO offered the Partnership for Peace alternative in December 1994 as a mechanism for security cooperation and possible expansion. Jeffrey Simon, *The PFP Path and Civil-Military Relations*, in NATO ENLARGEMENT: OPINIONS AND OPTIONS 49-52 (Jeffrey Simon ed., 1995).

for Peace initiative.⁴⁰ Events such as in Iraq and the continuing strife within the countries of the former Soviet Union may warrant NATO attention as well.⁴¹ Competition for Caspian Sea oil may well add fuel to the flames of war.⁴²

To meet these challenges, the alliance's vision must be as clear today as it was when the partnership was formed. The North Atlantic Treaty is fifty years old. It was designed to enable Western Europe to withstand the onslaught of the Soviet Union. That threat is gone, at least for the imme-

39. See Steinberg, *supra* note 34, at 38 (detailing the European Union's inability to broker a durable cease-fire or construct a viable WEU's peacekeeping force). In the early part of the Bosnian conflict France insisted on broad European conduct under the WEU. This resulted in confusing command relationships in the Adriatic where both NATO and the WEU sought to enforce the embargo. Many of France's WEU partners became reluctant to act without the United States. *Id.* at 60-61.

40. Christopher Burns, *European "Roundtables" to Hear Rights Disputes*, PHOENIX GAZETTE, May 28, 1994, at A10. The European Union has recognized ethnic tensions would burden many of the Eastern European nations seeking to join it. Of prime concern are the large Hungarian minorities present in the Czech Republic and also to a greater extent within Romania. Russian minorities in the Baltic countries also could be a problem. Poland seeks guarantees for the rights of Poles in the Ukraine, and Germans are a prominent ethnic group within the Czech Republic. Recognizing that it will face the same problems when selecting candidates for expansion, and wary of admitting problems similar to the Turkey/Greece dispute, NATO has encouraged these nations to sign "friendship" treaties in hopes these will keep disputes from spinning out of control. *Id.* The Hungarians have concluded agreements with both the Romanians and the Slovakian Republic with uncertain prospects for success. See Tom Hundley, *Hungary Taking the High Road in Bid to Join NATO*, CHICAGO TRIB., Apr. 6, 1997, at 6.

41. See *Caucasus Region Torn By Independence Struggles*, ASSOCIATED PRESS, Oct. 20, 1997, available in 1997 WL 4888688 (cataloging persistent fighting across the former Soviet republics, including Nagorno-Karabakh featuring Armenian versus Azerbaijani; Chechnya pitting predominantly Muslim groups against Russia; and, rebellions in Abkhazia and South Ossetia, breakaway provinces of Georgia). Tensions heightened between Armenia and Azerbaijan recently when the moderate president stepped aside after a rift developed between his party and hard-liners. The president had called for negotiations over Nagorno-Karabakh, but members of his own party would not back him. The new president was the leader of Nagorno-Karabakh during its six-year war against Azerbaijan. Hasmik Mkrtchyan, *Backers of Ex-Armenian Leader Quit*, WASH. POST, Feb. 5, 1998, at A21.

42. Three regional powers, Russia, Turkey, and Iran have struggled for control of the Caspian Sea area for centuries. Each has an ethnic card to play justifying its interest in the area. Meanwhile, Western interests recently concluded oil deals with Azerbaijan. The huge petroleum reserves can only be exported via pipeline. Current plans call for the main line to exit Azerbaijan then cross Georgia and Turkey to the port of Ceyhan. Russia and Iran are unhappy about the proposal and have recently strengthened ties with Armenia-Azerbaijan's nemesis. Phil Reeves, *Black Gold: West Lays Its Bets As the Caspian's Oil Bonanza Begins*, THE INDEPENDENT (London), Nov. 13, 1997, at 17.

diate future. Meanwhile, threats along NATO's expanding periphery indicate that the alliance must prepare to perform humanitarian missions and to support fledgling democracies in a broader area to thwart the spillover of violence into its own region.

This article argues that NATO does not need express UN Security Council approval before it can legally perform peace operations under Chapter VIII of the UN Charter, particularly when NATO performs humanitarian interventions and interventions on behalf of democratic governments. Many critics argue that these are not internationally accepted authorities for use of force.⁴³ Just as peacekeeping evolved from Chapter VI without a textual basis,⁴⁴ as Chapter VIII becomes energized, regional organizations will undertake peace operations in which the parameters are not discernible from the dry words of the UN Charter.

The proposals that NATO should conduct peace operations within or adjacent to the North Atlantic region when prompted by humanitarian or democratic concerns, are in accord with the current practice of nations.⁴⁵ NATO should recognize them as legitimate aims. The treaty should reflect the Alliance's right to intervene when a regional government's action or inaction leads to an imminent humanitarian disaster. Likewise, the organization should have the ability to intervene on behalf of democratic governments that are overthrown by unconstitutional means. New members joining NATO understand that they are bound to maintain a democratic

43. See *infra* notes 184-191 and accompanying text.

44. See, e.g., Thomas G. Weiss, *New Challenges for UN Military Operations: Implementing an Agenda for Peace*, WASH. Q. 51 (Winter 1993).

45. For example, the UN Security Council authorized "all necessary means" to restore the Aristide government in Haiti, specifically finding a "threat to security and peace in the region" in a situation traditionally recognized as an internal affair. See S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg. at 4, U.N. Doc. S/RES/940 (1994) [hereinafter Resolution 940]. According to one commentator, the Security Council took great pains to emphasize the "unique" nature of the situation in Haiti hoping to avoid establishing the unique as the norm. The same commentator, however, acknowledges the difficulty of unmaking precedent. See Antonio F. Perez, *On the Way to the Forum: The Reconstruction of Article 2(7) and Rise of Federalism Under the United Nations Charter*, 31 TEX. INT'L L.J. 353, 430-432 (1996). Likewise, the Security Council praised the Economic Community of West African States humanitarian intervention in Liberia even though it did so in the midst of an internal struggle. See S.C. Res. 788, U.N. SCOR, 47th Sess., 3138th mtg., U.N. Doc. S/RES/788 (1992) (finding the deteriorating situation in Liberia "constitutes a threat to international peace and security, particularly in West Africa as a whole" and commending Economic Community of West African States for its efforts).

form of government, that their militaries submit to civilian control, and that they will settle long-standing ethnic and border disputes.⁴⁶

Reaffirming these basic values in the North Atlantic Treaty would emphasize the goals and aspirations of the present members. Endorsing these principles should be the price of admission for those nations seeking to join the alliance. Therefore, this article argues that the members of the North Atlantic Treaty should consider amending the treaty to clarify NATO's authority as a Chapter VIII regional association to perform peace operations beyond collective self-defense in the North Atlantic area.

As noted above, NATO is already performing peace operations. The utility of changing the treaty to reflect what is already a *fait accompli* is questionable. The suggested changes, however, define the legal basis for future alliance action. The treaty defines both the rights and obligations of its members. Without a textual basis, NATO does not have a clearly defined legal right to conduct peace operations in its own charter. Conversely, NATO members have no affirmative obligation to participate in operations beyond the clear text of the treaty. Updating the treaty will clarify the legal foundation for NATO peace operations, which is currently based on strained re-interpretation of the treaty.⁴⁷

The amendments should also clarify the position of NATO members concerning out-of-area conflicts. The present treaty permits military action only within the North Atlantic region and only for collective self-defense.⁴⁸ In all other instances, members are bound only to "consult" when an individual member's interests are threatened.⁴⁹ Most of the conflicts that NATO will be called upon to help resolve originate in areas immediately adjacent to, but not within, the North Atlantic region. To

46. Bureau of European-Canadian Affairs, United States Dept. of State, *Minimum Requirements for NATO Membership* (last modified Aug. 15, 1997) <http://www.state.gov/www/regions/eur/fs_970815members.html>.

47. This hypothesis is supported by recent events. One need look no further than the firestorm of controversy surrounding the Grenada invasion to find arguments that the invasion was illegal because, among other reasons, the Charter of the Organization of Eastern Caribbean States (OECS) did not permit the action. The Grenada incident is discussed *infra* at notes 176 to 191 and accompanying text. The legality of intervention by the Economic Community of West African States (ECOWAS) in Liberia is also in dispute despite the implied authority granted to that action by the Security Council. *See infra* notes 231-267 and accompanying text. After NATO began bombing the FRY, Yugoslavia's representative to the UN charged in an emergency meeting of the Security Council that NATO was disregarding its own "statute." U.N. SCOR, 54th Sess., 3988th mtg., U.N. Press Release SC/6657 (1999) at 12.

48. North Atlantic Treaty, *supra* note 2, art 5.

maintain the advantages that derive from using the NATO structure, such as command and control, interoperability, and standardized procedures, the members must be prepared to act outside the strict regional parameters written into the treaty.

It is not at all clear that NATO members are currently prepared to act "out of area." For example, despite the German government's recent pronouncements,⁵⁰ it is uncertain when that nation will permit its armed forces to participate in NATO operations other than collective self-defense. At least in the early stages of the Bosnia conflict, Germany did not permit its ground troops to aid the UN Protection Force in Bosnia-Herzegovina.⁵¹

The German government also refuses to participate in countries where there is lingering hostility towards Germany due to occupation during World War II.⁵² Similarly, France has been reluctant to participate in the European Union fact-finding efforts in Algeria due to its own historical involvement in that country.⁵³ Others, for political or practical reasons, may also be reluctant to commit out-of-area without prompting by treaty obligations.

The amendments suggested in this article offer distinct advantages over two alternatives that are typically advanced to keep peace operations within the sole control of the United Nations. First, maintaining the NATO command and control structure during peace operations avoids the inevitable confusion arising from the ad hoc coalitions typically used by the UN. Second, it is a viable alternative to the extinct concept of a universal force formed under Article 43 of the UN Charter.⁵⁴

From the United States' perspective, the suggested amendments present two further advantages. First, placing responsibility for peace operations in NATO keeps the United States firmly engaged in Europe,

49. *Id.* art. 4. "The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened." *Id.*

50. Hans Georg Ehrhart, *Germany*, in CHALLENGES FOR THE NEW PEACEKEEPERS 32, 40 (Trevor Findlay ed., 1996).

51. UN Protection Force was the multinational force that preceded NATO intervention in Bosnia. Further details are provided *supra* notes 333 to 368 and the accompanying text.

52. See Ehrhart, *supra* note 50, at 40.

53. See Trueheart, *supra* note 13. The Algerian Government criticizes France for any comments it makes about the situation, while suffering terrorist bomb attacks from the Algerian opposition. *Id.*

whereas the United States would be excluded if another security structure, such as the West European Union, took on the duty. Most NATO allies will welcome continued United States involvement. As a practical matter, they have demonstrated reluctance to engage in peace operations without the United States' commitment.⁵⁵ Additionally, action within NATO seems to be a more politically acceptable alternative to most United States lawmakers.⁵⁶ Forces devoted to NATO do not face the same personnel and funding limits found in the UN Participation Act.⁵⁷

Part II of this article explores why the United Nations is unable to function as the sole guarantor of international peace and security. The focus is on the practical constraints acting on the international organization. Part III discusses the role of regional organizations and their relationship with the UN. Deriving their legal authority from Chapter VIII of the UN Charter, these regional arrangements have evolved to the point that their importance in maintaining regional peace can be nearly as great as that of the United Nations.

Case histories concerning regional action in the Dominican Republic, Grenada, Liberia, and Haiti record the emerging partnership between the UN and regional organizations. Those missions also demonstrate the creation of customary international law favoring regional action, especially in the field of humanitarian relief and democratic intervention.

Part IV narrows the focus on regional organizations to the role of NATO in Bosnia. It examines the factors supplying the impetus for transforming NATO from a west European collective-security arrangement to a sponsor of regional peace and security. Part V explains why NATO does not need UN Security Council authorization to conduct humanitarian and democratic intervention peace operations. It also argues that the member

54. Article 43 of the UN Charter envisions that the Member States will "make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities . . ." UN CHARTER art. 43. Some have inaccurately described this arrangement as the creation of a UN standing army. Whatever its form, no nation has concluded such an agreement, or is it likely to ever be implemented. *But see* Henrikson, *supra* note 15, at 63-70 (asserting Article 43 is the most effective way the UN can constrain the newly powerful regional organizations).

55. *See* Steinberg, *supra* note 34, at 60-61.

56. *Cf.* 22 U.S.C.A. § 287 (West 1999) (setting United States troop contribution to UN peacekeeping operations at no greater than one thousand men and the funding parameters for the same).

57. *Id.*

nations should amend the treaty to define clear and consistent goals for the organization in the twenty-first century. A clear legal basis for conducting humanitarian and democratic peace operations promotes unity of purpose and vision for the alliance. The members must commit themselves to their new mission and redefine their operational area.

II. Why UN Peace Operations Need Regional Help

The UN faces growing limits on its ability to conduct peace operations. This part examines the practical shortcomings of the organization, which lead it increasingly to ask for regional help. The structure of the UN Charter and external influences beyond the UN's control cause these problems.

One problem built into the structure of the UN Charter is the veto power. The power, controlled by the permanent members of the Security Council, is often blamed for the UN's inconsistent approach to peace operations. Peace operations during the Cold War era were often blocked due to East-West competition.⁵⁸ Article 27 of the charter provided a convenient mechanism for the opponents to thwart resolutions they thought were advantageous to the other side.⁵⁹ This provision allows any one of the five permanent members to obstruct actions supported by the other members of the Security Council.⁶⁰ Over the course of forty-five years, the veto power prevented the UN from taking a decisive role in over one hundred major conflicts that resulted in about twenty million deaths.⁶¹ From 1945 through 1990, the permanent members used the veto 279 times.⁶²

A rare episode, when the veto failed to block UN enforcement action, occurred at the beginning of the Korean Conflict.⁶³ With Soviet backing, North Korea launched an invasion of its sister state on 24 June 1950. The United States immediately called for the Security Council to convene. Fortunately, the Soviet representative was absent.⁶⁴ The Council voted nine to zero, with one abstention, to condemn the invasion and demanded immediate North Korean withdrawal.⁶⁵ A second resolution, taken before the Soviet representative could hasten back to New York, gave UN members authority to "repel the invasion and restore peace."⁶⁶

The Soviets did not make the mistake of boycotting the Security Council again. Boxed in by the competition, the UN developed peace-keeping as a sort of "Chapter Six and a half" measure⁶⁷ to address situations where East-West interests did not conflict, or where, often for

different reasons, those interests coincided.⁶⁸ For example, in 1960, the

58. See Major General V.A. Zolotarev, *The Cold War: Origins and Lessons*, in INTER-NATIONAL COLD WAR MILITARY RECORDS AND HISTORY 11 (William W. Epley ed., 1994) for an interesting view from the Russian perspective on the forces driving the Cold War. General Zolotarev believes:

Looking for a culprit in the 'Cold War' is in our opinion a useless exercise because everything in world politics is inter-connected. Thus, any action of one party, which at first glance provided an incentive for the escalation of hostility, if studied thoroughly, will turn out to be a response to some measure of the opponent. One should be forthright: both opposing parties did not act with pristine motives and this led to increased tensions on a global scale in the post-war period, even though the cooperation reached during World War II created conditions for the coordinated solving of problems.

Id. at 12. In his view the desire of the Soviet Union to establish pro-Communist regimes in Eastern Europe received impetus from perceived slights when the West attempted to accept German surrender in Italy without Soviet participation and then abruptly halted Lend-Lease activities. By 1947 the Soviet fears were confirmed by Winston Churchill's famous "Iron Curtain" speech and the announcement of the Truman Doctrine that was designed to thwart Soviet aims of establishing a pro-Communist government in Greece. The Soviets viewed the Marshall Plan as an attempt to collapse their buffer zone and blocked its extension into Eastern Europe. To provide a counter to the Marshall Plan, the Soviets then created the Information Bureau of Communist Parties. This was supported by a system of friendship, cooperation and mutual aid treaties, which General Zolotarev admits were of a decidedly "anti-Western" character. The West reacted by creating the WEU in 1948 and NATO in 1949. The Warsaw Pact formally came into being in 1955. By then the arms race was in motion, especially in the nuclear field. *Id.* at 12-14.

59. U.N. CHARTER art. 27(3) states in pertinent part: "decisions of the Security Council on . . . [non-procedural] matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members."

60. *Id.*

61. *An Agenda For Peace: Preventive Diplomacy, Peacemaking and Peace-keeping: Report of the Secretary-General*, para. 14, U.N. Doc. A/47/277/S/ 24111 (1992) [hereinafter *An Agenda For Peace*].

62. *Id.*

63. BRIAN CROZIER ET AL., *THIS WAR CALLED PEACE* 92, 93 (1984).

64. The Soviets were protesting the presence of the Chinese Nationalists on the Council in lieu of the Communist government. *Id.* at 93.

65. S.C. Res. 82, U.N. SCOR, 5th Sess., 473d mtg., para. 1, U.N. Doc. S/INF/5/Rev.1 (1950).

66. S.C. Res. 83, U.N. SCOR, 5th Sess., 474th mtg., para. 5, U.N. Doc. S/INF/5/Rev.1 (1950).

67. See Weiss, *supra* note 44, at 52 (crediting Secretary General Dag Hammarskjöld with this description of military operations which had no reference in the Charter, but which seemed to bridge the gap between the Chapter VI mandate for pacific settlement of disputes and the Chapter VII enforcement provisions).

new Republic of the Congo appealed to the United States for assistance when its former colonial overlord, Belgium, sent troops there to protect its citizens following a breakdown of law and order in that country.⁶⁹ For a variety of reasons, the United States was unwilling to devote its time and manpower to the problem.⁷⁰ On the other hand, the United States feared that the Soviets would intervene, so they referred the Congolese to the UN Security Council.⁷¹

If the disturbance was a purely internal matter, the Security Council may also have declined to get involved if they believed Article 2(7) was a prohibition.⁷² The Congo government, however, complained that Belgian troops had violated its nation's sovereignty by entering under the "pretext" of protecting Belgian citizens.⁷³ This placed the Security Council in a quandary. The Western powers were anxious to avoid sanctions against Belgium, but feared that invoking Chapter VII would inject Soviet ground troops into the area.⁷⁴ Likewise, the Soviets were eager to ensure that United States forces would not intervene.⁷⁵ Ultimately, both sides were happy to let the Secretary General handle the situation using peacekeeping procedures.⁷⁶ The Security Council empowered the Secretary General to

68. See Trevor Findlay, *The New Peacekeepers and the New Peacekeeping*, in CHALLENGES FOR THE NEW PEACEKEEPERS 1 (Trevor Findlay ed., 1996) (tracing the evolution). Findlay states, "Neither mentioned by name nor given a specific legal basis in the UN Charter, peacekeeping evolved pragmatically in response to the limited room for maneuver afforded the UN by East-West conflict." *Id.*

69. BRIAN URQUHART, *A LIFE IN PEACE AND WAR* 145-177 (1987).

70. *Id.*

71. *Id.*

72. U.N. CHARTER art. 2(7) states: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . but this principle shall not prejudice the application of enforcement measures under Chapter VII." The accepted reading of Article 2(7) then was that it demanded strict non-intervention. This interpretation has evolved with time, however. See *An Agenda For Peace supra* note 61, para. 17 ("The time of absolute and exclusive sovereignty . . . has passed.").

73. William J. Durch, *The UN Operation in the Congo: 1960-1964*, in THE EVOLUTION OF UN PEACEKEEPING 315 (William J. Durch ed., 1993). The Congo had been a Belgian colony. In the de-colonization movement, Belgium abruptly divested itself of its protectorate in June 1960. Within days the Congo was in chaos. Belgium quickly re-introduced its troops to protect roughly 100,000 of its citizens there. In reality, the peacekeeping action in the Congo involved not only persuading Belgian troops to leave, but to keep the Congolese factions from tearing the country apart. See MILLER, *supra* note 28, at 77.

74. See MILLER, *supra* note 28, at 77.

75. *Id.*

“take steps” to render aid, including military assistance, to the Congo government.⁷⁷

As tempting as it is to blame the Cold War for Security Council deadlock, the presumption is not entirely accurate. For example, both Britain and France used their veto to block Security Council action during the Suez Crisis, hoping to preserve their political interests in the area despite opposition from their allies.⁷⁸ Then, after the brief moratorium on vetoes noted in *An Agenda for Peace*,⁷⁹ it has reappeared in the post-Cold War Security Council as members continue to protect their own political inter-

76. In accordance with guiding principles set by Secretary General Hammarskjold during the Suez action the Security Council decided that permanent members of the Security Council should not contribute forces to peacekeeping efforts. This principle was still honored when forces were identified for the Congo. UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, *THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING* 48, 221 (2d ed., 1990) [hereinafter *THE BLUE HELMETS*]. According to the official UN version of events, the Secretary General felt that it was unnecessary to invoke the enforcement provisions of the Charter because he “assumed that, were the United Nations to act as proposed, the Belgian Government would withdraw its forces from Congolese territory.” *Id.* at 219.

77. See S.C. Res. 143, U.N. SCOR, 15th Sess., 873d mtg., U.N. Doc. S/4387 (1960) (including authority “to provide . . . such military assistance as may be necessary”). This brief unanimity among the permanent Security Council members would not last. By February 1961 it was apparent the main threat to the Congo was from the Congolese themselves as various provinces attempted to break away. Within what may be referred to loosely as the central government there was internal squabbles and attempted coups. Further attempts to refine the mission moved fitfully after vetoes and threats of veto as one member and then another supported the various factions. See MILLER, *supra* note 28, at 77-81.

78. THOMAS M. FRANCK, *NATION AGAINST NATION* 41-45 (1985). Egypt nationalized the Suez Canal in July 1956. Israel attacked the area in October because they claimed fey-adeen were raiding from the Sinai. The attack was calculated to draw a response from Egypt. By pre-arrangement with the Israelis, British, and French paratroopers then took the canal after warning “both” sides to back off. Their vetoes blocked any action by the Security Council. The British and French proposed using NATO to restore order, but the United States insisted the UN was the proper forum. The General Assembly convened in emergency session while Secretary-General Hammarskjold and Canada’s foreign minister Lester B. Pearson worked out a behind the scenes deal to peacefully intervene using a multinational peacekeeping force (but without troop contributions from the “Big Five”). This United Nations Emergency Force (UNEF) was the first true peacekeeping force providing the model followed by the UN for decades thereafter. A former UN official gives most of the credit for the idea to Secretary General Hammarskjold for creating a “conceptual masterpiece in a completely new field, the blueprint for a non-violent, international military operation” in response to the abortive raid. URQUHART, *supra* note 69, at 133. It is an interesting piece of trivia that the UNEF was equipped with United States surplus World War II helmets spray-painted United Nations blue to distinguish them from other forces. The blue helmets are now a fixture of peacekeeping. *Id.* at 134.

79. See *An Agenda For Peace*, *supra* note 61.

ests.⁸⁰ This has led some member states to complain that the decisions of the Security Council reflect only the interests of the powerful permanent members, not the organization as a whole.⁸¹ Many have lobbied for either an expanded Council and/or limitation on the veto power.⁸² Despite these initiatives, the veto is likely to continue as an impediment to many future UN peace operations.

There are other practical limits preventing the UN from effectively performing peace operations. The UN frequently does not receive the forces and logistics it needs to respond to threats to peace.⁸³ Additionally, the world organization is often at political odds with important members, particularly the United States, and it suffers financial reverses because of these disagreements.⁸⁴ Finally, the UN has not developed the necessary

80. A sampling of recent vetoes include: A United States veto blocking a resolution condemning Israel's east Jerusalem settlement policy (*see Chance to Effect Change at the UN*, BUS. TIMES (London), Mar. 25, 1997, available in 1997 WL 2966637); a United States veto preventing a second term for then Secretary General Boutros-Ghali (*see Top U.N. Post Now Wide Open*, ARIZ. REPUBLIC (Phoenix), Dec. 5, 1996, at A16 (casting the lone dissenting vote on the fifteen member Security Council)); a United States veto threat following a proposal to remove punitive sanctions against Iraq (*see United States Vows Veto on Iraq*, PITTSBURGH POST-GAZETTE, Aug. 3, 1995, at A9); a United States veto over a resolution demanding Israel stop its settlements in East Jerusalem, (*Indonesia Disappointed Over United States Veto on Security Council*, KYODO NEWS INT'L, May 22, 1995, available in 1995 WL 2225306); and a Russian veto to apportion the cost of peacekeeping efforts in Cyprus to all UN members (*Russia Uses Veto on Security Council to Kill Cyprus Plan*, ORANGE COUNTY REG. (CA), May 12, 1993, at A14 (citing the lone dissenting vote on the Council)).

Recently, the Russians insisted the United States needed further authority from the Security Council before launching an attack against Iraq to compel that country to comply with UN sanctions imposed following the Gulf War. Russia hinted that it would then veto the proposed action. Daniel Williams, *Yeltsin Says Bombing Iraq Might Bring 'World War.'* WASH. POST, Feb. 5, 1998, at A21. Russia initially blocked a proposed arms embargo against Serbia following unrest in the Kosovo region. William Drozdiak, *West Vows New Sanctions on Yugoslavia*, WASH. POST, Mar. 26, 1998, at A26. The arms embargo was approved only after Russia forced the other members to delete a paragraph calling the Kosovan situation a threat to international peace and security. John M. Goshko, *Arms Embargo on Yugoslavia*, WASH. POST, Apr. 1, 1998, at A24.

81. INTERNATIONAL TASK FORCE ON THE ENFORCEMENT OF U.N. SECURITY COUNCIL RESOLUTIONS, UNITED NATIONS ASS'N OF THE UNITED STATES OF AMERICA, WORDS TO DEEDS: STRENGTHENING THE U.N.'S ENFORCEMENT CAPABILITIES 34 (1997) [hereinafter WORDS TO DEEDS].

82. *Id.*

83. *See infra* Part II. A.

