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Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'

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Abstract

This article examines the question whether it is within the Security Council's powers to adopt resolutions which authorize member states to use force. This question has gained importance since the end of the Cold War as such authorization resolutions have become the primary instrument through which the Security Council has acted in situations where the use of military force is considered necessary. The provisional conclusion is drawn that it is an implied power of the Council to adopt such resolutions. However, it is also argued that both the Charter system and principles of delegation reject carte blanche delegations and favour authorizations which respect the authority and responsibility of the Security Council in the United Nations collective security system. Before reaching final conclusions, the author examines the views of the member states and the practice of the Security Council. Member states find the model of authorization resolutions as such generally acceptable, although some states have expressed a concern for greater UN control. In its practice, the Council has to a considerable extent responded to this concern. Three specific aspects are discussed: the mandate and the duration of authorized operations, and reporting requirements. There is a clear tendency towards greater control by the Security Council in relation to all three of these aspects.

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1 Introduction: The Development and Nature of Authorization Resolutions

From the outset, the UN collective security system not only lacked the teeth of a standing UN force, but in addition the Cold War prevented the Security Council more generally from playing the role foreseen by the UN Charter. Consequently, when facing crisis situations, the member states themselves had to act, rather than rely on the UN. While the drafters of the Charter without doubt envisaged a more active and effective role for the Council, nevertheless by giving the right of veto to the permanent members they also excluded such a role if there was no consensus between these five.

The end of the Cold War has meant that consensus between the permanent five has become more common. The post-Cold War era has been characterized not only by new (often internal) conflicts, but also by the increased possibility for the Security Council to address these conflicts; the number of resolutions adopted has risen rapidly. Most of these developments have received attention: more frequent recourse is made to Chapter VII; a widening interpretation of the notion of a 'threat to the peace' has evolved; the second and even third generation of UN peacekeeping has been established; discussions concerning the creation of a UN standing force have taken place; and so on.¹

This article will focus on another result of post-Cold War developments: the widespread use made of resolutions of the Security Council which authorize member states to use force in particular cases. These resolutions have become the primary instrument through which the Security Council has acted if the use of military force was considered necessary. This practice is likely to continue in the future.

This model of 'delegated enforcement action' is not explicitly mentioned in the UN Charter as one of the instruments available to the Security Council (with the exception of enforcement action by regional arrangements or agencies: Article 53(1)). It is true that under Article 42, a power is given to the Security Council to take enforcement action. However, as can be concluded from the *travaux préparatoires* and from the Charter system, the only *explicit* power given to the Council under this provision is a power to undertake such action by its own forces to be made available by the members in accordance with Article 43.² When no such forces were made available to the Council, the question arose whether this gap could be filled by *implying* powers such as the power to use forces that are not its own and therefore escape its full control.

¹ See in particular R.-J. Dupuy (ed.), *The Development of the Role of the Security Council — Peace-Keeping and Peace-Building* (1993); and the articles and essays prepared for the symposium on re-envisioning the Security Council, published in 17 *Michigan Journal of International Law* (1996). In addition, see also Murphy, 'The Security Council, Legitimacy, and the Concept of Collective Security after the Cold War', 32 *Columbia Journal of Transnational Law* (1994) 201–288; and Rossman, 'Article 43: Arming the United Nations Security Council', 27 *New York University Journal of International Law and Policy* (1994) 227–263.

² See L. M. Goodrich, E. Hambro and A. P. Simons, *Charter of the United Nations. Commentary and Documents* (3rd revised ed., 1969) 314–317, and — more extensively on this point — the second edition of this book (1949) by Goodrich and Hambro, at 278–281; H. Kelsen, *The Law of the United Nations* (1950) 756; F. Seyfersted, *United Nations Forces in the Law of Peace and War* (1966) 31–32 and 162–164; Ciobanu, 'The

Such delegated enforcement action has been considered a 'half-way house' between the unilateral recourse to force by states and collective security as laid down in the Charter.³ On the one hand, the Council is at last playing its proper role: during the Cold War it was generally inconceivable to consider asking the Security Council for permission to use force; this has become much more common over the last 10 years. This change is more fundamental than may at first appear. On the other hand, it is also clear that the role which is in fact now being played by the Council is limited to legitimizing the use of force, without keeping it under strict control.

The model of delegated enforcement action was used for the first time in 1950 (Korea). In this case, due to the absence of the Soviet Union (because of the alleged misrepresentation of China in the UN) the Security Council was able to determine that a 'breach of the peace' had occurred, and recommended the UN member states to 'make such [military] forces and other assistance available to a unified command under the United States of America' (Resolution 84). The return of the Soviet Union to the Council and the continuing Cold War antagonism prevented the Council from further using this instrument, with the exception of 'Article 41½' Resolution 221 (Rhodesia) adopted in 1966. Only in 1990 was this model reinvented and applied against Iraq (Resolutions 665 and 678).

The most important authorization resolutions subsequently adopted by the Security Council are:

- Resolutions 770, 787, 816, 836, 908, 1031, 1088, 1174, 1244, 1247 (former Yugoslavia);
- Resolution 794 (Somalia);
- Resolution 875 (Haiti);
- Resolution 929 (Rwanda);
- Resolution 940 (Haiti);

Power of the Security Council to Organize Peace-Keeping Operations', in A. Cassese (ed.), *United Nations Peace-Keeping: Legal Essays* (1978) 15–53 at 19; Fischer, in J.-P. Cot and A. Pellet (eds), *La Charte des Nations Unies* (2nd ed., 1991) 710–716; and UN Doc. A/47/277 and S/24111 (An Agenda for Peace), paras 42–43.

³ See Freudenschuß, 'Between Unilateralism and Collective Security', 5 *European Journal of International Law* (1994) 492. Franck has called this instrument the 'franchise model' (Franck, 'The United Nations as Guarantor of International Peace and Security: Past, Present and Future', in C. Tomuschat (ed.), *The United Nations at Age Fifty — A Legal Perspective* (1995) 25–38). However, this term is not particularly appropriate. One of the characteristics of franchising is the existence of a uniform marketing concept developed by the franchisor, which is put at the disposal of a franchisee, while the use made of this concept is supervised. These features are mostly absent in the case of authorization resolutions. Quigley draws an analogy with government policy in a domestic context: 'what the Security Council has done is to follow the trend towards privatization. Instead of carrying out military actions itself, the Council hires the work out to individual states' (Quigley, 'The "Privatization" of Security Council Enforcement Action: A Threat to Multilateralism', 17 *Michigan Journal of International Law* (1996) 249–283 at 250). This is too cynical a view, as privatization implies the abandonment of government control and, moreover, the core business of a government is not subject to privatization. Again, a fundamental characteristic of authorization resolutions is that these Security Council permissions are a *conditio sine qua non* for the lawful operation by a 'coalition of the able and willing'.

- Resolution 1080 (Great Lakes region);
- Resolutions 1101 and 1114 (Albania);
- Resolutions 1125, 1136, 1152, 1155 and 1159 (Central African Republic);
- Resolution 1132 (Sierra Leone);
- Resolution 1216 (Guinea-Bissau); and
- Resolution 1264 (East Timor).

These resolutions were adopted to permit the use of force for a wide variety of purposes, such as the supervision of compliance with economic sanctions imposed by the Security Council ('Article 41½' resolutions), but also the liberation of a country from foreign occupation (Kuwait), the return to power of the legitimate authorities (Haiti), or the restoration of internal peace and security (East Timor). Authorization resolutions have mostly been adopted without the consent of the 'target state', although in some cases such consent has been given by the government in power (Albania) or by the government in exile (Haiti). Almost all post-Cold War authorization resolutions, starting with Resolution 678, explicitly refer to Chapter VII of the Charter, either at the end of the preamble or in the relevant paragraph of the resolution; some of these resolutions also refer to Chapter VIII of the Charter.⁴ An analysis of the possible differences and similarities between authorization resolutions based on Chapter VII and those based on Chapter VIII is beyond the scope of this article and as such will not be addressed.⁵ The focus of this study is on the permissibility of such authorizations in general.

Thus, the adoption of authorization resolutions has become a matter of course, although their use has not been undisputed. Questions concerning the role of the Security Council emerged in particular following the adoption of Resolution 678 (Iraq). While this resolution is often considered to be based on either Article 42 or Article 51 of the Charter, it has also been criticized because the Security Council 'eschewed direct UN responsibility *and* accountability for the military force that ultimately was deployed, favoring, instead, a delegated, essentially unilateralist determination and orchestration of world policy, coordinated and controlled almost exclusively by the United States'.⁶

Criticism was not only voiced in legal writings, but also in practice. In the Security Council meeting in which Resolution 678 was adopted, Cuba stated: 'The text before us moreover violates the Charter of the United Nations by authorizing some States to

⁴ Resolutions 787, 794, 816, 875 and 1132. An exception is Resolution 1216 which has no reference to Chapter VII or Chapter VIII of the Charter.

⁵ Cf. also White and Ülgen, 'The Security Council and the Decentralised Military Option: Constitutionality and Function', 44 *Netherlands International Law Review* (1997) 378–413 at 388–389, who refer to 'the thin line between military actions under Chapter VII and those under Chapter VIII'. See further D. Sarooshi, *The United Nations and the Development of Collective Security* (1999) 247–284.

