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Hegemonic Intervention as Legitimate Use of Force

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INTRODUCTION

This article argues that the international community confers legitimacy upon the hegemonic use of force, even if the intervention is *prima facie* illegal under international law. As the Security Council unwillingly lends its support to the exercise of hegemonic power through resolutions on the maintenance and restoration of peace, structural pressure on the law of the use of force is mounting. The completion of the evolutionary process through the emergence of a new norm is, however, not in sight.

The legitimacy of interventions of that kind is intimately linked to the emergence of "world risk society."[1] Indiscriminate transnational violence, or threat thereof, is progressively taking root as a long-term risk feature of contemporary international relations. Armed activities at the periphery of the global military system (militias with local agendas), actions of global terror networks, or threats arising from states without internal checks and balances constitute major risks to the alleged "normality" of global society. As illegitimate violence increases, it clashes with expanding legitimate counter-violence emanating

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1. For this concept, see Ulrich Beck, *Living in the World Risk Society*, 35 ECON. & SOC'Y 329 (2006).

from the center of the global military and political system. Hegemonic intervention is thus a constituent element of global society's overall violent communication cycle.

Risk containment is the basis for the legitimacy of hegemonic intervention in a two-sided paradox. On the more visible side, the intervening powers assert legitimacy for preventing the risk of spontaneous mega-violence[2] and for protecting universal rights through world society-building.[3] On the less visible side, the international community is compelled to manage the risk of hegemonic intervention itself; in fact, it has limited choice but to confer legitimacy upon the intervention once it is initiated, as the risk of its failure would magnify the destabilization of the global system, while its success would put everyone better-off in comparison to the *status-quo ante*. Hegemonic intervention is an extremely costly, risky, and potentially destabilizing enterprise, but still of a very different normative order than predatory and illegitimate regional armed conflicts. Its alleged legality rests on grounds such as self-defense, *ex post* or implicit authorization by the Security Council, intervention upon invitation, or humanitarian intervention. These legal justifications seem to overlap with the more ambivalent form of "forcible countermeasures for the

2. The prefix "mega" is often used in recent academic literature: mega-catastrophe, *see* Robert J. Rhee, *Terrorism Risk in a Post-9/11 Economy: The Convergence of Capital Markets, Insurance, and Government Action*, 37 ARIZ. ST. L. J. 435 (2005); mega-risk, *see* Robert Walker, *Under New Management: Science Policy in a Republican House of Representatives*, 8 HARV. J.L. & TECH. 257 (1995); mega-law, *see* Marc Galanter, *Mega-Law and Mega-Lawyering in the Contemporary United States*, *in* THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS, AND OTHERS (Robert Dingwall & Philip Lewis, eds., Palgrace Macmillan 1983); mega-law and mega-programs, *see* Oliver A. Houck, *Environmental Law in Cuba*, 16 J. LAND USE & ENVTL. L. 1 (2000-2001).

3. "World society-building" is my translation of the German term *Verweltgesellschaftung*, used by MATHIAS ALBERT, ZUR POLITIK DER WELTGESELLSCHAFT 338 (Velbrück 2002). In a systems-theoretical perspective, the term signifies the process of evolution and deterritorialization of various systems of action and communication (for example, law, politics, economy, religion, media) which claim their autonomy vis-à-vis the state and coalesce at a global level. *See* Achilles Skordas, *"Just Peace" Revisited: International Law in the Era of Asymmetry*, *in* TERRITORIAL CONFLICTS IN WORLD SOCIETY: MODERN SYSTEMS THEORY, INTERNATIONAL RELATIONS AND CONFLICT STUDIES (S. Stetter, ed., Routledge 2007). The process of world society-building is narrowly correlated with the rising significance of human rights as structural guarantees of societal pluralism. *See* Gert Verschraegen, *Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory*, 29 J.L. & SOC'Y 258 (2002). For a glossary of the terms used by systems theory, see HANS-GEORG MOELLER, LUHMANN EXPLAINED: FROM SOULS TO SYSTEMS 215 (Open Court 2006).

restoration of peace." Thus, the intervening powers enforce the objectives of the international community and of the international legal order on their own initiative, and despite the questionable legality of their action, they do not incur state responsibility, but have, in principle, the "obligation to reconstruct."

This paper argues that hegemonic intervention lacks the capacity to crystallize into a general principle of international law. Its overall effectiveness is becoming increasingly doubtful, and global actors, including the media and civil society, aggressively oppose it, blocking its further evolution. However, this form of use of force seems to be ingrained in the power structure and legal architecture of the contemporary international system as a predictable pattern of state conduct and as a general principle of international legal relations.

The present paper is divided into three sections. In Section I, the theoretical foundations and assumptions are laid down. This section will define the conceptual contours of hegemonic intervention and will analyze its sociological foundation, which is related with the increase of decentralized violence in its various forms. In addition, this section will clarify the meaning of legitimacy, disassociating it from the broad idea of popular support. It will also emphasize that legitimacy is generated primarily by the UN Security Council and by the practice of states and international organizations, and mirrored in the evolution of the law of the use of force. On its turn, evolutionary pressure is intimately connected with the prevention of mega-risks arising from both, the increase of transnational violence and the hegemonic intervention itself. Section II reviews the practice of the United Nations Security Council, and explores the various elements of the hegemonic intervention that have been identified in the previous section. The interventions in Kosovo (1999), Afghanistan (2001) Iraq (2003), and Lebanon (2006) demonstrate the variations among instances of use of force that might be considered as subscribing to the hegemonic societal project. Lastly, Section III will integrate the various elements of international practice into the concept of legitimate hegemonic intervention as a general principle of international legal relations.

The hegemonic intervention as a socio-legal concept does not readily fit into the categories of international law. The theoretical model proposed here aspires to explain the incongruities of international practice by introducing the

paradigm of a hybrid pattern of conduct, which is constantly oscillating across the boundary that separates legality from illegality.

I. THEORETICAL FOUNDATION OF THE HEGEMONIC INTERVENTION

A. CONCEPT AND SOCIO-LEGAL BACKGROUND

Hegemonic intervention is undertaken at the periphery of global society, in order to preserve peace at its center, including the suppression of major threats to the global political, economic and human rights order.[4] Thus, such intervention is conceived and implemented by major powers, formal alliances, or by coalitions of the willing with the objective of preventing major risks to global stability, but without a clear and unambiguous legal basis or mandate in international law. Structural reform of the target-state or territory is generally a main, but not indispensable, component of the hegemonic intervention; though establishing conditions conducive to good governance and the rule of law is a dimension of the hegemonic project, the hegemonic intervention should not be considered as identical with regime change, as this term has been used with respect to the war in Iraq.[5]

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4. The center of the global society does not signify specific states or territories, but rather the space of regular operations of function systems and activities, including the location of the intelligence centers of global society; periphery indicates the transition to the space of turbulence and of non-workable linkages between function systems. The center/periphery distinction, as well as the concept of hegemony, indicate the asymmetry of global society. For further references to literature, see Skordas, *supra* note 3. In the context of the use of force, the term "hegemonic powers" does not refer to specific countries, but to concentrations of politico-military power that plan and carry out in the kind of military interventions. From the very rich "hegemony" or "center/periphery" literature, see HEGEMONIE GEPANZERT MIT ZWANG – ZIVILGESELLSCHAFT UND POLITIK IM STAATSVERSTÄNDNIS ANTONIO GRAMSCIS (Sonja Buckel & Andreas Fischer-Lescano, eds, Nomos 2007); LAW AND GLOBALIZATION FROM BELOW - TOWARDS A COSMOPOLITAN LEGALITY (Boaventura de Sousa Santos & César Rodríguez-Garavito, eds, Cambridge University Press 2005); BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW (Cambridge University Press 2003); UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW, (Michael Byers & Georg Nolte, eds., Cambridge University Press 2003); U.S. HEGEMONY AND INTERNATIONAL ORGANIZATIONS (Rosemary Foot et al., eds., Oxford University Press 2003).