84. *See infra* Part II. B.

command, control, and logistics framework necessary to direct large-scale interventions.⁸⁵

A. Article 43: Gone But Not Forgotten

While the liberal use of the Security Council veto mirrors the members' distrust of each others' political agendas, their refusal to establish a permanent on-call force for UN peace operations reflects distrust of the world organization itself. Article 43 is the legal authority for such a force.⁸⁶ The article came closest to implementation right after World War II when the Security Council produced a draft of general principles to guide negotiation of Article 43 agreements.⁸⁷ However, the draft was never approved. Although there were several reasons given for this failure,⁸⁸ the original motivation was probably political disagreement founded in Cold War distrust.⁸⁹

Just as the Cold War did not cause all of the Security Council vetoes, it also was not the sole barrier to implementing Article 43. In a burst of enthusiasm, the Secretary General greeted the conclusion of the Cold War by stating, "the improvement of relations between States east and west affords new possibilities, some already realized, to meet successfully threats to common security."⁹⁰ He judged that the time was right to ask UN members to negotiate Article 43 agreements "essential to the credibility of the United Nations as guarantor of international security."⁹¹

The response to the Secretary General's plea was less than overwhelming. No state has negotiated an Article 43 agreement.⁹² The United

85. See *infra* Part II. C.

86. See *supra* note 54 and accompanying text.

87. *General Principles Governing the Organization of the Armed Forces Made Available to the Security Council by Member Nations of the United Nations*, U.N. Doc. S/336 (1947).

88. U.N. SCOR, 2d Sess., 139th mtg. (1947) indicates that the main points of contention were over numbers and types of military support to be given by the permanent members and the logistics required to base, supply, deploy, and re-deploy the troops. *Id.* at 956-975.

89. See, e.g., Henrikson, *supra* note 15, at 63; James E. Rossman, *Article 43: Arming the United Nations Security Council*, 27 N.Y.U. J. INT'L L. & POL. 227, 231-233 (1994); Andrew S. Miller, *Universal Soldiers: U.N. Standing Armies and the Legal Alternatives*, 81 GEO. L.J. 773, 775 (1993).

90. See *An Agenda For Peace*, *supra* note 61, para. 8.

91. *Id.* para. 43.

States flatly rejected the proposition,⁹³ as did China.⁹⁴ Political reality quickly set in.

When the Secretary General supplemented *An Agenda for Peace*, without directly addressing Article 43, he conceded that the United Nations did not have the “capacity to deploy, direct, command, and control operations” for the purpose of peace enforcement.⁹⁵ He also stated that “it would be folly to attempt to do so at the present time when the organization is resource starved and hard pressed to handle the less demanding peace-making and peacekeeping responsibilities entrusted to it.”⁹⁶

Commentators give wide-ranging reasons for countries failing to implement Article 43.⁹⁷ For instance, there are several political rationales advanced against creating a UN army. First, nations resist participating in actions in areas where they have no defined strategic interests.⁹⁸ Second, smaller states and those without a permanent seat on the Security Council fear that they will be the object of UN intervention, whereas the permanent members could block intrusions into their own sovereignty through the use of the veto power.⁹⁹ The third reason is the likelihood that the permanent members would be unable to agree on a politically acceptable and compe-

92. *But see infra* notes 102-112 (discussing the recent formation of the U.N. Stand-by Forces High Readiness Brigade [SHIRBRIG]). The SHIRBRIG countries have not signed Article 43 agreements, although their pledges support the principles of Article 43.

93. BUREAU OF INT’L ORG. AFFAIRS, UNITED STATES DEPT. OF STATE, PUB. 10161, PRESIDENTIAL DECISION DIRECTIVE (PDD) 25: THE CLINTON ADMINISTRATION’S POLICY ON REFORMING MULTILATERAL PEACE OPERATIONS, *reprinted in* 33 I.L.M. 795, 802 (1994) [hereinafter PDD 25] (“The United States does not support a standing UN army, nor will we earmark specific United States military units for participation in UN operations.”).

94. Paul Lewis, *U.N. Set to Debate Peacemaking Role*, N.Y. TIMES, Sept. 6, 1992, at A7.

95. *See Supplement to an Agenda For Peace*, *supra* note 14, para. 77.

96. *Id.*

97. On the technical level, the drawbacks reported in 1947 remain valid today: Under what circumstances would a member be permitted to withdraw forces dedicated to the UN? If granted the right to withdraw, could the forces be pulled while the UN was actually engaged in combat? How would the UN determine the nationality of the commanders? How are troop contribution obligations determined? What form would UN basing rights take? And, would the UN establish time limits for withdrawal after termination of hostilities? *See Miller, supra* note 89, at 800-805.

Modern concerns added to this litany include: Who has command and control of the forces? How would the UN army be trained to ensure uniform tactics and doctrine? How would the UN ensure interoperability among forces with different languages and equipment? *See Rossman, supra* note 89, at 245-247.

98. *See Rossman, supra* note 89, at 245.

99. *Id.* at 246.

tent military commander.¹⁰⁰ Finally, a deadlocked Security Council may block any action to prevent or to stop aggression.¹⁰¹

The outline of a scaled-down Article 43 can be seen in the recently established Planning Element for the UN Stand-by High Readiness Brigade.¹⁰² Although France suggested a UN rapid reaction force in 1992, the idea never moved past the talking stage.¹⁰³

The Secretary General repeated the call for a rapid reaction force in 1995.¹⁰⁴ The UN members discussed several ideas, but seven countries, led by Denmark,¹⁰⁵ took the first affirmative step in December 1996 when they agreed to form the UN Stand-by High Readiness Brigade with a command headquarters near Copenhagen, Denmark.¹⁰⁶

Despite its designation as a "UN" force, however, the Stand-by High Readiness Brigade is actually a multilateral agreement to which the UN is not a party.¹⁰⁷ The parties to the agreement envision a force that will be based in their home countries and assembled only for training purposes or for peace operations approved by both the Security Council and their own national governments.¹⁰⁸ Additionally, the agreement contains an opt-out

100. *Id.*

101. *Id.*

102. *Secretary-General Says Initiative is Milestone in Efforts to Enhance UN Machinery for Peace*, M2 PRESSWIRE, Sept. 4, 1997, available in 1997 WL 13654073.

103. See Paul Lewis, *France's U.N. Plan at Odds with United States*, N.Y. TIMES, Feb. 2, 1992, at 7 (reporting France's offer to put 1000 French soldiers on 48-hour notice for UN peacekeeping duty—a plan the United States did not endorse. It is interesting to note that although the French proposed the idea in 1992 they never implemented it, nor are they a member of SHIRBRIG).

104. See *Supplement to an Agenda For Peace*, supra note 14, para. 43.

105. The original parties to the agreement were Denmark, Sweden, Canada, Poland, Norway, Austria, and the Netherlands. *SHIRBRIG Accord Steps Up UN Ability to Deploy Peacekeepers to Crisis Areas*, JANE'S DEF. WKLY., Jan. 8, 1997, at 20.

Later, Argentina, Belgium, the Czech Republic, Finland, and Ireland agreed to participate as observers. *UN Head Urges Support for New Standby Force*, JANE'S DEF. WKLY., Sept. 10, 1997, at 8. By December 1997, however, Poland had not yet joined the steering committee for the group. *Dutch Join UN SHIRBRIG*, JANE'S DEF. WKLY., Dec. 10, 1997, at 14.

106. See *SHIRBRIG Accord Steps Up UN Ability to Deploy Peacekeepers to Crisis Areas*, supra note 105.

107. *Id.*

108. *Id.*

provision wherein each country can decide not to contribute forces for a particular operation, while the other members can press ahead.¹⁰⁹

This last provision calls into question the actual utility of the force, especially in light of its composition and logistics. Manned with a maximum of only 4000 troops, it is designed for light peacekeeping duties in “potential conflict areas but where there is little danger of fighting breaking out.”¹¹⁰ The force will also be dependent on logistical support and air-lift from other nations.¹¹¹ Obviously, even a small opposing force would quickly outgun this modest force if the situation turned hostile. One expert noted that they would serve as little more than a “trip-wire,” putting a “would-be aggressor on notice that moving his forces . . . would involve him in armed conflict with the Security Council and the entire world.”¹¹²

Its status as a trip-wire should be small comfort to any rapid reaction force. Even strong supporters of the UN have concluded that the most ambitious UN standing army will probably not boast enough force to oppose a “medium grade belligerent.”¹¹³ Those forces would, of course, be dependent on a logistics tail composed of expensive air- and sea-lift-forces that the UN also does not possess. To assist these components, the national forces of the members would have to respond quickly after all. In the final analysis, then, without an Article 43 force or a credible UN rapid response force, the UN is totally dependent on the uncertain political will of the supporting member states.¹¹⁴

B. Political Disagreements and Financial Woes

The truth is that neither the United States nor the Soviets had ever really developed the political commitment to the central idea of the [UN], which would have been necessary to make it work, the sort of commitment, for example, which the constituents of our domestic system have to the United States Constitution. That takes not merely political will but reciprocal

109. *Id.*

110. See *UN Head Urges Support for New Standby Force*, *supra* note 105.

111. See *Dutch Join UN SHIRBRIG*, *supra* note 105.

112. Professor Robert Turner, *quoted in* Rossman, *supra* note 89, at 258.

113. See *WORDS TO DEEDS*, *supra* note 81, at 33. The Secretary General hypothesizes that he currently has a commitment of about 88,000 troops from 70 countries “potentially available.” See *Secretary-General Says Initiative is Milestone in Efforts to Enhance UN machinery for Peace*, *supra* note 102.

confidence, rooted in trust that the other side will play by the rules established in the fundamental document if we do.¹¹⁵

The above quote was written during the Cold War, but the reality is that political division in the UN has never been limited strictly to the East-West conflict. President Charles de Gaulle reportedly was fond of calling the institution the "Disunited Nations," devoting itself to "world disorder."¹¹⁶ Speaking in 1961 against the backdrop of the Congo peacekeeping initiative, de Gaulle had the opportunity to witness first hand the trends that are now familiar when peace operations go wrong.¹¹⁷ In the Congo, states that initially supported the operation were disillusioned when it dragged on, and what we now call "mission creep" changed the fundamental nature of the operation.¹¹⁸ In an attempt to impose their political will on the peacekeeping process, members voted against the resolutions, withheld funds, had on-scene proxies work at cross-purposes, and even threatened to withdraw troops and logistical support.¹¹⁹

It should come as no surprise that the divergent political views among nations and between the states and the UN result in frequent deadlocks.¹²⁰ These impasses need not be exclusively Security Council vetoes. Security

114. See WORDS TO DEEDS, *supra* note 81, at 32-33. Despite the current optimism over the rapid reaction force, whether it is the SHIRBRIG or some other force, the enthusiasm is not universal. Apparently some countries with less than sterling civil rights records or with skeletons in their closets concerning the way they came to power, fear the force will be used against them. Others do not want their nationals to spend extended periods under UN command. Costs are always a concern. *Id.* In the United States, there is strong support for the proposition that the President can never relinquish command to the UN. See David Kaye, *Are There Limits to Military Alliance? Presidential Power to Place American Troops Under Non-American Commanders*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 399, 439 (1995). Critics argue that the President abrogated his constitutional responsibility as commander and chief in Bosnia and Somalia because he allowed non-United States actors to decide when and where United States force would be employed. *Id.* This led President Clinton to declare: "The President retains and will never relinquish command authority over United States forces." His declaration, PDD 25 also says that large-scale combat deployments should be under United States command and operational control or "through competent regional organizations such as NATO or ad hoc coalitions," and "[n]o president has ever relinquished command over United States forces. Command constitutes the authority to issue orders covering every aspect of military operations and administration. "[But if operational control is given to a UN commander], United States commanders will maintain the capability to report separately to higher United States military authorities, as well as the UN commander." See PDD 25, *supra* note 93, at 807-809.

115. See FRANCK, *supra* note 78, at 59.

116. Charles Burton Marshall, *Revision of the United Nations Charter*, in THE UNITED NATIONS IN PERSPECTIVE 77 (E. Berkeley Tompkins ed., 1972).

117. *Id.*

Council inaction is almost as common. Arguably, the Security Council's aversion to becoming involved in quagmires in the Federal Republic of Yugoslavia, Liberia, and Haiti actually prolonged the strife in those areas.¹²¹ This type of stalemate is also dangerous because the effort to craft politically acceptable mandates may leave Security Council resolutions vague and subject to differing interpretations by those tasked to carry them out. Setbacks often lead to backlash against the UN.¹²²

Perhaps the damaged relationship between the UN and the United States best illustrates the political and financial problems facing the organization. The United States was one of the founding states of the United Nations.¹²³ It made the UN a pillar of its foreign policy.¹²⁴ When the first enforcement action was launched, the United States led the way into Korea.¹²⁵ It even insisted against its own allies that the Suez Crisis be resolved through the auspices of the UN.¹²⁶

The UN grew rapidly in its first twenty-five years. Membership expanded from fifty-one at or near inception to 127 members by 1972.¹²⁷ Most of the new members were from developing nations.¹²⁸ The General Assembly came to be dominated by their voices calling for economic aid for development.¹²⁹ The "nonaligned" bloc of newly admitted states often

118. The goal of Resolution 143 was to facilitate the withdrawal of Belgian forces from the Congo and enable the Congolese forces to restore order. When secessionist movements continued to threaten the country's stability, the Security Council authorized its force to maintain the territorial integrity and political independence of the country. *See* S.C. Res. 161, U.N. SCOR, 16th Sess., 942nd mtg., U.N. Doc. S/4722 (1961). Still later in November 1961, the Security Council authorized U.N. forces to arrest and deport all foreign mercenaries in the country who were there (usually with the backing of an outside government) supporting the various secessionist forces. *See* S.C. Res. 169, U.N. SCOR, 16th Sess., 982nd mtg., U.N. Doc. S/5002 (1961). From a declared policy of neutrality and non-intervention, these resolutions transformed the operation to a situation where "self-defense" increasingly took on an offensive overtone. *See, e.g.,* MILLER, *supra* note 28, at 96-99; Durch, *supra* note 73, at 327.

119. MILLER, *supra* note 28 at 79-80. For a survey of what options the major players chose, *see* Durch, *supra* note 73, at 322-326.

120. For example, the Secretary General is extremely protective of the UN's claimed prerogative of strategic command and control of forces placed at its disposal for peacekeeping. *See Supplement to an Agenda For Peace, supra* note 14, paras. 38-42. *But see* PDD-25, *supra* note 93, at 801 (defining United States reasons for involvement in UN peace operations as first, "to persuade others to participate in operations that serve United States interests," and second, "to exercise United States influence over an important UN mission without unilaterally bearing the burden").

121. *See* Borgen, *supra* note 33, at 829. Perhaps the current situation in Kosovo is yet another example of this phenomenon. *See* Drozdiak, *supra* note 80.

voted against the interests of the United States.¹³⁰ Since the United States was the major contributor to the UN budget, United States policy-makers debated the wisdom of the investment.¹³¹

At first, the United States focused on the nonaligned and Soviet blocs as the source of its disillusionment.¹³² Later, the target of United States displeasure shifted to the world organization itself, with some United States interests advocating that the United States use its financial clout to motivate the UN to make needed organizational changes.¹³³ For a brief

122. See WORDS TO DEEDS, *supra* note 81, at 9, 48. The Congo operation was an early illustration of this phenomenon. There are additional examples. Somalia, where the mission to protect humanitarian relief turned into a manhunt for a warlord which ultimately got twelve Americans killed. Bosnia, before IFOR got involved when the UN's mandate switched uncertainly between humanitarian aid to setting up safe havens, and then using force to actively engage violators of the safe zones. See Address by Ambassador Richard Gardner, *Franklin Roosevelt and World Order: The World We Sought and the World We Have*, in 142 CONG. REC. S12458 (daily ed. Oct. 21, 1996) (statement of Sen. Kennedy) [hereinafter Address by Ambassador Richard Gardner].

In Somalia and the former Yugoslavia, there were large gaps between the ambitious Security Council mandates and the capacity of the world organization to carry them out. The inevitable result has been disillusionment with the UN, particularly within the United States. These UN operations, as well as the crisis in Rwanda, have called into question a central presumption of collective security—the willingness of democratic countries to risk casualties in conflict situations ‘anywhere in the world,’ where they do not see their vital interests as being at stake.

Id. See also FRANCK, *supra* note 78, at 174.

123. ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 174 (1994).

124. See *id.* (arguing that the UN “was at the center of United States foreign policy” during the 1950s and 1960s as it argued for an expansive view of what the UN could take on, while conversely the Soviets advocated a very conservative approach).

125. S.C. Res. 84, U.N. SCOR, 5th Sess., 476th mtg., U.N. Doc. S/INF/5/Rev.1 (1950) delegated the Security Council's command and control of UN operations in Korea to the United States.

126. See *supra* note 78 and accompanying text.

127. Carlos P. Romulo, *Crosscurrents in the U.N.*, in THE UNITED NATIONS IN PERSPECTIVE 92 (1972).

128. *Id.*

129. *Id.*

130. *Id.* at 92-95. See also Opinion, *A Poor Investment*, SAN DIEGO UNION-TRIB., Mar. 19, 1984, at B6 (describing the UN as “a sounding board for diatribes against America” and stating that UN members vote against the United States 75% of the time; additionally, the nonaligned nations of Africa, Asia, and Latin and South America voted with the United States only about 20% of the time).

period during the Reagan administration, Congress followed through on its threats, drastically cutting back United States contributions to the UN.¹³⁴ The administration came to believe, however, that the cuts hurt the United States more than they helped, because they undermined United States foreign policy goals.¹³⁵

When President Clinton took office, he reportedly backed increased participation in UN initiatives.¹³⁶ A Republican majority in Congress, however, became even more critical of the UN bureaucracy than had been members of the Reagan administration.¹³⁷ Their perceptions that the UN was an overblown and inefficient organization were enhanced by the UN's operational failures in Somalia and Bosnia.¹³⁸ This time, the United States

131. By the early 1980s the United States Ambassador to the UN, Jeanne Kirkpatrick, began to describe the organization as "a very dismal show." Jeanne Kirkpatrick, Address to the American Legion, *quoted in* Editorial, "Dismal Show" Deplored, OKLA. CITY TIMES, Feb. 23, 1982, available in 1982 WL 2393074. She believed that the General Assembly allowed small countries to dominate the discussion and that their involvement actually helped polarize the world making conflict resolution more difficult. *Id.* Ambassador Kirkpatrick began to support the idea of selective cuts in United States funding for the UN. *See* Editorial, *Waffling on the UN*, DAILY OKLAHOMAN, Oct. 8, 1983, available in 1983 WL 2169569; *see also* Opinion, *supra* note 130 ("What's worse, the United States pays for this abuse. The United States treasury bankrolls a quarter of the United Nation's total budget. And because most nations fail to pay their share of the bill, the American contribution usually rises to more than a third.").

132. *See, e.g.*, Andrew Radolf, Opinion, *United States Turns Up Heat on Bias at the U.N.*, SAN DIEGO UNION-TRIB., Apr. 29, 1984, at C5 (describing the results of a "report card" which helped the United States determine how much foreign aid it should allocate to a country based on its UN voting record).

133. *See id.* The Nichols Amendment to the UN Participation Act, called for a review of "how well the UN is fulfilling [its] mandate . . . to maintain international security and promote 'peaceful relations among states.'" The UN budgeting process came under attack. *See U.N. Wasting United States Tax Money, Heritage Says*, SAN DIEGO UNION-TRIB., June 19, 1984, at A4.

134. *See, e.g.*, *Reagan Reverses Stance, Tries to Restore U.N. Funding*, N.Y. TIMES, Sept. 14, 1986, at A2.

135. *See Reagan Urges Congress to Restore U.N.'s \$79.2 Million*, L.A. TIMES, July 22, 1987, at 1.

136. *See GOP Casts Pall Over U.N. Anniversary*, DALLAS MORNING NEWS, Jan. 1, 1995, at A23.

137. *Id.*

138. *See, e.g.*, *GOP Casts Pall Over U.N. Anniversary*, DALLAS MORNING NEWS, Jan. 1, 1995, at A23; Christian Chaise, *Clinton Has No "Instant Solution" to UN Debt Problem*, AGENCE FRANCE PRESSE, Oct. 20, 1995, available in 1995 WL 7870821; Bob Dole, *Dole to Introduce Bill Targeting Outrageous U.N. Taxation Schemes*, Jan. 17, 1996, available in 1996 WL 5167019; Editorial, *Split Policy at the U.N.*, WASH. POST, Sept. 24, 1997, at A20. Political differences prevented any money from being appropriated for UN purposes in fiscal year 1998. *See Goshko, supra* note 23.

removed almost all monetary backing for the UN, plunging it into its present financial morass.¹³⁹

The UN did not help its cause. It moved too slowly to implement the organizational changes, which it finally admitted needing all along.¹⁴⁰ In part, the developing nations hindered change because they insisted that the UN's major function should be rendering economic aid.¹⁴¹ Nevertheless, United States complaints about the speed of reform led directly to the ouster of Boutros-Ghali from the Secretary-General post.¹⁴²

Meanwhile, the financial debacle caused other ripple effects. Because of the shortfall in funding, the UN cannot reimburse participating states for their peacekeeping activities.¹⁴³ In turn, those states cannot, or will not, participate in future operations without such funding.¹⁴⁴ When the UN cannot fill the peacekeeping role, regional organizations are the logical entities to step in to impose a solution.

C. Command and Control of Resources and Troops

In the golden age of peacekeeping following the Suez Crisis, peace operations occurred after two sovereign nations agreed to stop fighting and were willing to have the UN help them to keep their promises by deploying along their borders.¹⁴⁵

Secretary General Hammarskjold set three straightforward rules for deploying peacekeeping troops: (1) the nations consent to their presence, (2) minimum use of force in self-defense or to defend the mission, and (3) the peacekeeping force must remain strictly neutral.¹⁴⁶ The first expansion of those concepts occurred in Lebanon and Jordan when the UN agreed to deploy peacekeeping forces within a state upon its consent if there was evidence that outside forces were influencing internal events.¹⁴⁷

Events in the Congo strained the basic rules to the limits—most would say past the cracking point. The Congo operation prompted a commenta-

139. See *supra* note 23 and accompanying text.

140. John M. Goshko, *U.N. at Odds Over Needs of Africa*, WASH. POST, Sept. 26, 1997, at A19.

141. *Id.*

142. See *Top U.N. Post Now Wide Open*, *supra* note 80.

143. See Findlay, *supra* note 68, at 30.

144. *Id.*

145. ARTHUR LEE BURNS & NINA HEATHCOTE, *PEACE-KEEPING BY U.N. FORCES* 18 (1963).

146. *Id.*

147. *Id.* at 22.

tor to observe, “The moment a peace-keeping force starts killing people it becomes part of the conflict it is supposed to be controlling, and therefore a part of the problem.”¹⁴⁸ He apparently believed that taking sides or using force in any way beyond self-defense would cause the UN to lose its aura of international respect.

Nevertheless, the spectrum of peace operations has continually expanded. Peacekeeping itself seems to include everything from traditional border watch to the more “robust” actions now called “peace enforcement.”¹⁴⁹ Peace enforcement is the most radical new concept. First authorized in Somalia to protect humanitarian relief operations, peace enforcement allows forces carrying out the Security Council mandate to use “all necessary means” to protect the mission without the consent of the state or the parties involved.¹⁵⁰ At the same time, the intervenors maintain the fiction that they are not a belligerent force.¹⁵¹

This evolution in peacekeeping places heavily armed troops, often without specific training in peace operations, in situations where cease-fires are uncertain or nonexistent.¹⁵² This has triggered an enormous debate within the peacekeeping community.

Proponents of the so-called “Scandinavian model” agree with Sir Urquhart that use of force only demeans the international organization and

148. URQUHART, *supra* note 69, at 179.

149. See Findlay, *supra* note 68, at 17, 18. The author identifies the range of activities now considered peacekeeping: disarmament (Somalia, Haiti); promotion and protection of human rights (Cambodia, El Salvador); mine clearance, training, and awareness (Afghanistan, Cambodia); military and police training (Cambodia, Haiti); boundary demarcation (Kuwait-Iraq); civil administration (Cambodia); refugee assistance and repatriation (FRY, Somalia, others); reconstruction and development (Somalia); maintenance of law and order (Cambodia and Somalia). *Id.*

150. Walter Gary Sharp, Sr., *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. & INT’L L. 93, 105-107 (1996).

151. *Id.*

152. See Findlay, *supra* note 68, at 1. The end of the Cold War has actually complicated matters. More forces have been freed up for peacekeeping duties, but have little training for it.

At the same time, peacekeeping has become much more complicated as “second generation peace-keeping” attempts to impose a solution on the conflict by either diplomatic or military means. *Id.* at 13. Often consent is weak, or missing entirely by the time the forces are on the ground. *Id.* at 24.

leaves it open to charges of favoritism.¹⁵³ Conversely, advocates of the "British model" of "robust" peacekeeping seem to be prevailing.¹⁵⁴

The complexity of new peace operations reveals the failings of the UN command structure. "[T]he ad hoc, amateurish, almost casual methods of the past simply could not keep pace, resulting in disorganization, mismanagement and waste."¹⁵⁵ Coordination between the civilian and military arms of the UN has always been difficult during armed conflict.¹⁵⁶ Command and control is now critical. Despite prodding by the United States and others, a recent report from a pro-UN American group still characterizes the results of the UN reform effort as "woefully inadequate."¹⁵⁷

Regional organizations are increasingly called to fill these gaps in the UN peace operations system. From a political and operational standpoint, it makes sense for the regional organizations to conduct peace operations. First, they are more likely to act in areas where they perceive that their vital national interests are threatened. Second, they are less likely to sabotage the mission when their own troops are on the ground. Third, they train together regularly, usually under identified chains of command, and have forged common doctrine, rules of engagement, and divisions of labor. Finally, while members of the regional organization will surely have their political differences, they form bonds over time that are usually absent from short term "coalitions of the willing."¹⁵⁸

III. Legal Basis for Regional Efforts

The legal basis for regional involvement in peace operations is already in place. Chapter VIII of the UN Charter protects the rights of regional organizations to exist and to deal with regional matters "consis-

153. *Id.* at 24.

154. *Id.* at 24-27.

155. *Id.* at 18.

156. *See, e.g.,* MILLER, *supra* note 28, at 88, note 35 (detailing the problems involved with coordinating the Congo mission: language problems, incompatible equipment and procedures, lack of common training and staff structures, and twisting chains of command); Findlay, *supra* note 68, at 25.

157. *See* WORDS TO DEEDS, *supra* note 81, at 6.