⁶ Weston, 'Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy', 85 *AJIL* (1991) 516–535 at 517. Others expressed similar criticism: see, e.g., Djiena Wembou, 'Reflexions sur la validité et la portée de la Résolution 678 du Conseil de Sécurité', 5 *African Journal of International and Comparative Law* (1993) 34–54. See in general Schachter, 'United Nations Law in the Gulf Conflict', 85 *AJIL* (1991) 452–473; according to Schachter, 'Resolution 678 may be read as consistent with both Article 51 and Article 42' (*ibid.* at 462).

use military force in total disregard of the procedures established by the Charter.’⁷ In the same meeting Malaysia declared:

we have always insisted on the centrality of the United Nations role in the maintenance of international peace and security. Any proposed use of force must be brought before the Council for its prior approval, in accordance with the specific provisions of Chapter VII of the Charter. We regret that this point is not clearly reflected in this resolution, a precedent that may not bode well for the future. When the United Nations Security Council provides the authorization for countries to use force, these countries are fully accountable for their actions to the Council through a clear system of reporting and accountability, which is not adequately covered in resolution 678 (1990).⁸

Similar questions were posed when the Security Council took recourse to this instrument of delegated enforcement in subsequent crises.

Thus there is every reason for a closer analysis of the question of whether it is within the Security Council’s powers to adopt authorization resolutions. Are there any Charter conditions which these resolutions must satisfy, or is the Council free to give the member states in question *carte blanche*? Are there any conditions outside the UN Charter?

Various answers are given to questions such as these.⁹ In addition, writers have been known to change their views on the nature and legal basis of these resolutions, in particular as a consequence of developments in practice during recent years.¹⁰ This lack of consensus in legal doctrine is perhaps not surprising. However, the increasing recourse to this instrument and the possible far-reaching consequences of its use call

⁷ UN Doc. S/PV.2963, at 58.

⁸ *Ibid.*, at 76.

⁹ According to R. Higgins, *Problems and Process. International Law and How We Use It* (1994) 266: ‘It would also seem perfectly possible for such action [i.e., action under Article 42, by those who are willing to participate] to be authorized by the Security Council as an enforcement action under Article 42, even if it was to be carried out by UN members not under a unified UN command. And this was effectively the position achieved by Security Council Resolution 678 (1990) on the Gulf.’ Essentially the same view is taken by Sarooshi, *supra* note 5, at 153, who concludes that ‘the Security Council has the competence to delegate its Chapter VII powers to UN member states’; more specifically, with regard to Resolution 678, Sarooshi is of the opinion that ‘the Council’s delegation of its operational power of command and control to member states in the Gulf was legally acceptable’ (*ibid.*, at 186). A critical opinion is given by White, in particular as regards authorizations in the early 1990s which were vague and for which no UN control was foreseen (N. D. White, *The Law of International Organisations* (1996) 191–199; and N. D. White, *Keeping the Peace — The United Nations and the Maintenance of International Peace and Security* (2nd ed., 1997) 115–128). He is much less critical as regards more recent authorizations: see White and Ülgen, *supra* note 5. A Charter fundamentalist in this respect is J. Quigley, ‘The United States and the United Nations in the Persian Gulf War: New Order or Disorder’, 25 *Cornell International Law Journal* (1992) 1–49. Quigley arrives at the conclusion that ‘Resolution 678 violated the UN Charter in several significant ways’ (*ibid.*, at 32).

¹⁰ An example is B. Conforti, who writes in *The Law and Practice of the United Nations* (1996) 203–204, that he was originally of the view that these resolutions are unlawful. His view was amended following the adoption of Resolution 678 which, according to Conforti, was based on Article 51 of the UN Charter. Subsequently, more recent resolutions required another change of view, as the *intra*-state nature of the conflicts in question excluded Article 51 as a legal basis. At present Conforti is of the view that such a delegation of the use of force ‘is rather to be considered as permissible under an unwritten rule which is now emerging (and which now exists in a grey area between legality and illegality)’ (*ibid.*, at 204).

for further study. The present article, therefore, intends to shed more light on the legal issues involved, and will analyse how these issues are addressed in the most important authorization resolutions. In doing so, the scope of this article is limited to the resolutions mentioned above, of which it is undisputed that they explicitly authorize the use of force. There are also cases in which it is — usually fiercely — disputed whether or not the Security Council has *implicitly* authorized the use of force, such as Resolution 688 (Iraq) and Resolutions 1199 and 1203 (Kosovo).¹¹ However, the legal debate on these cases is essentially different from that concerning explicit authorizations; it centres around questions such as the weight given to Article 2(4) of the Charter and the legitimacy of bypassing the Security Council for humanitarian or other reasons if it seems impossible to obtain a clear and explicit authorization from the Security Council.¹² The present analysis intends to focus on the lawfulness of Security Council resolutions which are explicit and undisputed authorizations to use force.

The issues analysed here are also relevant when it comes to questions of responsibility. Who is responsible for damage caused by ‘coalitions of the able and willing’: the coalition states (collectively or individually), or the UN, or both? If these operations were UN operations, the UN would normally be liable for damage caused to third parties.¹³ However, as a UN-authorized operation is not the same as a UN operation, this begs the question of to what extent a coalition act which causes damage is imputable to the UN as ‘authorizer’ of the operation. And, even if the operation were to be considered a UN operation, further questions emerge: specific

¹¹ In the case of Resolution 1203, the Council was confronted with a *fait accompli*: the NATO decision adopted a few days before to use force if necessary (the so-called activation order). Not surprisingly, attempts by NATO to agree upon a legal basis for the decision in question failed (see *NRC Handelsblad*, 12 October 1998, at 5). And during the subsequent Security Council discussions members were severely critical. China and the Russian Federation abstained from voting. Costa Rica stated (UN Doc. S/PV.3937, at 6–7): ‘The Security Council cannot, nor should it, transfer to others or set aside its primary responsibility for the maintenance of international peace and security. . . Only the Security Council can authorize the use of force to ensure compliance with its resolutions, in exercise of its primary responsibility for the maintenance of international peace and security.’ Brazil (*ibid.*, at 10–11) took the same point of view. To accommodate these concerns, the preamble of Resolution 1203 reaffirmed that ‘under the Charter of the United Nations, primary responsibility for the maintenance of international peace and security is conferred on the Security Council’. Nevertheless, it was clear that the authority of the Security Council had suffered. In view of the subject matter of this article, reference should also be made to another part of the statement of Costa Rica: ‘we do not believe that the Security Council should, in any case, authorize missions with military troops whose limits and powers are not clearly pre-established or whose mandate may be conditioned to the subsequent decision of other organs or groups of states’ (*ibid.*, at 6–7).

¹² As is demonstrated by Lobel and Ratner, ‘Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease Fires and the Iraqi Inspection Regime’, 93 *AJIL* (1999) 124–154. See also the statement by Costa Rica in the Security Council meeting during which Resolution 1203 was adopted, UN Doc. S/PV.3937, at 6–7.

¹³ This principle has been generally accepted. For example, when authorized visitors to the UN’s peacekeeping force in Cyprus (UNFICYP) suffered injury as a consequence of an accident with a helicopter of the British contingent of this force, the UN’s Office of Legal Affairs concluded that the UN, as the carrier, ‘could and normally would be held liable by third parties’; whether ultimately the UN or the United Kingdom (the owner of the helicopter) would bear the cost of possible compensation depended on

problems of the responsibility of international organizations exist, for example because most organizations do not have their own finances but depend on contributions from the member states.¹⁴ Hardly any research has been done concerning such complex responsibility questions in relation to UN-authorized operations by ‘coalitions of the able and willing’ and the analysis of such questions exceeds the scope of this article.¹⁵

In the second section of this article the question will be addressed of whether the Security Council’s power to adopt authorization resolutions is implied by the Charter. In order to answer this question, it is necessary to examine the views of the member states (section 3) and the practice of the Security Council (section 4). Some conclusions will be drawn in section 5.

2 Authorization Resolutions and the Powers of the Security Council

A *An Implied Power to Adopt Authorization Resolutions?*

It is clear that the power to adopt authorization resolutions is not explicitly attributed to the Council by the Charter. Thus the question arises of whether this power is *implied* by the Charter. There is much difference of opinion as to the scope of implied powers of international organizations. If a broad interpretation is given — as was done by the ICJ in the *Reparations* case — it is difficult not to conclude that the Council is empowered to adopt such resolutions. Without such powers the Council is left impotent if it is necessary to take military enforcement measures, and thus the UN cannot perform the functions assigned to it by the member states. But this is also true if a narrow interpretation of implied powers is used. The Security Council has the explicit power to take military enforcement action. If this power cannot be exercised in the absence of the necessary means, the Council is permitted to employ other, implied powers so as to enable the organization to carry out its tasks. Under this narrow interpretation, the existence of an explicit power to impose military enforcement measures is essential. Without such a power the advocates of this restrictive interpretation would certainly consider it too far-fetched to imply the power to adopt authorization resolutions, the

the arrangements made between them. See *UNJY* (1980) 184–185. For further discussion, see generally E. Lauterpacht, ‘The Development of the Law of International Organization by the Decisions of International Tribunals’, 152 *RdC* (1976-IV) 412–413. Within the context of the ILC discussions on state responsibility, the issue of the responsibility of international organizations was only obliquely referred to: see 2 *YBILC* (1975) in particular at 87–91.

¹⁴ H. G. Schermers and N. M. Blokker, *International Institutional Law* (3rd ed., 1995) 990–995, and the references therein to further literature.

¹⁵ Seyersted, *supra* note 2, in particular at 90–126; C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (1996) chapter 8, in particular at 244; Sarooshi, *supra* note 5, at 163–166. See also UN Doc. A/51/389 (reproduced in 37 *ILM* (1998) 700), para. 18.

aims of the organization being the only, and much too vague, link with the member states' common interest in the organization.