5. *See* Michael Reisman, *Why Regime Change Is (Almost Always) a Bad Idea*, 98 AM. J. INT'L. L. 516 (2004). However, the author misses the point, when he distinguishes humanitarian intervention as a "short-term initiative" from the

Structural change does not indeed need to be spelled out as the explicit legal or political justification of the intervention. It suffices that a link is factually established between the use of force and a process for achieving long-term stability in the area of intervention. It is another, but related, question whether these ends are feasible, or under what conditions they might be achieved.[6] The assertion is not that hegemonic intervention is desirable or even effective in restoring peace and stability, but that it might be legitimate, even if it fails to achieve its goals. Again, legitimacy is not defined by popular support for the use of force but rather by the institutional support of states, and of the international community.[7]

The origins and elements of hegemonic intervention as a hybrid socio-legal form of the use of force can be traced back to some incoherent and disparate practices of the Cold War, including the Reagan and Brezhnev doctrines, and incidents like the preventive Israeli attack against the Osiraq nuclear reactor in Iraq in 1981.[8] However, the intervention in its current form is the outcome of the particular circumstances that facilitated the emergence of generalized and decentralized political violence in the post-1990s.[9] There are three major instances of intensified violence in the post-Cold War era: a) violence from the periphery of the global military system, b) global terrorism, and c) violence, or threat thereof, from the periphery of the global political system. Hegemonic intervention has been the legitimate—but not necessary legal—response to these forms of illegal and illegitimate violence.[10]

Military and security has become a global system with its own defining features through a centuries-long evolutionary

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"future-oriented" regime change. *Id.* at 517. As the Kosovo case clearly demonstrates, humanitarian intervention is intimately connected with institution-building and structural domestic reform.

6. *See infra*, note 196.

7. *See infra*, note 32.

8. *See, e.g.*, Anthony D' Amato, *Israel's Air Strike Against the Osiraq Reactor: A Retrospective*, 10 TEMP. INT'L & COMP. L.J. 259 (1996); David Fidler, *War, Law and Liberal Thought: The Use of Force in the Reagan Years*, 11 ARIZ. J. INT'L & COMP. L. 45 (1994); Nicholas Rostow, *Law and the Use of Force by States: The Brezhnev Doctrine*, 7 YALE J. WORLD PUB. ORDER 209 (1980-1981); Anthony Winer, *The Reagan Doctrine, the 2003 Invasion of Iraq and the Role of a Sole Superpower*, 22 L. & INEQ. 169 (2004).

9. For a sociological approach to modern warfare, see Klaus Schlichte, *World Society and War*, *in* TERRITORIAL CONFLICTS IN WORLD SOCIETY, *supra*, note 3..

10. On the distinctions with respect to the war in Iraq, see Anne-Marie Slaughter, *An American Vision of International Law?*, 97 AM. SOC'Y INT'L L. PROCS. 125 (2003).

process.[11] Over time, military violence was "tamed" by the political system, which ultimately came to possess a monopoly on the use of force, and by international organizations, such as NATO and the UN.[12] Nonetheless, the world military system is characterized by the divide between center and periphery: In various areas of conflict and inherent instability, military and paramilitary groups confront, and dominate the political system, and this leads to the breakdown of state structures.

Indeed, the first generation of armed conflicts in the post-Cold War era, including those in the successor states of the former Yugoslavia and in Africa, has been characterized by the progressive breakdown of order and effective government.[13] The increasing influence of the military cannot be appropriately characterized as the classical form of the "coup d'Etat" that maximizes the authority of the organized military in the political system. The problem should be properly reformulated in the more radical form of "warfare as governance," in the sense of policies deliberately axed on cannibalization and pillage of natural resources, destruction of state structures, and redefinition of territory and population through ethnic cleansing.[14] The Kosovo intervention was the hegemonic

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11. Gorm Harste, *Society's War: The Revolution of a Self-Referential Military System*, *in* OBSERVING INTERNATIONAL RELATIONS: NIKLAS LUHMANN AND WORLD POLITICS 157 (Mathias Albert & Lena Hilkermeier, eds., Routledge 2004). On the law of armed conflict as internal program of action of the military in modern warfare, see DAVID KENNEDY, OF WAR AND LAW (Princeton University Press 2006).

12. UN General Assembly Res. 55/96 on the promotion and consolidation of democracy calls upon states to ensure "that the military remains accountable to the democratically elected civilian government," and this constitutes an element of the rule of law, U.N. Doc. A/RES/55/96 ¶ 1(c)(ix), (Feb. 28, 2001). Under the U.N. Charter, resolutions by the Security Council, including those under Chapter VII, need to be taken by nine of the fifteen members, including the concurring votes of the permanent members. U.N. Charter art. 27, para. 3. On the voting in the Security Council, see Bruno Simma et al., *Art. 27*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Bruno Simma, ed., Oxford University Press 2002). NATO takes its decisions by consensus. *See* NATO HANDBOOK 33, , *available at* http://www.nato.int.

13. This phenomenon is known as the "failed" or "juridical" state. *See* Colin Warbrick, *States and Recognition in International Law*, *in* INTERNATIONAL LAW 243-47 (Malcolm Evans, ed., 2d ed., Oxford University Press 2006). On the consequences of the failure of the legal order, see Mark Massoud, *Rights in a Failed State: Internally Displaced Women in Sudan and Their Lawyers*, 21 BERKELEY J. GENDER, L. & JUST. 2 (2006).

14. On the particular features and forms of these conflicts, see Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116 (December 19, 2005);*Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, U.N. Doc. S/1999/1257 (December 16, 1999); *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, U.N. Doc. S/2005/60 (Feb. 1,

response to a conflict of that kind, because the instability at the periphery risked destabilizing the center.[15]

The case of terrorism is trickier. Terror represents the second generation of post-Cold War conflicts, and should not be confused with the periphery of the organized military system, as it has developed into an autonomous system of a different order. Terrorism as a global system of action emerges out of the particularities of post-modern society. Though individual or collective terrorist acts have been part of the political tradition in a variety of cultures, including, in particular, the West,[16] the terrorist attacks of 9/11 constitute the "hegemonic act" that established the global system of terror.[17]

Following this foundational moment, terrorist acts taking place in various locations and regions are no longer observed as isolated incidents nor are they solely assessed in terms of the numbers of victims. Terrorist acts are now being perceived and evaluated according to their connectivity and message, which relates to the responsibility of the center to restore a global order that excludes exclusion.[18] Participants in, and observers of, generalized violence or armed conflicts have developed expectations regarding the recognition of motives and interpretation of acts, and terror plans are prepared in view of escalation, media attention, and expected responses.

After the 9/11 attacks, anti-terror legislation was enacted within a matter of weeks, followed by administrative practice,[19]

2005); *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, U.N. Doc. S/2002/1146 (Oct. 16, 2002);*Report of the UN Secretary-General pursuant to General Assembly resolution 53/35 – The fall of Srebrenica,* U.N. Doc. A/49/549, (Nov. 15, 1999).

15. *See infra*, Section II.A.

16. On the West German terrorism of the 1970s and the state of mind of that era, see STEFAN AUST, DER BAADER-MEINHOF KOMPLEX (Hoffmann und Campe 2005).

17. On the concept of the political and on the concept of hegemonic act in systems-theoretical perspective, see URS STÄHELI, SINNZUSAMMENBRÜCHE 230 (Verbrück 2000).

