

Peace and Security Achievements and Failures

Rosalyn Higgins *

The history of the United Nations, 1945-1995, in the field of peace and security, would be a scholarly enterprise of several volumes. One is struck first of all by the sheer magnitude of all that has happened relating to the UN's role in peace and security during these years. The texts, the problems, the events, the attempts, the developments, the successes, the failures, the new problems – come teeming upon each other. But, looking back over the last fifty years, it seems to me that certain trends and patterns are clearly discernible. We cannot understand where we are now, and what problems the United Nations faces today in the field of peace and security, without understanding what was intended, and what has actually occurred in the intervening period time. And only then can we explore what is happening today – and the implications for tomorrow.

I. The First Phase: What was Intended

To look at the text of the Charter, and to remind ourselves of what was originally intended, is to see how far we have come from the original ideas of the founding fathers. The United Nations Charter was intended to provide a comprehensive set of prescriptions on conflict resolution and the use of force. On the one hand there were the provisions for settling disputes between States, and the prescriptions as to when force could or could not be used. On the other was the intended capability of the United Nations itself to provide collective security, if necessary by enforcing the peace. Chapter VI of the Charter indicates the appropriate methods of settling international disputes and gives the Security Council certain powers in relation to these. Whether decisions taken by the Security Council under Chapter VI can be binding has been the subject of some controversy . But it is agreed that generally

* Professor of Law, The London School of Economics & Political Science till July 1995; Judge of the International Court of Justice.

speaking, resolutions under Chapter VI will be recommendatory, rather than decisions which bind the membership at large by reference to Article 25. The International Court of Justice in the *Namibia* case made the extremely important observation (which has implications for other chapters of the Charter as well) that resolutions may in any event have operative effect – that is to say, the findings of fact, or applications of law within an organ’s own competence, are determinative.¹

As for the entitlement of States to use force, the matter was meant to be resolved by the combined application of Article 2(4) and Article 51. All use of force save in self-defence was prohibited under Article 2(4) (as the International Court in the *Corfu Channel* case was to affirm in its judgment in 1949). Article 51 did not entirely ‘match’ Article 2(4), in that under the former a State could use force ‘if an armed attack occurs’, but the latter provision prohibited the threat or use of force. (Years later, in the *Nicaragua v. United States* case (Merits), the International Court was further to underline that Articles 2(4) and 51 were not fully obverse sides of the same coin, by its finding that not all illegal uses of force constituted an armed attack, and that the right to self-defence was available only in regard to the latter).²

The Charter envisaged that States could reasonably be required to abstain from the use of force save in self-defence through the provision of collective security by the Security Council. Article 39 empowers the Security Council to determine the existence of a threat to or breach of international peace, and to recommend or decide on measures to maintain or restore international peace. Article 40 provides for provisional measures. Article 41 refers to non-forcible sanctions, including diplomatic and economic sanctions. Article 42 provides for military enforcement measures, to be carried out by forces made available to the Security Council under the special agreements envisaged in Article 43. The Security Council would thus be able to order economic and diplomatic sanctions, and also – directly, if it so chose, without first imposing sanctions under Article 41 – military sanctions. The forces would be available, the decision to use them in particular circumstances binding on all concerned. The Military Staff Committee was to be established to deal with the military planning and logistical aspects of such measures, as well as advising on a number of other military matters contained in Articles 45-47 of the Charter.

II. The Second Phase: What Happened – Developments up to 1990

The failure of the United Nations to put in place the envisaged collective security system has had several major consequences, each of which characterize the second phase in the last half century. The first is that States have in fact relied, as much as they have been able to, legally, militarily and politically speaking, on the unilateral

1 ICJ Reports (1971) at para. 105.

2 ICJ Reports (1986) at paras. 193-5 and 210-211.

use of force. Unilateral military action was engaged in by various of the major powers, invoking an 'invitation' from the State concerned (USSR in Hungary; USSR in Afghanistan); the protection of one's nationals (USA in Suez; USA in the Dominican Republic; USA in Grenada); or an extended notion of self-defence including, *inter alia*, the protection of one's nationals abroad (USA in Libya). The period 1956-1990 was characterised by a long list of unilateral uses of force, albeit that some effort was made to articulate the justifications by reference to Articles 2(4) and 51.

During this period the General Assembly also passed its celebrated series of 'law making' resolutions on issues related to the use of force. Important among these have been the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (General Assembly Resolution 2625) and the 1974 Definition of Aggression (General Assembly Resolution 3314). These Declarations reflected a determination by the Assembly to act, notwithstanding the freeze in the Security Council – but other factors also, including notably the tension between the apparent general prohibition of the use of force in Article 2(4) and a widely perceived need to supply military aid to those fighting against colonialism. The Declarations – similar, it may be thought, to many of the 'law making' pronouncements of the General Assembly in other fields – have provisions within them to suit diverse shades of opinion and political conviction: these elements are sometimes contradictory. But they have come to be widely cited – including, from time to time, by the International Court of Justice itself. There is always a paragraph that can be invoked to fit a particular occasion and legal counsel before the Court ignore them at their peril.