There are at least four limitations to the use of implied powers. The question arises whether these limitations preclude the implication of a power for the Security Council to adopt authorization resolutions. The first limitation is that implied powers may not change the distribution of functions within an organization.¹⁶ This limitation was important in the *Certain Expenses* case, but does not have to be further discussed in view of the theme of this article, as authorization resolutions have been adopted solely by the Security Council. As the gist of these resolutions is the permission to use force, they are based on Chapter VII of the UN Charter which is the *domaine réservé* of the Security Council.

A second limitation is that recourse to implied powers must be necessary or essential for the organization to perform its functions. This limitation was mentioned by the ICJ in the *Reparation for Injuries* case.¹⁷ In the case of authorization resolutions, it is clear that there is no alternative. Without UN forces as intended by the drafters of the Charter, and without 'coalitions of the able and willing' authorized by the Security Council, no other instrument is available to the UN. If the Council were not entitled to use the authorization instrument, the UN could not have acted in most or all of the cases in which it has now played a role.

A third limitation is the existence of certain *explicit* powers in the area concerned.¹⁸ If there is an explicit power in the constitution, does this prevent the use of an implied power in the same area? A narrow view on this matter has been expressed by some of the judges of the ICJ.¹⁹ The ICJ itself has not taken a position so far. Campbell's conclusion is correct: 'the exercise of powers would have to be such as would not

¹⁶ A. I. L. Campbell, 'The Limits of the Powers of International Organizations', 32 *ICLQ* (1983) 523–533 at 529–532. Cf. also D. Sarooshi, 'The Legal Framework Governing United Nations Subsidiary Organs', 67 *BYIL* (1996) 413–478 at 458–477.

¹⁷ ICJ Reports (1949), at 182: 'Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it *by necessary implication as being essential to the performance of its duties*' (emphasis added).

¹⁸ See in particular Campbell, *supra* note 16.

¹⁹ For example by Judge Moreno Quintana in the *Certain Expenses* case: 'The implied powers which may derive from the Charter so that the Organization may achieve all its purposes are not to be invoked when explicit powers provide expressly for the eventualities under consideration' (ICJ Reports (1962), at 245). See also Hackworth, dissenting judge in *Effect of Awards of Compensation Made by the UN Administrative Tribunal*, Advisory Opinion of 13 July 1954, ICJ Reports (1954), at 80. A partly different opinion is given by Bustamante, dissenting judge in the *Certain Expenses* case. He was of the view that the UNEF and ONUC operations could be undertaken despite the fact that Article 43 agreements had not been concluded. However, he also asked the question whether 'the negotiation of "special agreements" is, according to the spirit of the Charter, such a basic one that, if such agreements are not concluded, the action ordered should not be undertaken' (*ibid.* at 298). Bustamante's answer to this question was in the negative ('I incline not to think so'), but implies that it would have been positive had the issue concerned been 'a basic one'.

substantially encroach on, detract from, or nullify other powers.²⁰ On the one hand, it is difficult to accept that the use of implied powers may violate explicit powers. On the other hand, if certain powers are enumerated explicitly but in practice their use encounters difficulties, it is arguably too strict to prohibit the organization from using any other powers if this would mean that it cannot perform its functions. The main question here is whether the conclusion of Article 43 agreements — as the explicitly foreseen instrument in the Charter to carry out military enforcement action — is so fundamental that failing to conclude such an agreement must necessarily prevent the Security Council from using alternative means. A negative answer must be given to this question. It is fundamental that the power has been attributed to the Council to take military enforcement action. The drafters of the Charter had to choose between different ways of making available the necessary troops.²¹ A choice was made in favour of the Article 43 agreement. Is the Council, failing such agreement, barred from employing another, less far-reaching technique? Clearly not, as this would mean that not only the instrument, but also the power to take military action would become a dead letter and the UN collective security system would be without its *ultimum remedium*.

Finally, a fourth limitation requires that the use of implied powers may not violate fundamental rules and principles of international law.²² It is in relation to this limitation that two questions arise which need thorough examination. First, it must be analysed whether the Charter requires the Security Council to control fully the operations by 'coalitions of the able and willing' which it has authorized (section B below). Secondly, it must be analysed whether there are any limits under international law for the delegation of powers by international organs (section C below). Some provisional conclusions will be drawn in section D.

B A Violation of the UN Charter?

The UN's main purpose is to maintain international peace and security. To that end, 'effective collective measures' will be taken 'for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace'.²³ Member states must refrain in their international relations from the threat or use of force.²⁴ The primary responsibility for the maintenance of international peace

²⁰ Campbell, *supra* note 16, at 528. Gill arrives at essentially the same conclusion, which in his view 'follows from the basic canons of treaty interpretation, such as those contained in Article 31 of the Vienna Convention on the Law of Treaties and from general principles of interpretation such as *lex specialis derogat legi generali*': Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers under Chapter VII of the Charter', 26 *Netherlands Yearbook of International Law* (1995) 33–138 at 71.

²¹ Goodrich, Hambro and Simons, *supra* note 2, at 317–318.

²² Gill, *supra* note 20, at 71: 'the Council's general powers do not provide it with a blank cheque to take measures which would violate fundamental principles and rules of international law, even if these are not specifically referred to in Chapter I or in other provisions of the Charter' (in Gill's analysis, general powers are the same as implied powers). As an example, Gill refers to the 1971 *Namibia* Opinion.

²³ UN Charter, Article 1(1).

²⁴ *Ibid.*, Article 2(4).

and security is conferred on the Security Council.²⁵ To this end, specific powers are attributed to the Security Council; the most far-reaching of these are laid down in Chapter VII of the Charter.

The rules laid down in Chapter VII of the Charter are fundamentally different from the League of Nations' core rules for maintaining international peace and security. The core rules of the Covenant embodied a decentralized system of collective security. It was first and foremost for the member states to act if one of them resorted to war; the Council of the League only had the duty to recommend military measures.²⁶ When the UN Charter was drafted, a different, essentially centralized system of collective security was set up. Whereas the League Covenant mostly contained obligations for member states ('the Members of the League agree that ...'), it is characteristic of the UN Charter that powers are attributed to the Security Council ('the Security Council may ...'). It is for the Security Council to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression', and it is for the Security Council to make recommendations, or decide what enforcement measures shall be taken in accordance with Article 41 (not involving the use of armed force) and Article 42 (military action).²⁷

Military action clearly is the *ultimum remedium* for the Security Council, and may only be undertaken if the Council considers that measures not involving the use of armed force would be inadequate or have proved to be inadequate. Only in such cases may the Security Council 'take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.'²⁸ To this end, the Security Council should dispose of forces. However, while the drafters of the Charter agreed in principle on this idea, they were not able to elaborate more detailed rules governing such forces. The Charter therefore only has a number of procedural rules in this area, providing that member states undertake to make available armed forces to the Council in accordance with a special agreement or agreements.²⁹

The key role given to the Security Council in the Charter system of collective security is also apparent from other Charter provisions. Article 51 lays down the inherent right of individual or collective self-defence if an armed attack occurs against a UN member state, but only 'until the Security Council has taken the measures necessary to maintain international peace and security'.³⁰ Such self-defence measures '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

²⁵ *Ibid.*, Article 24(1).

²⁶ Covenant of the League of Nations, Article 16.

²⁷ UN Charter, Article 39. For analyses of this centralized Charter system, see Kelsen, *supra* note 2, at 724 *et seq.*; M. Virally, *L'Organisation Mondiale* (1972) 456–465; and Frowein, in B. Simma (ed.), *The Charter of the United Nations* (1995) 605 *et seq.*

²⁸ UN Charter, Article 42.

²⁹ *Ibid.*, Article 43.

³⁰ *Ibid.*, Article 51.

take at any time such action as it deems necessary in order to maintain or restore international peace and security'.³¹ In addition, Article 53 provides that 'no enforcement action shall be taken under regional arrangements or by regional agencies without the *authorization* of the Security Council'.³²

The above-mentioned rules demonstrate that the founding fathers of the UN have reserved a pivotal role for the Security Council in the UN system for the maintenance of international peace and security. From one perspective this was an important innovation, a considerable step forward as compared to the decentralized League system. From another perspective, the founding fathers had no choice but to give such a pivotal role to the Security Council. For years, writers had emphasized the indivisibility of world peace.³³ The development of weapons of mass destruction has made this indivisibility more visible and has underlined the need for the development of 'countervailing powers' for the Security Council.

From a strictly legal point of view, the Council is under no obligation to control operations by 'coalitions of the able and willing' more fully, in view of the large amount of discretion it has under the Charter and the additional 'benefit of the doubt' provided by the ICJ in its *Certain Expenses* Opinion.³⁴ In addition, the Charter does not in principle reject the technique of authorizations: Article 53 mentions the possibility for the Security Council to 'utilize such regional arrangements or agencies for enforcement action under its authority', leaving it to the Council to implement this delegation.³⁵

Nevertheless, the widely used practice of authorization resolutions fits in badly with the Charter *system*, another means of treaty interpretation.³⁶ This system is founded on the primary responsibility of the Security Council in the maintenance of international peace and security, and the Council does not seem to take this responsibility very seriously if it leaves member states largely free to carry out these operations and if it gives away the possibility of stepping in if things get out of hand.

³¹ *Ibid* (emphasis added).

³² Emphasis added.

³³ An early example is I. Kant, *Zum ewigen Frieden* (1795) 27: 'Da es nun mit der unter den Völkern der Erde einmal durchgängig überhandgenommenen (engeren oder weiteren) Gemeinschaft so weit gekommen ist, daß die Rechtsverletzung an einem Platz der Erde an allen gefühlt wird ...'