18. *See* Dirk Baecker, *Disseits von Gut und Böse*, *in* TERROR IM SYSTEM: DER 11. SEPTEMBER UND DIE FOLGEN 201, 210-212 (Dirk Baecker et al., eds., Carl-Auer-Systeme Verlag 2002).

19. Within the United States, the Patriot Act was enacted on October 26, 2001 (Public Law 107-56), one and a half months after the September 11 attacks. On November 13 of the same year, the President issued a Military Order on the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism", Mil. Order No. 57,833, Fed. Reg. 57,833 (Nov. 16, 2001). On March 21, 2002, the Department of Defense issued Military Commission Order No. 1. *See* 41 ILM, 725 (2002). On March 12, 2002, the Inter-American Commission on Human

and military action was undertaken against terrorist groups and the alleged host states. The terror system emerged within a very short period of time, and its (ir)rationality infiltrated and partially reoriented the operations of the political and the economic systems.[20] The emergence of the system of terror—including anti-terror policies of all kinds—has already developed its own "world" and conceptual horizon.[21] The war against Afghanistan and the saga of the "global war on terror"[22] respond to the emergence of terrorism as a global system of political and/or religiously motivated violence. Transnational violence takes hold and attains a more structured form[23] in comparison to the first generation of conflicts.

In the third generation of conflicts, the center/periphery distinction is applicable to the global political system itself. The lack of domestic checks and balances in local political systems is evidenced by strong linkages between military power and religion (Iran)[24] or by the "structural and actual" violence of totalitarian political systems (Baathist Iraq,[25] North Korea[26]).

Rights adopted its Decision on Request for Precautionary Measures on the Detainees at Guantánamo Bay, Cuba. *Id.* at 532. On April 15, 2002, the United States submitted its response. *Id.* at 1015.

20. *See* IAN LUSTICK, TRAPPED IN THE WAR ON TERROR (University of Pennsylvania Press 2006). On the structural implications of terrorism in the economy, see Rhee, *supra* note 2.

21. *See generally* PETER FUCHS, DAS SYSTEM "TERROR" – VERSUCH ÜBER EINE KOMMUNIKATIVE ESKALATION DER MODERNE (transcipt Verlag 2004). *See also* TERROR IM SYSTEM, *supra* note 18.

22. Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, § 2(a) (2001).

23. *See generally* ULRICH SCHNECKENER, TRANSNATIONALER TERRORISMUS – CHARAKTER UND HINTERGRÜNDE DES "NEUEN" TERRORISMUS (Suhrkamp 2006).

24. *See* Louis René Beres, *Israel, Iran, and Nuclear War: A Jurisprudential Assessment*, 1 UCLA J. INT'L L. & FOREIGN AFF., 65 (1996) (recounting early international implications of this relationship). *See also* Amir Azaran, *NPT, Where Art Thou? The Nonproliferation Treaty and Bargaining: Iran as a Case Study*, 6 CHI. J. INT'L L. , 415 (2005). *See also* Neil Shevlin, Comment, Velayat-E Faqih *in the Constitution of Iran: The Implementation of Theocracy*, 1 U. PA. J. CONST. L. , 358 (1998) (noting the totalitarian and militant character of the Iranian political system) *and* Timothy Garton Ash, *Soldiers of the Hidden Imam*, 52 THE NEW YORK REVIEW OF BOOKS 17, (Nov. 3, 2005). *See also* Matthias Küntzel, *A Child of the Revolution Takes Over – Ahmadinejad's Demons*, THE NEW REPUBLIC, April 24, 2006, *available to subscribers at* http://www.tnr.com/showBio.mhtml?pid=888&sa=1 (*last accessed* on 05/12/07).

25. *See* Nathan J. Brown, *Constitutionalism, Authoritarianism, and Imperialism in Iraq*, 53 DRAKE L. REV., 923 (2005) (recounting the authoritarian constitutional tradition of Iraq).

26. *See* Dae-Kyu Yoon, *The Constitution of North Korea: Its Changes and Implications*, 27 FORDHAM INT'L L.J. 1289 (2004). *See also* Chin Kim & Timothy G.

Under the strong pressure of the globalization process that puts the very existence of authoritarian societal orders at risk, the preparedness of the above states to have recourse to force is strengthened. Here, the problem could be formulated as "calculated ambiguity" with respect to risk and to the real possibility of recourse to indiscriminate violence, including through Weapons of Mass Destruction (WMD) that cause massive loss of life and disruption of societal activities all over the world.[27] The war against Iraq exemplifies the miscalculations and huge risks of the hegemonic intervention, as well as the failure of communication between the center and the periphery of the global political system.[28]

Transnationalism escalates the potential for violence, as terrorism and interstate and domestic conflicts with ethnic or religious character are merging together to expand and differentiate patterns of violence. Israel's simulation of a hegemonic intervention in Lebanon,[29] Somalia's puzzle,[30] and Iraq's quagmire[31] circumscribe broadening conflicts, in which state and non-state actors confront each other through the use of force and often without clear strategic objectives. Hegemonic intervention has become a constituent part of that

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Kearley, *The 1972 Socialist Constitution of North Korea*, 11 TEX. INT'L L. J. 113 (1976).

27. *See* Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, 83 FOREIGN AFF. 1, 136 (2004). For the Iraqi case, see *infra* Section II.C(1).

28. This is particularly visible with respect to the failure of intelligence. *See infra*, note 197.

29. *See infra*, Section II.D.

30. With respect to the developments in Somalia in 2006-2007 (assumption of power by the Union of Islamic Courts, Ethiopian intervention on December 23, 2006 and return of the Transitional Government in Mogadishu), *see* the Statements of the President of the Security Council, U.N. Doc. S/PRST/2006/31 (July 13, 2006) and U.N. Doc. S/PRST/2006/59 (Dec. 22, 2006). *See also* S.C. Res. 1724 U.N. Doc S/RES/1724 (Nov. 29, 2006) *and* S.C. Res. 1725, U.N. Doc S/RES/1725 (Dec. 6, 2006). Regarding the Ethiopian intervention, *see Thank You and Goodbye*, ECONOMIST, Jan. 6, 2007, at 10. *See* also *By Dawn the Islamists Were Gone, id.*, at 41-42. On the United States' military involvement, *see This Time It's Revenge*, ECONOMIST, Jan. 13, 2007, at 41-42. There has been an impressive lack of protest against the US-Ethiopian intervention, and only one meeting of the UN Security Council was held on December 26, S/PV.5614. In this meeting, the Special Representative of the U.N. Secretary-General briefed the members of the Council on the ongoing crisis, but no member of the Council took the floor, and no further meetings of the Council were held until February 20, 2007. S.C. Res. 1744/2007, unanimously adopted at that date, authorized member states of the African Union under Chapter VII to establish a security mission in Somalia and support the Transitional Government. S.C. Res. 1744, ¶ 4, U.N. Doc S/RES/1744 (Feb. 20, 2007). The resolution also determined the basic principles that should govern the political process. *Id.* at ¶¶ 1-3.

31. *See infra*, note 145.

communication cycle and claims its own idiosyncratic legitimacy. This is based on the response of states and international institutions to a paradoxical double risk: risk engendered by the novel forms of transnational violence and risk of failure of the hegemonic intervention itself.

B. LEGITIMACY

The legitimacy of the hegemonic intervention does not mirror the degree of acceptance of the intervention by the broader public but rather signifies the institutional support of, and acceptance by, the international community.[32] In this sense, it links risk with evolution: if international actors set the prevention of certain forms of risk as an objective of the international community, then legally relevant practice might favor hegemonic intervention and exercise evolutionary pressure upon the Charter's rules prohibiting the use of force.