Paramilitary groups, not officially under the control of the State, emerged early in this period with the operations of the Fedayeen across the Egyptian-Israeli borders in the early 1950s. By the 1980s the phenomenon of terrorism – sometimes State sponsored, sometimes not – had become a major political factor of the era. The impotence felt by States in the face of this phenomenon also encouraged the unilateral use of force against States deemed to have instigated and supported such acts, as well as reprisal raids directed against 'liberation groups'.

A second consequence was that the United Nations decided that the absence of agreements under Article 43 made impossible an obligatory call upon members to participate in military enforcement. But military interposition, upon the request of the receiving State, and with the participation of those members of the United Nations which volunteered, would be possible. Thus was the notion of UN peace-keeping born. In 1957, with the United Nations Emergency Force in operation, Dag Hammarskjöld issued his famous Summary Report of 1958,³ which was to operate as a model for peace-keeping operations for the next thirty five years. Central to

3 A/3943, Summary Study of the experience derived from the establishment and operation of the Force: Report of the Secretary-General, 9 October 1958.

those understandings were that peace-keeping would be by consent; that force would be used only in self-defence (later, in the Cyprus operation – coming after the difficulties of the UN operation in the Congo – this was extended to force to protect the integrity of the mandate and agreed freedom of movement); and that it would not be used to determine political outcomes within a country.

In 1962 the International Court of Justice confirmed the legality of such peace-keeping action, both in Suez and in the Congo.⁴ Both the Court, and the Secretary-General in his 1957 Report, left open the question of whether enforcement action, albeit with States volunteering rather than being commanded to participate, could occur in the absence of the wider agreements under Article 43.

It was also envisaged that permanent members would not be involved in UN peace-keeping, although collective security under Chapter VII had been predicated on leadership and control by the permanent members. Part of the role of peace-keeping was to exclude the rivalries of the Cold War from areas to which it had not yet spread. In later years this principle became qualified – United Kingdom participation in Cyprus, and later French participation in Lebanon, and, in due course, as the Cold War began to thaw, United States and Soviet participation in the Middle East, began the long road back towards the idea of major power responsibility in peace-keeping.

As early as ONUC (Congo 1960) and UNFICYP (Cyprus 1964) UN peace-keeping operations had begun to undertake ancillary functions: persuasion and negotiation with local military personnel and officials; humanitarian relief; the provision of safe passage for convoys; protection for the cultivation of crops.⁵

But while creative activity occurred to maximize the possibilities of Articles 24 and Chapter VII (even if sometimes colloquially referred to as activities coming under Chapter Six-and-a-half), throughout all this period there were virtually no developments under Chapter VIII. Apart from a brief flurry about the ability of the OAS to impose membership-related sanctions upon Cuba without reference to the Security Council, and an abortive OAU peace-keeping effort in relation to the Chad-Libya dispute, matters relating to Chapter VIII remained dormant. And NATO and the Warsaw Pact continued their growth as collective self-defence arrangements, agreeing only that they were not regional arrangements and could thus act without prior reference to the United Nations.

4 *Case of Certain Expenses of the United Nations*, Advisory Opinion, ICJ Reports (1962).

5 For details, see Higgins, *United Nations Peace-keeping 1946-1967*, Vol. 2, at 129-144; Vol. 3, at 40-53.

III. The Third Phase: Developments since the End of the Cold War

Since the end of the Cold War there has been a marked decline in the unilateral use of force by the United States outside of the United Nations. Since the coincidence of its own objectives and those of the United Nations in the Iraq invasion of Kuwait, the advantage has been seen in the United States of making the United Nations the centre of foreign policy. The disappearance of the old, hostile Soviet Union has made the Security Council a more comfortable environment. There has been a substantial common interest in peace and security matters between the United States, France and the United Kingdom, with much common ground also with the Russian Federation. China remains uneasy, but does not feel strongly enough to veto.

The Gulf War was an event of global importance, securing the liberation of Kuwait and restoring self-confidence to the United Nations. (A gradual return to some credibility in this area had in fact begun a little earlier, when the UN had managed to play a positive role in bringing the Iraq-Iran war to an end; and Perez de Cuellar had impressively seized the opportunities offered by the transmitted proposal that the UN negotiate the release of all kidnapped civilians held in the Middle East.) The mechanism eventually used was an authorization to States acting in a coalition to use 'all necessary means' (clearly understood as a reference to the use of force against Iraq if it had not complied by a future specified date with a series of Security Council resolutions). Thus due warning was given and time was bought for finalizing military arrangements under United States command. In contrast to Korea the Iraq operation was not a United Nations Command, but rather an authorized operation in which States were understood to need to act in support of, and within, the parameters of Security Council resolutions. The Gulf War has been important too for showing that the UN was prepared for a long term commitment to economic sanctions at the conclusion of hostilities if all the stipulated conditions were not met; and for the first manifestations of the need to deal also with the humanitarian aspects of the problem (Security Council Resolution 688) by addressing the predicament of the Kurds through the imposition of safe havens. But it was an imposition 'with the consent' of the Iraq government – a consent periodically challenged in word and in deed. The Western States decided that they would patrol no-fly zones to ensure respect for these zones, asserting this to be 'based on' the UN resolutions, though not specifically authorized by them. One now had action 'authorized' by the UN through an absence of protest rather than through a specific resolution.