³⁴ This would be different if authorization resolutions created 'coalitions of the able and willing' as subsidiary organs of the Security Council (as is the case with UN peacekeeping forces). If created as subsidiary organs, they would be under the authority and control of the Council, since this is an essential characteristic of subsidiary organs. However, authorization resolutions until now did not establish such coalitions as subsidiary organs, possibly with the exception of Resolutions 83 and 84 (Korea). See Sarooshi, *supra* note 16, at 439–441 and 447–458. Sarooshi analyses the case of Korea (at 439–441) but does not discuss subsequent authorization resolutions.

³⁵ See also White and Ülgen, *supra* note 5, at 381. See in general Morrison, 'The Role of Regional Organizations in the Enforcement of International Law', in J. Delbrück (ed.), *Allocation of Law Enforcement Authority in the International System* (1995) 39–56.

³⁶ Vienna Convention on the Law of Treaties, Article 31(1). A similar conclusion is drawn by P. Kooijmans, 'De Veiligheidsraad — Juridische problemen in verband met toestemming aan en controle op militaire onderaannemers', 10 *VN Forum Special* (1997) 3, at 16–21.

The Secretary-General is aware of these risks.³⁷ Seen from this perspective, the Council would act more conscientiously, more in accordance with the thrust of the Charter provisions, if it kept more of a grip on these operations.

Thus we can conclude that the Council is entitled, on the basis of the Charter, to adopt authorization resolutions, the most acceptable legal basis being Article 42.³⁸ The Charter has no hard limits for these resolutions; at most they do not fit well with the Charter system. This is true in particular for authorization resolutions in which the Security Council fails to exercise any control over operations by ‘coalitions of the able and willing’.

C Limits to the Power of Delegation?

International law seems to lay down two general restrictions for organs of international organizations in regard to their power of delegation. First, no powers may be delegated which the delegating organ does not itself have. Conditions related to these powers must be delegated together with the power itself. Secondly, as a rule, *responsibility* may not be delegated; the delegating organ itself must remain responsible.³⁹ These restrictions have been applied by the Court of Justice of the European Communities. This case law concerned both the general concept of delegation and its limitations, and, more specifically, delegation by the organization to the member states.

The *First Meroni* judgment of 1958 concerned a dispute between the Italian undertaking Meroni and the High Authority of the Coal and Steel Community.⁴⁰ Meroni claimed that a decision by the High Authority according to which Meroni was required to pay a certain amount of money to the Imported Ferrous Scrap Equalization Fund should be annulled. One of the submissions by Meroni related to the alleged illegality of the delegation of powers resulting from this decision by the High Authority. The latter had entrusted certain tasks falling within its responsibility to two private agencies (one of them being the above-mentioned Fund). According to Meroni, this delegation was beyond the High Authority’s powers.

The Court observed that, if the High Authority had itself exercised the powers now delegated to the two agencies, those powers would have been subject to the rules laid down by the Treaty establishing the European Coal and Steel Community and in particular those which impose upon the High Authority the duty to state reasons for its decisions, the duty to publish annually a general report, and the duty to publish

³⁷ In his Supplement to an Agenda for Peace, Secretary-General Boutros-Ghali wrote that ‘the arrangement can have a negative impact on the Organization’s stature and credibility. There is also the danger that the States concerned may claim international legitimacy and approval for forceful actions that were not in fact envisaged by the Security Council when it gave its authorization to them’ (UN Doc. A/50/60, S/1995/1, at 19).

³⁸ A similar conclusion is drawn by White and Ülgen, *supra* note 5.

³⁹ Schermers and Blokker, *supra* note 14, at 153–156; I. Seidl-Hohenveldern and G. Loibl, *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften* (6., überarbeitete Auflage, 1996) 115.

⁴⁰ Case 9/56, *Meroni* [1958] ECR 133, at 133.

such data as could be useful to governments or to any other parties concerned. In contrast, the decision in question did not make the exercise of the powers which it conferred upon the private agencies subject to any of the conditions to which it would have been subject if the High Authority had exercised them directly. Thus, powers were delegated which were more extensive than those of the delegating organ.

Moreover, the Court considered that:

The consequences resulting from a delegation of powers are very different depending on whether it involves clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, or whether it involves a discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy. A delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate, brings about an actual transfer of responsibility.⁴¹

In this specific case the Court ruled that there was 'a wide margin of discretion', and thus an actual transfer of responsibility, which violated the relevant rules of the Treaty Establishing the European Coal and Steel Community.⁴² For these reasons, the Court annulled the decision.⁴³

Other cases decided by the ECJ concerned delegation by the EC to the member states. In one case the Court concluded that 'the member states were able to take, *on a transitional basis and without prejudice to any future action on the part of the common institutions*, any implementing measures compatible with the principles of the regulation'.⁴⁴ In another case, the Court decided that delegation was not permitted. It considered that 'Article 37(2) of the basic regulation enabling the Commission to take, in accordance with the consultation procedure of the Management Committee, measures directly applicable in a member state, cannot be interpreted as enabling the Commission to impose upon a member state the obligation to draw up, under the guise of implementing measures, essential basic rules which would not be subject to any control by the Council'.⁴⁵ Furthermore, the Court has determined that the requirements of the protection of fundamental rights in the Community legal order are also binding on the member states when they implement Community rules.⁴⁶

If these two general restrictions for delegation by organs of international organizations are now applied to authorization resolutions of the Security Council, the second restriction is clearly the most important. To what extent did the Council delegate a *responsibility*? This seems to have happened in the case of certain

⁴¹ *Ibid.*, at 152.

⁴² *Ibid.*, at 154.

⁴³ *Ibid.*, at 149–150. Cf. also Sarooshi, *supra* note 5, at 36–38 and 42–43.

⁴⁴ Case 30/70, *Scheer*, [1970] ECR 1197, at 1207 (emphasis added).

⁴⁵ Case 23/75, *Rey Soda*, [1975] ECR 1279, at 1302–1303.

⁴⁶ Case 5/88, *Wachauf*, [1989] ECR 2609, at 2639. See also the Opinion of Advocate General Jacobs in this case, who took the view that 'when acting in pursuance of powers granted under Community law, member states must be subject to the same constraints, in any event in relation to the principle of respect for fundamental rights, as the Community legislator' (*ibid.*, at 2629).

resolutions. In these cases, the member states in question more or less received a *carte blanche*, or — to use the words of the ECJ — ‘a wide margin of discretion’; thus an ‘actual transfer of responsibility’ took place. In the case of other resolutions (for example, Resolution 794 concerning Somalia) the Council retained more control over the operation.

Decisions of the ECJ cannot of course be transposed indiscriminately to rather different cases such as the one discussed here, as their context and in particular the respective institutional structures are completely different. Of particular importance is the role of the ECJ. Within the European Communities, it is possible to obtain binding judicial decisions on these questions. Within the UN, such a possibility is lacking; at most an advisory opinion by the ICJ could be requested.⁴⁷ But this is not likely to happen soon, as long as these ‘coalitions of the able and willing’ are the only effective instrument to carry out military enforcement action backed by the authority of the Security Council. Nevertheless, the case law of the ECJ may be relevant, especially where it refers to basic principles which not only apply within the Community, but also in the larger international legal order. Moreover, because of its supranational character, Chapter VII of the Charter is not fundamentally different from the Treaty establishing the European Coal and Steel Community, and the Security Council and the High Authority have sufficient characteristics in common to provide a basis for comparing their supranational powers.

It is doubtful, however, that the principles of delegation discussed here have been established firmly enough as fundamental principles of international law to conclude on this basis alone that there is no implied power for the Security Council to adopt authorization resolutions. Rather, it seems that these principles indicate a preference for control by the Council over operations by ‘coalitions of the able and willing’ so as not to abdicate the authority and responsibility bestowed on it by the Charter.

D Provisional Conclusion

The analysis above leads to the provisional conclusion that there is an implied power for the Security Council to adopt authorization resolutions. At the same time, however, the analysis has indicated that both the Charter system and principles of delegation reject *carte blanche* delegations and favour authorizations which respect the authority and responsibility of the Security Council in the United Nations collective security system.

Before final conclusions can be drawn, it is necessary to examine the views of the member states and the practice of the Security Council. The views of the member states are important because interpretations of the Security Council ought to be generally acceptable to member states in order to give such interpretations binding force.⁴⁸ The practice of the Security Council will also be analysed, as increasing

⁴⁷ As has been suggested by Quigley, *supra* note 3, at 278.

⁴⁸ This matter was discussed during the 1945 San Francisco Conference which drafted the UN Charter. Committee IV/2 of this Conference not only stated in its report that ‘each organ will interpret such parts of the Charter as are applicable to its particular functions’ (Doc. 933, IV/2/42 (2), 13 *UNCIO* 709), it added: ‘[I]t is to be understood, of course, that if an interpretation made by any organ of the Organization

acceptance has been given to the idea that the practice of international organizations has become an independent means of interpretation.⁴⁹

3 Authorization Resolutions: Views of the Member States

In the only two cases of Cold War authorizations — Resolutions 83 and 84 (Korea) and Resolution 221 (Rhodesia) — the issue of control by the Security Council did not play an important role.⁵⁰ The end of the Cold War and the related new activism of the Security Council also induced criticism of the manner in which this new activism took shape. If a close look is taken at the reports of the meetings of the Security Council during which post-Cold War authorization resolutions were adopted, it is striking how often these resolutions are criticized, precisely for the reason that the Council does not control the operations it authorizes.