1. Risk

Risk has become a structural feature of contemporary society,[33] and risk management permeates in practice all fields of social life.[34] Risks linked to the use of force need thus to be embedded and viewed in this broader context. States are motivated to respond to violence by ensuring the security of their territories, citizens, and residents; the authorities are obligated to take measures to prevent the occurrence of mega-harms and to maintain order within the sphere of state's jurisdiction. Failure to do so can amount to violations of individual rights, such as the right to life.[35] The potentially

32. *See* NIKLAS LUHMANN, A SOCIOLOGICAL THEORY OF LAW 201 (Elizabeth King & Martin Albrow trans., Routledge & Kegan Paul 1985) (noting, "the institutional aspect of legitimacy is lodged neither in a value deduction nor in the factual diffusion of conscious consensus, but in the assumption of acceptance.").

33. *See* Beck, *supra* note 1. *See also* ULRICH BECK, WELTRISIKOGESELLSCHAFT-AUF DER SUCHE NACH DER VERLORENEN SICHERHEIT (Suhrkamp 2007); ULRICH BECK, RISIKOGESELLSCHAFT – AUF DEM WEG IN EINE ANDERE MODERNE (Suhrkamp 1986) *and* NIKLAS LUHMANN, RISK: A SOCIOLOGICAL THEORY (Rhodes Barrett trans., Walter de Gruyter 1993).

34. *See, e.g.,* Malcolm Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 CRIMINOLOGY, 449 (1992) (explaining the turn of criminal law theory and practice from the individual to the postmodern "actuarial consideration of aggregates," risk, and prevention). *See also* Lisa L. Miller, *Looking for Postmodernism in All the Wrong Places: Implementing a New Penology*, 41 BRIT. J. CRIMINOLOGY 1, 168 (2001).

35. The European Court of Human Rights determined as follows the positive

devastating consequences of that kind of violence are not the byproduct but the *telos* of the respective activities.

The counter-discourse on the "responsibility to protect,"[36] the "duty to prevent,"[37] and the principle of "civilian inviolability"[38] illustrates the corresponding inflation of legitimacy claims, which relate to the potential use of force for the protection of major interests of the international community.[39] Thus, on the level of societal discourse, the distinction between illegitimate and legitimate claims on the use of force is similar to the communication cycle regarding "violence versus counter-violence." On this level of pre-legal claims, the concept of legitimacy with respect to the hegemonic intervention is still nebulous and unstructured; however, it reflects the primordial societal pressure upon the legal system,[40]

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obligation of states to provide protection to individuals under Art. 2 of the European Convention on Human Rights (right to life):

> It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted . . . that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.

Osman v. the United Kingdom, 23452/94 Eur. Ct. H.R. 101, ¶ 115 (1998). In another case, the Court affirmed that the state has the obligation to protect the lives of individuals from risks related to activities of contra-guerilla groups. *See* Mahmut Kaya v. Turkey, 22535/93 Eur. Ct. H.R. 129, ¶¶ 85-101 (2000). *See also* ALASTAIR MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS 15-22 (Hart 2004).

36. *See* GARETH EVANS & MOHAMED SAHNOUN, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001).

37. *See* Lee Feinstein & Anne-Marie Slaughter, *supra* note 27.

38. Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J., 1 (2002).

39. *See, e.g.*, HUMANITARIAN INTERVENTION – ETHICAL, LEGAL, AND POLITICAL DILEMMAS (J.L. Holzgrefe & Robert Keohane eds., Cambridge University Press 2003) *and* NICHOLAS TSAGOURIAS, JURISPRUDENCE OF INTERNATIONAL LAW: THE HUMANITARIAN DIMENSION (Manchester University Press 2000) (evidencing the debate on the humanitarian intervention).

40. Proto-juridical ethical norms are emerging on the level of international relations as byproducts of violations of human body, or of the ecological foundations of human life. The question is whether and under what conditions they can find access to the formal legal system. *See* Niklas Luhmann, *Ethik in Internationalen Beziehungen*, 50 SOZIALE WELT , 247 (1999).

which formally recognizes legal recourse to force only under the restrictive conditions set out in Chapters VII and VIII of the UN Charter.

Hegemonic intervention seeks its legitimacy in the prevention of harm that originates from the intensification of violence at the periphery of global society. Intuitively, it seems that the legitimacy of the intervention depends on its effectiveness. Should the intervening powers succeed in restoring peace, and achieving "good governance," legitimacy, in principle, should not be denied. Should they fail, the intervention is expected to be placated as illegitimate. This course of reasoning would make any further discussion on legitimacy superfluous, as it would subsume legitimacy under effectiveness.

It is without any doubt that the effective prevention of mega-harms and the suppression of threats would greatly contribute to the popular and institutional acceptance of hegemonic intervention. However, it is necessary to take account of the second dimension, too, and view the hegemonic intervention as a mega-risk of its own: the enterprise of suppressing or removing the risk of transnational violence, or of bringing forward the modernization of the socio-political structures of the target state or territory by compulsion is an extraordinarily complex task to accomplish, and the intervention may succeed or fail in that respect.[41] Paradoxically, this inherent risk does not diminish but, instead, enhances and stabilizes the legitimacy of the intervention. Legitimacy is not the result of effectiveness at the end of the process alone; legitimacy emerges within the process of risk prevention and of enforcing reform, during which the institutional support of the international community may emerge, or not emerge. In this sense, legitimacy is intimately linked to the fundamental normative values of the international community and is detached from the political perceptions on success or failure. Instead of focusing on the results, it might be more appropriate to focus on the medium itself.

State-building and democratization are long-term objectives of the international community; the United Nations and its member states have attempted to realize this Grand Project

41. On the risk of terrorism and of the preventive measures against it, see Klaus Japp, *Zur Soziologie des fundamenalistischen Terrorismus*, 9 SOZIALE SYSTEME 54, 82–84 (2003).

since the end of the Cold War,[42] utilizing a variety of paths and methods. Hegemonic intervention is one of the mechanisms that have been used—successfully or unsuccessfully—to trigger or support domestic reform and good governance. Thus, the intervention generates a mega-risk for the international community; while such use of force may, if it succeeds, promote the stabilization of global order, it can also contribute to its fundamental destabilization, if it fails. Outright rejection of an intervention that might promote the international interest as illegal and the strict implementation of the rules on international state responsibility, including the re-establishment of the *status-quo ante*,[43] would create legal and political conditions conducive to the further breakdown of global order.

If the intervention constitutes a mega-risk, then the international community, acting, in principle, but not exclusively, through the UN Security Council, has to manage its consequences and prevent the disaster of its potential failure. Successful risk management is not impossible, and the hegemonic powers are willing to negotiate the terms of the deal. Though they have recourse to force without the consent of the international community, or even despite the open disagreement of the UN member states, they need the institutional support of the system to achieve their objectives. Therefore, and subsequently to the initiation of hostilities, the Security Council does not indeed take "full responsibility" for the crisis, but its member states negotiate packages of measures to safeguard the transition to the new order proposed and envisaged by the

42. The comprehensive concept can be seen in the Agendas for Peace, Development, and Democratization of the former UN Secretary-General Boutros Boutros-Ghali. *See Agenda for Peace*, U.N. Doc. A/47/277 (June 17, 1992); *Supplement to an Agenda for Peace*, U.N. Doc. A/50/60 (Jan. 3, 1995); *Agenda for Development*, U.N. Docs. A/48/689 (Nov. 29, 1993), A/48/935 (May 6, 1994), A/49/665 (Nov. 11, 1994); and *Agenda for Democratization*, U.N. Doc. A/51/761 (Dec. 20, 1996). *See also* Seth Jones & James Dobbins, *The UN's Record in Nation Building*, 6 CHI. J. OF INT'L L. 703 (2006); William Maley, *Democratic Governance and Post-Conflict Transitions*, 6 CHI. J. OF INT'L L.683 (2006).