158. This phrase is used often to describe missions undertaken by nations with common interests, but which do so in an ad hoc manner without being compelled by membership in a security arrangement. *See, e.g.,* Thomas G. Weiss, *The UN's Prevention Pipe-Dream*, 14 BERK. J. INT'L L. 423, 430 n.28 (1996) (describing the difference between these ad hoc organizations and a theoretical organization under the complete command and control of the UN).

tent with the purposes and principles of the United Nations.”¹⁵⁹ These rights were hard won and, until recently, somewhat hollow, as the UN has attempted to define the regional organizations’ role very narrowly. The reasons for this approach are rooted in the history of the Charter negotiations and in historical fears of establishing “spheres of influence.”¹⁶⁰

A. Legal Framework

In 1945, during negotiations at Dumbarton Oaks in Washington, D.C., the preliminary draft proclaimed the UN the only international organization to which disputes between states could be submitted.¹⁶¹ One bloc, led by the Latin American nations, complained that this arrangement would take away their ability to respond in self-defense.¹⁶² They also felt that the proposed Charter would encroach too deeply on their capacity to resolve local issues and bypass regional organizations already in existence.¹⁶³

159. See U.N. CHARTER art. 52(1).

160.

[T]here are undoubtedly . . . considerations . . . which point to the need for great caution in admitting such [regional] arrangements into a global system. For one thing, they have too often in the past been the occasion for fear and suspicion instead of inspiring confidence and cooperation. . . . Furthermore, they tend to emphasize limited commitments, whereas modern war and the increasing interdependence of the modern world reduce the possibility of thinking realistically in such terms.

LELAND M. GOODRICH & EDVARD HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 310 (1949). See also ROBERT C. HILDERBRAND, DUMBARTON OAKS 24, 25 (1990) (relating Secretary of State Cordell Hull’s fears that regionalism would inhibit free trade and would be subject to abuse by the Great Powers who would dominate them. He also wished to avoid an excuse for United States isolationism, which might recur if the United States were given the choice of only participating in the Western Hemisphere).

161. Arend, *supra* note 26 at 7-18. Within the American camp, opinion was apparently split. As related, fearing a slip back into American isolationism, Secretary of State, Cordell Hull believed in a strong, central UN. See HILDERBRAND, *supra* note 160, at 24. Conversely, Senator Vandenberg, the American delegate to the regional committee at the San Francisco Conference, wanted to support the Latin American proposals. *Id.* at 6, 11-12. See also Borgen, *supra* note 33, at 798-799 (agreeing that it was a push from the Americans, North and South which led to the drafting of Chapter VIII).

162. See Arend, *supra* note 26, at 7-18

163. *Id.*

Another group, the victorious Allied Powers, wanted the flexibility to deal with a possibly resurgent Germany and Japan.¹⁶⁴

Diplomats opposed to regional organizations feared that if these groups were coequal with the UN they would render the world organization impotent and lead to regional hegemony by a few powerful states or alliances.¹⁶⁵ Ultimately, the parties compromised on Chapter VIII and the “inherent right to self-defense” principle of Article 51.¹⁶⁶

In an effort to balance the competing interests between the world body and the regional organizations, the drafters developed a complex scheme of articles requiring states to move between Chapter VI and Chapter VIII. No matter how nimbly the reader jumps, however, these competing provisions are difficult to harmonize. For instance, Article 33 says that

164. *Id.* at 7-18.

165. Arend, *supra* note 26, at 12. Essentially, this is the “spheres of influence” argument mentioned above. The resistance to participation by regional organizations in peace activities did not go away with the adoption of Chapter VIII. Apprehension of “spheres of influence” is still one of the leading non-legal arguments for resisting expansion of the regionals role. *See, e.g.*, Stromseth, *supra* note 31, at 498 (arguing that a greater out-of-area role for NATO might be viewed by weaker states as colonial power strong-arming); Binai-fer Nowrojee, *Joining Forces: United Nations and Regional Peacekeeping—Lessons Learned from Liberia*, 8 HARV. HUM. RTS. J. 129, 148 (1995) (decrying the role Nigeria has taken in Liberia because “the broad power given to regional organizations raises the risk of regional expansionist tendencies that could jeopardize the perceived impartiality of the United Nations and eventually discredit the peacekeeping process”); David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT’L L. 209, 228-229 (1996) (reasoning that the regional organization’s proximity and familiarity with the warring parties may generate more bias or self-interest than other states might have and that their actions may conceal driving interests of the regions most powerful members); *but see id.* (supporting regional involvement because multilateral decision-making requires consensus among states which have diverse interests lessening chance that acts are purely in self-interest and “the member states are likely to have a greater expertise on issues driving the conflict and greater familiarity with the warring parties than extra-regional actors”); WORDS TO DEEDS, *supra* note 81, at 42 (admitting regionals are often more familiar with the problems, the players, the history, and the subtleties of the situation).

166. *See* U.N. CHARTER art. 51. Those critical of the compromise term the deal the “three concessions.” *See* Henrikson, *supra* note 15, at 38-41. The concessions are: (1) the right to submit disputes to a regional organization first; (2) continued operation of existing mutual defense pacts and recognition of right to preemptive enforcement actions in those regions; and (3) the inherent right to individual and collective self-defense. *Id.* *But see* GOODRICH & HAMBRO, *supra* note 160, at 309 (arguing that the inclusion of these provisions was probably inevitable given the limited ability of most states to project power far beyond their borders, that national interests drive the decisions of states, and the demonstrated willingness of states in the past to enter into such arrangements when they have common interests at stake).

members “may” seek to resolve disputes at the regional level before resorting to the Security Council.¹⁶⁷ On the other hand, Article 52 says that members of regional arrangements “shall” resort to the regional forum first before referring disputes to the Security Council.¹⁶⁸ The article also directs the Security Council to refer disputes to the regional organization for pacific settlement.¹⁶⁹ Finally, the same article purports to take away with one hand what it has just given with the other.¹⁷⁰ Article 52, Section 4, says that despite the language of the first three paragraphs, the Security Council’s power to investigate disputes which may endanger international peace and security,¹⁷¹ and the ability of member states to bring these disputes to the attention of the Security Council, is not impaired.¹⁷²

What is left unsaid in Article 52 is perhaps as important as what is said. By retaining a niche for the Security Council in Article 52(4), does the Charter imply that the Security Council has the sole power to “recommend appropriate procedures or methods of adjustment” under Article 36¹⁷³ and the sole power to “decide whether to take action under 37?”¹⁷⁴ These are the provisions commonly regarded as the basis for the “Chapter Six and a half” peacekeeping powers.¹⁷⁵ If so, the rest of Article 52 is rendered meaningless. Conversely, if Article 52 retains meaning, it could support the theory that a regional organization may do anything short of enforcement action as long as it is consistent with the purposes and principles of the UN Charter.¹⁷⁶

Article 52 does not require the regional organization to seek approval of the Security Council before embarking on attempts to peacefully resolve disputes.¹⁷⁷ It also does not require the organization to cease its efforts once the Security Council becomes involved in a matter.¹⁷⁸ This contrasts with Article 53, which requires regional organizations to gain Security Council approval before conducting enforcement actions.¹⁷⁹ Accordingly,

167. U.N. CHARTER art. 33.

168. *Id.* art. 52(2).

169. *Id.* art. 52(3).

170. *Id.* art. 52(4).

171. *Id.* art. 34.

172. *Id.* art. 35.

173. *Id.* art. 36(1).

174. *Id.* art. 37(1).

175. *See* Weiss, *supra* note 44, at 51.

176. This concept will be explored more extensively *infra* notes 180-191 and accompanying text.

177. U.N. CHARTER art. 52.

178. *Id.*

an expansive reading of Article 52 provides the regional organizations a flexible tool with which to perform peace operations.

Commentators writing shortly after the approval of the Charter attempted to reconcile the provisions concerning regional organizations by saying that, by its terms, Article 52 was limited to "local disputes."¹⁸⁰ By local, they meant between members of the regional organization itself.¹⁸¹ The Security Council would then exercise its pre-eminent right to maintain international peace and security if there was a dispute not involving a member of a regional organization or if the regional organization was unable or unwilling to resolve the dispute.¹⁸² In practice, regional organizations do not always confine dispute resolution to member states, and the line between what is and what is not enforcement action is blurred.¹⁸³

At one end of the spectrum, an argument can be made for a narrow interpretation of Article 52. The narrowest interpretation would prohibit use of force by a regional organization except in cases of collective self-defense in response to armed attack, or after bringing a situation to the Security Council's attention and obtaining its authorization to use force.¹⁸⁴

179. *Id.* art. 53.

180. See GOODRICH & HAMBRO, *supra* note 160, at 314, 315.

181. See *id.* (acknowledging that the Chapter VIII provisions are "not wholly in harmony with the procedures laid down in Chapter VI"; and attempting to reconcile the inconsistencies by limiting regional action to instances that "exclusively involve states which are parties to such regional arrangements"); see also NORMAN BENTWICH & ANDREW MARTIN, A COMMENTARY ON THE CHARTER OF THE UNITED NATIONS 112 (1950) (interpreting the provisions to mean that the regional councils must handle local disputes unless the regional arrangement does not provide for dispute resolution or the matter is beyond its capacity to handle).

182. U.N. CHARTER art. 24.

183. See *supra* note 4. Article 53 of the UN Charter accords the regional organization the right to perform enforcement actions only after approval of the UN Security Council. On the other hand, the Security Council is empowered to task regional organizations with enforcement duties if appropriate. *Id.*

184. See Anthony Chukwuka Ofodile, *The Legality of ECOWAS Intervention in Liberia*, 32 COLUM. J. TRANSNAT'L L. 381, 411-412 (1994) (asserting that the Security Council has the sole prerogative to determine threats to international peace and security, and seeing liberalization of this standard as an invitation to the regional organization to justify their intervening in civil wars at will). Some writers seek to redefine what is meant by "use of force" to include actions such as economic sanctions which can have a profound impact on the internal order of a state. See Borgen, *supra* note 33, at 800 (asserting that the pre-Charter debates indicated the term "enforcement actions" should be a broader concept than the one currently embraced by the Security Council; and noting that during the Cuban missile crisis the Council adopted a more restrictive interpretation to include only affirmative use of force).

In other words, the regional organization must use diplomacy unless a member state is attacked, but otherwise it must wait for the Security Council to act under Article 53 before responding. The danger of this approach is that if the UN is frozen because of a veto or indifference, regional action is also handcuffed. For example, had NATO followed this model in the Kosovo situation, it would have had to stand idly by as Yugoslavian security forces slaughtered the Albanian Kosovars and drove them from their homes.

A more relaxed interpretation would allow the regional organization to use force without Security Council authorization, but only within strictly prescribed parameters. The most widely accepted examples are intervention based on invitation of lawful authority and for the limited purpose of rescuing foreign nationals trapped within a combat zone.¹⁸⁵ Although this is normally a workable and widely accepted definition, it could be considered too narrow. For instance, the charter neither clarifies the legal options of a regional organization if a central government of a state collapses or condones widespread human rights abuses, nor does it define the point at which such a situation becomes “a threat to international peace and security.”¹⁸⁶

Those espousing a more liberal interpretation of Article 52 claim that a regional organization can project force into the sovereign territory of another nation without Security Council approval as long as it does so “in conformity with the purposes and principles of the UN Charter.”¹⁸⁷ The argument is that regional action is lawful if its aims are primarily to address “humanitarian” concerns for the victims of the breakdown of law and order. Although the intervenors are not expected to abrogate all self-interest, their actions must not be motivated primarily by a desire to change the

185. Robert J. Beck, *International Law and the Decision to Invade Grenada: A Ten-Year Retrospective*, 33 VA. J. INT'L L. 765, 803 (1993).

186. Compare U.N. CHARTER art. 42 (“Should the Security Council consider that measures . . . would be inadequate . . . it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”) with U.N. CHARTER art. 52 (“Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security. . . .”).

187. See U.N. CHARTER art. 52(1). See also *id.* art. 2(4) (prohibiting the use of force or threats thereof against the political independence or territorial integrity of a state or for any other end inconsistent with the purposes and principles of the UN Charter).

receiving state's form of government, or an excuse for regional hegemony. Attempts to redefine borders are especially frowned upon.¹⁸⁸

Currently, the widest expansion of Article 52 is espoused by writers asserting that states have "both the right and the duty" to intervene if a democratically elected government is over-thrown.¹⁸⁹ Many scholars are uncomfortable with throwing the door to Article 52 action so wide open to interventionism.¹⁹⁰ They conclude that support for humanitarian or "democratic" intervention requires support either by a change to Chapter VIII, a specific authorization in the regional organization's charter, or both.¹⁹¹

After fifty years of debate, there is still no settled consensus on the meaning attached to the provisions in Chapter VIII.¹⁹² At most, there is

188. See, e.g., Moore, *supra* note 28, at 145 ("Actions to restore order and self-determination in a setting of breakdown of authority are not enforcement actions, which would require Security Council approval, and may be taken at the initiative of a genuinely independent regional arrangement."); Nowrojee, *supra* note 165, at 131-132 (arguing that "genuinely independent regional intervention" is lawful in the context of humanitarian intervention); Lori Fisler Damrosch, *Introduction*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 1, 3 (Lori Fisler Damrosch ed., 1993) (declaring that the present system is designed to keep states from unilaterally projecting force into another state to effect its internal government, and that it is not self-evident that the same constraints apply to altruistic collectives working for the common good). See FRANCK, *supra* note 78 at 166-167 (discussing India's ulterior motives for invading East Pakistan, now Bangladesh, disguised behind humanitarian motives).

189. Malvina Halberstam, *The Copenhagen Document: Intervention in Support of Democracy*, 34 HARV. INT'L L.J. 163, 167 (1993). See also Damrosch, *supra* note 188, at 12 (listing democratic intervention as one instance where the international community has shown a recent willingness to support when pursued by a broad based coalition). The concept of democratic intervention will be discussed in more detail *infra* at notes 452 to 476 and accompanying text.

190. See, e.g., Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A.F. L. REV. 235, 271 (1997) (asserting democratic intervention is not justifiable without Security Council approval). For that matter, many are also unwilling to accept the position that the United States took in the Cuban missile crisis and the Dominican Republic operation that a regional organization is authorized to perform enforcement actions as long as its actions are not condemned by the Security Council. David Wippman, *Enforcing the Peace: ECOWAS and the Liberian Civil War*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 187 (Lori Fisler Damrosch ed., 1993).

191. See, e.g., Borgen, *supra* note 33, at 799, 800 (explaining his thesis that to find "appropriateness" of regional action in today's world one must go outside the UN Charter to examine "the charters of the regional organizations themselves"; reporting the Organization of American States position that an action requiring use of force must not only be authorized by Chapter VIII, but also under the regional organization's own charter; and, advocating a change to Chapter VIII to clarify what actions are permissible under Article 52).

only agreement that there is a “gray area” in which use of force by a regional organization short of direct enforcement action is permissible.¹⁹³ As the case studies that follow demonstrate, this ambiguity and its resulting tension between the UN and regional organizations greatly influenced their legal relationship.¹⁹⁴

B. The Beginning of Customary International Law on Peace Operations

Before 1965, there was little reason to resolve the balance of power between the UN and regional organizations, because the regional organizations did not often act. There were two attempts to involve NATO in peacekeeping, once in the Suez¹⁹⁵ and again in Cyprus, but neither was implemented.¹⁹⁶ During the Cuban missile crisis, the United States sought and received the backing of the Organization of American States to estab-

192. John F. Murphy, *Force of Arms*, in *THE UNITED NATIONS AND INTERNATIONAL LAW* 120 (Christopher C. Joyner ed., 1997).

193. *Id.* at 118. See also Wippman, *supra* note 165, at 231.

The denotation of [the force] as a peacekeeping force frees the [Security Council] delegates from having to consider awkward questions about retroactive validation of . . . use of force under chapter VIII . . . they do not distinguish . . . actions that might constitute peaceful regional measures under article 52 . . . and actions that might more appropriately be considered regional enforcement action under article 53

Id. Joachim Wolf, *Regional Arrangements and the U.N. Charter*, in 6 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 289, 291 (Max Planck Institute ed., 1983) (asserting the appropriateness of regional action is based on the existence of a local dispute and on the regional organization’s choice of peaceful means to settle it).

194. While approving the concept that the disagreement over what is and what is not enforcement action has enhanced the tension between the UN and regional organizations, Anthony Clark Arend argues that just as often conflict results because the “initial jurisdiction” of a dispute is unclear. Either one organization takes action at the expense of the other, or alternately both organizations may hesitate while waiting to see if the other will act. He uses the examples of the Gulf War, where some members of the Arab League complained the UN acted too precipitously before the League had a chance to resolve the situation; the Balkans, where the UN’s first inclination was to try and let Europe work out a solution; and Haiti where the Organization of American States took the lead although that organization wanted UN involvement. See Arend, *supra* note 26, at 18-26.

195. See URQUHART, *supra* note 69. In 1956 the United States turned down a joint plan by Britain and France to have NATO separate the forces. *Id.*

196. See MILLER, *supra* note 28, at 121. In 1964 the British attempted to work out a cease-fire arrangement between Greece, Turkey, and Cypriot forces. A 10,000 man NATO force was to supervise the agreement. The United States backed the plan, but ultimately the Cypriot President, Archbishop Makarios, nixed the idea. *Id.*

lish a partial blockade of the island. Only U.S. vessels carried out the "quarantine" of Cuba, however. Of course, no ground troops were sent to the island.¹⁹⁷

1. The Dominican Republic

The Dominican Republic operation by the Organization of American States was the first real test of a regional force in action under Chapter VIII. On 25 April 1965, a coup toppled the military government that had itself disposed of a democratically elected president two years prior.¹⁹⁸ After the rebels (or "Constitutionists") installed a new president, Loyalist troops attacked, and a civil war began.¹⁹⁹ On the same day, the United States ordered a naval task force to the island, anticipating a need to evacuate American citizens.²⁰⁰ Before the evacuation occurred, the United States received information that indicated that the rebel government was Communist-dominated.²⁰¹

The mission was modified. Washington directed the task force to "restore law and order, prevent a Communist take-over of the country, and protect American lives."²⁰² These directions, which were later made public,²⁰³ caused some embarrassment to the United States in convincing the rest of the world that this was a legitimate intervention under Chapter VIII.²⁰⁴ Nevertheless, the American naval forces, joined by the 82nd Air-

197. See Murphy, *supra* note 192, at 119-120. The action was specifically taken under the auspices of the Organization of American States acting as a Chapter VIII regional organization. The United States argued that the quarantine was not an enforcement action and therefore required no Security Council blessing. Alternately, the United States said even if the action could be classified as enforcement the Security Council had implicitly endorsed the action by failing to adopt a draft Soviet resolution condemning the quarantine. *Id.* See also Wippman, *supra* note 190, at 186, 187 (noting the United States stance, but also acknowledging that most states rejected the United States view).

198. Chronology of events taken from LAWRENCE A. YATES, POWER PACK: UNITED STATES INTERVENTION IN THE DOMINICAN REPUBLIC 181-186 (1969) [hereinafter POWER PACK]. Power Pack was the United States code name for the Dominican operation. *Id.* at 183.

199. *Id.* at 181-186.

200. *Id.*

201. *Id.*

202. *Id.* at 182.

203. White House press release, May 2, 1965, reprinted in DEPARTMENT OF STATE BULLETIN, No. 1351, May 17, 1965, cited in MILLER, *supra* note 28, at 151.

204. See MILLER, *supra* note 28, at 151.

borne, quickly established a separation zone between the combatant forces.²⁰⁵

After the United States intervened, the Organization of American States immediately called for a cease-fire.²⁰⁶ A number of Organization of American States members were convinced that the United States intervention violated the Organization of American States Charter²⁰⁷ and were prepared to condemn the United States action.²⁰⁸ However, a majority adopted a resolution to “internationalize” the peacekeeping force and agreed to form the Inter-American Peace Force.²⁰⁹

The provisions accompanying the resolution stated that the goals of the Inter-American Peace Force were to “cooperate in the restoration of normal conditions in the Dominican Republic, in maintaining the security of its inhabitants and the inviolability of human rights, and in the establishing of an atmosphere of peace and conciliation that will permit the functioning of democratic institutions.”²¹⁰ The resolution informed the UN Security Council of its action, but did not request its blessing.²¹¹ The Inter-American Peace Force assumed control of all military operations on 29 May 1965.²¹² Thereafter, the Organization of American States forces, including up to 10,000 American troops, remained in effective control of the Dominican Republic. After presidential elections were held in June 1966, the Organization of American States ended the Inter-American

205. *Id.*

206. M. MARGARET BALL, *THE OAS IN TRANSITION* 472 (1969).

207. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 [hereinafter OAS Charter]. At the time of the action articles 15 and 18 read, respectively and in pertinent part, “[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State . . .” and, “[t]he American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof.” *Id.*

208. *See* BALL, *supra* note 206, at 474.

209. Resolution Adopted in the Third Plenary Session of the 10th Meeting of the Consultation of Ministers of Foreign Affairs of the Organization of American States, OAS Doc. 39 Rev. Corr. (1965), *reprinted in* 4 I.L.M. 594 (1965) [hereinafter Resolution 39]. Six out of twenty countries represented at the Consultation believed the United States action was an outright violation of the OAS Charter, before reaching the question whether it was in violation of the UN Charter. Those countries were Ecuador, Chile, Uruguay, Peru, Venezuela, and Mexico. Despite its belief, Venezuela abstained from the vote, probably because they were having problems with Cuban supported guerrilla groups at the time. *See* BALL, *supra* note 206, at 474, 475.

210. Resolution 39, *supra* note 209, para. 2.

211. *Id.* para. 7.

Peace Force mandate.²¹³ All foreign forces withdrew by September 1966.²¹⁴

As noted above, the United States stated three reasons to justify its intervention. First, it claimed the right to protect its citizens' lives.²¹⁵ Although the initial United States intervention may have been warranted on this basis, the operation quickly progressed beyond the parameters of self-defense.²¹⁶ The second justification asserted by the United States was that the Dominican insurgency was being directed and controlled by an outside force, namely Communist Cuba.²¹⁷ By implication, the United States mission was prosecuted by virtue of anticipatory self-defense. The Organization of American States' reaction, however, clearly did not support that view.²¹⁸

The third objective, supported explicitly by the Organization of American States, was to restore law and order.²¹⁹ Yet, the Organization of American States' action did not fit the classic mold of peacekeeping. As discussed previously, peacekeeping, as understood in 1965, first required consent from all the warring parties.²²⁰ The United States, however, did not obtain consent from both parties before entering the Dominican Republic. In fact, fighting was escalating at the time.²²¹ Furthermore, after the mission was turned over to the Inter-American Peace Force, the

212. A Brazilian general assumed command of the force—one of the few times in its history that the United States government has surrendered tactical command and control of American soldiers to a foreign commander. See MILLER, *supra* note 28, at 158; POWER PACK, *supra* note 198, at 150. As discussed *supra* note 93, there is a strong constitutional argument that the executive may relinquish tactical control to a foreign commander only in emergency situations.

213. See POWER PACK, *supra* note 198, at 185, 186.

214. *Id.*

215. MILLER, *supra* note 28, at 151.

216. J.B.L. Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 197 (Robert Lillich ed., 1973). Most authorities agree a state has an inherent right and duty to protect its citizens. A caveat to that right is the expectation that the intervention will be strictly limited to that purpose. The legal basis became less clear in the Dominican Republic as the United States force actively interposed itself between the combatants. Still later, the United States extended its security perimeter outwards, squeezing the rebel forces into a smaller area, but at the same time protecting them from Loyalist attacks. See POWER PACK, *supra* note 198, at 183-85. Shortly after they arrived United States forces established an International Security Zone (ISZ). That zone was extended on several occasions as the security needs of the force expanded, and the Inter-American Peace Force sought to enforce cease-fires. *Id.* The conclusion must be that at some point the United States intervention lost its legitimacy if it was based solely on protection of its nationals.

217. MILLER, *supra* note 28, at 151.

Organization of American States did not obtain consent either.²²² The insurgents lobbied for UN involvement rather than Organization of American States mediation, especially after an United States operation designed to enhance the security of the neutrality zone severely constricted the rebel operating area.²²³

The Inter-American Peace Force was on sounder footing regarding the other two elements of peacekeeping. Despite some lapses, the Inter-American Peace Force did manage to maintain its neutrality and limited its use of force to self-defense.²²⁴

Regardless of whether the action was called peacekeeping, protection of foreign nationals, or some other form of operation, the United States and the Organization of American States felt justified in relying on Chapter VIII of the UN Charter as the basis of their mission.²²⁵ In any event, the

218. There was some historical precedent for the United States position. During the Cuban missile crisis, the United States had managed to convince the Organization of American States that the "Marxist-Leninist" doctrine was a threat to the independence of the region's members constituting justification for self-defense. See Resolution VI of the Eighth Meeting of Consultation, Punta del Este, Uruguay, January 1962, in U.N. Doc. S/5075, 17 (1962).

However, on this occasion when the resolution came up for vote five Latin American countries felt strongly that the OAS Charter precluded intervention in a member state's internal affairs for any reason. The remaining Organization of American States countries voted for the resolution only after amending it to show that they did not approve of the initial United States intervention but were prepared to undertake a peacekeeping role anyway. See MILLER, *supra* note 28, at 153. Even those members who voted for the resolution permitting formation of the Inter-American Peace Force consented to an amendment, which specifically stated approval of the Organization of American States mission did not signify approval of the initial intervention. See BALL, *supra* note 206, at 480 (arguing this was just as much a defense by the Latin American states against the United States as it was the United States acting in self-defense against Communism; their chosen method was not to fight the Americans, but instead to assume the American's duties).

219. See Resolution 39, *supra* note 209.

220. See BURNS & HEATHCOTE, *supra* note 145, at 22.

221. See generally POWER PACK, *supra* note 198, at 181-186.

222. See MILLER, *supra* note 28, at 156, 162.

223. *Id.* Conversely, the Loyalists preferred Organization of American States mediation, even though they felt Organization of American States presence effectively kept them from controlling the rest of the country. *Id.*

224. *Id.* at 160, 161.