For example, during the meeting in which Resolution 665 (Iraq) was adopted, it came as no surprise that Iraq took the view that '[t]he Security Council has no right to deprive itself of its own authority, or to delegate that authority to a number of states,

or by a committee of jurists is not *generally acceptable* it will be without binding force. In such circumstances, or in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may be necessary to embody the interpretation in an amendment to the Charter' (*ibid.*, at 710). Thus it was agreed in 1945 that it is not fully up to the organ in question to decide which specific powers can be implied and which not. In addition, the interpretation given must receive general acceptance with the member states. Ciobanu observes that this 'represents an attempt to reconcile two conflicting approaches to the subject: one which claimed the benefit of the classic principle of unanimity in the interpretation of general multilateral treaties, and another which, putting special emphasis on the character of the Charter as the constituent instrument of an international organization, required the approval of the majority rule' (D. Ciobanu, *Preliminary Objections Related to the Jurisdiction of the United Nations Political Organs* (1975) 172).

⁴⁹ It would suffice to look only at the practice of states in the case of a treaty *not* creating an international organization. However, if a treaty creates an international organization, a new entity is created with a will of its own which is distinct from that of the member states. The ICJ has extensively referred to the practice of an organization as a means of interpretation, for example in the *Certain Expenses* case, in the 1971 *Namibia* Opinion and, more recently, in the 1996 Advisory Opinion in the *Nuclear Weapons (WHO)* case. Other courts such as the ECJ and the Appellate Body of the World Trade Organization (WTO) have done so as well. The acceptance of the notion of practice of the organization is also evident from the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Article 2(1)(j) of this Convention defines 'rules of the organization' as meaning 'in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and *established practice of the organization*' (emphasis added). In 1976, Lauterpacht rightly concluded that '[i]t is probably necessary to recognize that recourse to the practice of international organizations now stands on an independent legal basis; that is to say, that there exists a specific rule of the law of international organization to the effect that recourse to such practice is admissible and that States, on joining international organizations, impliedly accept the permissibility of constitutional development in this manner' (Lauterpacht, *supra* note 13, at 460).

⁵⁰ See the reports of the meetings of the Security Council during which these resolutions were adopted: UN Doc. S/PV.474 (Resolution 83) and UN Doc. S/PV.1277 (Resolution 221). Only one member of the Council (Argentina, in the case of Resolution 221) was against a broad authorization (UN Doc. S/PV.1277, at 11). Sarooshi, *supra* note 5, at 161 and 169–174, refers to attempts by Secretary-General Lie to get more UN control over the operation in Korea. These attempts failed, presumably due to resistance by the US.

unless the Charter is properly amended'.⁵¹ Essentially the same view was taken by Yemen and Cuba, countries which to some extent supported Iraq and abstained from voting in this case. Cuba referred to:

a strange and tortuous wording which has nothing to do with the concepts laid down in our Charter and which specifically, in my delegation's view, represents a clear violation of Article 41, Article 42, Article 43, paragraph 1, Article 46, Article 47, paragraph 1, and Article 48, paragraph 1. There will be very few paragraphs of Chapter VII left inviolate if the Council adopts the draft resolution now before it.⁵²

However, essentially the same objection was also put forward by members of the Council which did not support Iraq, such as Colombia and Malaysia.⁵³ Colombia expressed its concern that 'the Security Council is delegating authority without specifying to whom. Nor do we know where that authority is to be exercised or who receives it. Indeed, whoever does receive it is not accountable to anyone'.⁵⁴ And the statement by Malaysia showed realism but also a preference for more UN control:

The link in the resolution between the countries referred to in paragraph 1 and the United Nations is not so satisfactorily spelt out as one would have wished. But one should not be starry-eyed and imagine that, given the present realities, there can be an international force under a blue flag policing and enforcing United Nations injunctions. Given the need of the hour to ensure the complete effectiveness of sanctions, the Security Council must, until that day comes, be content with only the beginning of United Nations control action, although Malaysia and others would have preferred a more assertive and prominent role for the United Nations.⁵⁵

Three months later, during the meeting in which Resolution 678 (Iraq) was adopted, Yemen referred to this decision as 'a classic example of authority without accountability'.⁵⁶ And Malaysia declared: '[w]hen the United Nations Security Council provides the authorization for countries to use force, these countries are fully accountable for their actions to the Council through a clear system of reporting and accountability, which is not adequately covered in resolution 678 (1990)'.⁵⁷ A *crescendo* of criticism was heard when the war against Iraq started and the Security Council sat by and watched.⁵⁸ For example, in Mexico's view '[t]he Security Council should consider a broader debate on the way in which the actions it has authorized are being conducted and should not shirk its primary mandate under the Charter to maintain international peace and security'.⁵⁹

Following the termination of Operation Desert Storm the issue of UN control dominated the discussions about authorization resolutions. Numerous countries required the Security Council to exercise its responsibility in substance, instead of only

⁵¹ *Ibid.*, at 71.

⁵² UN Doc. S/PV.2938, at 12–13/15.

⁵³ *Ibid.*, at 21–25 and 37. Yemen and Cuba more or less supported Iraq's position (*ibid.*, at 8–11 and 12–21), and abstained from voting.

⁵⁴ *Ibid.*, at 22–25.

⁵⁵ *Ibid.*, at 37.

⁵⁶ UN Doc. S/PV.2963, at 33.

⁵⁷ *Ibid.*, at 76.

⁵⁸ See UN Docs S/PV.2976, S/PV.2977 (Part I) and S/PV.2977 (Part II).

⁵⁹ UN Doc. S/PV.2977 (Part II, closed-resumption 2), at 222.

giving a formal but flimsy seal of approval.⁶⁰ Even the US permanent representative to the UN, Ambassador Pickering, suggested — albeit outside the Security Council room — that ‘we should begin now to look over the ground of possible United Nations enforcement arrangements as set forth in the Charter’.⁶¹

Criticism reached a *fortissimo* at the end of 1992, during the discussions surrounding Resolution 794 (Somalia).⁶² Some months after a UN peacekeeping force had arrived in Somalia the situation deteriorated, and reached a state of complete anarchy during the second half of 1992. On 29 November of that year, Secretary-General Boutros-Ghali presented a report to the Security Council in which five options were listed, ranging from a minimal to a maximal role for the UN. Option Four was the possibility of adopting an authorization resolution. Option Five, ‘which would be consistent with the recent expansion of the Organization’s role in the maintenance of international peace and security and which would strengthen its long-term evolution as an effective system of collective security, would be for a country-wide enforcement operation to be carried out under United Nations command and control’.⁶³ The result of the discussions was laid down in Resolution 794, and comes closest to Option Four. However, at the insistence of the developing countries a substantial role was given to the UN in the implementation of the resolution, which was to become *Operation Restore Hope*. An authorization was not only given to member states, but also to the Secretary-General,⁶⁴ who was also empowered to decide on the involvement of the UN peacekeeping force in the coalition forces led by the US.⁶⁵

The actual involvement of the UN in the implementation of this operation was the *leitmotiv* of the meeting of the Security Council during which Resolution 794 was adopted.⁶⁶ On this occasion, Austria referred to the suggestion which it had made after the Gulf War, ‘to look more closely into possible “fine print” for enforcement action under the auspices of the United Nations. While this was never done in a systematic way, today’s resolution advances in a pragmatic manner a number of important elements.’⁶⁷ Although the resolution was adopted unanimously, several members continued to favour a much stronger UN involvement. For example, China’s view — as it has consistently been in these matters — was:

in spite of the fact that the Secretary-General has been given some authorization, the draft resolution has taken the form of authorizing certain countries to take military actions, which may adversely affect the collective role of the United Nations. We hereby express our reservations on this.⁶⁸

⁶⁰ See in particular the report of the Security Council meeting during which Resolution 686 was adopted, UN Doc. S/PV.2978.

⁶¹ Speech delivered on 4 March 1991, to which the Austrian representative in the Council referred (UN Doc. S/PV.2981, at 121).

⁶² See on this resolution Freudenschuß, *supra* note 3, at 512–515.

⁶³ UN Doc. S/24868.

⁶⁴ Resolution 794, para. 10.

⁶⁵ *Ibid.*, para. 6.

⁶⁶ For the report of this meeting, see UN Doc. S/PV.3145.

⁶⁷ *Ibid.*, at 32.

⁶⁸ *Ibid.*, at 17.

And Belgium also ‘would have preferred this to be a purely United Nations operation, as in the fifth option proposed by the Secretary-General’.⁶⁹

Full UN involvement was realized in March 1993, when most of the tasks of the coalition forces were taken over by UNOSOM II. As is well known, UNOSOM II became a disappointment to some, a failure or even a nightmare to others. Proponents of future military action under full UN control will have to take this experience into account. This experience also led to a reappraisal of authorization resolutions, which indeed not only lack the advantages but also the disadvantages of operations under full UN control.

During the discussions regarding Resolution 794 some states emphasized that they were willing to accept this operation because it was ‘an exceptional action in view of the unique situation’,⁷⁰ which ‘should not, however, set a precedent for the future’.⁷¹ Zimbabwe, however, already observed that ‘any unique situation and the unique solution adopted create of necessity a precedent against which future, similar situations will be measured’.⁷² And, indeed, it did not take long before similar situations arose: the genocide in Rwanda and the crisis in Haiti. In these cases the Security Council also adopted authorization resolutions, and members stressed that they were also ‘unique’ situations. In the Security Council meetings where these resolutions were adopted the minimal role for the Council in the execution of the resolutions was criticized — although less severely than in the case of Somalia — and a number of members stated that the better approach would have been to expand the UN peacekeeping forces present in Rwanda and Haiti.⁷³ In the case of Haiti, Mexico expressed the following view:

The foundation for the action proposed, as can be seen from the report of the Secretary-General, appears to be previous practice, that is, precedent. . . [A] kind of *carte blanche* has been awarded to an undefined multinational force to act when it deems it to be appropriate. This seems to us an extremely dangerous practice in the field of international relations.⁷⁴

Such criticism came not only from developing countries, but also from New Zealand and Spain. With respect to *Opération turquoise*, the US admitted that the solution agreed upon was not ideal.⁷⁵

Similar criticism was uttered when other authorization resolutions were adopted,⁷⁶

⁶⁹ *Ibid.*, at 24.