43. According to Art. 35 of the International Law Commission's (ILC) articles on state responsibility, "[a] State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed." G.A. Res. 56/83, Annex, U.N. Doc. A/RES/56/83 (Jan. 28, 2002). This provision, taken literally, would mean that the intervening powers would be obliged to unconditionally re-establish the previous authoritarian rule and withdraw their forces from the territory in question. *See also* Arts. 40 and 41 of the International Law Commission's (ILC) articles on state responsibility.

intervening powers. As international practice demonstrates, the Security Council lends the necessary support and legitimacy to the intervention and its objectives in various stages of the conflict, including after the termination of hostilities, but without explicitly approving the use of force by the intervening powers in the terms of Articles 42 or 53 of the UN Charter.[44]

This system of reciprocally regulated risk is completed with the intervening powers' own legal risk: if the intervention is not deemed to protect broader international interests, the international institutions and third states will have no reason to manage its consequences and contribute to its success. Under these circumstances, the use of force will be neither legitimate, nor privileged. International institutions or third states concerned can respond by activating various forms of the international state responsibility of the aggressor, or by instituting criminal proceedings against the individuals involved.

2. Evolution of the Law of the Use of Force

Evolution of the legal system, of a normative complex, or of legal regime is the process of variation, selection, and re-stabilization or retention of elements or structures of the legal system or of specific fields of law.[45] Variation is conceptualised as a deviation in the reproduction of the elements of the system, as critique, or as negation of the existing norms; variation produces material relevant for evolution, which is usually lost and rejected.[46] Selection changes the structures; through selection, the event is condensed into a normative structure,

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44. *See infra*, Section II.

45. On the concept, process and stages of societal evolution and evolution of law, see NIKLAS LUHMANN, DIE GESELLSCHAFT DER GESELLSCHAFT 413–594 (Suhrkamp 1997); NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM, 230-73 (Klaus Ziegert trans.) (Oxford University Press 2004); Gunther Teubner, *Evolution of Autopoietic Law*, *in* AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 217 (Gunther Teubner ed., Walter de Gruyter 1987); A.G. Keller, *Law in Evolution*, 28 YALE L. J. 769 (1919); W. Jethro Brown, *Law and Evolution*, 29 YALE L. J. , 394 (1920); Jacob Henry Landman, *Primitive Law, Evolution, and Sir Henry Sumner Maine*, 28 MICH. L. REV.404 (1930); Robert Clark, *The Interdisciplinary Study of Legal Evolution,* 90 YALE L. J. 1238, 1238 (1980-1981); E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV.38 (1985); Mark Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV.641 (1996). *See also* recently Marc Amstutz & Vaios Karavas, *Rechtsmutation: Zu Genese und Evolution des Rechts im transnationalen Raum*, 8 RECHTSGESCHICHTE 14 (2006).

46. NIKLAS LUHMANN, DIE GESELLSCHAFT DER GESELLSCHAFT, *supra* note 45, at 461–62.

which anchors itself in the memory of the system.[47] Retention marks the consolidation and crystallization of the evolutionary achievement in the system, such as the codifications in the legal system,[48] or the emergence of a new norm or legal principle. The question here is whether hegemonic intervention has evolved into the rank of a rule of international law, either in the form of custom or as a general principle of international law.

The Cold War era was marked by variation, as evidenced by unilateral, allegedly legitimate, breaches of the prohibition of the use of force.[49] However, the ICJ Nicaragua Judgment was sufficiently clear so that, despite variation, no stabilization of a new norm favoring intervention was visible.[50] In the post-Cold War era, the UN Security Council offered a forum for the interaction of states that became, for a number of reasons, a main vehicle for the evolution of the law of the use of force. In this capacity, the Council led the evolution to the stage of selection.[51] The reasons for that capacity of the Council are manifold.

First, the emerging, but often ambivalent, consensus among the permanent members enabled the Council to make binding decisions and adopt a rich body of "jurisprudence" on the use of force.[52] The Council does not directly make any pronouncements on the basis of the distinction between legal and illegal conduct, but it interprets the notions of the "threat to the peace, breach of peace or act of aggression" by subsuming specific acts or situations under these terms; it then addresses regulatory acts to the states involved in the conflict, and decides on the enforcement of its decisions.[53]

The significance of the Security Council's action for the evolution of the law of the use of force is apparent not only in the presence, but also in the absence, of a clear-cut Chapter VII authorization. The interpretation of the resolutions should then reveal, whether recourse to force constitutes a threat to the

47. *Id.* at 476, 487.

48. *Id.* at 487.

49. *See supra*, note 8.

50. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 136, ¶ 292 (3) (June 27).

51. *See infra*, Section II.

52. For an overview of the relevant literature, legal framework, and activities of the Security Council, see Michael Bothe, *Peace-Keeping (648–700.),* Nico Krisch & Jochen Abr. Frowein, *Introduction to Chapter VII (701–17)* and Waldemar Hummer & Michael Schweitzer, *Chapter VIII, Regional Arrangements, Art. 52 (807–53) in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra*, note 12.

53. U.N. Charter, arts. 39–42.

peace or whether force operates rather in the direction of restoration of peace, by wholly or partly realizing the objectives of the international community. Thus, the distinction between threat to the peace and restoration of peace supersedes the distinction between legality and illegality. The Council's action distinguishes between legitimate and illegitimate use of force in the context of the above dichotomy. The potential, but not necessary, divergence between the two distinctions, legal and illegal versus threat to and restoration of peace, is a major feature of the hegemonic intervention.

Second, the Security Council is a main vehicle for the evolution of the law on the use of force, although it is not an organ of democratic representation of the international community.[54] The impact of the Council is derived from a number of factors that confer upon its practice an increased weight. The Charter conferred the primary responsibility for the maintenance of international peace and security to the Security Council despite, or rather because of, its "oligarchic" nature, as the decisions of the organ represent the will of the major political and military powers of the world.[55] Concentrated politico-military and societal power undermines the stability of current status of the law of the use of force through the expanding practice of the Council.[56] Practice and *opinio juris sive necessitatis* of the Council and of its members have a major impact on the law of the use of force.

Although preliminary consultations may be held *in camera*, the statements of its members and the adoption of its decisions are pronounced in public and scrutinized by global and regional media. Security Council sessions are "world events"[57] and the

54. Efforts to democratize the system by expanding membership have failed, for the time being. *See* the proposals of the Secretary-General, *In Larger Freedom: Towards Development, Security, and Human Rights for All*, ¶¶ 167-70, U.N. Doc. A/59/2005 (Mar. 21, 2005).

55. U.N. Charter art 24, para. 1. On the historical background of the composition of the U.N. Security Council, see Jost Delbrück, *Article 24*, ¶¶ 1–2, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra*, note 12.

56. Permanent members of the U.N. Security Council can be considered as "specifically affected" states with respect to the evolution of the customary law of the use of force, cf. North Sea Continental Shelf, (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 42 (Feb. 20, 1969). On power and international law, see MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES, 35–40 (Cambridge University Press 1999).

57. The term "world event" is used by Rudolph Stichweh, *The Genesis of World Public Sphere* (Inst. for World Soc'y Stud., Univ. of Bielefeld, Working Paper, 2002), *available at* http://www.uni-bielefeld.de/(en)/soz/iw/pdf/stichweh_5.pdf (*last accessed* on 05/12/07).

participating governments are well aware of the political and legal ramifications of their decisions on the domestic sphere, as well as on the international plane. The Council is accountable to the world public opinion, and the governments of the member states to their domestic constituencies.