225. The position of the United States was that regardless of which justification was accepted the action in question was not enforcement action. *Id.* at 159.

international community did not rebut the United States assertion that the intervention was not enforcement.²²⁶

The UN was effectively excluded from the Dominican conflict. An early draft resolution by the Soviets seeking to condemn the American action failed.²²⁷ When the UN sought to carve out a mediation role for itself, the Organization of American States termed the attempted involvement “obstructionist.”²²⁸ Meanwhile, the United States lobbied successfully in the Security Council to have it recognize that the Organization of American States was dealing effectively with the situation and that the UN's participation would be unwarranted duplication of effort.²²⁹ In the end, the UN's role was limited to sending a representative of the Secretary General with two military advisors to “observe and report.”²³⁰

The Dominican operation arguably provides the earliest evidence that customary international law supports an expanded role for NATO under Chapter VIII. First, it shows there is considerable room for maneuver in Article 52 regarding what response a regional organization may legally pursue without UN approval, short of active enforcement measures such as those in Korea and the Persian Gulf. Second, it demonstrates that an effective regional organization can accomplish significant results in peace operations without UN command and control. The Dominican example,

226. *Id.*

227. *Id.* at 155, 156. Although the cynical might guess the resolution failed by reason of the United States veto, in fact the United States abstained from voting. This lends some credence to the United States argument that a Chapter VIII enforcement action need not be expressly approved by the Security Council. *See, e.g.,* Murphy, *supra* note 192, at 119, 120 (citing the United States position in both the Dominican and Grenadan actions that Security Council approval of regional enforcement action may be implied). In all, the Security Council considered the Soviet proposal in twenty-nine meetings over a three-month period, but never reached consensus on a resolution condemning the actions of the United States or the Inter-American Peace Force. *See* THE BLUE HELMETS, *supra* note 76, at 200.

228. OAS Doc. 81 Rev. (June 2, 1965), in U.N. Doc. S/6370 and Add. 1 & 2 (1965) (complaining vehemently that the UN was undermining its efforts to negotiate the formation of an interim government).

229. *See* FRANCK, *supra* note 78 at 70, 71 (quoting the United States Ambassador to the UN, Adlai Stevenson, that UN involvement would “tend to complicate the activities of the Organization of American States by encouraging concurrent and independent considerations and activities . . . when the regional organization seems to be dealing with the situation effectively.”). *See also* MILLER, *supra* note 28, at 159 (restating the United States position against UN involvement).

230. THE BLUE HELMETS, *supra* note 76, at 200. Initiatives to expand the representative's role to permit him to supervise cease-fires and investigate complaints of human rights violations failed to receive any support. *Id.* at 203.

however, also cautions that regional organizations should have clear organizational guidelines to avoid confusion and dissension when deciding to conduct peace operations.

2. Grenada

When the United States next performed a peace operation in conjunction with a regional organization, reaction from the UN was even more hostile. On 25 October 1983, acting upon the invitation of the Organization of Eastern Caribbean States and cooperating with its forces, the United States invaded the island nation of Grenada.²³¹ A storm of international criticism washed over the United States for its action, including condemnation by the UN General Assembly.²³²

Nevertheless, the events leading up to the invasion justify the mission of the United States and the Organization of Eastern Caribbean States.²³³ Grenada was one of seven members of the Organization of Eastern Caribbean States, along with St. Vincent, St. Lucia, Dominica, Antigua, St. Kitts, and Montserrat.²³⁴ In March 1979, Maurice Bishop led a Communist coup, which overthrew its democratically elected government.²³⁵ Bishop suspended the Constitution and replaced it with several "People's Laws."²³⁶

The new government invited Cuban advisors, expanded the armed forces, and began constructing a large aircraft runway which many believed would be used as a convenient point of departure for Soviet spy planes to land and refuel before continuing their mission to support the communist insurgency in Angola.²³⁷ The Cubans were expected to use the island as a base for their operations in Latin America. The democratic governments of the other Organization of Eastern Caribbean States members

231. See Moore, *supra* note 28, at 145.

232. G.A. Res. 38/7, U.N. GAOR, 38th Sess., U.N. Doc. A/RES/38/7 (1993). The United States never got the chance to plead its case as the Assembly invoked its rule of closure cutting off debate. U.N. GAOR, at 12-15, U.N. Doc. A/38/PV.43 (1983). The vote was 108 in favor of the resolution, 9 against, with 27 abstentions. *Id.* at 45-50.

233. See Moore, *supra* note 28, at 145; Beck, *supra* note 185, at 765.

234. See *supra* note 233 and accompanying text.

235. See *id.*

236. See *id.*

237. See *id.*

became concerned their own sovereignty would be threatened, but they were unable to attract much international support for their concerns.²³⁸

On 13 October 1983, members of his own government deposed Bishop.²³⁹ Reportedly, these members believed he was not hard-line enough, and he had sought economic aid from Western countries against their wishes.²⁴⁰ Country-wide rioting followed, and the government lost effective control of the nation.²⁴¹ The members attempted to impose a twenty-four hour curfew, with orders to Grenadan forces to "shoot on sight."²⁴² Even though a number of protesting civilians were killed by armed forces, the rioting continued.²⁴³ Supporters attempted to free Bishop, but he was killed in the attempt.²⁴⁴

Meanwhile, the United States government had grown concerned for the safety of more than one thousand United States citizens trapped on the island, many were there attending medical school.²⁴⁵ President Reagan directed his advisors to develop an evacuation plan and sent State Department officials to arrange permission from the remnants of the Grenadan government.²⁴⁶

Negotiation proved fruitless, mainly because it was impossible to determine who was in charge of the government.²⁴⁷ It became clear that instead of arranging to let foreign nationals leave, the Grenadan negotiators were unwilling to allow an evacuation under any circumstances.²⁴⁸ In light of the recent Iranian hostage crisis, President Reagan became convinced that he risked a similar situation if the United States did not take immediate steps.²⁴⁹

The Organization of Eastern Caribbean States members met continuously through the crisis.²⁵⁰ On 21 October 1983, they extended an oral request for military assistance to the United States to help them "stabilize

238. *See id.*

239. *See id.*

240. *See id.*

241. *See id.*

242. *See id.*

243. *See id.*

244. *See id.*

245. *See id.*

246. *See id.*

247. *See id.*

248. *See id.*

249. *See id.*

the situation and establish a peace-keeping force.”²⁵¹ The United States, mindful of the legal aspects in question, felt that it was important that it receive the request in writing.²⁵² A written request followed on 23 October 1983.²⁵³ By the time the United States received word of an additional request for intervention by the Governor General of Grenada, the United States/Organization of Eastern Caribbean States operation was imminent.²⁵⁴ The invasion was launched on 25 October 1983.²⁵⁵ By 8 December 1983, most U.S. troops had been withdrawn.²⁵⁶

The Organization of Eastern Caribbean States and the United States rested their legal justification for the invasion on three bases: (1) protection of foreign nationals, including U.S. medical students; (2) the request of lawful authority; and (3) collective action by a regional organization under Article 52 of the UN Charter.²⁵⁷ As was the case in the Dominican operation, the main argument against protection of nationals was the scope of the mission.²⁵⁸ Intervention based on invitation by lawful authority is also a well-recognized concept in public international law.²⁵⁹ The unfortunate difficulty with justifying the intervention on this basis was that at the time Sir Paul Scoon made the request, the Grenada Constitution had

250. WILLIAM C. GILMORE, *THE GRENADA INTERVENTION: ANALYSIS AND DOCUMENTATION* 104 (1984).

251. The invitation was also extended to Jamaica and Barbados, who are not members of Organization of Eastern Caribbean States, either. *Id.*

252. *Id.* at 100.

253. *Id.* An account of the behind the scenes negotiations between the United States, the Organization of Eastern Caribbean States, Jamaica, and Barbados is in Beck, *supra* note 185, at 783-86.

254. *See* Beck, *supra* note 185, at 789. Interestingly, these facts were mostly available soon after the Organization of Eastern Caribbean States intervention. Nevertheless, so great was the international backlash and scholastic sniping that opponents of the operation questioned the respective governments' beliefs that foreign nationals were in danger, whether the United States had attempted to resolve the matter peacefully at all, and whether the Governor General had even extended an invitation. Opponents also suggested the United States pressured the Organization of Eastern Caribbean States into acting, and charged that the Reagan administration had been planning the invasion all along. Finally, they disputed whether the Grenadan government had really collapsed. Writing ten years after the incident and drawing from a wide number of sources, Professor Robert J. Beck concluded that the facts were mostly in favor of the United States position, even though he also concluded the legal basis for the invasion was lacking. *Id.*

255. Moore, *supra* note 28, at 150, 151.

256. *Id.* at 152.

257. *See* Beck, *supra* note 185, at 770. Authorities discussing Article 52 in the context of the Grenada invasion mentioned, but did not rely on the concepts of humanitarian and democratic intervention. A discussion of those concepts, however, appears later in this article to reflect their evolution under Article 52.

been suspended. Bishop's "People's Laws" vested all executive and legislative power in his Communist government.²⁶⁰

The experts are in disagreement regarding the authority of the Organization of Eastern Caribbean States to intervene under Article 52. A broad reading of Article 52 leads to the conclusion that a regional organization may legitimately intervene to restore order when a state of anarchy prevails in the receiving state.²⁶¹ A narrow reading of Article 52 leads to an opposite result.²⁶² The political reaction of the world community at the

258. Rather than establishing a beach-head and then withdrawing after the students were evacuated, the Organization of Eastern Caribbean States launched a full invasion, actively engaging forces throughout the island. (In point of fact it appears the Grenadan forces did little fighting. Instead, Cuban irregulars provided the main opposition). Accordingly, the Reagan administration never tried to assert protection of nationals as the sole basis of the intervention. *See Moore, supra* note 28, at 151.

259. *See* IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 317 (1963). In this instance, the Organization of Eastern Caribbean States asserted that the request for intervention by Grenadan Governor General, Paul Scoon, was alone sufficient justification of its action. Under the Grenada Constitution, the Governor General appears to wield broad executive powers, especially if for some reason the Prime Minister is unable to act. *See Moore, supra* note 28, at 145-48.

260. Commentators Beck and Joyner did not rest their arguments against the invasion solely on the illegitimacy of Governor General Scoon's request. *See Beck, supra* note 185, at 799-800; Christopher C. Joyner, *Reflections on the Lawfulness of Invasion*, 78 *AM. J. INT'L L.* 131, 138-139 (1984). Beck discounts the Governor General's authority, but also noted that his review of the evidence ten years after the event demonstrated that the United States had already made the decision to invade prior to receiving word of the request, so it had no impact on the decision. Joyner labels the question "polemical," but doesn't attempt to resolve the controversy. Nevertheless, since he decides the invasion was illegal the conclusion must be that he discounts the claim. *But see Moore, supra* note 28, at 153 (arguing that as the only constitutional representative of the government at the time the Governor General's request was alone sufficient legal authority to justify the invasion). At some level it is fundamentally distasteful that a democratically elected government could be forcefully overthrown by an authoritarian regime which could then set up the non-intervention provisions of the UN Charter, found at article 2(7), against the ousted government's plea for outside help. This article argues below that the time to recognize the so-called "democratic intervention" doctrine has arrived. However, at the time of the Grenada operation it must be conceded the democratic intervention doctrine had not received sufficient support to raise it as a serious justification of Organization of Eastern Caribbean States action. Accordingly, it will not be addressed at this point.

261. *See, e.g., Moore, supra* note 28, at 145; *see* text accompanying note 189. *See also* Wippman, *supra* note 165, at 231 (arguing that in some instances a state no longer effectively exists, therefore the intervention is not against a state, and further that it is not an enforcement action under the UN Charter).

time affects the development and interpretation of customary international law. Therefore, the reaction of UN member states is instructive.

The General Assembly resolution, however, condemning the invasion does not settle the issue. Such resolutions are not binding international law, although the resolutions may be evidence of international consensus that may lead to development of treaties or customary international law.²⁶³ Further, there is much evidence that the Assembly's reaction was based on the perception that this was not truly a regional action. The evidence suggests that international backlash was driven by the belief that the invitation was a mere cover for United States policy objectives—ousting a Communist government in the western hemisphere and keeping a strategic airport out of Soviet and Cuban hands.²⁶⁴ Therefore, the reaction of the only official organization to speak for the world community is ambiguous. At most, it stands for the proposition that the organization regarded the invasion as a power play by the United States, not a regional “humanitarian” peacekeeping action.

Another weakness in the Grenada mission was its lack of support in the Organization of Eastern Caribbean States Charter. The Organization of Eastern Caribbean States is a sub-regional organization. Therefore, it also must comply with the provisions of the Organization of American States Charter.²⁶⁵ As in all matters in this controversial operation, the authorities are divided concerning whether the Organization of Eastern Caribbean States met those conditions.²⁶⁶ The United States attached great

262. See, e.g., Beck, *supra* note 185; see text accompanying note 185 (asserting a very narrow band within which a regional organization may use force: collective self-defense, enforcement action after Security Council authorization; and, pursuant to invitation by lawful authority).

263. Christopher C. Joyner, *The United Nations as International Law-Giver*, in *THE UNITED NATIONS AND INTERNATIONAL LAW* 443-446 (Christopher C. Joyner ed., 1997).

264. See Brown, *supra* note 190, at 250 (asserting this belief was driven by the overwhelming composition of the force—1900 of 2200 participating troops were American—and the Organization of Eastern Caribbean States members were tiny Caribbean states with little voice inside or outside their region). There is much circumstantial support for this idea, especially when one reviews the facts surrounding the Liberian operation discussed *infra* at notes 270 to 301 and the accompanying text. The operation in Liberia was dominated by the forces of one regional power, Nigeria, acting without the consent of a legitimate government, and unauthorized by the Security Council. Yet, the operation drew not a peep of protest from the General Assembly. Under these circumstances, the Assembly's action, as one writer puts it, “speaks with Delphic ambiguity.” Tom Farer, *A Paradigm of Legitimate Intervention*, in *ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS* 334 (Lori Fisler Damrosch ed., 1993).

265. See *supra* note 207 and accompanying text.

importance to the issue. It clearly believed that the Organization of Eastern Caribbean States had authority in its Charter to intervene in Grenada's internal affairs.²⁶⁷

Taking these events into consideration, by 1983 customary international law arguably established three conditions for the validity of regional peace operations. First, the operation must be based on regional charter authority. Second, the intervention must be a truly collective effort and not a mask for regional hegemony. Finally, and most controversially, prior Security Council authorization was not necessarily required. Recent regional peace operations also support this last proposition, while further defining the grounds upon which regional intervention can be justified.²⁶⁸

C. Recent Developments in the Customary International Law of Intervention

Despite the experiences of the United States in the Dominican Republic and Grenada, cooperation between the UN and regional organizations has improved tremendously in recent years. Whatever the reason for the change, this section demonstrates that it has been accompanied by an adjustment in attitude towards the available responses of regional organizations that seek to conduct peace operations. Case studies in this and the following section regarding recent peace operations in Liberia and Haiti, as well as the NATO operation in Bosnia discussed below in Part IV, sug-

266. See, e.g., Moore, *supra* note 28, at 157, 158 (Organization of Eastern Caribbean States acting in full compliance). But see Beck, *supra* note 185, at 803; Joyner, *supra* note 260, at 135-36 (Organization of Eastern Caribbean States violating both Charters); Brown, *supra* note 190, at 249 (invasion beyond the scope of the Organization of Eastern Caribbean States Treaty). Although it may have been just as restrictive at the time of the invasion, Article 1 of the current version of the OAS Charter, including provisional articles not yet ratified, specifically states, "The Organization of American States has no powers other than those expressly conferred on it by this Charter, none of whose provision authorizes it to intervene in matters that are within the internal jurisdiction of the Member States." OAS CHARTER art. 1, *as amended by* Protocol of Buenos Aires, Feb. 27, 1967, 721 U.N.T.S. 324, *as amended by* Protocol of Cartagena de Indias, Dec. 5, 1985, in 25 I.L.M. 529 (1986). The integrated text of the OAS Charter, including provisional Protocols of Washington (1992) and Managua (1993) appear at 33 I.L.M. 985 (1994).

267. See Beck, *supra* note 185, at 783-86.

268. See *infra* Part III.C.

gest that humanitarian and democratic interventions are legally valid under Chapter VIII, even without express UN Security Council approval.²⁶⁹

1. Economic Community of West African States in Liberia

Resistance to the dictatorship of Samuel Doe in Liberia ignited into civil war on Christmas Eve, 1989.²⁷⁰ Within six months, there was no semblance of a central government.²⁷¹ The three factions struggling for power paid little regard to the civilian population, and human rights violations were widespread on all sides.²⁷² Appeals from neighboring states for UN action garnered no response.²⁷³ In August 1990, the Economic Community of West African States decided to send a “peacekeeping” force, later known as the Economic Community of West African States Cease-fire Monitoring Group (ECOMOG),²⁷⁴ to Monrovia, Liberia’s capital, citing a humanitarian need to stop the slaughter and restore regional peace and stability.²⁷⁵ It announced a three-fold mission: (1) to establish a cease-fire, (2) to put an end to routine destruction of lives and property, and (3) to ensure free and fair elections would be conducted.²⁷⁶

The Economic Community of West African States is a collection of sixteen West African states, including Liberia, which decided to cooperate to enhance the economic prospects of its region. It is a sub-regional organization under the auspices of the Organization for African Unity.

269. This thesis does not discuss the Somalia operation in detail even though it arguably opened the door to acceptance of humanitarian intervention. It is not included as a case study because the operation was carried out by a classic ad hoc coalition under UN authority rather than by a regional organization acting as such. Conversely, the Haiti mission is included despite the fact a UN multinational force conducted the operation. It is included both because it was prompted and to some extent guided by Organization of American States initiatives, and because it provides support for the hypothesis that democratic intervention is now regarded as a legitimate subject justifying external intervention into the internal affairs of a nation.

270. See Wippman, *supra* note 165, at 224-225, and Wippman, *supra* note 190, at 158-159.

271. *Id.*

272. *Id.*

273. *Id.*

274. The peacekeeping force was officially designated the Economic Community of West African States Cease-fire Monitoring Group (ECOMOG) by the *Final Communiqué of the First Session of the Community Standing Mediation Committee, ECOWAS*, Banjul, Republic of Gambia, August 6-7, 1990, reprinted in Wippman, *supra* note 190, at 167 n.29.

275. *Id.*

276. *Id.*

Although its charter contains a provision permitting the organization to act in collective self-defense, this authority is a dubious basis on which to justify its intervention into the internal affairs of Liberia.²⁷⁷ Several members apparently believed it did not. After a five nation standing committee recommended the response, some member states declared that Economic Community of West African States had overstepped its bounds and refused to join in the operation.²⁷⁸ Nevertheless, the organization's majority vote rule allowed the effort to proceed.²⁷⁹

Immediately after the Economic Community of West African States announced its decision, and before it placed troops on the ground, at least one rebel faction, the National Patriotic Front of Liberia led by Charles Taylor, declared that it would forcefully oppose the peacekeeping force.²⁸⁰ The Doe faction requested the force proceed, but there is much doubt whether Doe still constituted a "legal authority" who could consent to an armed intervention.²⁸¹ Apparently, the Economic Community of West African States did not attach much significance to the invitation either, because it never attempted to justify its action on that basis.²⁸² Accordingly, when the Economic Community of West African States force hit the ground in Monrovia in August 1990 and was immediately engaged by the National Patriotic Front of Liberia, it could not pretend that it was in Liberia by consent to enforce a cease-fire.²⁸³

After a sharp fight, the Economic Community of West African States forces drove Taylor's group from the capital and established a cease-fire.²⁸⁴ It was a shaky peace that would not last. The opposing Liberian forces fractured and reformed several times, creating a politically chaotic situation that twelve peace-agreements and seventeen cease-fires in the first

277. See Wippman, *supra* note 190, at 166. The pact did permit the member states to provide mutual assistance if an internal conflict supported and engineered from the "outside" appeared likely to endanger the peace and security of Economic Community of West African States. What is deemed to be from "outside" is ambiguous. Does it mean from outside the member state experiencing the difficulty, or outside the region itself? There is no evidence any nation from outside the region was involved in fomenting the Liberian insurrection. On the other hand, some fingers pointed to Cote d'Ivoire as the source of arms and supplies for one or more of the rebel factions. *Id.* at 166 n.27.

278. *Id.* at 167.

279. *Id.*

280. *Id.*

281. See Wippman, *supra* note 165, at 224-225 (noting that by the time Doe "consented" he had long since lost control of anything except a small faction calling itself the Armed Forces of Liberia).

282. *Id.*

five-year period could not resolve.²⁸⁵ The persistence of the group, however, eventually paid off as fighting subsided, and the factions agreed to national elections in 1997.²⁸⁶ Although the elections were postponed on several occasions, outside observers certified a “free and fair” election in Liberia in July 1997.²⁸⁷

Although successful, the Liberian campaign by the Economic Community of West African States is legally controversial. From the outset, the regional organization justified its intervention solely on humanitarian grounds.²⁸⁸ As noted, it did not claim that its operation was based on consent, and it could not claim that it was acting in self-defense. Some of its own members believed that the operation was impermissible under its own charter.²⁸⁹ Most legal authorities reviewing the Economic Community of West African States Charter agree with that assessment.²⁹⁰ Finally, there

283. The National Patriotic Front of Liberia accused Economic Community of West African States of being a cover for Nigerian expansionist motives. Nowrojee, *supra* note 165, at 135. Another accusation claimed Nigeria prompted the intervention because it was afraid success by the National Patriotic Front of Liberia would spark an uprising against its own military regime which itself had an appalling human rights record. Ofodile, *supra* note 184, at 397-99, 403. Although these claims may have merit, the critics admit Economic Community of West African States made obvious efforts during the course of the intervention to accommodate the National Patriotic Front of Liberia’s reasonable demands. *Id.* at 385. Nevertheless, similar accusations surfaced during Economic Community of West African States’ most recent intervention in Sierra Leone. Economic Community of West African States agreed to send ECOMOG forces into Sierra Leone after a military junta overthrew the elected president in May 1997. Economic Community of West African States brokered a deal designed to hand power back to the elected government in April 1998, but renewed fighting canceled the bargain. Despite the preference of some Economic Community of West African States members that diplomatic efforts continue, Nigeria apparently took matters in its own hands and decided to impose a military solution. *See, e.g.,* James Rupert, *Forces Press Sierra Leone Government*, WASH. POST, Feb. 11, 1998, at A27; James Rupert, *Nigerians Welcomed in Freetown*, WASH. POST, Feb. 15, 1998, at A27.

284. *See* Ofodile, *supra* note 184, at 385.

285. *See* *Untitled Article*, AGENCE FRANCE-PRESSE, Aug. 20, 1995, available in 1995 WL 7845970; Nowrojee, *supra* note 165, at 134.

286. Success is partially attributable to Economic Community of West African States members’ ability to resolve their own differences. By the end of the first year of their peace operation all members agreed to create ECOMOG alleviating some concern that Nigeria was dominating the operation. *See* Wippman, *supra* note 190, at 167-69. When the Cote d’Ivoire, which had been suspected by some members to be providing arms and supplies to Taylor’s forces, became a member of the standing committee, it was forced into a position where it was responsible for brokering a politically acceptable solution. *Id.* at 170-71.

287. Thalif Deen, *UN Mission Quits Liberia as Peace Goal is Reached*, JANE’S DEF. WKLY, Sept. 3, 1997, at 30.

288. *See supra* note 276 and the accompanying text.

289. *See* Wippman, *supra* note 190, at 167.

is no record that the Economic Community of West African States sought Security Council authority to conduct the operation.

As usual, the Security Council's reaction to the Liberian intervention was ambiguous. During the first two years of the operation, the Security Council issued two brief statements through its president.²⁹¹ The statements merely requested the warring parties to cooperate with the Economic Community of West African States in reaching a peaceful settlement to the conflict, but did not otherwise discuss the war or the ECOMOG's use of force.²⁹² When the fighting erupted again in November 1992, the Economic Community of West African States asked the Security Council to support its call for an embargo to deprive the Liberian factions of war material. The Council obliged by issuing a resolution, which determined that the deteriorating situation in Liberia "constitutes a threat to international peace and security, particularly in West Africa as a whole." Recalling "the provisions of Chapter VIII," the Council commended the Economic Community of West African States and called upon them to continue their efforts.²⁹³

Eventually, the Security Council authorized the UN Observer Mission in Liberia to monitor implementing one of the early peace accords in 1993.²⁹⁴ The Security Council, "not[ed] that this would be the first peace-keeping mission undertaken by the United Nations in cooperation with a peace-keeping mission already set up by another organization."²⁹⁵ It left

290. See, e.g., Ofodile, *supra* note 184, at 410-11 ("The Charter of ECOWAS did not empower the organization to involve itself in matters of peace and security."); Nowrojee, *supra* note 165, at 135 (citing "tenuous legal grounds" for intervention under ECOWAS Charter); Wippman, *supra* note 190, at 183-84 (supporting the proposition that a Chapter VIII organization is authorized to use force against a member state only if authorized by its own charter, the charter of any larger regional organization to which it belongs, and pursuant to Security Council authorization, and finding none of those elements clearly in favor of Economic Community of West African States action in this instance); Brown, *supra* note 190, at 256-57 (analyzing the ECOWAS Charter and determining it addressed only international armed conflicts, not internal wars).

291. See U.N. SCOR, 46th Sess., 2974th mtg., U.N. Doc. S/22133 (1991); U.N. SCOR, 47th Sess., 3071st mtg., U.N. Doc. S/23886 (1992).

292. *Id.*

293. S.C. Res. 788, U.N. SCOR, 47th Sess., 3138th mtg., U.N. Doc. S/RES/788 (1992).

294. S.C. Res. 866, U.N. SCOR, 48th Sess., 3281st mtg., U.N. Doc. S/RES/866 (1993).

295. *Id.*

the actual peacekeeping to ECOMOG while its ninety-member mission verified compliance with the peace accord and the disarmament process.²⁹⁶

The UN Observer Mission in Liberia did not change significantly after this accord broke down and was followed by three more years of intermittent fighting. Throughout the UN's association with the Economic Community of West African States, the Security Council praised the efforts of the regional organization and encouraged the parties to cooperate with the ECOMOG, but neither explicitly condoned nor condemned its initial intervention.²⁹⁷

What motive can be attributed to the Security Council's silence regarding the authority for the Liberian operation? Is it, as one commentator suggests, recognition that a legitimate regional organization needs no authority for this type of operation?²⁹⁸ If so, it seems to validate the United States' position during the Cuban missile crisis and the Dominican Republic operation.²⁹⁹

Alternately, is the Security Council's reaction more than just "failure to condemn," but rather its approval, which can be fairly implied from the words of the resolutions?³⁰⁰ Or is the Security Council's response merely

296. This arrangement was hailed as a possible blueprint for the future. See Nowrojee, *supra* note 165, at 129. To some extent the model has been emulated between the UN and Organization of American States in Haiti, and the UN and NATO in Bosnia.