⁷⁰ China (UN Doc. S/PV.3145, at 17).

⁷¹ India (*ibid.*, at 51).

⁷² *Ibid.*, at 7.

⁷³ UN Docs S/PV.3392 (Rwanda) and S/PV.3413 (Haiti).

⁷⁴ UN Doc. S/PV.3413, at 4–5. Mexico was not a member of the Council at the time, but participated in the meeting at its request.

⁷⁵ ‘The point here is that if we are to respond effectively to the variety of conflicts we see in the world today we must be flexible enough to accept imperfect solutions when no perfect solutions are available to us’ (UN Doc. S/PV.3392, at 7).

⁷⁶ See for example UN Doc. S/PV.3106 (Resolution 770), at 12–14 (India), 16–18 (Zimbabwe) and 51 (China); UN Doc. S/PV.3137 (Resolution 787), at 6 (India); UN Doc. S/PV.3191 (Resolution 816), at 4 (France) and 19–20 (Brazil); UN Doc. S/PV.3713 (Resolution 1080), at 13 (China); UN Doc. S/PV.3723 (Resolution 1088), at 15 (China); UN Doc. S/PV.3758 (Resolution 1101), at 3 (China); and UN Doc. S/PV.3808 (Resolution 1125), at 7 (France, Chile).

such as Resolution 1031 (the legal basis for IFOR in former Yugoslavia).⁷⁷ Nigeria observed that 'we should not continue to contract out what would normally be a United Nations responsibility to a group of powerful states'.⁷⁸ And Brazil was of the view that '[i]f these forces are to be perceived by the international community as legitimate and credible, however, the necessary accountability towards the Security Council must be strictly observed'.⁷⁹ In addition, three of the five permanent members of the Council stressed the need for political control by the Council.⁸⁰

The discussions concerning Resolution 1154 are also relevant in this context. This resolution was adopted immediately after the successful mission of UN Secretary-General Kofi Annan to Iraq in February 1998. It endorsed the memorandum of understanding signed by the Deputy Prime Minister of Iraq and the Secretary-General and also indicated that 'any violation would have severest consequences for Iraq'. The central issue dominating the meeting in which this resolution was adopted was the so-called automaticity issue: the question whether UN members, in particular the US, would *automatically* (i.e. without a further Council resolution) have the right to use force in case of a violation of the memorandum by Iraq. No agreement was reached on this issue. The US and the UK did not receive support for the view that UN members would have such an automatic right. The other members of the Council, including the other permanent members, emphasized the powers and authority of the Security Council and in some cases explicitly rejected any automatic right for members to use force. Sweden emphasized that 'the Security Council's responsibility for international peace and security, as laid down in the Charter of the United Nations, must not be circumvented'.⁸¹ Brazil stated that it was 'satisfied that nothing in its [the Resolution's] provisions delegates away the authority that belongs to the Security Council under the Charter and in accordance with its own resolutions'.⁸² And Russia concluded that:

there has been full observance of the legal prerogatives of the Security Council, in accordance with the United Nations Charter. The resolution clearly states that it is precisely the Security Council which will directly ensure its implementation, including the adoption of appropriate decisions. Therefore, any hint of automaticity with regard to the application of force has been excluded; that would not be acceptable for the majority of the Council's members.⁸³

It was clear in these discussions prior to the adoption of Resolution 1154 that most Security Council members wanted to leave it to the Security Council — and not to the

⁷⁷ Cf. in this context para. 39 of this resolution: 'Recognizes the unique, extraordinary and complex character of the present situation in Bosnia and Herzegovina, requiring an exceptional response.'

⁷⁸ UN Doc. S/PV.3607, at 15.

⁷⁹ *Ibid.*, at 27.

⁸⁰ *Ibid.*, at 14 (China), 21–22 (France) and 25 (Russia).

⁸¹ UN Doc. S/PV.3858, at 9.

⁸² *Ibid.*, at 7. A similar observation was made by Costa Rica (*ibid.*, at 5).

⁸³ *Ibid.*, at 17. Disagreement among the permanent members also appears from the translation of 'severest consequences' in the French version of the resolution: 'de très graves conséquences' (instead of, for example, 'les conséquences les plus graves').

US — to evaluate the implementation of the memorandum of understanding and if necessary to take decisions concerning the use of force. The authority of the Security Council was at stake and was not ‘delegated away’ in the end.

Finally, brief reference may be made to the views of member states regarding Resolution 1244 (KFOR). A number of Security Council members emphasized the importance of Security Council control of this operation in Kosovo.⁸⁴ However, this should also be seen in the context of the preceding NATO ‘air campaign’ against Yugoslavia, the criticism that this use of force was not explicitly authorized by the Security Council, and the general support for the fact that the Security Council was ‘resuming its legitimate role in the Kosovo crisis’.⁸⁵

The above survey demonstrates that the now frequently employed ‘model’ of authorization resolutions is far from being undisputed, which provides all the more reason to examine how the Security Council has responded to such criticism and to analyse, in a more general way, the Council’s practice concerning these resolutions.

4 Authorization Resolutions: The Practice of the Security Council

Apart from the views of the member states, the practice of the Security Council must also be analysed. A problem regarding recourse to such practice as an independent means of interpretation is the age-old characteristic of international law that ‘violations of law can lead to the formation of new law’.⁸⁶ Where does a violation of the law stop, and where does the new law begin? The circularity in reasoning that a particular practice is justified by that very same practice has not failed to attract the attention of the critics of such practice.⁸⁷ For example, when in 1965 the UN Secretary-General and the President of the General Assembly presented a joint report on UN peacekeeping to the General Assembly, the Soviet Union was of the opinion that:

in paragraph 52 of the report an attempt is made to define the functions and powers of the Security Council and the General Assembly in peacekeeping matters on the basis, not of the

⁸⁴ E.g., France (UN Doc. S/PV.4011, at 12). The Russian Federation stressed that the resolution ‘authorizes the deployment in Kosovo, under United Nations auspices, of international civil and security presences with a clearly formulated, concrete mandate. The activities of both presences are to be carried out under the thorough political control of the Security Council’ (*ibid*, at 7).

⁸⁵ UN Doc. S/PV.4011, at 11 (Slovenia).

⁸⁶ Higgins, *supra* note 9, at 19. See also Tammes, ‘Decisions of International Organs as a Source of International Law’, 94 *RdC* (1958-II) 348–349; A. Cassese, ‘Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?’, 10 *EJIL* (1999) 30: ‘it is not an exceptional occurrence that new standards emerge as a result of a breach of *lex lata*’.

⁸⁷ Judge Fitzmaurice has paid attention to this in his separate opinion in the *Certain Expenses* case, *supra* note 19, in particular at 201 (‘The argument drawn from practice, if taken too far, can be question-begging’). An example can be found in the quotation above from the decision by the Yugoslavia Tribunal (‘thus’ in the last sentence).

Charter, but mainly of the past practice of these organs when violations of the Charter were allowed to occur.⁸⁸

And in relation to authorization resolutions, this circular dilemma of international law has been aptly put by White:

there are now, within the UN's terms, several precedents for recommendatory military action, and it is arguable that the Security Council has by its practice established a power to authorize states to take 'necessary measures' with regard to a particular conflict or situation. On the other hand, it is arguably legally unacceptable to imply a power which goes against the express provisions of the Charter which clearly envisage collective security in the form of the centralization of armed force.⁸⁹

There is no single formula to answer this question. It is particularly here that the absence is felt of fully fledged judicial review powers to address the problem of circularity.

From what has been described in the previous paragraph it is clear that the Security Council itself considers authorizations to 'coalitions of the able and willing' a useful and, in the first place at least, lawful addition to the existing instruments at its disposal to maintain international peace and security. At the same time, however, it seems that the Council has taken the above-discussed criticism by member states seriously, and has responded to it in three different ways. First, the definition of the mandate has become less broad over time. Secondly, the period for which an authorization is given has become more limited in time. Thirdly, member states which carry out the authorization operation are required to report to the Council more and more fully. These three ways of getting more of a grip on authorization actions will now be examined more closely.

Originally the objective of the operation which is authorized or, more precisely, the purpose for which possible use of force is permitted, was very broad. The objective stated in Resolutions 83 and 84 (Korea) is 'to repel the armed attack and to restore international peace and security in the area'. And the objective indicated in Resolution 678 (Iraq) is 'to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area'. Consequently, in the case of Iraq, when the coalition forces faced the choice between advancing to Baghdad or not, this objective furnished hardly any guidance. All authorization resolutions adopted subsequently have been more precise, even though they may include rather general elements. For example, Resolution 940 (Haiti) defines the following objective: 'to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island

⁸⁸ UN Doc. A/6026, reproduced in 20 GAOR, Annexes, agenda item 101, at 10 (1965).

⁸⁹ White, *Keeping the Peace*, *supra* note 9, at 128.