The developments were now to come thick and fast. The Secretary-General issued his *Agenda for Peace*,⁶ a bold initiative in which specific proposals were made for new UN roles and new UN methods. In the peace and security area a

6 AJ47/277-S/24111, June 1992.

remarkable new typology was offered – without ever in terms rejecting the old categories of ‘enforcement’ and ‘peace-keeping’. The talk was now of peace-making, peace-building, peace enforcement, humanitarian assistance. In all of these, apparently, there was to be peace-keeping support. By implication, peace-keeping was thus no longer to be confined to overseeing ordered and agreed cease-fires. It could – apparently in the absence of the classic essential precondition of its deployment (along with consent), deliver humanitarian aid, provide for the introduction of democratic elections, facilitate the monitoring of human rights. UN peace-keeping had in fact already been deployed in support of some of these tasks – but with the prior agreement of the parties both for a cessation of hostilities and the achievement of the agreed outcome. The role of UNTAG in Namibia, and ONUVEN in Nicaragua at the end of the decade met with a substantial success. The former operated on the basis of South Africa’s consent to the Namibia peace plan; the latter on the basis of the Guatemala Agreements. But *Agenda for Peace* essentially removed the condition of prior agreements to be firmly in place.

Agenda for Peace further spoke of the need for military support for such operations, opening the way to an enforcement element *within* peace-keeping operations – thus setting aside the long-standing distinction between enforcement and peace-keeping. How were these new, all-embracing objectives and overlapping functions to be achieved? The time had come for the long dormant Chapter VIII to be revived.

From the moment he arrived at the United Nations, Dr. Boutros Ghali, who already had written a leading study on the topic,⁷ sought to put regional organizations back into centre play. In his annual reports he wrote of the support they could provide. He observed with perspicacity in his 1992 Report⁸ that the moment was ripe because both regional organizations and the United Nations were redefining their missions after the end of the Cold War.

Agenda for Peace provided the opportunity to expand on the subject. Referring to ‘a new complementarity’, he suggested that the potential of regional organizations should be utilized across the new typology of functions that he had identified – preventive diplomacy, peace-making, peace-keeping and peace-building. The first and second functions correspond approximately to the envisaged use of regional agencies in peaceful settlement in Article 33 and the regional actors in Article 52. The last two find no ready Charter authority. And the Charter intentions of the utilization of regional arrangements for enforcement action under Article 53 are not reflected in *Agenda for Peace*.

These proposals for ‘a new complementarity’ had a dual basis. The first was to meet a very practical need. Great efforts had been made by successive Secretary-Generals, key Secretariat personnel, and dedicated military collaborators to build up

7 Boutros Ghali, *Contribution à l'étude des ententes régionales* (1949).

8 See paragraphs 114 and 115 of the ‘Report of the Secretary-General on the Work of the Organization’ (1992) published in Vol. 46 *Yearbook of the United Nations* (1992) 3 at 17.

the UN's military capabilities in the sixties, seventies and early eighties. Staff training had been urged, Secretariat handling skills deepened, liaison with national military decision makers established, standby provisioning recommended. But at the end of the day UN members had, with few exceptions, not been prepared to earmark forces for UN use, and Secretariat operational command skills remained limited. In any event, most of these efforts had been directed at classic UN peace-keeping, and not at either enforcement under Article 42 of the Charter, or the new envisaged functions of 'peace-making' and 'peace-building'. As to the former, it rapidly became clear that, notwithstanding the end of the Cold War, UN members were not at all inclined to put the original intentions of Article 43 into place. Quite simply, they did not wish the UN to have either standing forces or forces on standby⁹ that could be called into operation upon decision of the Security Council. With more and more new-style peace-keeping envisaged (and already occurring), it was apparent that the UN could not either materially or financially provide for its ever expanding programme.

It remains baffling that the response of the Secretary General to this reality was to suggest that the UN should establish a rapid reaction force (Supplement to *Agenda for Peace*, A/50/60, S/1995/1, at para. 44), when the establishment of what he terms 'the Security Council's strategic reserve' required exactly all those commitments of political will that the member states are so manifestly unwilling to make.