297. Besides Resolutions 788 and 866, see, e.g., S.C. Res. 813, U.N. SCOR, 48th Sess., 3187th mtg., U.N. Doc. S/RES/813 (1993) ("welcoming the continued commitment of" Economic Community of West African States, and commending its efforts) and S.C. Res. 1100, U.N. SCOR, 52nd Sess., 3757th mtg., U.N. Doc. S/RES/1100 (1997) ("Noting with appreciation the active efforts of Economic Community of West African States to restore peace, security, and stability to Liberia, and commending the States which have contributed to the ECOMOG.").

298. See Brown, *supra* note 190, at 258. The former Secretary General, Perez de Cuellar reportedly lent his unexpected support to this viewpoint, when in response to questions he said Economic Community of West African States did not need the consent of the Security Council before intervening in Liberia. See Peter da Costa, *Peacekeepers Run to U.N. as Mediation Runs Out of Steam*, INTERPRESS SERVICE, Sept. 23, 1992, available in LEXIS, News Library, Inpres File.

299. See *supra* note 218 and accompanying text. See also Wippman, *supra* note 190, at 187 (comparing the Economic Community of West African States action which had at best "implicit" approval by the Security Council with the United States position during the Cuban missile crisis and Dominican Republic operation that "failure to condemn" is equivalent to authorization).

a pragmatic recognition of a *fait accompli* while trying to avoid establishing precedent?³⁰¹

The fact remains that for the first time a regional organization undertook a humanitarian intervention without express Security Council approval while avoiding international censure. When studied in light of the Grenada and Dominican adventures, the implication is that no prior Security Council authorization is necessary when other regional organizations, such as NATO, undertake humanitarian intervention under the proper circumstances. This is an important principle for future NATO peace operations, and one that the organization has relied upon during its current operations in Kosovo.³⁰²

2. *The Organization of American States in Haiti*

Haiti has a long history of military dictatorships, often punctuated by coups and counter-revolutions.³⁰³ After vigorous negotiations by the Organization of American States, the ruling junta permitted free elections in December 1990.³⁰⁴ The Organization of American States and the United Nations extensively monitored the elections.³⁰⁵ In February 1991, Jean-Bertrand Aristide took office as one of the few democratically elected

300. The resolutions "recall" the provisions of Chapter VIII and refer to the ECOMOG as a peacekeeping force. See *supra* notes 293, 294, and 297. Professor Wippman argues that resolution 788, and the debates leading up to its adoption, reflect clear approval of the Economic Community of West African States initiatives. The resolution also may reflect the Council's strong sense of relief that the group was willing to try and settle a protracted conflict at a time when the UN was "over-stretched." Wippman, *supra* note 190, at 173-74.

301. See Ofodile, *supra* note 184, at 414 (endorsing the operation would have set a dangerous precedent, while condemning it would have contributed to further breakdown of law and order; asserting the reference to Chapter VIII in the resolutions merely recognizes Economic Community of West African States' status as a regional organization).

302. See *infra* notes 431-435 and the accompanying text.

303. For a brief sketch of Haiti's tortured political background, see Domingo E. Acevedo, *The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 119, 123-128 (Lori Fisler Damrosch ed., 1993).

304. *Id.* at 128-31.

305. *Id.*

presidents in the history of Haiti.³⁰⁶ After only seven months, however, another military coup deposed Aristide.³⁰⁷

The Organization of American States did not hesitate to become involved. Drawing on the strength of the Santiago Declaration,³⁰⁸ the Organization of American States Permanent Council issued a resolution condemning the coup, calling for immediate restoration of Aristide to power, and convening an ad hoc meeting of foreign ministers (the Ad Hoc Group).³⁰⁹ The Organization of American States vigorously pursued sanctions against Haiti. The Ad Hoc Group issued a resolution reasserting the call for restoration of the Aristide government; announcing an embargo to effect a political, economic, and financial isolation of the Cedras regime; and implementing measures to monitor human rights.³¹⁰ When the regime immediately rejected its demands, the Ad Hoc Group announced that it would not recognize the de facto government, although it would send a civilian commission to negotiate.³¹¹

Although the Organization of American States began to lobby the UN to have the Haitian matter placed on its docket almost immediately after the coup, the UN took little action.³¹² After the third Organization of American States resolution, the General Assembly passed a resolution in

306. Aristide took 67% of the popular vote. *Id.* Additional details concerning the Aristide election are available in Felicia Swindells, *U.N. Sanctions in Haiti: A Contradiction Under Articles 41 and 55 of the U.N. Charter*, 20 *FORDHAM INT'L L.J.* 1878 (1997).

307. The traditional Haitian power base backed the coup due to their fear of Aristide's reforms. The leader of the new junta, General Raoul Cedras, claimed that Aristide was persecuting the National Assembly and the armed forces. *See generally* Acevedo, *supra* note 303, at 131; Brown, *supra* note 190, at 259.

308. *Santiago Commitment to Democracy and the Renewal of the Inter-American System*, O.A.S. General Assembly, 3rd Plenary Sess., June 4, 1991, at 1, O.A.S. Doc. OEA/Ser.P/XXI.O.2 (1991) [hereinafter the Santiago Declaration]. In the Santiago Declaration the Organization of American States expressed unequivocal support for representative democracy. The Declaration requires an immediate meeting of the Permanent Council whenever a democracy is irregularly removed. In turn, the Council must call for an ad hoc meeting of foreign ministers or of the Organization of American States General Assembly which then must decide whether to take action consistent with the OAS Charter and the Charter of the United Nations.

309. *Resolution in Support of the Democratic Government of Haiti*, CP/RES.567 (870/91), Sept. 30, 1991.

310. *Resolution in Support for the Democratic Government of Haiti*, MRE/RES. 1/91, doc. OEA/Ser.F/V.1, Oct. 3, 1991. With regard to Chapter VIII, Article 54, the resolution notified the UN of its actions. *Id.*

311. *Resolution in Support for the Democratic Government of Haiti*, MRE/RES. 2/91, Oct. 8, 1991.

support of the Organization of American States' actions and requested the world community to honor the embargo.³¹³ Thereafter, the Haiti situation did not engage the UN's attention for almost two years.³¹⁴

The Organization of American States issued two more resolutions in 1992 in an attempt to strengthen its embargo.³¹⁵ The embargo effort was weakened, however, by several factors. First, the United States did not fully support the embargo.³¹⁶ Also, the Organization of American States Charter arguably did not permit the organization to impose its decisions on its members.³¹⁷ A final problem is that, even if it could line up support amongst its members, it could not enforce the embargo against the rest of the world without UN support.

In 1993, possibly influenced by increased refugee flows, the United States again threw its weight behind the Organization of American States' efforts before the UN.³¹⁸ The Security Council recognized the "unique and

312. See Brown, *supra* note 190, at 259. See also Arend, *supra* note 26, at 22-23 (noting a clash in philosophy between the Organization of American States and the UN). Initially the UN did not put the item on its agenda because it considered it an internal matter mandating non-interference under Article 2(7). The Organization of American States disagreed, arguing that it was a matter of collective self-defense and therefore a proper matter for international jurisdiction. *Id.*

313. G.A. Res. 46/7, U.N. GAOR, 46th Sess., Supp. 49, U.N. Doc. A/46/49 (1991).

314. *Id.*

315. *Restoration of Democracy in Haiti*, MRE/RES. 3/92, May 17, 1992 (calling for stronger measures and asking for UN support); *Reinstatement of Democracy in Haiti*, MRE/RES. 4/92, Dec. 13, 1992 (issuing yet another call to the UN for a possible global embargo).

316. See Acevedo, *supra* note 303, at 137. In February 1992, United States policy shifted from strict enforcement of the embargo to permitting exemptions on a case by case basis. Economic losses by American companies and efforts to reduce the flow of refugees from Haiti were suspected as the reasons for the policy change. *Id.*

317. See OAS CHARTER, *supra* note 207. Article 18 says:

No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, or cultural elements.

Id. Article 19 says: "No state may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind." *Id.*

exceptional circumstances” existing in Haiti and issued Resolution 841 directing member states to comply with the Organization of American States embargo and directing the Secretary General to establish a working committee in conjunction with the Organization of American States to monitor compliance and progress in Haiti.³¹⁹ The UN appeared to try to limit the value of its resolution as precedent. Having found a “threat to international peace and security,” it took the unusual step of authorizing the Security Council President to release a statement emphasizing once again the “uniqueness” of the situation and its decision to act only after the efforts of the Organization of American States and the General Assembly were unavailing.³²⁰

What were the “unique and exceptional” aspects to the Haiti crisis? Resolution 841 expresses concern about “mass displacements of population” and deplores the failure to “reinstate the legitimate government.”³²¹ Yet, similar situations have occurred across the world in the past without the Security Council invoking Chapter VII authority.³²² No further clarification was forthcoming from the Security Council. Shortly after Resolution 841, the de facto government signed the Governors Island Agreement³²³ with Aristide. The agreement was designed to work towards peaceful turnover of power.³²⁴ Just as quickly, the Cedras regime reneged.³²⁵ Thereafter, the UN sanctions referred to the military govern-

318. See Acevedo, *supra* note 303, at 137, 138.

319. S.C. Res. 841, U.N. SCOR, 48th Sess., 3238th mtg., U.N. Doc. S/RES/841 (1993) [hereinafter Resolution 841]. Adopted 16 June 93, it (1) referenced the Organization of American States resolutions and GA resolutions calling for an embargo; (2) recalled Chapter VIII to stress the need for cooperation between the UN and the Organization of American States in the matter; and (3) then acted under Chapter VII to impose the embargo consistent with that called for by Organization of American States.

320. United Nations Security Council, Provisional Verbatim Record of the Three Thousand Two Hundred and Thirty-Eighth Meeting, U.N. Doc. S/PV.3238, 16 June 1993. For accounts of the events leading to the release of these documents, see Swindells, *supra* note 306, at 1916, and Perez, *supra* note 45, at 430-32.

321. See Resolution 841, *supra* note 319.

322. See Perez, *supra* note 45, at 430-33.

323. *Governors Island Agreement*, in *Report of the Secretary General: The Situation of Democracy and Human Rights in Haiti*, S.C. Doc., 48th Sess., at 2-5, U.N. Doc. A/47/975-S/26063 (1993). The agreement was supposed to allow Aristide’s choice as Prime Minister to assume his role as part of a ten-step plan for restoring democracy to Haiti. *Id.*

324. *Id.*

325. See S.C. Res. 873, U.N. SCOR, 48th Sess., 3291st mtg., U.N. Doc. S/RES/873 (1993).

ment's "failure to fulfill their obligations under the agreement" as constituting "a threat to peace and security in the region."³²⁶

Finally, exasperated by the de facto government's intransigence, on 31 July 1994 the Security Council authorized a multinational force to use "all necessary means" to enforce the Governors Island Agreement.³²⁷ Other goals were to return the legitimate government to power, to establish and to maintain a secure and stable environment for implementation of the agreement, and to ensure the safety of a UN follow-on force.³²⁸ The basis for the Security Council's decision was again the Governors Island Agreement, although concern for violations of civil liberties, and the plight of Haitian refugees caused the Council "grave concern."³²⁹

Despite the attempt to limit the Security Council's resolutions, for the first time the UN authorized the use of force to change the government of a nation not at war with its neighbors.³³⁰ About thirty nations, ranging from "Bangladesh to Bolivia," prepared to enforce the resolutions.³³¹ By implication, they endorsed the concept of democratic intervention. Only the last minute abdication by the Cedras regime prevented the permissive use of force from occurring.³³²

The Haiti situation demonstrates that under the right circumstances the international community is prepared to support interventions based on democratic motives. This article argues that support for democracy is a fundamental principle on which NATO is based. History and the conditions within some new member states, and others on the periphery of NATO, make it foreseeable that the Alliance may need to engage in democratic intervention in the future. Since these operations may occur with-

326. *See id.* (reversing the Security Council's decision ending the embargo rendered when it had looked like a political solution had been reached); S.C. Res. 875, U.N. SCOR, 48th Sess., 3293rd mtg., U.N. Doc. S/RES/875 (1993) (allowing stop and search of ships headed to Haiti).

327. *See* Resolution 940, *supra* note 45.

328. *Id.*

329. *See id.* pmb., para. 4.

330. *See* Brown, *supra* note 190, at 259.

331. The appeal for a multinational force was directed particularly to the states "in the region." *See* Resolution 940, *supra* note 45, para. 12. But, response to the appeal was much broader. *See* Brown, *supra* note 190, at 259; Perez, *supra* note 45, at 236.

332. The multinational force entered Haiti unopposed in September 1994. Brown, *supra* note 190, at 259. Less than six months later the Security Council determined a secure and stable environment permitting entry of the UN Mission in Haiti had been achieved and began planning to deploy 6000 troops to keep the peace. S.C. Res. 975, U.N. SCOR, 50th Sess., 3496th mtg., U.N. Doc. S/RES/940 (1995).

out explicit Security Council approval, it is necessary that NATO lay the legal foundation for its involvement in advance by making the necessary adjustments to the North Atlantic Treaty.

IV. UN/NATO Cooperation in Bosnia: Charter-Based Regional Peace Operations

The inability of the UN to handle more robust peace operations was amply demonstrated in Bosnia and Somalia.³³³ In an effort to put more “teeth” in its arsenal, it came to regard regional military alliances such as NATO as potential agents.³³⁴ In 1995, Kofi Annan, the future Secretary General, predicted that the regional organizations would assume more of the peace operations role, but that the Security Council would maintain overall strategic command and control of the operation.³³⁵ He was only partly correct. Within the year, NATO assumed complete command and control of the Bosnia mission.³³⁶ Although the UN “invited” NATO to assume the role, it had little choice in the matter since NATO had already negotiated the turnover with the factions within Bosnia.³³⁷

In June 1992, NATO signaled the possibility of its assuming a peace operations role by issuing the Oslo Declaration.³³⁸ The declaration stated in pertinent part that the North Atlantic Council agreed “to support on a case by case basis in accordance with [its] own procedures, peacekeeping activities under the responsibility of the Conference on Security and Cooperation in Europe”³³⁹ (hereinafter called OSCE to reflect its name change). The Alliance extended a similar offer to the UN in December 1992.³⁴⁰

While all NATO members are also members of the UN and of the OSCE, the reverse is not true. When the Security Council, the OSCE, and NATO agree that a peace operation is appropriate, there is no conflict over authorization. The open question concerns whether NATO has legal authority to conduct peace operations when it desires to act, but the OSCE and the Security Council do not give permission. This article argues below

333. See FM 100-23, *supra* note 3, at 6-12.

334. Kofi A. Annan, *UN Peacekeeping Operations and Cooperation with NATO*, in UN PEACE OPERATIONS 406 (Walter Gary Sharp, Sr. ed., 1995).

335. *Id.*

336. See *supra* note 8 and accompanying text.

337. *Id.*

338. Oslo Declaration, *supra* note 30, at 51.

in Part V that NATO can act independently of Security Council and OSCE permission.

Within days after the General Framework Agreement for Peace was signed, the Security Council issued Resolution 1031, extending its mantle of international legitimacy to the initiative.³⁴¹ In the years since the agreement, NATO has accomplished what neither the UN nor any other European security group was able to manage—an enforceable cease-fire between the warring parties which allows the parties to continue negotiating a political solution to the crisis.

Despite its success, NATO was not predestined to take the lead role in Bosnia. After the break up of the Soviet Union, some writers forecast that a uniquely European institution such as the OSCE, the West European Union, or the European Union would be the organization most likely to assume peacekeeping tasks in the European theater.³⁴² France became a fervent proponent of developing a European defense identity separate from NATO.³⁴³ The West European Union was often its organization of choice.³⁴⁴ When hostilities broke out in Yugoslavia, France insisted that the situation was a European problem and that it should be solved by European means.³⁴⁵

It was partly for that reason that the European Union found itself alone in 1991 trying to resolve yet another Balkan War without UN or NATO assistance.³⁴⁶ Borrowing the authority of the OSCE,³⁴⁷ the Euro-

339. *Id.* para. 11. As previously noted, the Conference on Security and Cooperation in Europe has become the Organization for Peace and Cooperation in Europe (OSCE). The OSCE, which has also been referred to as "the Helsinki process," was until recently little more than a forum for consultation for 55 countries across Europe and North America ("from Vancouver to Vladivostock" is the popular refrain). It allowed East-West discussion on issues other than military affairs. Like NATO, it sought a new role when the Soviet Union collapsed. Unlike NATO, OSCE explicitly transformed itself into a Chapter VIII regional organization formally linking itself to the UN system. As a recognized regional organization, it serves as a legal framework for peacekeeping operations. OSCE's drawback is that it has no military forces of its own, so it "subcontracts" with the WEU, NATO, and the Commonwealth of Independent States (CIS). Jerzy M. Nowak, *The Organization for Security and Co-operation in Europe*, in CHALLENGES FOR THE NEW PEACEKEEPERS 122, 127 (Trevor Findlay ed., 1996). See also NORTH ATLANTIC TREATY ORGANIZATION, BI-MNC DIRECTIVE, NATO DOCTRINE FOR PEACE SUPPORT OPERATIONS, E-2 (11 Dec. 1995) (citing the Security Council and the OSCE as the only sources of authority for NATO peace operations).

340. *Final Communiqué issued by the North Atlantic Council in Ministerial Session*, NATO PRESS COMMUNIQUÉ M-NAC-2 (92) 106, Dec. 17, 1992.

341. See *supra* note 8 and accompanying text.

pean Union tried to negotiate an end to the conflict. Although it arranged a brief cease-fire in September 1991, the European Union's inability to

342. See Stromseth, *supra* note 31, at 492. Without the benefit of hindsight, Professor Stromseth projected in 1991 that a "pan-European institution" might be a better option to keep the peace in Europe beyond the traditional NATO borders. She felt the NATO role should be narrowly focused as a "residual deterrent" for collective self-defense against a possible Soviet reformation. That would help avoid the inherent danger of rekindling Russian fears which NATO expansion was bound to arouse. *Id.* Professor Stromseth also felt allowing NATO "out of area" would infringe on the prerogatives of the Security Council. *Id.* at 497-98. Finally, she advocated WEU develop rapidly to become a pillar of both NATO and the European security structure—a concept which would later be called "dual-hatting." *Id.* at 499. See also JOHN WOODLIFFE, *THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER INTERNATIONAL LAW* 334 (1992) (asserting that the broad authority of WEU would allow the European Allies to exercise out of area jurisdiction than the more strictly defined North Atlantic Treaty would allow).

343. See WOODLIFFE, *supra* note 342, at 336. France complains that NATO competes inappropriately for new roles, which one of the other European organizations is designed to fulfill now or for which it can develop to fill in the future. Rader, *supra* note 7, at 153. When NATO produced the first draft of its Doctrine for NATO Peace Support Operations, France complained that it did not address OSCE operations and stalled its implementation until the doctrine was redrafted. *Id.*

344. The WEU was created in 1948, the year prior to NATO. See Treaty for Collaboration In Economic, Social, and Cultural Matters and for Collective Self-Defense, March 17, 1948, 19 U.N.T.S. 51, as modified by Protocol Modifying and Completing the Treaty for Collaboration In Economic, Social, And Cultural Matters And For Collective Self-Defense, October 23, 1954, 211 U.N.T.S. 342 (also called the Brussels Treaty of 1948). After NATO was formed, the WEU folded its command structures into those of NATO. PAUL BORCIER, *THE ASSEMBLY OF WESTERN EUROPEAN UNION* 13-14 (1975). Its members resuscitated it in 1984 with a view to creating a "more cohesive European security and defense identity." WOODLIFFE, *supra* note 342, at 333. Its main operational achievements before the Yugoslavian conflicts were providing escort for oil tankers in the Persian Gulf during the Iran-Iraq War, and projecting a naval force into the area during the Persian Gulf War. *Id.* See also Stromseth, *supra* note 31, at 495-496. This meager experience did not prepare the WEU when in 1992 it answered the Security Council's request for member states to enforce the embargo against the warring Yugoslavian republics. It attempted, with limited success, to "operationalize" its activities by adding a planning staff and identifying European forces available for its missions. See Steinberg, *supra* note 34, at 58. The WEU was confirmed as the sole European institution competent to wield operational forces by the Treaty on European Union, February 7, 1992, reprinted in 31 I.L.M. 253 (1992) (also called the Maastricht Treaty). NATO announced it would aid the effort by allowing the WEU to use its assets and non-American commanders. See Brown, *supra* note 190, at 277.

345. Richard M. Connaughton, *European Organizations and Intervention, in PEACE SUPPORT OPERATIONS AND THE UNITED STATES MILITARY* 193 (Dennis J. Quinn ed., 1994).

346. The Security Council initially regarded the Yugoslavian conflict an internal affair. It still regarded article 2(7) as a bar to getting involved in the situation. Steinberg, *supra* note 34, at 38. The Council did agree to impose an arms embargo on Yugoslavia after repeated European Union requests. S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg., U.N. Doc. S/RES/713 (1991).

develop a credible West European Union peacekeeping force doomed the effort.³⁴⁸

When it became apparent that the European effort was failing, the Security Council finally agreed to establish the UN Protection Force, contingent on the parties establishing another cease-fire.³⁴⁹ That was achieved in January 1992, and the first phase of the Yugoslavian conflict drew to a close.³⁵⁰ It became clear that the forces were disengaging in Slovenia and in much of Croatia.³⁵¹ Unfortunately, the Bosnia situation rapidly deteriorated.³⁵² After the factions killed several European Union monitors, the UN devised forceful measures to secure the Sarajevo airport and to protect humanitarian relief programs.³⁵³

Shortly after the Oslo Declaration in June 1992, NATO began monitoring shipping traffic in the Adriatic Sea, and then shifted to active enforcement of the arms embargo imposed by Resolution 713.³⁵⁴ At first, NATO worked in conjunction with the West European Union, but command relationships grew increasingly complex as the operation went along. Eventually, the two organizations merged into a single chain of

347. Yugoslavia was not a member of the European Union, but it was a member of the OSCE. Therefore, European Union selected member states who were a member of both organizations to act as mediators. The idea was that the OSCE "provided the jurisdictional framework while the [European Union] provided a credible threat of economic sanctions." Borgen, *supra* note 33, at 809.

348. See Steinberg, *supra* note 34, at 38. Despite French optimism, its WEU partners proved unwilling to insert ground troops without United States support. *Id.* at 60-61. Gaps in the European approach to security outside of NATO were again revealed during the 1997-8 crisis concerning Iraq. The European Union was unable to develop a combined strategic approach to the crisis. Britain backed the United States initiative; France did not. Most other European Union nations were along the political spectrum in between. As soon as the crisis appeared in abatement the members verbally attacked Britain, which had the rotating European Union presidency at the time, for actions inconsistent with the European agenda. Charles Trueheart, *Europe Brought Many Sides to Dispute*, WASH. POST, Feb. 27, 1998, at A29.

349. S.C. Res. 743, U.N. SCOR, 47th Sess., 3055th mtg., U.N. Doc. S/RES/743 (1992).

350. See Steinberg, *supra* note 34, at 40-41.

351. *Id.*

352. *Id.*

353. S.C. Res. 752, U.N. SCOR, 47th Sess., 3069th mtg., U.N. Doc. S/RES/752 (1992).

354. See Rader, *supra* note 7, at 142.

command (Operation Sharp Guard), which was essentially the NATO chain of command.³⁵⁵

In the air, command relationships were just as confusing. In a short period of time, NATO went from monitoring flights in the Security Council proclaimed no-fly zone³⁵⁶ to actively enforcing the no-fly zone,³⁵⁷ to providing close air support to protect UN Protection Force personnel,³⁵⁸ and eventually using force to protect the so-called safe areas.³⁵⁹ Command and control of these operations required a cumbersome “dual-key” procedure.³⁶⁰

The dual-key approach began when the UN ground commander made a request for air support to the Secretary General.³⁶¹ The Secretary General then called the NATO Commander, Allied Forces in Southern Europe with his request. Finally, the Commander, Allied Forces in Southern Europe called the strike forces located at Aviano Air Base, Italy, to authorize the strike.³⁶²

Despite these drawbacks, the cumulative weight of the NATO air campaign forced the parties to the negotiating table. The General Framework Agreement was initialed in Dayton, Ohio, in November 1995.³⁶³ The UN was a minor player in the General Framework Agreement for Peace, which was essentially brokered by NATO.³⁶⁴ Although the Security Council was “invited” to approve the deal, there seems little doubt that NATO

355. *Id.*

356. S.C. Res. 781, UN SCOR, 47th Sess., 3122nd mtg., U.N. Doc. S/RES/781 (1992).

357. S.C. Res. 816, UN SCOR, 48th Sess., 3199th mtg., U.N. Doc. S/RES/816 (1993)

358. See NATO Factsheet No. 4, *supra* note 5, at 3. Soon after this authorization was granted the Serbian militia took several hundred UN Protection Force members hostage to protect themselves from the air-strikes. This illustrates an undesired side effect of “robust” peacekeeping—and validates the United States position in the Dominican Republic that two international organizations ought not be in the same place trying to do the same job at the same time. See *supra* note 229 and the accompanying text. See also Rader, *supra* note 7, at 149 (noting the hostages were in the unusual circumstance of being caught between their peacekeeping duties and another organizations “peace” mission).

359. S.C. Res. 836, UN SCOR, 48th Sess., 3228th mtg., U.N. Doc. S/RES/836 (1993).

360. See NATO Factsheet No. 4, *supra* note 5, at 4.

361. *Id.*

362. *Id.* See also Kaye, *supra* note 114, at 439 (arguing that the United States President unconstitutionally relinquished his strategic command authority over United States troops and policy objectives in this instance).