Agreement'. Another example is Resolution 1101 (Albania): 'to facilitate the safe and prompt delivery of humanitarian assistance, and to help create a secure environment for the missions of international organizations in Albania, including those providing humanitarian assistance'. Finally, the authorizations in the case of the Central African Republic (Resolutions 1125, 1136, 1152, 1155 and 1159) are specifically limited 'to ensure security and freedom of movement' of the personnel involved in the operation. This comes close to the traditional rule for UN peacekeeping forces that the use of force is in principle only allowed in cases of self-defence.⁹⁰ It is clear from these examples that the Security Council after the adoption of Resolution 678 has chosen to define more precisely the purpose for which the authorization to use force is given.

In so doing, the Security Council reduces the risk that the objectives of the coalition or of coalition members diverge from those of the Council. This risk is inherent in the concept of authorizations to such coalitions and the most frequent reason why such operations are criticized.⁹¹ For example, when Resolution 929 (Rwanda) was adopted, some members of the Security Council referred to the suspicion that the French initiative for *Opération turquoise* was not inspired by humanitarian concerns only, but also by special relationships with the Hutus, one of the two main parties in the tragedy in Rwanda.⁹² This is reflected in the provision in Resolution 929 requiring the participating member states to carry out the mandate 'in an impartial way'. Likewise, Resolutions 1101 and 1114 (Albania) authorized member states 'to conduct the operation in a neutral and impartial way'. Impartiality is traditionally one of the cornerstones of UN peacekeeping,⁹³ but is regularly questioned with regard to 'coalitions of the able and willing'. As precise a definition as possible of the objectives of such operations may contribute to limiting the risk of diverging objectives of the Security Council and the coalition (or coalition members).

A second way for the Council to get more of a grip on the operation for which an authorization is given is to limit the duration of such authorization.⁹⁴ In some of the earlier authorization resolutions there was simply no such limit (for example, Resolutions 678 (Iraq), 770 (former Yugoslavia) and 794 (Somalia)). The more recent authorization resolutions, however, are different in this respect, with the

⁹⁰ Indeed, when in the case of the Central African Republic the authorization came to an end (15 April 1998), the newly established UN Mission in the Central African Republic (MINURCA) was given permission 'to take action to ensure security and freedom of movement of its personnel in the discharge of its mandate' (Resolution 1159).

⁹¹ See White and Ülgen, *supra* note 5, at 379; Lobel and Ratner, *supra* note 12; and Sarooshi, *supra* note 5, at 153–163.

⁹² See UN Doc. S/PV.3392, for example at 2 (Russian Federation), 6 (US), 9 (Czech Republic) and 10 (Nigeria).

⁹³ S. Vohra, 'Impartiality in United Nations Peace-Keeping', 9 *Leiden Journal of International Law* (1996) 63–85; White, *Keeping the Peace*, *supra* note 9, at 235–237.

⁹⁴ Cf. also White and Ülgen, *supra* note 5, at 408–409.

exception of Resolutions 940 (Haiti), 1244 (KFOR)⁹⁵ and 1264 (East Timor).⁹⁶ So far, the 'authorization period' varies from 11 days (Resolution 1155 (Central African Republic)) or three months (Resolution 1101 (Albania), extended by 45 days) to a year and a half (Resolution 1088 (SFOR)). This is a reasonable limitation of the authorization, particularly if compared with the old practice of giving a mandate for six months to UN peacekeeping forces (with more limited room to use force).

Nevertheless, the question should be posed as to why it is necessary to limit authorizations in time since it is never possible to define beforehand how much time is needed to achieve the goals of the operation. Indeed, some authorizations prescribe a 'functional deadline', sometimes combined with time limits.⁹⁷ In addition, when in 1998 the extension of the SFOR (former Yugoslavia) authorization was discussed, some countries took the view that no deadline should be fixed for the operation so as to offer sufficient guarantees for long-term stability in the region. Nevertheless, Resolution 1174 continued the SFOR operation only for a one-year period, which illustrates the current reluctance towards authorizations without deadlines.⁹⁸ This reluctance is justified in particular when one or more of the veto powers participate in the operation. Through their veto, these powers may for an indefinite period prevent the adoption of a Security Council decision terminating the authorization.⁹⁹ This is not necessarily what they always want,¹⁰⁰ but the case of Iraq has demonstrated that it is a real possibility that a veto power can block an agreement to terminate an authorization.

A third development is the Security Council practice to require the member states concerned to report more extensively and more frequently on how the authorized operation is carried out. Strictly viewed, this in itself is not an instrument to obtain

⁹⁵ In the negotiations concerning Resolution 1244 (KFOR), China originally insisted on an authorization limited to one year (see www.abcnews.go.com/wire/World/Reuters, accessed 9 June 1999, on file with the author). However, it finally agreed to a compromise laid down in para. 19 of the resolution: 'the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise.' It is clear from this wording that any of the veto powers participating in KFOR can prevent a termination of the authorization.

⁹⁶ Para. 10 of Resolution 1264 provides that 'the multinational force should collectively be deployed in East Timor until replaced *as soon as possible* by a United Nations peacekeeping operation' (emphasis added).

⁹⁷ E.g., Resolution 940 (Haiti), para. 8: 'when a secure and stable environment has been established and UNMIH has adequate force capability and structure to assume the full range of its functions . . .'. This was to be decided by the Security Council, taking into account recommendations by the member states and the Secretary-General. In other cases there is a limitation in time, but the Secretary-General or the Security Council may determine that the objectives of the operation have been fulfilled earlier (e.g., Resolutions 929 and 1080).

⁹⁸ See also the report of the meeting during which Resolution 1174 was adopted, UN Doc. S/PV.3892, in particular at 8, 13–14, 16 and 21–22.

⁹⁹ This possibility has been criticized but is unlikely to be abolished in the near future. See Caron, 'The Legitimacy of the Collective Authority of the Security Council', 87 *AJIL* (1993) 552–588, in particular at 577–588; and B. Fassbender, *UN Security Council Reform and the Right of Veto* (1998) 338–340.

¹⁰⁰ As is illustrated by the transition from UNITAF to UNOSOM II (Somalia) which took place later than desired by the UNITAF leaders and earlier than desired by the UN Secretary-General. See Anderson, 'UNOSOM II: Not Failure, Not Success', in D. C. F. Daniel and B. C. Hayes (eds), *Beyond Traditional Peacekeeping* (1995) 267–281 at 268; and UN Doc. S/25354.

greater control, but a precondition for effective supervision. Being well informed is indispensable for the implementation of responsibility by the Security Council. A parallel may be drawn here with the European Communities, where the Court of Justice feels strongly about obligations on the member states to report to the European Commission. This is seen by the Court as a prerequisite for the Commission to carry out its watchdog tasks.¹⁰¹ A number of members of the Security Council hold the same point of view with regard to the tasks of the Council. The United States for example observed in the discussions surrounding the adoption of Resolution 1125 (Central African Republic):

We welcome the provision of this resolution that calls for bi-weekly reporting from the Inter-African Missions on the situation in the Central African Republic. This will provide the Council with a regular update and ensure effective Council oversight of the operation it is approving today. We also believe that the Secretary-General should take steps to increase the United Nations knowledge of developments in the Central African Republic, so that he can provide his own views to the Council.¹⁰²

Originally, the requirement to report was not very strict. Resolution 678 only requested the coalition forces 'to keep the Security Council regularly informed'. On this basis several member states sent extremely short reports (one or a few pages) to the Council, essentially containing the message that the operation was going smoothly and was under (their) control.¹⁰³ Subsequent resolutions requested reporting on a more regular basis, for example at least once a month (IFOR and SFOR),¹⁰⁴ or even at least twice a month (Resolution 1080 (East Zaire)) or once every two weeks (Resolutions 1101 and 1114 (Albania), Resolution 1125 (Central African Republic)). In the case of the two resolutions dealing with Albania, for the first time reports were required to fulfil certain conditions: 'periodic reports ... *inter alia* specifying the parameters and modalities of the operation on the basis of consultations between those Member States and the Government of Albania'. This new development has not been continued in subsequent authorizations.

One inherent feature of reporting by coalition states is that it is not likely that these states will report to having acted outside the mandate. It is therefore important that authorization resolutions also request the Secretary-General to report, as was mentioned by the United States when Resolution 1125 was adopted (quoted above). Security Council practice is far from uniform in this respect. In some cases no such task is given to the Secretary-General (for example, Resolution 678). Where he is requested to report, different modalities have been used. In most of the latest

¹⁰¹ E.g., Case 96/81, *Commission v. Netherlands*, [1982] ECR 1791, at 1803; Case C-237/90, *Commission v. Germany*, [1992] I-5973, at I-6016; Case C-194/94, *CIA Security*, [1996] I-2201, at I-2245–2247.

¹⁰² UN Doc. S/PV.3808, at 9. See also, for example, UN Doc. S/PV.3607, at 14 (China), 22 (France), 25 (Russian Federation) and 29 (Ukraine).

¹⁰³ See, e.g., UN Doc. S/22341. A survey of these reports can be found in the UN publication, *The United Nations and the Iraq–Kuwait Conflict 1990–1996* (1996) 159.