The second reason for the drive to involve regional organizations in the UN's peace and security activities was, said the Secretary-General in *Agenda for Peace*, to contribute to 'a deeper sense of participation, consensus and democratization in international affairs'. This stated reason reflected the alienation felt by many States in the face of the preponderant power of the 'P3' – the United States, France and the United Kingdom. But this suggestion would only have made sense if regional organizations around the world would assume these burdens – whereas the reality was that the organization best equipped to do so was NATO, which was also looking for a new role. And the United States, France and the United Kingdom are, of course, critically important members of NATO as well as of the Security Council.

The history to date of the role that regional organizations could play has not been very encouraging. In the first place, most regional organizations are not fitted for military collective security or 'peace support'. Further, it may be the case that far from being best placed to resolve a problem within the region, they are perceived by one of the protagonists as irretrievably committed to the other side: the Arab League could hardly be expected to resolve the Arab-Israeli dispute. The theoretical

9 The Secretary-General in his *Supplement to an Agenda for Peace*, A/50/60, S.1995/1, 3 January 1995 notes (at 11): 'A considerable effort has been made to expand and refine stand-by arrangements, but these prove no guarantee that troops will be provided for a specific operation. For example, when in May 1994 the Security Council decided to expand the United Nations Assistance Mission for Rwanda (UNAMIR), not one of the 19 governments that had at that time undertaken to have troops on stand-by agreed to contribute.'

advantages of the regional approach – that is to say, familiarity with the parties and the issues – are offset by the practical disadvantages of partisanship and local rivalries. The Arab League and the Gulf Cooperation Council played no significant role in the Iraq-Kuwait dispute; the OAU has been unable to assist in Somalia or Angola, ASEAN has made a negligible contribution to the problems of Cambodia. Even in Central America it was the Contradora process rather than the Organization of American States which provided the initial regional impulse for peace-keeping. Why should it be supposed that a new partnership could now be forged between regional organizations (often not equipped to undertake military activities) and the UN?

The post-Gulf War period has been characterized by the rising expectations of the international community; a sense of obligation coupled with reluctance on the part of the major States; and a determination within the senior levels of the UN Secretariat to force the UN from the constraints of the past and to harness new possibilities. The way in which this combination of factors has become operational on the ground is extraordinary. The United Nations has at the time of writing some fifteen peace-keeping operations in force, thirteen of them mounted in the last three years.

These considerations have underlain the regional imperatives, as well as other forms of novel delegation of powers under Chapter VII. The encouragement of 'regionalism', however loosely defined, has led to disturbing phenomena. We have seen the proliferation of institutions involved in the former Yugoslavia, as much for reasons of competition and of regional politics as of appropriate functional capacity. We have seen first the embargo of the EC, its observer mission to Yugoslavia, discussions in the CSCE and the WEU, and the eventual – and tardy – reference to the Security Council. Thereafter the UN, NATO and the WEU (monitoring the UN embargoes in the Adriatic) have all been involved. WEU has also sent a police force to Mostar, which has been put under the administration of the EC; and the Russian Federation put forces on the ground in a move generally regarded as helpful to resolving a UN-Serb confrontation at Gorazde in 1993, but still outside of UNPROFOR.

Elsewhere, the Security Council has *ex post facto* approved peace-keeping activities of the CIS in Georgia (Security Council Resolution 937), where a UN Observer Group already exists (UNOMIG), where the CSCE is actively involved, and where the UN High Commissioner for Refugees has had to be active. In Liberia the Security Council has relied on a grouping of States (ECOWAS) that does not constitute a regional agency. Everything is being tried – often simultaneously.

A major effort has been made to establish a working relationship between the United Nations and NATO, and it has been put into operation in the former Yugoslavia. The legal basis of this collaboration – as with so much that today happens under the new 'flexible pragmatism' – remains somewhat uncertain. Article 52 provides that nothing in the 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 such activities are consistent with the purposes and principles of the UN. Article 53 provides that 'The Security Council should, where appropriate, utilize such regional arrangements – or agencies for enforcement action under its authority'. NATO has never been regarded as a regional arrangement or agency, but as a collective self-defence pact. It nonetheless responded to the Security Council request to regional bodies of January 1993 to study ways and means to maintain peace and security within their areas, and ways and means to improve coordination with the United Nations. NATO's basic mandate – let alone the fact that it is not a regional organization – might have been thought to have presented a further problem. Its central mandate under Article 5 of the North Atlantic Treaty¹⁰ is that 'The Parties agree that an armed attack against one or more of them is considered an attack on them all'. Without formal treaty amendment to allow it either to act in circumstances other than an attack on one of the members or 'out of area', NATO has in fact systematically adopted a new role – that of 'peace support operations'. NATO had already begun its search for a new post-Cold War role, adopting its 'New Strategic Concept' at its Rome Summit in late 1992.¹¹ In June 1992 NATO had determined that it would 'support peace-keeping activities under the responsibility of the Conference on Security and Cooperation in Europe'.¹² Even before the Security Council approach of January 1993, Secretary-General Boutros Ghali had asked NATO to assist in supporting future UN resolutions in the former Yugoslavia, and had received a positive reply from NATO Secretary-General Manfred Wornat, the terms of which are significant:

We confirm the preparedness of our alliance to support, on a case by case basis and in accordance with our own procedures, peace-keeping operations under the authority of the UN Security Council, which has the primary responsibility for peace and security. We are ready to respond positively to initiatives that the UN Secretary-General might take to seek Alliance assistance in the implementation of UN Security Council resolutions.¹³

The commitment was thus not a generalized commitment to the UN, and it was to be done by reference to NATO's own procedures – acknowledging always the Security Council's primary responsibility. Within five months, NATO was acting out of area, in circumstances other than those envisaged in its Treaty, and in circumstances that have also to be said not to be those of Article 53 of the UN Charter. NATO has been assisting the UN in relation to (a) the naval embargoes; (b) the enforcement of the no-fly zone over Bosnia; (c) the protection of UN personnel; and (d) the protection of safe zones. It is also engaged in a variety of other related functions – including contingency planning for any possible peace plan for Bosnia.

10 North Atlantic Treaty 1949, 34 UNTS 243.

11 D. Leuridijk, *The United Nations and NATO in the Former Yugoslavia*, Netherlands Atlantic Commission in cooperation with Netherlands Institute of International Relations 'Clingendael', (1994) 7.

12 *Ibid.*, at 13.

13 Final Communiqué, NATO Press Service, 17 December 1992.

Nor is it easy to define whether NATO's role is 'enforcement', albeit *within* a humanitarian aid/new style peace-keeping mission. From NATO's perspective, there are four separate missions: to monitor the no-fly zone (with AWACS), to enforce the no-fly zone, to offer 'close air support' of UN personnel, and to engage in air strikes for the protection of the designated safe areas.¹⁴ 'Close air support' is regarded as for purposes of self-defence, and stems from Security Council Resolution 816 of 31 March 1993, which was adopted under Chapter VII and Chapter VIII of the Charter. 'Air strikes' may arise in relation to the safe areas established under Resolutions 819 of 16 April 1993, 824 of 6 May 1993, 836 of 4 June 1993 and 844 of 22 June 1993. Resolution 836 authorised UNPROFOR, in carrying out its mandate regarding the safe areas, and 'acting in self defence, to take the necessary measures, including the use of force, to reply to bombardments against the safe areas by any of the parties'. This authorization is hardly a model of clarity and problems in its interpretation were inevitable. Further:

Member states, acting nationally or through regional organizations or arrangements, may take, under the authority of the Security Council and subject to close coordination under the Secretary-General and UNPROFOR, all necessary measures, through the use of air power, in and around the safe areas ... to support UNPROFOR in the performance of its mandate...¹⁵

Thus UNPROFOR cannot enforce the safe areas. It can 'in self defence' reply to bombardments against the safe areas. But it is actually individual members or regional organizations (and in reality, NATO, which is neither) which are to 'support UNPROFOR in the performance of its mandate' through the use of air power. The ensuing uncertainty is not hard to understand.

Decision-making in relation to these procedures is complex and, it may be thought, weighted in favour of inaction. 'Close air support' requires a request by those on the ground; but neither the UN Commander nor the Secretary-General's Special Representative will allow it if the attack is not still in progress. Further, the final decision to request it lies not even with the military commander but with the Special Representative of the Secretary-General. As for air strikes, a 'dual request/dual key' system operates. Both NATO and the UN can request such action, and both have to agree. There is thus a veto on the use of air strikes on both sides. NATO's impatience with the UN response in late 1994 was evident.

Looking back over this tumultuous recent period in the UN's history, there have undeniably been important successes, which should not be forgotten. UNIMOG played an honourable role in the final (and belated) wind-down of the Iran-Iraq war. UNTAG in Namibia carried out its duties, not without difficulty, in admirable fashion. UNAVEM was proficient in assisting in the disengagement of Cuban forces from Angola. And, at the time of writing, it looks as if UN peace-keeping

14 Useful information and analysis may be found in the weighty study of Leuridijk, *supra* note 11, and *NATO Doctrine for Peace Support Operations*, 20 October 1993 (NSC).

15 SC Res. 836 (1993).

action in Nicaragua, El Salvador and Haiti has met with a considerable measure of success. The long term prognosis for UNTAC's efforts in Cambodia is uncertain but this massive operation marked a new step in the enlargement of UN peace-keeping activities. Successive Under Secretaries-General have directed peace-keeping policy with outstanding commitment and ability.

At the same time, there have clearly been failures and an entirely new range of problems have now been added to the old ones.