363. See *supra* note 8 and accompanying text.

364. *Id.*

would have proceeded even without the Council's approval. Nevertheless, the Security Council approved the agreement in Resolution 1031.³⁶⁵

Resolution 1031 contained several unprecedented provisions. Besides handing over peacekeeping duties from the UN to a regional organization, it admonished the multinational force to respect the NATO chain of command and authorized NATO to "take all necessary measures" to achieve the humanitarian goals of the mission.³⁶⁶

The NATO peace operation in Bosnia was the first time a failed UN peacekeeping force handed off its responsibilities to a regional organization.³⁶⁷ The mission is an object lesson in how a combined force, honed by years of joint training, succeeded where an ad hoc coalition, the kind typically employed by the UN, did not. The Implementation Force made sure it provided its components with technologically superior equipment and logistics, directed by a well-integrated command and control structure, and with a clear mandate to use force to effectuate its mission. This level of support cannot be duplicated by the typical UN-directed peacekeeping operation.

Despite the success of the mission, the legal basis for the operation is controversial. Although NATO's presence is authorized by a Security Council resolution promulgated under Chapter VII, NATO's own charter, the North Atlantic Treaty, does not address peacekeeping at all. Unlike the OSCE, the Alliance has no formal status with the UN as a Chapter VIII regional organization. In Bosnia, NATO papered over this deficiency by borrowing its legitimacy from the OSCE. This position places the Alliance in direct opposition to the stance that it has taken for over forty years that it is simply a collective defense organization. It also calls into question

365. See S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg., U.N. Doc. S/RES/1031 (1995).

366. *Id.* A later extension of NATO's mandate was approved as a matter of course. See S.C. Res. 1088, UN SCOR, 51st Sess., 3723rd mtg., U.N. Doc. S/RES/1088 (1996). As of the date this article was completed, the Alliance planned to extend the mission into the foreseeable future. See *NATO to Extend Bosnia Force's Stay Past June*, WASH. POST, Feb. 19, 1998, at A24. Whatever form a follow-on force takes, the European allies have made it clear that their own commitment to Bosnia depends on the continued presence of American forces. See William Drozdiak, *NATO Ministers Agree Force Must Stay in Bosnia*, WASH. POST, Oct. 2, 1997, at A19 (detailing decision of North Atlantic ministers to stay beyond June 1998—as long as United States leadership and ground troops remain engaged).

367. See S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg., U.N. Doc. S/RES/1031 (1995).

NATO's traditional reason for avoiding classification as a Chapter VIII organization; that is, its desire to avoid limitations on its freedom of action.

Ultimately, the Bosnia action may be regarded as an anomaly. Its legal basis can be explained in terms of Security Council authorization, combined with host state consent. International pressure for action to stop the brutal human rights violations displayed daily through the electronic media probably had an impact as well.³⁶⁸ Meanwhile, NATO, as an organization, was searching for a mission following the collapse of the Soviet Union. The OSCE became a convenient forum to leverage the organization into the conflict without needing to examine closely or directly refute the historical justifications for the Alliance.

The need for NATO involvement in future "Bosnias" may not generate the same pan-European consensus needed to support an OSCE action. The European Union's ineffectiveness in Bosnia and its recent rejection of Turkey as a candidate member also shows that it is not prepared to assume any important security role.³⁶⁹ Additionally, it has already been demon-

368. See, e.g., Jeffrey Clark, *Debacle in Somalia: Failure of the Collective Response*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 205 (Lori Fisler Damrosch ed., 1993) (crediting the electronic media with being the catalyst for international intervention in Somalia). See also Nancy D. Arnison, *International Law and Non-Intervention: When Do Humanitarian Concerns Supersede Sovereignty?* 17 SUM FLETCHER F. WORLD AFFAIRS 199, 206-07 (1993) (asserting "there was little hope of assistance and protection for the victims of ethnic cleansing in Bosnia until television" prompted international response).

369. Apparently Turkey's status as the most important anchor on NATO's southern flank carries little weight with the European Union. At its December 1997 summit the European Union rejected Turkey's membership request placing the blame on purported human rights abuses. At the same time, it welcomed talks with six potential members who were until recently mortal enemies of Western Europe, and opened discussions with five others. *European Union Slams Door on Turkey*, ASSOCIATED PRESS, Dec. 13, 1997, available in 1997 WL 13312413. Turkey, angry over its rejection after working for membership for over ten years, accused the European Union of erecting "a new cultural Berlin wall." Lee Hockstader & Kelly Couturier, *Turkey Severs Ties with EU After Membership Snub*, LA TIMES, Dec. 15, 1997, available in 1997 WL 13145360. Reportedly, the Turks hinted that European Union's action could damage negotiations for a settlement in Cyprus. Rubbing salt into the wound, the European Union opened discussions with Cyprus, and countries with a reputation for economic and political turmoil, such as Slovakia and Bulgaria. *Id.* See also Ben Barber, *Turkey Threatens Partition of Cyprus*, WASH. TIMES, Dec. 19, 1997, at A17 (reporting the European Union rejection was based on a poor human rights record, continuing conflict with Greece over Cyprus, and economic difficulties within Turkey; Turkey accused some members, Germany in particular, of being culturally biased against Turkey and seeking to restrict flow of Turkish workers into Germany; European Union members permit free movement between their nations).

strated that Security Council stalemate still occurs despite the end of the Cold War. The North Atlantic Treaty Organization must be prepared to act pursuant to its own charter to address vital European security concerns without fostering its legitimacy from some other international organization.

V. Reexamining the North Atlantic Treaty after Bosnia and Kosovo

The rapidly developing events in the Balkans highlight NATO's transformation from an organization exclusively devoted to collective self-defense to an entity willing to ensure collective security by conducting peace operations. Developing customary international law supports this role whether NATO is acting pursuant to a UN Security Council grant of authority or not. Chapter VIII of the UN Charter, in conjunction with the Article 51 collective self-defense provision, is broad enough to guarantee NATO's traditional quest to preserve its freedom of action.

The North Atlantic Treaty Organization should amend the North Atlantic Treaty, however, to clarify the duties and responsibilities of its members within the reinvented Alliance. The North Atlantic Treaty Organization's goals have been too much subject to drift and uncertainty since the dissolution of the Soviet Union. Amending the treaty to reflect NATO's status as a Chapter VIII regional organization will help restore the clarity of vision the Alliance requires when it performs peace operations in the twenty-first century.

A. Preserving NATO's Freedom of Action

1. *The Legal Framework for Regional Organizations*

The North Atlantic Treaty Organization should discard the legal fiction that it is not a Chapter VIII regional organization. The drafters of the UN Charter deliberately left the exact meaning of "regional arrangement" unclear.³⁷⁰ Some basic concepts, however, have been identified.

In practice, the interpretation appears to include states that are more or less geographically co-located, and within that group of states the mem-

370. See GOODRICH & HAMBRO, *supra* note 160, at 310-11. A proposal by the Egyptian delegation was rejected because it was feared that in some unforeseen fashion the definition might be too narrow. *Id.*

bers agree to a charter which governs their relationships to some extent.³⁷¹ Of course, NATO easily clears these hurdles, sharing as it does a common set of interests under the auspices of the North Atlantic Treaty. Yet, NATO has historically sought to avoid being classified as a Chapter VIII organization.³⁷²

The definition was debated extensively during the drafting of the North Atlantic Charter, but the members could not agree whether or not the Alliance constituted a regional arrangement.³⁷³ They felt that the issue was significant because Article 53 obliged regional organizations to obtain Security Council authorization before engaging in "enforcement actions."³⁷⁴ Apparently, the members believed that if they identified themselves as a regional organization they risked limiting their freedom of action. They reached this conclusion because a veto by a permanent member of the Security Council, presumably the Soviet Union, would block their ability to operate.³⁷⁵ In the end, the drafters omitted any reference to Chapter VIII.

In light of international law developed since Chapter VIII was drafted, however, NATO's fictional status has little practical consequence. For instance, if NATO acts in self-defense, its operations are protected by Article 51, regardless of Security Council approval. Moreover, the devel-

371. See Wippman, *supra* note 190, at 183-84. For a view that regional organizations can be more certainly defined, see Ofodile, *supra* note 184, at 410. The writer offers three factors: (1) there is a standing agreement between a subset of member states of the UN; (2) the agreement specifically deals with matters of international peace and security; and (3) the group has a direct relation to the region. *Id.* But see Borgen, *supra* note 33, at 799 (describing the scant requirements as self-identification and the willingness of member states to perceive the group as a regional organization).

372. See *infra* notes 373-375 and accompanying text.

373. See Stromseth, *supra* note 31, at 482

374. *Id.* See also Meyer, *supra* note 31, at 423-24 (asserting long-held position of NATO that it was created under the auspices of Article 51 and therefore solely concerned with collective self-defense).

375. See Henrikson, *supra* note 15, at 42.

All of these agreements for common self-defense refer to Article 51, and thus can be said to avoid the constraints on 'regional arrangements or agencies' of Chapter VIII, and perhaps even the more general limitations imposed by the Charter on the resort to force by U.N. members viewing their own and their allies' vital interests.

Id. See also Borgen, *supra* note 33, at 797 (stating regionals intentionally sought to describe themselves as Article 51 collectives in order to avoid oversight by the UN).

opment of Article 52 demonstrates that consent-based peacekeeping is permissible with or without Security Council approval. Further, the UN's own campaigns have set the parameters for non-traditional peacekeeping short of enforcement action. Acting consistently with the "purposes and principles" of the Charter, precedent indicates that the community of nations is prepared to accept collective peace operations based on humanitarian concepts ranging from genocide to collapse of civil order.³⁷⁶

Ironically, under its present concept of peace operations, NATO subjects itself to the very oversight it sought to avoid during the Cold War. Russia wields veto power in both the Security Council and the OSCE.³⁷⁷ Yet, its present stance only allows NATO to pursue peace operations at the behest of one or more of those organizations.³⁷⁸ This effectively reduces the Alliance to little more than a subcontractor in peace operations.

Of course, the argument could be made that NATO preserved its independence by limiting its involvement to those it undertakes "on a case by case basis in accordance with its own policies and procedures."³⁷⁹ If so, this is a curious sort of freedom where the Alliance grants another organization the right to choose what peace operation it will or will not pursue in exchange for the right to decline to perform the operation. It is more rational for the NATO members to amend their charter to allow them to perform the peace operations which international law allows without UN (or Russian) oversight.

2. *The Russians Are Not Coming: They Are Already Here*

The current concept of NATO peace operations subjects the Alliance to supervision by the Russian government.³⁸⁰ If NATO agrees to pursue a

376. See Damrosch, *supra* note 188, at 12 (identifying the situations where approval most likely will occur as: genocide, interruption of delivery of humanitarian relief, violations of cease-fire agreements, collapse of civil order, and irregular interruption of democratic governance).

377. See U.N. CHARTER art. 27(3). See also Nowak, *supra* note 339, at 127.

378. See Oslo Declaration, *supra* note 30.

379. *Id.*

380. This section was written in 1998 before NATO's decision to intervene in Yugoslavia over Serbian aggression against the Albanian Kosovars. Immediately after the bombing campaign began, Russia recalled its representatives to NATO. See *Russia Cuts Ties to NATO*, ST. LOUIS POST DISPATCH, Mar. 25, 1999, at A1. At the time this article was submitted for press, it is unknown whether this is a permanent severance, or merely a pro forma diplomatic protest.

mission only after UN authorization, Russia's veto on the Security Council can block operations proposed by the Alliance. Furthermore, if NATO chooses to request authority from the OSCE, Russia also has an effective veto in that forum.³⁸¹ The result is that the Alliance completely loses its freedom of action without a separate basis for peace operations in its own charter.

The threat of a Russian veto over NATO peace operations is not unrealistic. For example, in 1995, Russia demanded a role in the Bosnia peace-keeping process and threatened to withdraw from the Partnership for Peace if its call was ignored.³⁸² Once inside the coalition, Russia used the presence of its 1400 troops as a bargaining chip for concessions in the way the mission was prosecuted.³⁸³ This approach by the Russian government is consistent with its broader long-range goal to strengthen the OSCE at the expense of the North Atlantic Alliance.³⁸⁴ It appears that Russia may have achieved this goal with enshrining the principle of OSCE supremacy in the Founding Act.³⁸⁵

It should come as no surprise that Russia's political interests are not necessarily congruent with those of the Alliance. As it struggles to reform itself, Russia seeks to maintain the illusion that it is still a superpower nation, even though it no longer has the means to preserve that status aside

381. In theory the OSCE has a "consensus minus one" decision-making model, therefore Russia could not alone block an action favored by the rest of the organization. The reality is that the 52 member OSCE is too unwieldy to be a reliable forum for collective action since any dissent by a strong voice such as Russia's is likely to sway other members to vote against a proposed action. See Steinberg, *supra* note 34, at 61.

382. Mikhail A. Alexseev, *Russia's "Cold Peace" Consensus: Transcending the Presidential Election*, 21 SPG FLETCHER F. WORLD AFF. 33, 39 (1997). This was not the first time Russia used the Partnership for Peace to put pressure on the Allies. Aware that the West was anxious to have its participation, Russia at first declined to join, then later insisted on "special member" status as a condition for its participation. *Id.*

383. In September 1997, NATO considered bombing a Serbian-controlled radio station, which was broadcasting anti-NATO rhetoric. Russia warned that the action would be "an intolerable use of force" that might endanger the peacekeeping mission. *United States Dispatches 3 Planes to Bosnia to Jam Serbs' Anti-NATO Broadcasts*, STAR-TRIB. (Minneapolis-St. Paul), Sept. 12, 1997, at 12A. The threat came during the first organizational meeting held in Brussels designed to establish the NATO-Russia Permanent Joint Council. The reported comment of "a senior NATO diplomat" was that, "It turned out to be a very disagreeable meeting. There was (sic) a lot of complaints around the table. This was not a good omen for the future work of the NATO-Russia council." William Drozdiak, *Moscow Warns NATO on Bosnia*, WASH. POST, Sept. 12, 1997, at A27.

384. Oskaras Jusys & Kaestutis Sadauskas, *Why, How, Who, and When: A Lithuanian Perspective on NATO Enlargement*, 20 FORDHAM INT'L L.J. 1636, 1658-59 (1997).

from its deteriorating nuclear arsenal.³⁸⁶ Its relationship with the West remains very unstable while it deals with the fundamental questions about its future.³⁸⁷

The problem most likely to cause friction with the Alliance is Russia's pursuit of hegemony over the hinterlands it lost during the break up of the Soviet Union. Immediately after the fall of the USSR, Russia sought to reassert control by forming the Commonwealth of Independent States.³⁸⁸ While the policy achieved some short-term success, it also multiplies opportunity for competition with the West. This occurs because several of the republics have developed important economic and political ties outside

385. See *North Atlantic Treaty Organization, Founding Act on Mutual Relations, Cooperation and Security Between NATO and the Russian Federation*, available at <<http://www.nato.int/docu/basicxt/fndact-a.htm>> [hereinafter FOUNDING ACT] (declaring the OSCE the only pan-European security organization; committing the parties to choosing it to avoid "dividing lines or spheres of influence"; and acknowledging the OSCE as the "inclusive and comprehensive organization for consultation, decision-making and cooperation in its area and as a regional arrangement under Chapter VIII of the UN Charter").

386. See generally Sherman Garnett, *Russia's Illusory Ambitions*, 76 FOREIGN AFF. 61, Mar. 1997.

387. Unsettled questions include whether Russia will continue as a fledgling democracy or lapse back into its traditional authoritarianism, and whether private enterprise will triumph over the command economy. See Richard Pipes, *Is Russia Still the Enemy?*, 76 FOREIGN AFF. 65, (Sept. 1997) available in 1997 WL 9287483. Despite progress the Duma, Russia's parliament, is still in communist hands. The popular base for democracy is also "thin and brittle." Many people responding to a poll before the 1996 Presidential elections felt they were better off under the old Soviet-style government. Observers note that the professional military officers corps is "embittered and vindictive" over the loss of Russia's military power. Moreover, there is only nominal civilian control over the military with only one civilian executive appointed to the Ministry of Defense. *Id.*

388. See *id.* (claiming the CIS mutual security treaty effectively entrusted security of all signatories to the Russian army); see also Alexseev, *supra* note 382, at 40, 46 (asserting that the tempo to reintegrate the lost republics increased after the 1996 Presidential election despite the claims of some observers that the call for confederation was merely election year rhetoric, and that "Moscow's strategy is . . . to integrate the former Soviet republics into a Russia-led collective security system and increase Russia's sharing of their natural resources."); Garnett, *supra* note 386, at 66 (noting CIS integration remains a key element in Russia's claims to great power status). Some former republics voluntarily joined the organization, while others were coerced. After Georgia refused membership, Russia actively fomented a rebellion in the Abkhazia region. When Georgia was unable to handle the situation without Russian help, Russia negotiated an agreement allowing it to station 15,000 troops on Georgian soil in addition to the "peacekeeping" mission it sent to the Abkhazia region. As soon as Georgia allowed the force in the "rebellion" abated. See Pipes, *supra* note 387.

Russia's "near abroad" while accommodating Russian military presence within their borders.³⁸⁹

Meanwhile, NATO enlargement pushes the Alliance to the borders of the Ukraine and the Russian province of Kaliningrad, a small enclave on the coast of the Baltic Sea between Poland and Lithuania.³⁹⁰ Russia fought the idea of NATO enlargement every step of the way, hoping to disband the Alliance or at least to wring concessions with its grudging cooperation.³⁹¹

Reportedly, a "White Book" released in late 1995 by Russia's intelligence services advocated this strategy.³⁹² Examples of the policy are abundant. As bribes for its cooperation in recent years, Russia bargained for a seat on the G-7 economic summit by threatening not to participate in the Partnership for Peace.³⁹³ It stalled ratification in the Duma of START II (Strategic Arms Reduction Treaty), the second stage of nuclear arms reduction, unless the West agreed to pay for it.³⁹⁴ Russia also threatened to withdraw from the Conventional Forces in Europe Treaty unless it was permitted to increase troop levels north of the Caucasus.³⁹⁵ A major con-

389. See Garnett, *supra* note 386, at 70-73. In September 1997 Russia had troops deployed in all the ex-Soviet republics with the exception of the Baltic states and Azerbaijan. See Pipes, *supra* note 387. Although the conflict may be some time away, observers perceive a "geopolitical fault line" opening up in Russia's south along the Caspian Sea and Central Asia. The area is likely to receive increased attention from the West due to its geopolitical importance and the presence of copious amounts of oil. For a discussion of the economic and military impact of the area, see *supra* note 41 and the accompanying text.

390. *Partnership for Peace*, NATO Basic Factsheet No. 9 (last modified Mar. 1996) <<http://www.nato.int/docu/facts/fs9.htm>>.

391. See Alexseev, *supra* note 382, at 33-34 (describing the Russian practice of realpolitik). According to Alexseev, the Russian perspective is that the world of geopolitics is a zero-sum game where a gain by the West is a loss to the Russians. He believes the approach will not soon change because it is accepted throughout the Russian system from the politicians to the intelligence services to the public. *Id.* at 33-37.

392. *Id.* at 37. The potential influence of this philosophy is supported by the fact that one of its sponsors was Yevgeny Primakov, then the head of Russia's Foreign Intelligence Service, now the Russian Prime Minister. *Id.* at 38.

393. *Id.* at 39.

394. *Id.* See also Jusys & Sadauskas, *supra* note 384, at 1663 (admitting that the Strategic Arms Reduction Treaty (START) delay may be blamed more on the technical and financial difficulties encountered by the Russians as they seek to destroy the outlawed multiple warheads, while producing single warhead missiles, but noting, "The possibility of hearing new excuses, however, should not be ruled out.").

395. See Alexseev, *supra* note 382, at 39-40. See also Jusys & Sadauskas, *supra* note 384, at 1662-63 (describing the bargain bitterly as a "needless one way concession" conducted in secrecy without the participation of non-Conventional Forces in Europe Treaty members affected by it).

cession sought by Russia is to increase its role in the European decision-making process.³⁹⁶

The Permanent Joint Council resulted from Russian pressure against the enlargement process. The Permanent Joint Council allows Russia to bypass the OSCE and the Euro-Atlantic Partnership Council and come directly to the table with NATO without the presence of the other Partnership for Peace members or even the NATO membership candidates.³⁹⁷

The agreement purports to blunt any negative consequences to this arrangement by stating that consultations will be conducted "with respect to security issues of common concern," but that such consultations "will not extend to internal matters of either NATO, NATO member states, or Russia."³⁹⁸ Additionally, it states, "Provisions of this Act do not provide NATO or Russia, in any way, with a right of veto over the actions of the other nor do they infringe upon or restrict the rights of NATO or Russia to independent decision-making and action."³⁹⁹

Nevertheless, observers are skeptical of NATO's ability to keep Russia out of its internal affairs.⁴⁰⁰ The initial Permanent Joint Council meetings demonstrate that there is validity to those observations. Russia used the very first ministerial meeting to demand that it be included in future Alliance decisions concerning action in Bosnia.⁴⁰¹ Subsequent meetings

396. See Alexseev, *supra* note 382, at 46. Russia's other purported goals are to seek to balance Western influence in Asia and Middle East, and to intensify its efforts to dominate the CIS. *Id.* Former Russian general and defense minister (and probable future Presidential candidate), Alexander Lebed, reportedly stated that "greater interaction with NATO gives Moscow a chance to influence and exploit significant differences among NATO member-states, thus undermining NATO from within." *Id.* at 45.

397. See Jusys & Sadauskas, *supra* note 384, at 1659-61. One of the possible consequences of the Permanent Joint Council arrangement is that it allows Russia to participate in the NATO decision-making process for almost a year and a half before the next round of negotiations for NATO membership. See generally FOUNDING ACT, *supra* note 385.

398. See FOUNDING ACT, *supra* note 385, at 4.

399. *Id.* at 5.

400. See, e.g., Martin Sieff, *First NATO-Russia Meeting Expected to Go Smoothly*, WASH. TIMES, Sept. 26, 1997, at A13 (quoting Peter Rodman, director of national security studies at the Nixon Center for Peace and Freedom, "[T]he existence of the Permanent Joint Council will make it a lot more difficult to keep Russia out of the room when NATO members are hammering out their decisions."); Tom Carter, *Kissinger Criticizes NATO-Russia Deal*, WASH. TIMES, Oct. 31, 1997, at A15 (quoting Henry Kissinger, former Secretary of State, that the act means "de facto membership"); Pipes, *supra* note 387, at 65 ("Russia has been given a seat on the Alliance's Permanent Joint Council, which assures it, if not of a veto, then of a voice, in NATO deliberations.").

established the tone where NATO members insist that certain matters are not “security issues of common concern,” but where the Russians assert the contrary view.⁴⁰² What is certain is that the Permanent Joint Council gives Russia a forum to discuss peace operations matters. The Founding Act specifically identifies peacekeeping operations as an area of mutual interest.⁴⁰³

The inference is that NATO has managed to box itself into a corner when it considers peace operations. Arguably, if peace operations are a natural outgrowth of Article 5, these missions are an internal matter for NATO policy-making alone. Yet, the Founding Act justifies the opposite conclusion that peace operations are subject to the independent review of both the OSCE and the Russian government. The very brief history of the Permanent Joint Council indicates that the Russian government will be quite active in asserting its views at all forums available to it. This dilemma cannot be resolved without a clear declaration in the North Atlantic Treaty that peace operations are an integral responsibility of NATO.

B. The Evolving Law on Intervention

The time is quickly approaching when NATO members will not have the leisure to practice “the art of watching countries explode from a safe distance.”⁴⁰⁴ While Algeria festers in the south, refugees swarm into France.⁴⁰⁵ Ethnic violence simmers around the Caspian Sea and cozies up to the border of Turkey.⁴⁰⁶ The North Atlantic Treaty Organization

401. Laura Silber & David Buchan, *Moscow Demands a Say Over Bosnia*, FIN. TIMES (London), Sept. 27, 1997, at 2.

402. The Founding Act established a three-member panel to set the agenda and chair the meetings. The three members are a Russian delegate, the NATO Secretary-General, and another NATO member representative which rotates monthly. See FOUNDING ACT, *supra* note 385, at 5. The result of this arrangement has reportedly, “proved to be a formula for virtual paralysis.” NATO members express fear that Russia seeks to use the agenda to undermine the organization’s policy-making. William, *West, Russia Vow Closer Cooperation*, WASH. POST, Dec. 4, 1997, at A40. On their behalf, the Russians warn that if they are not allowed a “genuine voice” in the Permanent Joint Council, its utility is limited. James Morrison, *Lukin on the Line*, WASH. TIMES, Feb. 24, 1998, at A16.

403. See FOUNDING ACT, *supra* note 385, at 6.

404. This phrase was borrowed from Philip Golub, *The Art of Watching Countries Explode from a Safe Distance*, ASIA TIMES, Mar. 25, 1997, at 9 (criticizing the West, especially NATO, for failing to stop large scale humanitarian crises along its immediate periphery until it is too late to do more than “pick up the pieces, once the damage has already been done”).

405. See *supra* note 13 and accompanying text.

enlargement produced candidate members with borders in close proximity with smoldering disputes.⁴⁰⁷ It is only a matter of time before some potential conflagration ignites into a war that will force the Alliance from the sidelines.

For example, a civil war recently erupted in Kosovo, a province in what remains of Serbian dominated Yugoslavia.⁴⁰⁸ As the violence spread during the spring and summer of 1998, it threatened to disrupt the fragile peace in Bosnia and draw Albania and Macedonia into the conflict.⁴⁰⁹

406. See *supra* note 42 and accompanying text.

407. Poland borders on the Baltic nations, which have unstable relations with Russia, and adjoins Belarus, which is ruled by an autocratic holdover government from the communist era. See generally Jusys & Sadaukis, *supra* note 384. The Czech Republic survived its "velvet divorce" with Slovakia, but the latter nation has its own potential problems. Cf. Christine Spolar, *Lacking President, Slovakia is in Deadlock*, WASH. POST, Mar. 3, 1998, at A11 (reporting the Slovakian premier's bid to enlarge his powers, questioning the progress of democratic reforms, and highlighting the plight of ethnic minorities, the media, and the courts under the current regime). Hungary borders on the war-torn Balkan region.