Third, and as a consequence of the above, the Council appears as a "nomic community"[58] that produces a network of decisions and rules that interpret and apply the notion of peace, either in the dimension of the threat, or in the dimension of maintenance and restoration. The law of the Council defines the concept of international peace and security, and mobilizes the military resources of the world community for that purpose, redraws maps and borders, and secures—or puts at risk—the livelihoods of millions of people around the world. The Council determines the coordinates for the "risk management" of violence, including violence emanating from the hegemonic intervention, and orients the policy of the Organization to the achievement of specific goals relating to the maintenance of global stability.[59] The UN Security Council is the "centre of power" in the UN system, not because it is at the top of the institutional hierarchy and performs acts of a "world government,"[60] but because it has the authority to define the direction of UN policy with respect to the above issues. Using the terminology of Christine Bell in a different conceptual context, we may argue that the Council's practice, taken together with the response of states and other actors in international relations, including, but not limited to, peace

58. *See* Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1984). Cover used terms such as "nomic insularity" and "nomic reserve," or "nomian autonomy of a community," *id.* at 30, 33. On Cover's conceptualization, see Amstutz & Karavas, *supra* note 45, at 23–25.

59. Under U.N. Charter art. 24, para. 1, the member states "confer on the Security Council primary responsibility for the maintenance of international peace and security." Moreover, the Council has the authority to take binding decisions under Art. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.").

60. There is no hierarchical relationship between the Security Council and the other principal organs of the United Nations. The ICJ may resolve any legal issue between states, if it has jurisdiction, even if the Council is "seized of the matter." Case Concerning U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, ¶ 40 (May 24, 1980). The UN General Assembly may exercise its own powers of recommendation with respect to peace and security, even if the matter is in the agenda of the Security Council. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶¶ 24–28 (July 9, 2004).

agreements, constitutes the *lex pacificatoria*[61] that has substantially altered the coordinates of the interpretation of the law on the use of force.

Evidently, evolution of the law of the use of force is not exclusively depending on the Security Council. State practice beyond the Council is also important, and its significance may rise if the decision-making capacity of the organ is blocked by a renewed antagonism between permanent members. Furthermore, the International Court of Justice (ICJ) constitutes a forum of fundamental significance for the evolution of international law.[62] The Court's jurisprudence is an indispensable dimension of the evolutionary process, and it indicates whether variations or selections have indeed the potential to stabilize into a new norm.

Here, there appears to be a certain "division of labor" between Security Council and ICJ: If the Security Council is the organ that operates mainly on the level of selection, the Court's jurisprudence as subsidiary—or material—source of international law[63] can affirm the emergence of a new norm, or, alternatively, can obstruct a certain evolutionary path by stabilizing the existing normative patterns and rejecting alternatives; or, finally, the jurisprudence can decide in favor of undecideability by acquiescing to further selections, but without steering them toward a fixed direction of normative change.

It is important to clarify the role of adjudication in this latter alternative. The judicial function requires judgments to distinguish between legal and illegal conduct, or to stipulate on matters of state responsibility. Undecideability does not – and should not – mean mere detection of gaps-in-law, because the ICJ is obliged to offer guidance to states and to the international community when dealing with substantive law. Nonetheless, the Court may use legal-interpretive techniques to avoid challenging the broader direction of normative change, or defer

61. Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT'L L., 373, 407-12 (2006).

62. The U.N. Charter provides that "[t]he International Court of Justice shall be the principal judicial organ of the United Nations." (art. 92). For Niklas Luhmann, the courts occupy the center of the legal system, and legislation, or contracts, its periphery. *See* LUHMANN, LAW AS A SOCIAL SYSTEM, *supra* note 45, at 293. Whether the center/periphery distinction is applicable in the field of international law is an issue that cannot be dealt with here.

63. *See* Statute of the I.C.J. art. 38, para. 1(d) (June 26, 1945). *See also* Alain Pellet, *Article 38,* ¶¶ 301–19, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE – A COMMENTARY (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds., Oxford University Press 2006).

crystallization of the meaning of a norm to a future time.[64]

The Security Council, the state practice, and the ICJ are not the only relevant locations for the evolution of the law of the use of force, as there are other actors that may play a role in the overall process of customary law-creation. The inhuman consequences of modern warfare, and the widespread use of interrogation techniques that have shocked the conscience of mankind—the outrages of Abu-Ghraib[65] and Guantánamo[66]—are generating worldwide protest and disapproval capable of enhancing customary law creation in the area of international humanitarian law through *opinio necessitatis* and "Martens Clause";[67] at the same time, protest may block the emergence of a more permissive principle on the use of force. Protest, scandalization and *colère publique mondiale*[68] may create thus a counter-dynamic that opposes state practice and practice of the Security Council. The protest against hegemonic intervention becomes a factor in the evolution of the law on the use of force if it dominates the global media system, which produces or mirrors the trends of public opinion.[69] Through that avenue, scandalization may obstruct the emergence of *opinio juris,* which is necessary for the re-stabilization of a new norm of customary law. Indeed, it can be argued that scandalization functions in the exactly opposite direction, by lending support to, and by stabilizing, the *opinio juris* for the existing principle on the prohibition of the use of force. In global society, non-state actors may have an impact in customary-law formation.[70]

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64. *See Infra*, Section III *in fine*.

65. *See* the *Taguba Report on Treatment of Abu Ghraib Prisoners in Iraq, Article 15-6 Investigation of the 800th Military Police Brigade* (2004), available at http://www.fas.org/irp/agency/dod/taguba.pdf (*last accessed* on 05/12/07).

66. U.N. Comm'n on Human Rights, *Situation of the Detainees at Guantánamo*, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006) (*prepared by* Leila Zerrougui et al.).

67. *See* Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶ 527 (Jan. 14, 2000); Antonio Cassese, *The Martens Clause: Half a Loaf or Simply a Pie in the Sky?*, 11 EUR. J. INT'L L. 187 (2000).

68. ANDREAS FISCHER-LESCANO, GLOBALVERFASSUNG: DIE GELTUNGSBEGRÜNDUNG DER MENSCHENRECHTE 67–99 (Velbrück 2005).

69. On the media system, see LUHMANN, DIE GESELLSCHAFT DER GESELLSCHAFT, *supra* note 45, 1096–1109; NIKLAS LUHMANN, THE REALITY OF THE MASS MEDIA (Kathleen Cross trans., Stanford University Press) (2000). On the impact of the global media system in international customary law creation, see Achilles Skordas, *Hegemonic Custom?*, IN UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 320–27, *supra* note 4.

70. Arrest Warrant Case (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 153 (Feb. 14, 2002) (Van den Wyngaert, J., dissenting, ¶ 27). However, it seems that the role

II. THE PRACTICE OF THE UNITED NATIONS

The study of UN practice may reveal both the diversity and the common features of hegemonic intervention. The interventions in Kosovo, Afghanistan, and Iraq and the 2006 armed conflict between Israel and Hezbollah should be examined through the lens of the hegemonic use of force. This section explores: (1) whether or not the acts of the intervening powers are normatively privileged, and (2) the ramifications of the practice of the United Nations.

A. KOSOVO (1999)

The intervention of the North Atlantic Treaty Organization (NATO) in Kosovo was undertaken without proper authorization by the UN Security Council, notwithstanding the fact that previous resolutions of the Council had determined that the situation in the province constituted a threat to international peace and security.[71] Long before the NATO intervention, the Council made clear that the UN not only intended to stop the violence in the region, but also to promote "an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration."[72] Accordingly, it was to be expected that the restoration of peace would be achieved not only through the termination of the presence of the Yugoslav army in the province, but also through domestic reform.