IV. The Next Phase: A Call for Stocktaking

While there remains a general reluctance to impose the measures envisaged under Articles 41 and 42 of the Charter, the rate of use of economic measures has undoubtedly increased since the end of the Cold War. 1945 to 1990 saw just the arms embargo against South Africa of 1977, and the comprehensive economic and diplomatic sanctions mounted against Rhodesia from 1966-1979. Recently we have seen wide-ranging sanctions against Iraq from 1990; an arms prohibition on the totality of the former Yugoslavia since 1991, an arms embargo against Somalia from 1992, broad economic sanctions against Serbia and Montenegro from 1992, an arms embargo against Liberia in 1993, selectively tailored sanctions against Libya from 1992, economic measures directed against Haiti in 1993, and the UNITA held areas of Angola in the same year.

The tempo is manifestly increasing, even if the imposition is somewhat selective in the sense that other States meriting such a response have escaped sanctions. Even when acts manifestly contrary to international law and the Charter have occurred – the Moroccan military occupation of the Western Sahara, the Israeli group expulsion of the Hamas, the Indonesian occupation of and human rights violations in East Timor, for example, – the Security Council has retained the right to seek a solution that does not involve the imposition of sanctions.

As for military enforcement, it remains the case that Korea in 1950 and Iraq in 1991 are the only two examples. The precise status of each remains a matter of debate. In both, determinations under Article 39 were made. In Korea, States were called upon to offer assistance to South Korea in its self-defence under unified command, making it uncertain whether the action was under Article 42 (notwithstanding the failure of the Security Council to have concluded agreements under Article 43) or under Article 51 (though no Security Council pre-authorization would then be needed). And in the case of Iraq the early resolutions carefully referred to Article 51 as well as to Chapter VII – and those resolutions were affirmed in Resolution 660 which authorized the coalition of States to take all necessary measures to secure the objectives set out in the earlier resolutions. Again, the same uncertainty exists as to whether this should properly be regarded as an Article 42 or Article 51 action.

It also remains the case that – in the absence of the agreements envisaged under Article 43 of the Charter – the United Nations has never yet *decided* upon military enforcement. The reasons for the inability of the UN to put in place the military enforcement measures of Articles 42–48 during the Cold War are well rehearsed. By failing to go back to these possibilities at the end of the Cold War the Security Council has deliberately ensured that it will not have an effective enforcement capability, in which military action could be rapidly ordered, and perceived as being on behalf of, and participated in by, the UN membership as a whole. It must in fairness be said that there has been a general consensus – albeit tacit – that the Article 43 route was not the one to follow.

It necessarily follows that the only alternative is pragmatism. For all the rhetoric at the end of the Gulf War that the UN would now be able to act as it was meant to under the Charter, and enforce the peace, it is clearly not so. It has chosen not to be able to act as it was meant to under Articles 42–48; and the appetite for enforcement has turned out to be extremely limited. It is perceived that only a handful of States have an enforcement capacity. They find the burden onerous, financially, militarily – and in terms of public opinion. The concomitant of a growing global democracy is a free press and the opinion there expressed is often nationalistic. The refusal to recognize, from the outset, and most certainly at several discrete moments such as the shelling of Dubrovnik and the destruction of Vukovar, the situation in the former Yugoslavia as violence across State lines recognized as such by the international community, and thus requiring military enforcement, is wilful. It reflects a variety of factors – a desire not rapidly to repeat the Gulf experience, a sense that on this occasion there was no national interest, and a despair about being able to ‘impose a political solution’. A State which is attacked in a manner of extraordinary barbarity is entitled to expect the Security Council to take military action under Chapter VII and not disqualify itself by reference to dispute settlement difficulties under Chapter VI. The constant invocation by European national leaders of the lack of a national interest in military enforcement in the former Yugoslavia merely evidences a problem at the heart of the ‘new style flexible measures’. Collective security under the Charter was never meant to be predicated upon short-term national interest. It was the long-term interest in international peace and security that was to be the motivating factor. If the enforcement of peace is to be left to a decision by those with the capability as to whether an attacked State ‘matters’ or not, the reality is that the UN has no real collective security capability at all. And insisting that situations manifestly calling for enforcement are in fact situations calling for the new style UN peace-keeping operations is simply a turning away from unpleasant realities.

While it is, in my view, lamentable that States have failed to seize the opportunity offered by the end of the Cold War so far as effective UN enforcement is concerned, the lessons that the UN itself seems to draw from the Bosnia debacle (and indeed from the very different lessons of the failure in Somalia) are disturbing. Instead of deciding by reference to objective criteria the category of UN action

required, the contemporary thinking seems to be resolutely against differentiation, with events being allowed to dictate the character of the operation, which might change from moment to moment, or have within it totally irreconcilable elements:

[T]he principles and practices which had evolved in the Cold War period suddenly seemed needlessly self-limiting. Within and outside the United Nations, there is now increasing support for 'peace-keeping with teeth'. When lightly armed peace-keepers were made to look helpless in Somalia and Bosnia, member states and public opinion supported more muscular action... Today's conflicts in Somalia and Bosnia have fundamentally redrawn the parameters. It is no longer enough to implement agreements or separate antagonists; the international community now wants the United Nations to demarcate boundaries, control and eliminate heavy weapons, quell anarchy, and guarantee the delivery of humanitarian aid in war zones. These are clearly the tasks that call for 'teeth' and 'muscle', in addition to the less tangible qualities that we have sought in the past. In other words, there are increasing demands that the United Nations now enforce the peace, as originally envisaged in the Charter.¹⁶

Several observations may be made, beyond noting the tendency to conflate all experience, to reject all differentiation. Any demands that 'the United Nations now enforce the peace, as originally envisaged in the Charter', will certainly *not* be met by treating situations requiring enforcement as requiring 'muscular peace-keeping'. That is *not* what the Charter envisaged. What the Bosnia experience shows is that when States put peace-keepers in place – including those with the prime mandate to deliver humanitarian aid – then all realistic prospect of 'enforcing the peace' has gone. The enforcement of the peace of the victims of violation of Article 2(4) had already effectively been put aside by this selection of method of UN operation.

And insofar as resolutions make some later provision for protection, such as the establishing of safe havens, enforcement of these provisions also becomes intertwined with the protection of the UN personnel. Thus Resolution 836 authorized UNPROFOR '*acting in self defence*, to take the necessary measures, including the use of force, to reply to bombardments against the safe areas by any of the parties'. (Italics added). The safety of the peace-keepers becomes in effect the sole consideration. And, even then, fear of reprisals against national contingents serving in the UN operation becomes the dominant factor, and there is no realistic 'enforcement' of any sort – even when the NATO capability and the Security Council authority to act has been put in place. In February 1994 the killing of 68 civilians in Sarajevo by mortar fire led to an unprecedented response. The UNPROFOR Commander threatened to call in NATO airstrikes against Serb gun positions in the hills surrounding Sarajevo unless the guns were removed from range or placed under UN control. The ultimatum was complied with. In early April 1994 NATO executed two air support missions directed against Bosnian Serbs in the Goradze area. The request was made by UNPROFOR to protect UN military observers and liaison officers on the ground, but it also contributed to ending the

16 K. Annan, UN Under-Secretary General for Peacekeeping Operations, *NATO Review*, October 1993, at 4.

Serb shelling of the city. But the UN has not followed up on that experience of the importance of credible enforcement. In later comparable circumstances of flagrant violations of the safe areas, ultimata for compliance have been indicated and ignored, with no military consequence and at the end of 1994 the siege of Bihac (another 'safe area') and associated shelling and loss of life went unpunished. The violations were instead responded to by improved UN offers on the diplomatic front.

The failure to protect the designated safe areas publicly revealed the profound disagreements within the expanded UN peace-keeping system. NATO had put in place the capacity to respond to UN requests for air strikes. But when these were asked for by the Nordic battalion in Tuzla, they received neither the support of the UN Commander in Bosnia, Sir Michael Rose, nor of Mr. Akashi, the Secretary-General's Special Representative. The UN policy was that such strikes could take place only when an attack was in progress. It hardly needs to be said that, with the sort of NATO-UN arrangement in existence, that condition will hardly if ever be met. The policy is an invitation for frequent attacks on the UN of short duration. NATO publicly expressed its disquiet at UN prevarication.

In May 1995 a negotiated truce ended, with the seizure by the Bosnian Serbs of heavy weapons that had been handed over to the UN and the use of such weapons in the Sarajevo 'safe area'. NATO airstrikes were once again ordered. The Bosnian Serbs responded by seizing 370 UN peace-keepers as hostages. This crisis was eventually resolved by diplomacy. The UN insisted that it had made no promises in order to secure the release of the hostages. But no overt promises need to be made – no one can doubt that the UN cannot in the future envisage even very occasional airstrikes while its peacekeepers are in place.

And the lesson still has not been learned. The lesson is that mixed mandate actions are doomed to failure.¹⁷ Rather than acknowledge this, the response was an attempt by the United Kingdom, France and the Netherlands to establish a UN Rapid Reaction Force, whose function - never entirely clear - was said to be to protect UNPROFOR from a repeat of the humiliations of May 1995 and perhaps also to be part of a NATO operation for the withdrawal of UNPROFOR, should that later be decided upon. But its role was clearly not in any direct sense to protect civilians in the various 'safe areas' or to ensure the fulfilment of UNPROFOR's mandate generally. Indeed, the Secretary-General's Special Representative was at pains to assure the Bosnian Serbs that the new UN unit would present no threat to them. If NATO's involvement already represented a mixed mandate in the former Yugoslavia, then the proposed Rapid Reaction Force constituted a further mixing of the mandate. For reasons already identified its desirability is highly dubious. In any

17 See Higgins, 'The New United Nations and the Former Yugoslavia', 69 *International Affairs* (1993) 465. See also Zemanek, 'Peace-keeping or Peace-making', in N. Blokker and S. Muller (eds), *Essays in Honour of Henry Schermers*, Vol. I.

event, it is unlikely to be put to the test as the idea that it should be funded by the UN generally has not been acceptable to the United States.