408. Kosovo is 90% ethnic Albanian population (Muslims) has sought separation since the province's autonomous status was stripped in 1989 by the central government. The action was considered a prelude to the Bosnian conflict, because it set the tone for the drive towards the creation of "Greater Serbia." Although the main independence party advocated passive resistance, a more violent form of Kosovan nationalism emerged in the mid-1990s prompting thinly veiled threats from Serbian authorities that what happened to Bosnian Muslims could occur in Kosovo as well. See Philip Smucker, *Serbia's Tinderbox of Ethnic Strife, Kosovo Seethes*, PITTSBURGH POST-GAZETTE, Feb. 3, 1997. Serbia has a deep attachment to Kosovo because of its historical and religious significance to the Serbian Orthodox faith. The Battle of Kosovo in 1389 resulted in a crushing defeat for the Serbian forces by the Ottoman Turks. For 500 years, the Serbians suffered religious, ethnic, and social persecution at the hands of their Muslim conquerors. Their leaders vow that present-day Serbs will not suffer the same fate. See William Dorich, Commentary, *A Balkan Story the Media Ignored*, WASH. TIMES, Dec. 21, 1997, at B5.

409. See, e.g., Philip Smucker, *More Albanian-Serbian Clashes Shake Yugoslav Region*, WASH. TIMES, Jan. 16, 1998, at A15 (warning of a sharp increase in violence in Kosovo accompanied by little diplomatic effort to stop it); Georgia Anne Geyer, Commentary, *Kosovo: The Balkan's Next Trouble Spot*, CHICAGO TRIB., Feb. 20, 1998, at 25 (predicting the "next Balkans" begins in Kosovo and noting the likelihood the violence would spread into Macedonia with its large Muslim minority); Guy Dinmore, *Albanian Rebels Fight with Serbian Police*, FIN. TIMES (London), Mar. 2, 1998, at 2 (reporting a Kosovan terrorist attack which in turn led to a Serbian crackdown in which twenty Kosovan civilians were killed; as the violence escalated the Albanian government warned that Serbia's actions created a "serious war situation"); Chris Hedges, *Serbia Police Crush Protest by Ethnic Albanians in Kosovo*, N.Y. TIMES NEWS, Mar. 3, 1998, available in 1998 WL-NYT 9806104804 (reporting a Serbian crackdown on civilian protests which followed the weekend massacre of 20 Kosovan civilians; the Serb government refused to negotiate with the Kosovan parties and warned western diplomats that Kosovo was "an internal affair").

Western governments feared that Turkey and Greece, with their own well-known animosities, might also become involved.⁴¹⁰

Despite these fears and a Security Council threat to act,⁴¹¹ the fighting continued to escalate. By September 1998, the Security Council estimated that over 230,000 Kosovars had been displaced from their homes, and noted that many of these refugees were flowing into Albania, Bosnia, and many other European countries.⁴¹² “Concerned” that the situation was deepening into a humanitarian catastrophe, the Council declared the situation a “threat to peace and security in the region.”⁴¹³ Nevertheless, the members of the Council could not reach agreement on a course of action beyond encouraging the parties to cooperate with regional efforts to negotiate a peaceful solution.⁴¹⁴ In the end, they resolved only “to consider further action and additional measures to maintain or restore peace and stability to the region.”⁴¹⁵

When the violence continued, NATO seized on the latest Security Council resolution to press for a more aggressive solution. Purporting to act pursuant to Resolution 1199, the Alliance issued an action order on 13 October 1998.⁴¹⁶ The action order authorized NATO military forces to

410. A six-nation “contact group” composed of the United States, Russia, Britain, France, Italy, and Germany began attempts to negotiate a diplomatic solution. The United States vowed to press its allies to impose new economic and diplomatic sanctions against Serbia, but cautioned at the time that “the latest violence falls short of a threshold at which [it] would urge direct foreign military intervention.” Jeffrey Smith, *United States Assails Government Crackdown in Kosovo*, WASH. POST, Mar. 5, 1998, at A23. Nevertheless, NATO hinted that direct military intervention was a possibility because of the potential impact of the Kosovan situation on the stability of the region. Colin Soloway, *Serbia Attacks Ethnic Albanians*, WASH. POST, Mar. 6, 1998, at A1. Inevitably, Russia’s representative on the “Contact Group,” indicated it would not support forcible intervention. Colin Soloway, *Kosovo Under 2nd Day of Heavy Serb Assault*, WASH. POST, Mar. 7, 1998, at A1.

411. S.C. Res. 1160, U.N. SCOR, 53rd Sess., 3868th mtg., U.N. Doc. S/RES/1160 (1998). The Security Council purported to act under Chapter VII when it issued resolution 1160, but it never identified the specific threat to international peace and security. The Security Council imposed an arms embargo and threatened to “consider” additional measures unless constructive progress occurred. *Id.* at para. 19. The Security Council also seemed to favor direct interference with the internal political processes of the FRY by expressing, “its support for an enhanced status for Kosovo, which would include a substantially greater degree of autonomy and meaningful self-administration.” *Id.* at para. 5.

412. S.C. Res. 1199, U.N. SCOR, 53rd Sess., 3930th mtg., U.N. Doc. S/RES/1199 (1998).

413. *Id.*

414. *Id.*

415. *Id.* at para. 16.

begin air-strikes within ninety-six hours unless the warring parties reached a diplomatic agreement incorporating specific conditions supporting Resolution 1199.⁴¹⁷

The action order forced the Yugoslavian Government to accept, for the time being, an air verification regime (Operation Eagle Eye) run by NATO, and a corresponding OSCE-run Kosovo Verification Mission on the ground.⁴¹⁸ Faced with another NATO decision negotiated without its active participation, the UN Security Council issued Resolution 1203 endorsing the NATO and OSCE agreements.⁴¹⁹ At the insistence of certain members of the Council, Resolution 1203 included a mild remonstrance that "under the Charter of the United Nations, primary responsibility for the maintenance of international peace and security is conferred on the Security Council."⁴²⁰

Despite initial optimism following the agreements, the situation again deteriorated.⁴²¹ Anticipating a possible need to forcefully extract the Kosovo Verification Mission, the Alliance authorized Operation Joint Guarantor, a NATO ground force, which was deployed in the nearby Former Yugoslav Republic of Macedonia.⁴²² By late January 1999, NATO appeared fed up with both sides. It issued a forceful call for a peace con-

416. Secretary General Javier Solana, Statement to the Press by the Secretary General Following Decision on the ACTORD, Oct. 13, 1998, available at <<http://www.nato.int/docu/speech/1998/s981013a.htm>>.

417. *Id.* According to NATO, in order to avoid bombing the Yugoslavian government must stop Serbian attacks on Kosovo. Also, Yugoslavian forces were required to return to barracks, the government had to start peace talks with the Kosovars, and refugees must be allowed to return to their homes. NATO further demanded that international aid agencies be permitted full access to Kosovo and that Yugoslavia must cooperate with the War Crimes Tribunal at the Hague. As a final condition to avoid the strikes, Yugoslavia was required to permit international monitoring. Flora Botsford, *Countdown Begins to Kosovo Strikes*, BBC NEWS SERVICE, Oct. 13, 1998, available at <http://new.bbc.co.uk/hi/english/world/europe/newsid_192000/192253.stm>.

418. Secretary General Javier Solana, Statement to the Press by the Secretary-General Following the Meeting With Leaders of the FRY, Oct. 15, 1998, available at <<http://www.nato.int/docu/speech/1998/s981015a.htm>>.

419. S.C. Res. 1203, U.N. SCOR, 53rd Sess., 3937th mtg., U.N. Doc. S/RES/1203 (1998).

420. *Id.*

421. See Solana, *supra* note 418.

422. See *Statement on Kosovo, Meeting of the North Atlantic Council in Foreign Ministers Session*, NATO PRESS COMMUNIQUÉ M-NAC-2 (98) 143, Dec. 8, 1998.

ference, and warned both the Serbs and the Kosovars that they would face airstrikes if they failed to comply.⁴²³

With the threat of NATO action looming, the parties negotiated a conditional agreement at Rambouillet, France, on 23 February 1999.⁴²⁴ The agreement foresaw political autonomy for Kosovo while seeking to maintain the territorial integrity of Yugoslavia, itself.⁴²⁵ These so-called Rambouillet Accords, however, left many details unresolved. For example, the Serbs were unwilling to address the NATO proposal that its troops would deploy within Kosovo to enforce the deal.⁴²⁶ Nevertheless, NATO officials confidently predicted that the parties would sign when the peace conference reconvened in March.⁴²⁷

Their optimism proved to be misplaced. The fighting continued to escalate, and Yugoslav President Milosevic issued a statement decreeing that his country would under no conditions permit NATO ground troops within its borders.⁴²⁸ Although the Albanian Kosovars signed the deal on 18 March 1999, the Yugoslavian government refused to reciprocate despite repeated NATO warnings that it would begin an air campaign to force their compliance.⁴²⁹ Instead, it appeared to step up its efforts to eradicate Kosovar opposition, and conducted seemingly indiscriminate massacres of Albanian Kosovars resulting in mass flights by refugees.⁴³⁰ Finally, on 23 March 1999, NATO Secretary General Javier Solana announced that

423. See *The Kosovo Conflict*, ASSOCIATED PRESS, Mar. 25, 1999, reprinted in ST. LOUIS POST DISPATCH, Mar. 25, 1999, at A11.

424. See Bridget Kendall, *Partial Deal in Kosovo Talks*, BBC NEWS SERVICE, Feb. 23, 1999, available at <http://www.bbc.co.uk/hi/english/world/europe/newsid_284000/284876.stm>.

425. See *Full Text of the Kosovo Agreement*, BBC NEWS SERVICE, Feb. 23, 1999, available at <http://www.bbc.co.uk/hi/english/world/europe/newsid_285000/285097.stm> [hereinafter the Rambouillet Accords].

426. See Kendall, *supra* note 424.

427. *Id.*

428. See Claiborne, *supra* note 9.

429. See Tom Raum, *Clinton Details Serb Bombing Plan*, ASSOCIATED PRESS, Mar. 19, 1999, available at <http://dailynews.yahoo.com/headlines/ap/international/story.html?s=v/ap/19990319/wl/us_kosovo_89.htm>.

430. President William J. Clinton, Clinton Statement at the White House on Kosovo, Mar. 22, 1999, available at <<http://usa.grmbl.com/s19990322c.html>>.

NATO had ordered its forces to commence air operations within the Federal Republic of Yugoslavia.⁴³¹

The NATO Secretary General made it clear that the Alliance was forced to act to “halt the violence and bring an end to the humanitarian catastrophe now unfolding in Kosovo.”⁴³² The Russian Federation called an emergency session of the UN Security Council, “to consider an extremely dangerous situation caused by the unilateral military action of NATO members against the Federal Republic of Yugoslavia.”⁴³³ In the face of Russian charges that they had violated the UN Charter, NATO members steadfastly proclaimed they were acting to prevent the spread of a humanitarian catastrophe.⁴³⁴ The British representative stated a very clear rationale for NATO's intervention:

Every means short of force had been tried to avert this situation In such circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention was legally justifiable. The force now proposed was directed exclusively to averting a humanitarian catastrophe, and was the minimum judged necessary for the purpose.⁴³⁵

As this article was being prepared to go to press, the Alliance denied any plans to deploy ground forces, although one spokesman appeared to qualify NATO's previous categorical denials by saying there are “cur-

431. See Solana, *supra* note 9.

432. *Id.*

433. U.N. SCOR, 54th Sess., 3988th mtg., U.N. Press Release SC/6657 (1999) [hereinafter UN Press Release].

434. *Id.* at 2. The United States, Canada, the Netherlands, France, the United Kingdom, and Germany were present and defended their actions as legitimate use of force to prevent a looming humanitarian catastrophe. Representatives from Slovenia, Bosnia, Bahrain, and Albania supported them. Gambia and Argentina also made supportive statements without explicitly adopting humanitarian intervention as a legitimate exception for use of force. Conversely, the representatives of China, India, Belarus, and Yugoslavia joined Russia in condemning NATO intervention in strong terms. Namibia, Gabon, and Malaysia all clearly thought the dispute should be handled within the confines of the Security Council. *Id.* Meanwhile, in light of another UN Security Council stalemate, the UN Secretary-General issued a mild statement acknowledging the role of regional organizations under Chapter VIII, but reiterating his belief that the Security Council should have the primary responsibility for maintaining international peace and security. See Secretary General Kofi Annan, Statement on NATO Military Action Against Yugoslavia, Mar. 24, 1999, available at <<http://www.un.org/News/Press/docs/1999/19990324.sgsm6938.html>>.

435. *Id.* at 10.

rently” no plans for offensive ground operations.⁴³⁶ The only restraint, however, on executing ground operations appears to be the political considerations of its members, not the force of positive international law.

1. NATO and Human Rights

The North Atlantic Treaty Organization is not only the logical security organization to deal with threats to its security such as the violence in Kosovo, it is the sole association of states capable of doing so in the face of UN stalemate and pan-European vacillation. The law justifies NATO’s emerging role when the Alliance musters the political will to act. The dual doctrines of humanitarian and democratic intervention have achieved sufficient recognition in express and customary international law to permit NATO the freedom of action it requires to undertake these missions. When it conducts peace operations in furtherance of humanitarian or democratic goals, with or without Security Council support, NATO stands on the firm ground of customary international law.

While democratic governance may well be the primary human right from which all others flow,⁴³⁷ wider acceptance of other basic human rights concepts has also generated broader support for humanitarian intervention.⁴³⁸ Perhaps the reason is that nations more readily perceive that

436. See *Ruling Out Ground Troops*, ABC NEWS, Mar. 27, 1999, available at <http://www.abcnews.go.com/sections/world/DailyNews/kosovo990327_bombing2.html>.

437. See W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 *FORDHAM INT’L L.J.* 794, 795 (1995). Professor Reisman states:

It should not take a great deal of imagination to grasp what an awful violation of the integrity of the self it is when men with guns evict your government, dismiss your law, kill and destroy wantonly and control you and those you love by intimidation and terror. When that happens, all the other human rights that depend on the lawful institutions of government become matters for the discretion of dictators Military coups are terrible violations of the political rights of all the members of the collectivity, and they invariably bring in their wake the violation of all the other rights.

Id.

438. See David Wippman, *Treaty Based Intervention: Who Can Say No?*, 62 *U. CHICAGO L. REV.* 607, 679 (1995).

the mass migration of refugees, which often accompanies internal repression or disasters, constitutes a threat to international peace and security.⁴³⁹

Fleeing war and repression, millions of refugees have crossed the borders into Western Europe since 1989.⁴⁴⁰ In Germany alone, Kurdish refugees from Turkey and Iraq have increased 600% in recent years.⁴⁴¹ The arrival of so many in such a short period of time not only taxes the resources of the receiving states, but it also frays relationships among allies.⁴⁴² Under these circumstances, NATO intervention could be viewed as a form of self-defense.⁴⁴³ Of course, given the “threat to international peace” analysis currently employed by the international community,⁴⁴⁴ it is unnecessary to find that NATO is acting in self-defense of its own members in order for the Alliance to act. Nevertheless, the additional self-defense analysis may help NATO members identify humanitarian missions warranting the organization’s involvement, and upon which the North Atlantic Council may reach the required consensus.

For example, recent Serbian assaults on its ethnic Albanian Kosovar population created an estimated 500,000 refugees in a matter of days.⁴⁴⁵ While the bordering nations scrambled to prepare to receive their neighbors, NATO resisted calls for a ground campaign.⁴⁴⁶ Luckily, fears that

439. See David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 273 (1992). See also David Wippman, *Defending Democracy Through Foreign Intervention*, 19 Hous. J. INT’L L. 659, 672-73 (1997) (perceiving that the Security Council has lowered the threshold for what constitutes a “threat” by granting authority to use force in Iraq, Somalia, Rwanda, Haiti and Bosnia).

440. John Pomfret, *Europe’s ‘Rio Grande’ Floods with Refugees* WASH. POST, July 11, 1993, at A1. See also William Drozdiak, *New Wave of Fleeing Kurds Highlights Europe’s Vulnerability*, PITTSBURGH POST-GAZETTE, Jan. 11, 1998, at A3. For example, the numbers include 120,000 Moroccans to Spain, 600,000 Algerians to France, and 300,000 refugees fleeing to Germany alone during the Bosnian war. *Id.*

441. Many of the refugees make their way to Germany, which provides liberal benefits to newcomers. The Germans complain that their neighbors do little to halt the flow. See Elizabeth Neuffer, *BOSTON GLOBE*, Feb. 5, 1998, at A1.

442. *Id.* See also Peggy Polk, *Italy to Get Help with Influx of Yugoslav Refugees*, CHICAGO TRIB., Sept. 22, 1991, at 5 (detailing problems Italy encountered with refugees at the beginning of the conflict in the former Yugoslavia).

443. See Brian K. McCalmon, Note, *States, Refugees, and Self-Defense*, 10 GEO. IMMIGR. L.J. 215, 229 (1996) (arguing the deliberate actions of “sending” states which cause massive cross-border flows of refugees places enormous burdens on the security of the “receiving” state triggering the inherent right of self-defense in the latter state).

444. See Resolution 841, *supra* note 319.

445. See, e.g., *Humanitarian Woe*, ABC NEWS, Mar. 30, 1999, available at <http://www.abcnews.go.com/sections/world/DailyNews/Kosovo990329_albanians.html>.

Greece and Turkey could be drawn into a broader conflict on opposing sides have not yet been realized.⁴⁴⁷ This is a clear situation, however, in which a mandate in NATO's charter to address regional humanitarian concerns as a threat to regional peace would provide the tools and political direction the Alliance needs to deal with this type problem before it spirals out of control.

Another element dictating NATO involvement in humanitarian missions is the degree of media interest created by widespread disasters. This is often referred to as the "CNN factor."⁴⁴⁸ The North Atlantic Treaty Organization will confront situations necessitating humanitarian involvement more often than it faces a need to perform democratic intervention.⁴⁴⁹ The North Atlantic Treaty Organization is composed of many of the wealthiest and most technologically capable nations on Earth. Even if the members are not willing to become "the world's policemen," they are arguably morally obligated to relieve egregious human suffering in their area of competence and along the periphery of Europe. Chances are the electronic media will continue to provide the motivation in these instances when the political spirit would otherwise be weak.

At times, NATO will be blessed with the consent of the sitting government or governments and the approval of the Security Council, as it was in Bosnia. Unfortunately, as in Kosovo, it will often face host government opposition and Council deadlock. When that happens, NATO must be prepared to "go it alone." An amended, revitalized North Atlantic Treaty should commit its members to such missions and clearly state the criteria for NATO involvement in humanitarian ventures.⁴⁵⁰

446. See David Phinney, *The Stakes Are Raised*, ABC NEWS, Mar. 30, 1999, available at <<http://www.abcnews.go.com/sections/world/DailyNews/kosovopeace990329.html>>.

447. See, e.g., Terence Nelen, *Rumblings of a Balkan War*, ABC NEWS, Mar. 26, 1999, available at <<http://abcnews.go.com/sections/world/DailyNews/kosovobkg312.html>>.

448. See *supra* note 368 and accompanying text.

449. Humanitarian intervention can take place in a wide variety of situations from protecting religious and ethnic minorities, to ending large scale atrocities, to responding to mass suffering caused by natural or man-made disasters. See Scheffer, *supra* note 439, at 265.

450. *Id.* One suggested template is that intervention should occur when the humanitarian need is overwhelming, immediate action is required, and there is a clear threat to the security of a neighboring state or to regional stability. *Id.* at 290.

2. *The Imperative of Democratic Action*

The legal underpinning of humanitarian and democratic rights begins with the UN Charter itself. It is based on the principle of "respect for human rights and fundamental freedoms."⁴⁵¹ The UN's founding member nations, most of which had a grounding in democratic tradition, made a non-binding declaration that "[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."⁴⁵²

Unfortunately, when the declaration was reduced to a binding agreement, the resulting convention watered down the Charter's vision to the point that most nations, even one-party states like the Soviet Union, felt no qualms about ratifying the agreement.⁴⁵³ Until the past decade, little progress was made towards humanitarian and democratic goals, as autocratic rulers were allowed to turn democratic ideals upside down by hiding behind the concepts of "sovereignty," "domestic jurisdiction," and "internal affairs."⁴⁵⁴

When the United States invaded Panama, in part to restore the democratically elected Endara government, it suffered near unanimous disapproval.⁴⁵⁵ In retrospect, the United States action signaled a change in the way the world viewed intervention to uphold democratic and humanitarian rights. In Europe, the OSCE's predecessor organization issued a series of proclamations strongly supporting both democratic⁴⁵⁶ and humanitarian principles.⁴⁵⁷ The Organization of American States, normally the most conservative of organizations, made a powerful declaration in favor of democracy.⁴⁵⁸ Further, unlike the OSCE, which has no enforcement mechanisms or even a duty to consult following reported violations, the Organization of American States amended its Charter to permit sanctions against

451. U.N. CHARTER art. 1(3).

452. *Universal Declaration of Human Rights*, art. 21(3), G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt. 1, at 75, U.N. Doc. A/810 (1948).

453. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1966), [hereinafter the ICCPR].

454. See Reisman, *supra* note 437, at 799-800.

455. See G.A. Res. 240, U.N. GAOR, 44th Sess., at 1, U.N. Doc. A/RES/44/240 (1989) (condemning United States action in Panama even though the elected government approved of the mission). See also CP/RES.534, Organization of American States Permanent Council, OEA/ser.G/P/RES.534 (800/89) corr. 1 (1989) (mirroring the General Assembly's condemnation).

the organization's members, which may come to power by overthrowing democratic governments.⁴⁵⁹

These declarations prompted a number of observers to declare that the moral obligation to support human rights and democratic movements had become a legal duty.⁴⁶⁰ In principle, both the Secretary General of the

456. See *Conference on Security and Co-operation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension*, 29 I.L.M. 1305 (1990) [hereinafter the Copenhagen Document]. Conference on Security and Cooperation in Europe members "recognize that pluralistic democracy and the rule of law are essential for ensuring respect for all human rights." *Id.* The Copenhagen Document lists seven characteristics of democratic systems and the rule of law: (1) free elections, (2) a representative government, (3) accountability of the executive to a legislature or electorate, (4) clear separation between state and political parties, (5) an independent judiciary, (6) military forces under civilian control, (7) other related human rights. *Id.* at 1308-09; *Conference on Security and Co-operation in Europe: Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter*, Nov. 21, 1990, 30 I.L.M. 190, 193 (1991) [hereinafter the Charter of Paris]. The Charter of Paris states, "We undertake to build, consolidate and strengthen democracy as the only system of government of our nations. Human rights and fundamental freedoms are the birthright of all human beings, are inalienable and are guaranteed by law . . . Democracy is the best safeguard . . . [for all these rights]." And, "Our states will cooperate with each other with the aim of making democratic gains irreversible." *Id.* at 195; *Document of the Moscow Meeting of the Conference on the Human Dimension Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Factfinding*, 30 I.L.M. 1670 (1991) [hereinafter the Moscow Document]. Article 17 of the Moscow Document states:

The participating states (1) condemn unreservedly forces which seek to take power from a representative government of a participating state against the will of the people as expressed in free and fair elections and contrary to the justly established constitutional order; (2) will support vigorously, in accordance with the Charter of the United Nations, in case of overthrow or attempted overthrow of legitimately elected government of a participating state by undemocratic means, the legitimate organs of that State upholding human rights, democracy and the rule of law, recognizing their common commitment to countering any attempt to curb these basic values; and (3) recognize the need to make further peaceful efforts concerning human rights, democracy and the rule of law within the context of security and co-operation in Europe, individually and collectively, to make democratic advances irreversible and prevent any falling below the standards laid down in the principles and provisions of the Final Act, the Vienna Concluding Document, the Document of the Copenhagen Meeting, the Charter of Paris for the New Europe and the present document.

Id. at 1677.

United Nations⁴⁶¹ and the President of the United States⁴⁶² endorsed these rights. More importantly, the entitlement to protection of human rights and democratic governance has been upheld in practice.⁴⁶³

The continued existence of NATO is predicated on exporting and maintaining the democratic ideal. The democratic standard is embedded in the North Atlantic Treaty,⁴⁶⁴ declared in the Alliance's current strategic

457. See Charter of Paris, *supra* note 456, at 193-195 ("We affirm that the ethnic, cultural, linguistic and religious identity of national minorities will be protected and that persons belonging to national minorities have the right freely to express, preserve and develop that identity without any discrimination . . ."). See also the Moscow Declaration, *supra* note 456, at 1674-1676 (allowing experts to investigate suspected human rights violations with or without government consent and to offer advisory services with permission of the target government).

458. See Santiago Declaration, *supra* note 308.

459. See *Protocol of Amendments to the Charter of the Organization of American States*, Dec. 14, 1992, 33 I.L.M. 1005 (1994) (allowing the Organization of American States via Article 9 to suspend any member whose democratic government has been overthrown by force).

460. See, e.g., Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 89 (1992) (stating, "Democratic entitlement," building on "free and fair elections," is becoming the international standard); Tom Farer, *Collectively Defending Democracy in a World of Sovereign States: The Western Hemisphere's Prospect*, 15 HUM. RTS. Q. 716, 721 (1993) (stating that placing pressure on non-democratic governments does not violate sovereignty because it resides with the people, not the government); Acevedo, *supra* note 303, at 141-42 (remarking that the Santiago Declaration signals consensus within the Organization of American States community that democracy should be protected); Halberstam, *supra* note 189, at 166-67 (declaring that the Copenhagen Document implicitly authorizes military intervention to protect democracy); Scheffer, *supra* note 439, at 260 (stating a belief that the "proliferation of international treaties and conventions" protecting human rights "has now reached a critical mass that imposes limits on national sovereignty"). For a view that democratic entitlement is not an emerging norm, see Thomas Carothers, *Empirical Perspectives on the Emerging Norm of Democracy in International Law*, 86 AM. SOCIETY INT'L L. PROC. 261, 264 (1992) (claiming "many nations do not practice democracy and do not ascribe to it as an aspiration").

461. See *An Agenda For Peace*, *supra* note 61, para. 10 ("[R]espect for democratic principles at all levels of social existence is crucial; in communities, within States and within the community of States.").

462. See PDD 25, *supra* note 93, at 802-03 (stating the United States is willing to commit to regional action under certain circumstances where there is an urgent humanitarian disaster coupled with violence, or where there is a sudden interruption of an established democracy or a gross violation of human rights coupled with violence or threat of violence).