The intensification of the mass population exodus from Kosovo and the increased risk of a humanitarian catastrophe established the necessity for military action. At the eve of the intervention, half a million people had already fled the region.[73] The Kosovo crisis was more than a regional threat; it

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of mass media in the formation of societal protest is constitutive, in comparison to the more limited role of non-governmental organizations. The Human Rights Watch Report ENDURING FREEDOM: ABUSES BY U.S. FORCES IN AFGHANISTAN (2004), was initially barely noticed, as well as information of Amnesty International on the torture of Iraqi prisoners of war (AFP, May 16, 2003), contrary to the global protest that followed the publication of the Abu Ghraib torture photos in the mass media. *See, e.g.*, Seymour M. Hersh, *The Gray Zone: How a Secret Pentagon Program Came to Abu Ghraib*, THE NEW YORKER, May 24, 2004; Susan Sontag, *Regarding the Torture of Others*, THE N.Y. TIMES MAG.,May 23, 2004.

71. *See* S.C. Res. 1203, pmbl. ¶ 15, U.N. Doc. . S/RES/1203 (Oct. 24, 1998); S.C. Res. 1199, pmbl. ¶ 14, U.N. Doc. . S/RES/1199 (Sept. 23, 1998).

72. S.C. Res. 1160, ¶ 5, U.N. Doc. S/RES/1160 (Mar. 31, 1998).

73. *See* Press Release, U.N. Secretary-General, U.N. Doc SG/SM/6936 (Mar. 22, 1999).

constituted a threat for the center of world society, since this mass exodus risked destabilizing a large part of Europe and triggering a major European war. U.S. President Bill Clinton stressed this point in his statement at the day of the commencement of the intervention.[74]

Despite good reasons, the "anticipatory intervention" in Kosovo has been deemed *prima facie* illegal by the academic literature, albeit with ambivalence and uneasiness.[75] However, the intervention should not be considered as an "act of aggression"[76] because such a determination depends on a broader assessment of relevant circumstances.[77] Here, the

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74. Clinton stated:

> Kosovo is a small place, but it sits on a major fault line between Europe, Asia and the Middle East, at the meeting place of Islam and both the Western and Orthodox branches of Christianity. To the south are our allies, Greece and Turkey; to the north, our new democratic allies in central Europe. And all around Kosovo there are other small countries struggling with their own economic and political challenges, countries that could be overwhelmed by a large, new wave of refugees from Kosovo. All the ingredients for a major war are there: ancient grievances, struggling democracies, and in the center of it all a dictator in Serbia who has done nothing since the cold war ended but start new wars and pour gasoline on the flames of ethnic and religious division.

Sean Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L., 628, 630 (1999). On March 16, 1999, U.S. Department of State spokesman James Rubin stated, inter alia, the following: "Serb actions also constitute a threat to the region, particularly Albania and Macedonia and potentially NATO allies, including Greece and Turkey." *Id.* at 631. Similar fears of a regional destabilization on the Balkans had been expressed by President George H.W. Bush with respect to the war in Bosnia on August 6, 1992 in Colorado Springs. *See Remarks on the Situation in Bosnia and an Exchange with Reporters in Colorado Springs*, Aug. 6, 1992, http://bushlibrary.tamu.edu/research/papers/1992/92080601.html.

75. *See* Antonio Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23 (1999) [hereinafter *Ex iniuria ius oritur*]; Antonio Cassese, *A Follow-Up: Forcible Humanitarian Countermeasures and* Opinio Necessitatis, 10 EUR. J. INT'L L. 791 (1999); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999). For more categorical assessment of illegality, see Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L., 834 (1999); Georg Nolte, *Kosovo und Konstitutionalisierung: Zur humanitären Intervention der NATO-Staaten*, 59 ZAÖRV 941 (1999).

76. Under article 39 of the U.N. Charter, the existence of an act of aggression is determined by the U.N. Security Council. *See also* G.A. Res. 3314 (XXIX), U.N.. Doc. A/RES/3314 (Dec. 14, 1974) (defining aggression).

77. Although the first use of force by a state constitutes *prima facie* evidence of an act of aggression, this is an important, but not a conclusive, factor—"aggressive intent" should also be present. *Resolution on the Definition of Aggression*, [1974] 28

wider international interest was indeed served by the intervention, which had humanitarian purposes within the framework of restoring peace in the region. NATO acted without an explicit authorization, but within the objectives and the context set by the resolutions of the UN Security Council.[78] Moreover, the Security Council had rejected by majority vote and without the exercise of a veto, a draft resolution characterizing the intervention as a "flagrant violation" of the prohibition on the use of force.[79] The use of force against Yugoslavia fulfilled at least the customary condition of necessity,[80] though, apparently, not of proportionality.[81]

The agreement on the termination of hostilities was concluded under the auspices of the G-8 Ministers of Foreign Affairs but incorporated in a Security Council resolution under Chapter VII.[82] Under the terms of UNSC Resolution 1244/1999, the Federal Republic of Yugoslavia was required to withdraw its military, police and paramilitary forces from Kosovo, and thus abandon the effective exercise of sovereignty over the province.[83] At the same time, the Security Council authorized "Member States and relevant international organizations to establish the international security presence in Kosovo";[84] moreover, the

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U.N.Y.B. 843 art. 2.

78. *Compare, e.g.*, S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998), S.C. Res. 1203, U.N. Doc.S/RES/1203 (Oct. 24, 1998) (delineating the obligations of the Federal Republic of Yugoslavia), *and* Press Release, U.N. Secretary-General, *Secretary-General Offers Conditions to End Hostilities in Kosovo*, U.N. Doc. SG/SM/6952 (Apr. 9, 1999), *with* Press Release, NATO Secretary General, (1999)040 (Mar. 23, 1999), Press Release, NATO Secretary General, (1999)043 (Mar. 23, 1999), Press Release, NATO Secretary General, (1999)042 (Mar. 25, 1999) (delineating the objectives of NATO), *and* Press Release, NATO Heads of State and Government, S-1(99)62 (Apr. 23, 1999) (statement on Kosovo issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington, D.C.).

79. Belarus and Russian Federation: Draft Resolution, pmbl. ¶ 3, U.N. Doc. S/1999/328 (Mar. 26, 1999). The draft resolution was rejected by 12 votes against, and 3 in favor. *See* U.N. SCOR, 54th Sess., 3989th mtg. at 6, U.N. Doc.S/PV.3989 (Mar. 26, 1999).

80. This was the prevailing view of the member states of the UNSC. See the relevant statements in the sessions of U.N. SCOR, 54th Sess., 3989th mtg. at 3, U.N. Doc. S/PV.3989 (Mar. 26, 1999) and U.N. SCOR, 54th Sess., 3988th mtg. at 12, U.N. Doc. S/PV.3988 (Mar. 24, 1999).

81. This was due to the magnitude of the destruction and the intensity of the bombing of Yugoslavia. *See, e.g.*, The Secretary-General, *Report of the Inter-Agency Needs Assessment Mission*, ¶¶ 9, 19, 44, 51, 56, U.N. Doc. S/1999/662 (June 14, 1999).

82. S.C. Res. 1244, U.N.. Doc. S/RES/1244 (June 10, 1999).

83. *Id.* ¶ 3.

84. *Id.* ¶ 7.

Council decided that KFOR (Kosovo Force), "with substantial North Atlantic Treaty Organization participation [had to] be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo."[85] Thus, since the Council adopted the above resolution under Chapter VII of the Charter,[86] the deployment of NATO/KFOR forces constituted a step for the restoration of peace; this was recognition of the strong legitimacy of the intervention. Had the intervention been illegal and illegitimate, the Council would have had to either to condemn it, or not act at all, due the exercise of a veto by the permanent members affected by such a proposal.