It is timely to call a pause and to take stock of the recent efforts of the UN in the field of peace and security. Some tentative conclusions may be advanced.

1. The UN must face the issue of an enforcement capability and its responsibilities in this regard. The authorization of 'coalition forces' appears to be all that is on offer (and the United States has also made clear that it would not place its forces under unified command). This technique is not *per se* unacceptable, but it is also clear that this ensures that enforcement will only take place when there is a perceived national interest in doing so on the part of the major military powers. States, especially those ill-placed to rely on self-defence alone, are entitled under the UN Charter to turn to the Security Council in case of armed attack. The members of the UN have turned away from the opportunity provided by the ending of the Cold War to rectify this situation.

2. While the rigidities of the Cold War should not constrain us in the forthcoming phase of the UN's life, this does not mean that all legal considerations should be put on one side, and that the only factors should be 'pragmatism', 'flexibility', and 'dealing on a case by case basis'. The techniques of classifying and categorizing provide an operational discipline for protagonists and participants alike. A continued understanding of normative ground rules about the circumstances in which enforcement on the one hand, and peace-keeping on the other, is to be regarded as appropriate, is the best guarantee of respect for the UN and the achievement of its objectives. Excessive 'flexibility' is a recipe for operational uncertainty and non-compliance by the protagonists.

3. While the desire by the UN Secretariat to acquire 'flexibility' is understandable, its disadvantages have been underestimated. It appears now to be a source of pride to the UN that 'peace-keeping will have to be developed on a case by case basis' and that 'No two conflicts which may merit the involvement of international peace-keeping forces are alike'.¹⁸ But pragmatism must have its limits if contributors and protagonists are to know what to expect. We seem today to have swung so far from principle towards 'flexible pragmatism' that there is no clear understanding at all of what the UN may, and should, do in different particular circumstances.

4. Enforcement should remain clearly differentiated from peace-keeping. Peace-keeping mandates should not contain within them an enforcement function. To speak of the need for more 'muscular peace-keeping' simply evidences that the wrong mandate has been chosen *ab initio*. Although the UN may endeavour to separate out these 'combined' functions (through peace-keeping lying with the UN, and 'enforcement-in-support' lying with NATO), the protagonists will inevitably perceive calls from the UN to NATO as entailing a loss of UN impartiality. And the

18 K. Annan, *NATO Review*, October 1993, at 5.

incoherence in decision-making and the confusions in the varying command structures encourage contempt for a UN seen as weak as well as partisan.

5. It follows from all of the above that the technique of 'safe havens' is not to be regarded as desirable.

6. There is little advantage, and considerable disadvantage, in setting classic peace-keeping on one side in favour of the new 'mixed function peace-keeping' enumerated in *Agenda for Peace* and since. Again, this has served to sow the seeds of uncertainty and confusion, while placing in jeopardy – perhaps irredeemably – all that had so painstakingly been built up over the years in the UN peace-keeping operations.

7. No peace-keeping force should be put in the field without prior agreement on a cease-fire and a realistic political prospect of the seriousness of that undertaking. The key peace-keeping function should remain the security of the peace on the ground. Only then should ancillary functions be added. Humanitarian assistance, electoral observation, human rights monitoring should be additional to the securing of peace, and not *in lieu* of it. Never again should the UN engage in a form of peace-keeping which endeavours to provide food while allowing the slaughter to continue.

8. The experiment in 'achieving a secure environment' – perhaps through the efforts of individual States – ahead of the placing of a UN peace-keeping operation to maintain the peace, and perhaps engage in ancillary functions, should be allowed to continue. The Somalia and Haiti experiences point to date in somewhat different directions. The lesson seems to be that the provision, in a first phase, of a secure environment so that the UN can proceed to the second, humanitarian assistance phase, is only likely to be achieved if a dictatorial government is to be required to depart and a new democratic government installed. When there are collapsed structures of State authority or attempts are made to 'deal' with human rights violating governments, the mission will almost certainly not succeed.

9. It remains an inescapable truth that financial commitment is the yardstick of seriousness of intention about maintaining peace. In the absence of material provision, that is no real political will to keep the peace. Throughout the history of the United Nations its members have not been willing to pay the modest sums needed to secure the performance of its tasks. In this, alone, nothing has changed since the end of the Cold War. The financial arrears in July 1994 stood at nearly 30% higher than in July 1993 – when the situation was already very serious.¹⁹ The traditional financial irresponsibility continues unabated in this new era.

19 For details, see the speech given by the Secretary-General on 21 March 1995 at Yale University, 'Managing the Peace-keeping Challenge', SG/SM/5589, 22 March 1995.