463. Humanitarian interventions have garnered wide support in Liberia, *supra* notes 270-301 and the accompanying text; Bosnia, *supra* notes 333-369 and the accompanying text; Kosovo, and Somalia, see S.C. Res. 733, U.N. SCOR, 47th Sess., 3039th mtg., U.N. Doc. S/RES/733 (1992). Haiti was the first multilateral intervention in support of the democratic right. See *supra* notes 303-332 and accompanying text.

concept,⁴⁶⁵ and unanimously endorsed through its members' participation in the OSCE.⁴⁶⁶ When the Soviet Empire collapsed, United States officials promoted several reasons to retain the Alliance, including the theory that NATO has a "proven record of sustaining democracy."⁴⁶⁷ The North Atlantic Treaty Organization has acted consistently with that policy.

When the Alliance established the Partnership for Peace, it required prospective members to commit to promoting democratic principles and to establishing civilian control over their military forces.⁴⁶⁸ These same principles became prerequisites to membership during NATO enlargement.⁴⁶⁹ The Founding Act reiterates these principles.⁴⁷⁰

Under these circumstances, it is logical that NATO should be willing to conduct peace operations, even in a member state, if its democratically elected government is irregularly removed by armed force. Willingness to uphold democratically elected governments, if necessary through armed intervention, should be regarded as the price of admission into the Alliance. It ensures that NATO will not be forced to suffer a viper amongst its members. It also extends protection of this most basic of human rights to the fledgling democracies joining NATO, most of which have a short acquaintance with democratic governance.

This right can be lawfully conferred by treaty, even to the extent of permitting the use of armed force.⁴⁷¹ The North Atlantic Treaty Organiza-

464. See North Atlantic Treaty, *supra* note 2.

465. See *The Alliance's New Strategic Concept*, *supra* note 36, para. 15 ("NATO's essential purpose . . . is to safeguard the freedom and security of all its members by political and military means . . . based on common principles of democracy, human rights and the rule of law . . .").

466. See *supra* notes 339, 340 and accompanying text.

467. See, e.g., Strobe Talbott, *Russia Has Nothing to Fear*, NY TIMES, Feb. 18, 1997, at A19; Jusys & Sadauskas, *supra* note 384, at 1643 (asserting the belief that NATO enlargement extends universal democratic values beyond Europe's limits and may contribute to the development of democracy within Russia, despite itself); Mircea Geoana, *Romania: Euro-Atlantic Integration and Economic Reform*, 21 FORDHAM INT'L L.J. 12, 13 (1997) (arguing that NATO membership ensures the democratic stability of its neighbors).

468. See *supra* note 390 and accompanying text.

469. See *NATO's Enlargement*, NATO Basic Factsheet No. 13 (last modified June 1997) <<http://www.nato.int/docu/facts/enl.htm>> at 2 [hereinafter NATO Factsheet No. 13].

470. See FOUNDING ACT, *supra* note 385, at 1. "NATO and Russia, based on an enduring political commitment undertaken at the highest political level, will build together a lasting and inclusive peace in the Euro-Atlantic area on the principles of democracy and cooperative security." *Id.*

tion should endorse the democratic intervention doctrine by enshrining it in the North Atlantic Treaty.

The democratic intervention mission is bound to be the most controversial of NATO's new roles.⁴⁷² The compromise that produced the meaningless definition of democratic rights in the International Covenant on Civil and Political Rights means that in many cases the UN Security Council will be unable or unwilling to act. Critics who maintain that democratic intervention in Haiti was an anomaly point to the unique factors in that situation which led the Security Council to authorize intervention.⁴⁷³ Specific details include intimate involvement by the UN and the Organization of American States in the electoral process and the organizations' responsibility for the economic plight of the Haitian people who suffered immensely because of the embargoes.⁴⁷⁴ The critics say that intervention occurred because the international community had staked its reputation on delivering a solution in Haiti.⁴⁷⁵

The NATO advantage exists in the democratic tradition it has fostered. The North Atlantic Treaty Organization has staked its continued existence and membership on establishing democracy in its member states and advancing democracy elsewhere. Shaping a clear doctrine of democratic intervention within the Alliance creates the same international expectation that NATO will deliver and protect democracy by force if necessary. The concept of universal democratic rights is no less valid among non-NATO members as it is within the Alliance. Accordingly, NATO

471. See BROWNLIE, *supra* note 259, at 321 ("In general, the right of forcible intervention on the territory of a state may still be lawfully conferred by treaty."). See also Farer, *supra* note 264, at 332; Wippman, *supra* note 438, at 670.

472. See Wippman, *supra* note 438. Professor Wippman believes democratic intervention is not a broadly accepted right. He also considers it unlikely to become one soon because there is no wide consensus on what democratic norms entail. Professor Wippman notes that despite recent advances international law is still highly biased towards claims of sovereign rights. Finally, he believes that the biggest road-block may be the overall lack of resources and political will to assert the right. Therefore, without Security Council approval, Professor Wippman says only state consent will permit forcible intervention. *Id.* at 671. But see Reisman, *supra* note 437, at 801-02. Professor Reisman asserts that democracy is the basic human right, and that unilateral initiatives may be the only available method to redeem the privilege. Therefore, "in the short run effective international protection of fledgling democracies will depend on decisive action by the great industrial societies." *Id.* at 803. He maintains that only in this manner will customary international law develop to protect the rights of free peoples. *Id.*

473. See, e.g., Perez, *supra* note 45, at 430-32.

474. *Id.*

475. See Wippman, *supra* note 438, at 676-77.

should revise its treaty to serve notice that it will react when anti-democratic forces threaten regional peace.⁴⁷⁶

C. The Treaty as Charter for NATO's Mission

The NATO heads of state met in April 1999 for the fiftieth anniversary summit.⁴⁷⁷ After the meeting, the members announced a new strategic concept.⁴⁷⁸ Since the collapse of the Soviet Union, NATO has been an organization in search of a mission. The result has been a change in strategic direction every few years as the European situation evolves. As revolution swept Europe in 1990 and set the Warsaw Pact countries and Soviet satellite republics free, NATO called a summit in London and prepared to offer a hand of friendship to its erstwhile enemies.⁴⁷⁹ The Alliance announced its determination to enhance its political component consistent

476. Although NATO based its recent intervention in Yugoslavia over Kosovo in terms of humanitarian intervention, some actions and statements by its members and representatives imply that democratic principles support the action as well. For example, the Rambouillet Accords were designed to secure political autonomy for Kosovo and to develop mechanisms for free and fair elections for the governance of the province. *See* Rambouillet Accords, *supra* note 425. The comments of representatives speaking before the UN Security Council following the commencement of NATO action also mentioned the extent to which Albanian Kosovars had been deprived of their political rights. *See* UN Press Release, *supra* note 433.

477. NATO Communiqué, *The Alliance's Strategic Concept* (last modified Apr. 23, 1999) <<http://www.nato.int/docu/pr/1999/p99-065e.htm>>.

478. *Id.* The 1999 Strategic Concept reaffirms much of the 1991 version and alludes to operations such as those in Bosnia and Kosovo as “non-Article 5 crisis response operations.” *Id.* para. 31.

479. NATO Communiqué, *London Declaration on a Transformed North Atlantic Alliance*, July 8, 1990 (visited Feb. 4, 1998) <<http://www.nato.int/docu/comm/c900706a.htm>> [hereinafter *London Declaration*]. The prime concern of the day was ensuring the conventional arms talks continued forward despite the upheavals. The other major provisions called for establishing regular diplomatic liaison with Warsaw Pact members, and negotiating a declaration that the two organizations were “no longer adversaries.” *Id.*

with Article 2,⁴⁸⁰ but also emphasized its primary mission to remain a purely defensive alliance.⁴⁸¹

The following year, NATO issued a declaration identifying its four fundamental tasks.⁴⁸² The first task was to provide a foundation for a stable environment in Europe based on the growth of democratic institutions.⁴⁸³ Second, NATO pledged to serve as a forum for Alliance consultations and for “appropriate coordination of their efforts in fields of common concern.”⁴⁸⁴ Of course, NATO agreed its continuing mission was to deter and to defend against any threat of aggression against the territory of any NATO member state. The final fundamental task was to preserve the strategic balance in Europe.⁴⁸⁵ Of these four goals, the primary focus remained on collective self-defense.

In November 1991, the Alliance announced its first new strategic concept since 1967.⁴⁸⁶ The new strategic concept reflected the collapse of the Warsaw Pact and recognized that the greatest threat to NATO was no longer a full-scale attack across the entire European front.⁴⁸⁷ Instead, risks were more likely to occur from spillover from outside of the borders of NATO members.⁴⁸⁸ Nevertheless, it reconfirmed the “core purposes”⁴⁸⁹ and stated that “the maintenance of an adequate military capability and clear preparedness to act collectively in the common defense remain central to the Alliance’s security objectives.”⁴⁹⁰ To the extent that it addressed a role for NATO in peacekeeping at all, it foresaw the Allies being called upon to provide forces for UN missions.⁴⁹¹ The implication was, however,

480. See North Atlantic Treaty, *supra* note 2. “The Parties will contribute toward the further development of peaceful and friendly international relations by strengthening their free institutions, by bringing about a better understanding of the principles upon which these institutions are founded, and by promoting conditions of stability and well-being” *Id.* art. 2.

481. See *London Declaration*, *supra* note 479.

482. NATO Communiqué, *NATO’s Core Security Functions in the New Europe*, June 7, 1991 (visited Feb. 4, 1998) <<http://www.nato.int/docu/comm/c910607b.htm>>.

483. *Id.* para. 6.

484. *Id.*

485. *Id.*

486. See Simon, *supra* note 38, at 51. The new strategy called for a changed and smaller force structure to be maintained at lower levels of readiness. It focused on reducing nuclear arms and established the North Atlantic Cooperative Council to act as a liaison between NATO and the Central and Eastern European nations. See generally *The Alliance’s New Strategic Concept*, *supra* note 36.

487. See *The Alliance’s New Strategic Concept*, *supra* note 36, para. 7.

488. *Id.* para. 9.

489. *Id.* para. 20.

that NATO members would supply forces as individual nations rather than as a regional organization. The Alliance still considered the main threat, although admittedly a reduced one, to consist of the Soviet conventional and nuclear forces.⁴⁹²

The collapse of the Soviet Union occurred only one month later.⁴⁹³ Suddenly, the single mission, which had justified NATO for over forty years was not merely diminished, it had virtually ceased to exist. It was against this background that NATO announced its decisions in June and December 1992 to support peacekeeping efforts by the OSCE and the UN, respectively.⁴⁹⁴ In other words, less than a year after it released a new strategic concept that mentioned nothing about NATO peace operations, NATO was seeking a new mission beyond its traditional charter by offering its services to the OSCE.

The Partnership for Peace initiative and announcement of plans to expand NATO soon followed at the Brussels Summit in December 1994.⁴⁹⁵ The North Atlantic Treaty Organization perceived peacekeeping as the function best suited for cooperation between itself and the Partnership for Peace members. To some extent, the Partnership for Peace countries may have believed that their candidacy for NATO membership depended on their willingness to undertake peacekeeping duties in conjunction with the Alliance.⁴⁹⁶ Peacekeeping had become less the focus of NATO than a contest to determine the worthiness of the candidates. The real focus in the years since the Brussels summit has been on internal reor-

490. *Id.* para. 30. This principle is repeated throughout the document. *See, e.g., id.* para. 35 (“The Alliance is purely defensive in purpose: none of its weapons will ever be used except in self-defense . . .”); para. 53 (addressing a force restructuring plan permitting integrated multinational forces to replace national blocks in the planning of collective defense).

491. *Id.* para. 41.

492. *Id.* paras. 13, 14.

493. RICHARD SAKWA, *RUSSIAN POLITICS AND SOCIETY* 16-24 (1993).

494. *See* Oslo Declaration, *supra* note 30.

495. *Declaration of the Heads of State and Government Issued by the North Atlantic Council in Brussels, Belgium*, NATO PRESS COMMUNIQUÉ M-NAC-1 (94) 3, Jan. 11, 1994. The communiqué announced the additional plans to develop the European Security and Defense Identity (ESDI), and to strengthen the WEU. Although NATO made no promises to the Partnership for Peace nations that they would become NATO members, it certainly opened the door to the possibility. The possibility was confirmed later that year when NATO announced it “remains open to membership . . . and would welcome NATO enlargement . . .” *Final Communiqué of the North Atlantic Council in Ministerial Session*, NATO PRESS COMMUNIQUÉ M-NAC-2 (94) 116, Jan. 11, 1994, at 3.

496. *See* Simon, *supra* note 38, at 52.

ganization and political developments, while paying lip service to “fundamental purpose of collective self-defense.”⁴⁹⁷

Finally, the Alliance recognized that the strategic concept it had developed so recently was already obsolete. At the Madrid meeting in July 1997, NATO announced that it would reexamine the concept “to ensure that it is fully consistent with Europe’s new security situation,” with an eye towards revising the Strategic Concept at the April 1999 summit—the fiftieth anniversary of the Alliance.⁴⁹⁸ The aim is to “confirm [NATO’s] commitment to the core function of Alliance collective self-defense and the indispensable trans-Atlantic link.”⁴⁹⁹ Since that optimistic pronouncement, the United States has suggested that “banishing weapons of mass destruction . . . should be the ‘unifying’ threat that binds Europe and the United States in the post-Cold War era.”⁵⁰⁰ The United States vision also insists that NATO must expand its operations beyond its traditional borders and become “a force for peace from the Middle East to Central Africa.”⁵⁰¹

The European subset of the Alliance is not generally in agreement with the American assessment.⁵⁰² Despite the present expeditions to Bosnia and Kosovo, some European members are not keen on the prospect of pursuing peace operations away from the traditional NATO area of operations.⁵⁰³ As late as the Gulf War, it was an article of faith that the Alliance would not act “out of area,” and the NATO members remained true to form

497. See, e.g., *The Final Communiqué of the Ministerial Meeting of the North Atlantic Council in Sintra, Portugal*, NATO PRESS COMMUNIQUÉ M-NAC-1 (97) 65, May 29, 1997, covering topics ranging from NATO enlargement to establishment of a new Euro-Atlantic Partnership Council (EAPC) which merges the Partnership for Peace and the NACC, to the Founding Act between NATO and Russia. Also included are discussions of a NATO-Ukraine Charter, Mediterranean dialogue, the ESDI, cooperation with the OSCE, and upcoming agreements on non-proliferation of weapons of mass destruction. Additional items on the agenda noted the Chemical Warfare Treaty, the Conventional Forces in Europe Treaty, the START treaties, and the Ottawa Process for eliminating anti-personnel land mines. This process prompts the observation from some quarters that the political dimension of NATO has become more important than the military aspect. See Geoana, *supra* note 468, at 14-15. Nevertheless, the official line from the Alliance continues to be that it is purely a collective self-defense organization. See generally NATO Factsheet No. 13, *supra* note 469.

498. *Madrid Declaration on Euro-Atlantic Security and Cooperation*, NATO PRESS COMMUNIQUÉ M-1 (97) 81, July 8, 1997, para. 19.

499. *Id.*

500. William Drozdiak, *United States, Russia Clash Over Iraq Policy*, WASH. POST, Dec. 18, 1997, at A29.

501. William Drozdiak, *European Allies Balk at Expanded Role for NATO*, WASH. POST, Feb. 22, 1998, at A27.

502. *Id.*

during the conflict.⁵⁰⁴ The North Atlantic Treaty Organization currently does not require such a commitment.⁵⁰⁵ As one recent study suggests, most European allies simply have neither the inclination nor the means to conduct out of area operations.⁵⁰⁶ True to form, only Britain has offered direct support to the United States during the continuing Gulf crisis.⁵⁰⁷

Admittedly, this is a political question that argues against the likelihood of amending the treaty.⁵⁰⁸ Acknowledging the difficulty of amending the treaty, however, does not alter the need for the change. The march of

503. *Id.* Reportedly, France expresses concern that expanding NATO's reach would make it little more than a global military tool for United States interests. A diplomat from another NATO country asked, "If NATO is changing a military destiny once based on geography to a defense of common values, then where do we draw the limits?" *Id.*

504. There can be little doubt the Gulf War presented a clear threat to the interests of all the Allies. Western Europe as well as the United States procures more than one half of its petroleum needs from Southwest Asia, and the border of one ally, Turkey, was directly adjacent to the area of conflict. Yet, NATO members could not agree to deploy their forces as a united force. NATO settled for sending a small air defense force into Turkey. *See Stromseth, supra* note 31, at 495-96. *See also Final Communiqué of the North Atlantic Council Chairman*, NATO PRESS COMMUNIQUÉ, June 7, 1991, para. 8, <<http://www.nato.int/docu/comm/c910607a.htm>> (issuing self-congratulatory praise to the Alliance for its "political solidarity" and its "collective expression of support for the Ally facing a direct threat" and therefore "helping to deter a further expansion of hostilities"). Besides the United States (532,000 troops), the only NATO countries to send ground forces were Britain (35,000 troops) and France (13,500 troops). Italy contributed some air forces as well (eight aircraft). *See* JOHN E. PETERS & HOWARD DESHONG, *OUT OF AREA OR OUT OF REACH?* 5-24 (1995).

505. *See* Marc Rogers, *Will NATO Go Global?*, JANE'S DEF. WKLY., Apr. 14, 1999, at 24-26.

506. Drawing on the experiences of the Gulf War and surveying the aftermath, the study concluded: (1) few European countries demonstrated willingness to deploy out of area; (2) even the countries which deployed faced serious political opposition from their citizens over their involvement; (3) the allies do not have sufficient air or sea-lift capability to deploy and sustain significant forces; and, (4) even if they managed the deployment, uncoupling the forces from the other NATO structures, deploying, and then reconstituting their forces was accomplished only after great difficulty. *See* PETERS & DESHONG, *supra* note 504, at 24-27.

507. *See* Swardson, *supra* note 19 (noting Britain's consistent support of the United States on its Iraqi policy). The other European allies have thus far limited their support to offers to allow the United States to utilize their bases to transport material and manpower to the Gulf region. *See* Edward Walsh, *United States Downs Iraqi Plan for Weapons Inspections*, WASH. POST, Feb. 12, 1998, at A34. The three (then) candidate members for NATO expressed their support. They agreed to open up their bases, and possibly to contribute troops. Interestingly, the candidate members, Poland, the Czech Republic, and Hungary, also sent contingents to the Gulf during Desert Storm. *See* Christine Spolar, *East European NATO Aspirants Ready to Aid Possible Allied Military Strikes Against Iraq*, WASH. POST, Feb. 15, 1998, at A31.

world events will call upon the Alliance to perform peace operations. The North Atlantic Treaty currently does not clearly commit NATO to these missions, whether within or without the North Atlantic area.⁵⁰⁹ The North Atlantic Treaty Organization should cease the current drift, which forces constant reinterpretation of its treaty and face squarely the necessity for formally defining itself and its mission in today's world, as opposed to the world it faced in 1949.

Some observers suggest that the evolution of NATO from an alliance predicated purely on collective self-defense to a collective peacekeeping organization is entirely consistent with the present treaty.⁵¹⁰ Advocates point to Article 2 of the treaty, arguing that peacekeeping capability contributes to "promoting conditions of stability and well-being." They also

508. When the subject of out of area operations is broached, most point to the Germans as the source of the foot-dragging. For years the Germans claimed their Constitution and Basic Law for the Armed Forces prevented deployment of German forces beyond their country's borders in combat situations. See Stromseth, *supra* note 31, at 495-96. This was the excuse Germany employed in 1991 to justify its decision not to send forces to the Persian Gulf. This decision subjected Germany to so much questioning from other NATO members, however, that it may have influenced the government to modify its position. There is some evidence that the German government felt that its lack of participation in such operations might be harming its chances to become a permanent member of the Security Council in the event the Council was expanded. See Ehrhart, *supra* note 50, at 35. Beginning in April 1993, the German government allowed fire control officers to remain aboard NATO airborne warning and control aircraft (AWACS) enforcing the no-fly zone in Bosnia. The change was justified on the grounds that the AWACS were orbiting outside the combat zone and the mission was rendering "humanitarian aid." This and other decisions led the opposition party to protest that the ruling party was attempting to alter the law through creeping incremental changes. *Id.* Protests from the German opposition provoked a court battle, which eventually reached the Federal Constitutional Court (FCC) in 1994. The court concluded that German forces were constitutionally permitted to take part in NATO combat operations outside the German borders, and further, outside NATO borders if operating pursuant to collective security arrangements or UN authorization. The only limitations were that German forces could not operate outside the country as only a national force, and the German Parliament must approve the deployment either before or immediately after the action was taken. In reaching this decision, the FCC found that, although the North Atlantic Treaty did not literally permit NATO deployments outside the North Atlantic area, the organization's agreement to deploy to Bosnia acted as an "implicit" amendment to the treaty. Walter J. Lemanski, *The Reemergence of German Arms: How Far Will Germany's March Toward Full Use of Military Force Go?* 29 VAND. J. TRANSNAT'L L. 857, 870 (1996).

509. See Rogers, *supra* note 505, at 24, 25.

510. *Id.*

argue that the consulting provisions of Article 4 allow for consideration of actions outside the strict limits of the North Atlantic area.⁵¹¹

Finally, opponents of amending the treaty suggest that the Alliance should merely reinterpret the Article 5 language to permit out of area collective security despite the traditional understanding that it permits only collective self-defense.⁵¹² The reasoning seems to be that since the North Atlantic Council provides strategic direction for NATO's military arm, and the North Atlantic Council in turn receives its guidance from the member states, logically the North Atlantic Council may reinterpret its treaty in whatever manner it chooses.

The changes to the form and function of NATO, however, have been so pervasive that the organization now registered with the UN seems to be a different agency from the one now aggressively conducting peace operations in Kosovo without pretending that it is acting in collective self-defense.

Against its historical posture as a collective self-defense agency with interests only in the North Atlantic area, NATO is transforming itself into an entity that conducts peace operations out of its traditional area. Instead of limiting its protective reach to its own members, NATO now offers itself in a broader scope to the OSCE. In essence, the members have developed a "secret treaty" that the UN, and before it the League of Nations, sought

511. See, e.g., 139 CONG. REC. E1576-02 (daily ed. June 22, 1993) (statement of Rep. Hamilton) ("As its history proves, the Treaty gives the Allies ample flexibility to take the steps necessary to pursue security and stability in Europe. The treaty is sufficiently flexible to permit the use of NATO forces for peacekeeping purposes"). Yet, ultimately Rep. Hamilton tied a NATO peacekeeping effort to the traditional collective self-defense purpose. "[T]he conditions that create the need for peacekeeping activity would be an appropriate subject for consultations if any of the Allies considered that the territorial integrity, political independence or security of any ally were threatened." *Id.* at 1578.

512. See Rogers, *supra* note 505, at 24, 25.

to prevent.⁵¹³ Cumulatively, these changes beg for formal amendment to the North Atlantic Treaty.

By declaring itself a Chapter VIII regional organization, NATO will preserve its traditional freedom of action. Under the current state of customary international law, very little is prohibited to a legitimate regional concern. As the case studies presented earlier in this article demonstrate, collective action is not only condoned, it is also encouraged as long as the regional organization concerned has a sufficient legal basis for its action. The charter, in this instance the North Atlantic Treaty, is NATO's legal contract between its members as presented to the rest of the world. The charter basis for regional action should be as clear as possible.⁵¹⁴

VI. Conclusion

[T]he time has come to recognize what the UN cannot do. Although the UN is still capable of traditional peace-keeping, it

513. U.N. CHARTER art. 102(1) states in pertinent part: "Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it." *Id.* This provision is designed to prevent secret diplomacy, which was blamed in part for the spread of conflict during World War I, as each European nation was pulled in through the provisions of a secret compact it had concluded with its neighbor. Often the new combatant had no national interest at stake beyond the treaty obligation. *See BENTWICH & MARTIN, supra* note 181, at 177.

514. *See, e.g.,* Acevedo, *supra* note 303, at 119 (placing emphasis on the Charter of Organization of American States not containing provisions to enforce economic sanctions against Haiti and therefore being unable to command compliance with its embargo on the Cedras junta); Wippman, *supra* note 190, at 183 ("[E]ven if a particular subregional organization can legitimately claim to be a chapter VIII organization, its authority to use force against a member state depends on compliance with its own charter and rules . . ."); Moore, *supra* note 28, at 157-164 (pointing out the uproar following Grenada as to whether regional action there was consistent with the Organization of Eastern Caribbean States Charter). *Cf.* Damrosch, *supra* note 188, at 13. She writes:

The quest for *legitimacy* may begin, but need not end, with the powers and authorities granted to international institutions by their own charters, which by and large were written at a time when the perceptions of threats and needs were quite different from those of today. Existing institutions are being asked to take on functions that they were never intended to perform; they are being pushed to the limits of their own constitutions, or perhaps beyond them.

Id.

is not capable of effective peace enforcement against well-armed opponents who are not prepared to cooperate. This was amply demonstrated in Somalia and the [UN Protection Force's] experience in Bosnia. For the foreseeable future, the defeat of aggression and the enforcement of peace will have to be undertaken by United States-led "coalitions of the willing" as in Desert Storm, or by NATO-led coalitions such as [the] Implementation Force in Bosnia.⁵¹⁵

The North Atlantic Treaty Organization enjoys advantages that neither the UN nor any other regional organization in the world can claim. It has wealth, technological superiority, and a professional force structure honed by years of training together. The Alliance is firmly grounded in the moral strength of its common democratic ideology. What NATO often lacks is the political will and the freedom of action it requires to perform peace operations without oversight from other international organizations.

The political dimension will take care of itself. Necessity will require NATO to perform peace operations despite the conservative tendencies of its European members. The Alliance assured itself of that by voting to enlarge its membership. In turn, enlargement places the Alliance in the middle of traditional religious and ethnic strife and nudges the "North Atlantic" border towards numerous trouble spots on its periphery. There is sufficient legal basis within Chapter VIII of the UN Charter, together with the Article 51 provisions on collective self-defense and the widespread acceptance of the humanitarian intervention doctrine, to justify NATO in conducting these missions with or without Security Council approval.

The North Atlantic Treaty, basically unchanged in almost fifty years, was written for the world of the 1940s. It does not address the world as it is today and as it will be tomorrow. It does not account for the evolution of international law. The North Atlantic Treaty Organization should amend its charter to reflect the accepted legal framework for peace operations, and to restore the clarity of vision the Alliance requires when it performs those missions in the twenty-first century.

515. See Address by Ambassador Richard Gardner, *supra* note 122, at S12461.