¹⁰⁴ With regard to reporting by IFOR, the Dutch Advisory Council on Peace and Security, in its advice No. 20, *Innocence Lost: The Netherlands and UN Operations* (1996) 35, even speaks of 'a model for future practice by which the commitment of the United Nations can be underlined'.

authorization resolutions coalition states are requested 'to report through the Secretary-General' (for example, Resolutions 1136 and 1152 (Central African Republic), 1216 (Guinea-Bissau) and 1264 (East Timor)). In Resolutions 929 (Rwanda) and 940 (Haiti) separate requests for reports are made both to the coalition states and to the Secretary-General. For effective supervision it is obviously very important that the Secretary-General is involved in informing the Security Council on how the authorized operation is carried out. His perspective is different from that of the coalition force, as is evidenced by the example of Resolution 794 (Somalia). In that case the Secretary-General reported on 3 March 1993 'that the effort undertaken by UNITAF to establish a secure environment in Somalia is far from complete',¹⁰⁵ while the coalition leaders 'estimated that they had accomplished their mission by 20 January 1993 and desired to leave'.¹⁰⁶

These three developments demonstrate that there is a clear tendency towards more control by the Security Council. However, it may seem that if this tendency were to continue and were to be reinforced, a point would be reached where these operations were so heavily fine-tuned by the Council that they would closely resemble a true UN operation. If the Security Council were to formulate the mandate in very precise terms, if it were to give authorizations only for a brief period (for example, lasting one or a few months), and if extensive and frequent reporting were to be required, the difference between that operation and a proper UN operation would become small. While this may be welcomed from a legal point of view — as a development which is in line with the thrust of the relevant Charter provisions and with general principles of delegation — in practice it may not be found acceptable, in particular by 'coalition states'.¹⁰⁷ After all, the precise reason why the model of authorizations has become so popular is the *lack* of full UN control and the avoidance of micromanagement by the Security Council. Somewhat paradoxically, too little and too much UN control are the Scylla and Charybdis between which resolutions authorizing operations by 'coalitions of the able and willing' must sail. The three developments outlined above must therefore also be seen from this perspective. Most important are the nature of the mandate and the limitation in time of the authorization, as extensive and more frequent reporting will *as such* not change the nature of the operation.

The question may be asked if an authorization which includes a very specific mandate and not a general, widely phrased objective such as the one mentioned in Resolution 678, really is more or less the same as a true UN operation. Although the difference may indeed seem small or negligible, in reality this instrument for the Council to get more control and implement its responsibility is far from being a fully

¹⁰⁵ UN Doc. S/25354, at 13.

¹⁰⁶ Anderson, *supra* note 100, at 268.

¹⁰⁷ Who often prefer maximum flexibility and minimum Security Council involvement. See Sarooshi, *supra* note 5, at 167 and 173. Two days before Resolution 1264 (East Timor) was adopted, Foreign Minister Downer of Australia stressed that, in order to be effective, the coalition must have Australian leadership, and that 'Australia wanted a fairly robust Security Council resolution that did not tie the hands of the force' (see www.abcnews.go.com/wire/World/Reuters, accessed 13 September 1999, on file with the author).

fledged substitute for collective security as the founding fathers of the UN had in mind.¹⁰⁸ It has at least two limitations. The first is a fact of military life that it is impossible to put on paper in detail which choices must be made on the battlefield, taking into account rapidly changing circumstances. A second limitation is of a legal-political character, and concerns the right of the states participating in the operation to interpret the indicated objective, although such interpretation must be made in good faith. These inherent limitations significantly reduce the risks of micromanagement by the Security Council.

Of the three developments mentioned, the most certain way to control authorization operations is by a limitation in time. A distinction should be made here between coalitions which are led by, or otherwise include, one of the five veto powers, and those in which such powers do not participate. In the first case, if an authorization is unlimited in time, the veto power in question may indefinitely prevent the termination of the authorization. Resolution 678 is a case in point. Here a true *carte blanche* is given which cannot be taken back; as a result the Security Council has almost fully relinquished its control. From a legal point of view, authorizations of this type are the most difficult to reconcile with the Charter rules and principles of delegation. On the other hand, this drawback carries less weight in the case of authorizations to coalitions which do not include veto powers, as there is no single coalition state which in effect may cause the authorization to be prolonged forever.

Time limits may perhaps entail a certain risk of micromanagement. An example may be the authorizations given in the case of the Central African Republic which covered periods of, respectively, three months (Resolutions 1125 and 1136), 39 days (Resolution 1152), 11 days (Resolution 1155), and 19 days (Resolution 1159). Nevertheless, at the same time this is the main instrument through which the Security Council retains control over the authorization, in particular if one or more of the veto powers participate in the operation concerned. Therefore in practice it is particularly with respect to time limits that a balance must be struck between the need for Security Council control without going too much into details.

Finally, above all, the risk of micromanagement is avoided by the very concept of authorizations to ‘coalitions of the able and willing’. The three developments towards increased control, analysed above, can never transform a coalition force into a UN force. Inherent in the concept of authorizations to coalition forces is a division of tasks: operational command and control for the coalition; and ‘remote control’ (overall

¹⁰⁸ It seems that White originally took the position that it *may be* such a substitute, when he wrote that ‘[i]t appears unnecessary to place military operations under the complete control of the UN to achieve the centralisation of force necessary to fulfil the concept of collective security, if at the outset the Security Council effectively centralises the *objectives* of the military operation, thereby preventing the use of military action for purposes other than those of the Security Council’ (N. D. White, *Keeping the Peace* (1993) 103–104). Subsequently, he took a somewhat different position (N. D. White, *The Law of International Organisations* (1996) 193; and White, *Keeping the Peace*, *supra* note 9, at 118), which is further developed in White and Ülgen, *supra* note 5, at 387 and 401–404. Gaja also seems to have much confidence in this method of the Council to control better these authorization operations. Gaja, ‘Use of Force Made or Authorized by the United Nations’, in Tomuschat, *supra* note 3, in particular at 55–56.

political direction) for the UN.¹⁰⁹ As long as the operational command and control is reserved for the coalition forces, the danger of micromanagement by the Security Council is limited.

5 Conclusion

The end of the Cold War has taught us that there are other reasons besides the Cold War for the absence of Article 43 agreements which, according to the Charter, would provide the Security Council with the troops necessary to carry out military enforcement action. In future, therefore, authorization resolutions will be the primary instrument through which the Security Council will have to act if the use of military force is required to deal with crisis situations. Thus there is an urgency to the question as to whether it is within the Council's powers to adopt such resolutions.

The provisional conclusion was drawn above that it is an implied power of the Security Council to adopt such resolutions. At the same time, however, the analysis has indicated that both the Charter system and principles of delegation reject *carte blanche* delegations and favour authorizations which respect the authority and responsibility of the Security Council in the United Nations collective security system.

Next, the views of the member states and the practice of the Security Council were examined. The views of the member states are important because it is necessary for interpretations of the Security Council to be generally acceptable to the member states in order to give such interpretations binding force. The practice of the Security Council has been analysed, as there is an increasing acceptance that the practice of international organizations has become an independent means of interpretation. Therefore, the question can now be answered whether the views of the member states and the practice of the Security Council confirm the provisional conclusion drawn above.

It has been demonstrated that the model of authorization resolutions is far from being undisputed. Such resolutions evoke criticism, in particular where it is felt that the issue of control by the Security Council is not dealt with adequately. However, the core legal question is whether this model is considered generally acceptable by the member states. If this is not the case, a power for the Council to adopt such resolutions cannot be implied. The overview given above of the views of member states shows that there is considerable criticism, starting with Resolution 665 (Iraq), culminating in the 1992–93 discussions concerning Somalia, and decreasing thereafter. Critics are sometimes clearly 'case related' (Iraq, Cuba), but other members of the Council oppose this model on grounds of principle. Nevertheless, even though the overview above is far from complete since it is limited to the views expressed in Security Council

¹⁰⁹ Cf. UN Doc. A/49/681 (report of the UN Secretary-General on command and control of UN peacekeeping operations); Lobel and Ratner, *supra* note 12; W. Kühne, 'The United Nations, Fragmenting States, and the Need for Enlarged Peacekeeping', in Tomuschat, *supra* note 3, at 91–112.

meetings, the conclusion is justified that the model of authorization resolutions as such is found to be generally acceptable. Members often express their wish for greater UN control, but this does not often result in a negative vote or even an abstention. Perhaps, as far as there is a consensus at all on this matter, it has best been expressed by Malaysia in relation to Resolution 665, as quoted above: currently, in reality, full UN control is not possible, and ‘the Security Council must, until that day comes, be content with only the beginning of United Nations control action’.¹¹⁰ For the time being, the authorization model is generally accepted, but there is concern about the lack of control by the Security Council.

In its practice, the Council has to a considerable extent met this concern of the member states. A clear development can be traced from the adoption of Resolution 678 (Iraq) to more recently adopted authorization resolutions. Three specific aspects of this development have been discussed: the mandate and the duration of the authorized operation and the reporting requirements. As far as all three elements are concerned there is a clear tendency towards more control by the Security Council. Of the three, it is in particular the limitation in time of authorizations which enables the Council to control these operations. It now seems unlikely that the Council will again adopt an authorization resolution of the kind used in Resolution 678. Blank cheques seem out of date, and this is no mean achievement. A continuation and reinforcement of this tendency may entail a certain risk of micromanagement, but this must always be balanced against the risk of no management at all. Too little and too much Security Council control are the Scylla and Charybdis of authorization resolutions.

This development of Security Council practice is clearly in line with the thrust of the relevant Charter provisions and with general principles of delegation under international law. By further developing the authorization model in this way a constitutional development has taken place. It offers a fascinating example of a balance struck between rigidity and flexibility as twin requirements in the interpretation of constitutions of international organizations. On the one hand, the reality of the absence of Article 43 agreements had to be faced and an alternative instrument for military enforcement action had to be found. On the other hand, it has proved possible and — as can now be concluded — lawful to provide the Security Council with an alternative which conforms to the requirements of international law.

¹¹⁰ See the full quotation at the text at note 55 *supra*.