Though the political agreement facilitated by the G-8 took "full account of . . . the principles of sovereignty and territorial integrity of . . . Yugoslavia,"[87] it also put the province under international interim administration that would establish and oversee "the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo."[88] Last but not least, the international community undertook the obligation to support the reconstruction of the region, the stability of which was negatively affected by the Kosovo conflict, "including the implementation of Stability Pact for South Eastern Europe with broad international participation in order to further the promotion of democracy, economic prosperity, stability and regional cooperation."[89]

Whether U.N. Security Council Resolution 1244 constitutes possibly an implicit ex post facto full authorization of the intervention needs not be discussed here;[90] what is clear, however, is that the Council considered the objectives of the intervention as consistent with its own policies and objectives for the restoration of peace in the region. Another more plausible interpretation is that armed force may be employed as legitimate "forcible countermeasures" in which the international community had in practice set the objective of restoration of

85. *Id.* annex 2 ¶ 4.

86. *Id.* pmbl. ¶ 13.

87. The text of this statement of May 6, 1999 was incorporated as Annex I in S.C. Res. 1244, annex 1, *supra*, note 82.

88. *Id.* annex 2 ¶ 5.

89. *Id.* ¶ 17, annex 2 ¶ 9.

90. *See generally* CHRISTIAN WALTER, VEREINTE NATIONEN UND REGIONALORGANISATIONEN (1995) (detailed study on the pre-1995 practice of the United Nations on Chapter VIII).

peace, and the intervening powers enforced the relevant resolutions, albeit without first securing the legal authority to do so.[91] Notably, Resolution 1244 treated the actions of the Federal Republic of Yugoslavia as a threat to, and NATO's intervention as a restoration of, peace. Illegal, but legitimate: this was the conclusion of the U.N. Secretary-General on the day the bombardment of Yugoslavia began.[92]

As a consequence of the "international interest" in the management of the crisis, the rules on state responsibility were implicitly suspended by U.N. Security Council Resolution 1244; instead, Yugoslavia was treated as the party that had acted in violation of international law. In a functional equivalent of compensation for war damages, the Stability Pact was intended to assist the reconstruction of the region and its re-integration into the global economy.

B. AFGHANISTAN (2001)

The intervention in Afghanistan, following the 9/11 attacks, rests also on a controversial legal basis, although self-defense seems to be a *prima facie* argument in favor of the legality of the intervention.

U.N. Security Council Resolution 1368, adopted on September 12, 2001, was short of an explicit recognition of the right of the United States to intervene in Afghanistan in self-defense. Though the resolution condemned the terrorist attacks and recognized in general terms the "inherent right of individual or collective self-defense in accordance with the Charter,"[93] the formulation was less explicit than, for instance, in U.N. Security Council Resolution 661.[94] This was perhaps

91. *Cf.* Cassese, *Ex iniuria ius oritur, supra* note 75 (setting out criteria for justified use of force in the absence of Security Council authorization, and arguing that the NATO intervention in Kosovo met such criteria). However, in his follow-up article, he concluded that forcible countermeasures were not authorized by international law, *supra* note 75.

92. Press release, Secretary-General, U.N. Doc. SG/SM/6938 (Mar. 24, 1999): "It is indeed tragic that diplomacy has failed, but there are times when the use of force may be legitimate in the pursuit of peace . . . . But as Secretary-General I have many times pointed out, not just in relation to Kosovo, that under the Charter the Security Council has primary responsibility for maintaining international peace and security. . . . Therefore the Council should be involved in any decision to resort to the use of force".

93. S.C. Res. 1368, pmbl. ¶ 3, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

94. *See* S.C. Res. 661, pmbl. ¶ 6, U.N. Doc. S/RES/661 (Aug. 6, 1990) (affirming "the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter").

due to the factual uncertainties and legal ambiguities with respect to the attribution of acts of non-state actors to a State. The statement of the North Atlantic Council of the same date activated, for the first time, but in a rather conditional form, Art. 5 of the North Atlantic Treaty: "The Council agreed that *if it is determined* that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all."[95]

A major element of ambiguity with respect to the exercise of the right of self-defense is visible in the relationship between Usama bin Laden and Al-Qaeda with the regime of Taliban and Afghanistan as a state. Though it could make sense to attribute the actions of Al-Qaeda to Afghanistan and establish the existence of an armed attack, additional facts are necessary in order to support such an attribution. Chapter II of the International Law Commission's (ILC) Articles on State Responsibility[96] might be invoked to establish the link and to attribute the conduct of the terrorist group to Afghanistan. In the proceedings of the *Yusuf* case before the Court of First Instance of the European Communities, the Council made the argument that bin Laden was acting as an organ of the Afghan state, eventually as the Head of State.[97]

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95. Press Release, N. Atl. Treaty Org., Statement by the North Atlantic Council (2001)124 (Sept. 12, 2001) (emphasis added).

96. G.A. Res. 56/83, Annex, arts. 4–11, *supra* note 43.

97. *See* Case T-306/01, Yusuf v. Council, 2005 E.C.R. II-3533, ¶ 118. The Court stated:

> [T]he Council has added that Usama bin Laden was in fact the head and 'éminence grise' of the Taliban and that he wielded the real power in Afghanistan. His temporal and spiritual titles of 'Sheikh' (head) and 'Emir' (prince, governor or commander) and the rank he held beside the other Taliban religious dignitaries can leave little doubt on that score. Moreover, even before 11 September 2001, Usama bin Laden had sworn an oath of allegiance ('Bay'a') making a formal religious bond between him and the Taliban theocracy. He was thus in a situation comparable to that of Mr. Milosevic and the members of the Yugoslav Government at the time of the economic and financial sanctions taken by the Council against the Federal Republic of Yugoslavia . . . . With regard to Al-Qaeda, the Council has observed that it was common knowledge that it had many military training camps in Afghanistan and that thousands of its members had fought beside the Taliban between October 2001 and January 2002, during the intervention of the international coalition.

Id.

The use of force against Afghanistan did not have as an objective the repulsion of the alleged armed attack, since the terrorist acts took place and were completed on September 11, 2001. The statement of the U.S. government of October 7, 2001 was clear on the objective of risk prevention[98] and also hinted to the possibility of pre-emptive self-defense against other states.[99] Two days after the statement of the U.S. government, the U.N. Secretary-General said in an interview that this sentence "had caused some 'anxiety' among other Member States" and that "that is one line that disturbed some of us."[100]

However, even if the United States invoked the right of self-defense, the use of force against Afghanistan served primarily the general international interest for the eradication of terrorism. In this sense, the recourse to the use of force constituted enforcement of the objectives of the international community; this justified, and required, the active involvement of the Security Council.

Following the positive outcome of the conflict for the United States and its allies, the U.N. Security Council played a pivotal role in the formulation of the fundamental principles of the new constitutional order of Afghanistan. The military action of the United States did not have only the limited objective of destroying the material infrastructure of the terrorist organizations, but also the broader goal of reforming the political system of Afghanistan.[101] These objectives were

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98. The U.S. government stated:

> The attacks on 11 September 2001 and *the ongoing threat* to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. . . . In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States.

Letter from the Permanent Representative of the U.S. to the President of the Sec. Council, U.N. Doc. S/2001/946 (Oct. 7, 2001) (emphasis added).

99. *Id.* ("There is still much we do not know. Our inquiry is in its early stages. We may find that our self-defence requires further actions with respect to other organizations and other States.").

100. October 9, 2001, transcript with the author.

101. In his November 10, 2001 speech in the U.N. General Assembly, President George W. Bush stated:

> The United States will work closely with the United Nations and development banks to reconstruct Afghanistan after hostilities there have ceased and the Taliban are no longer in control. And the United States will

shared by the international community, as evident in Security Council deliberations, including the meeting of November 13, 2001, the day Kabul fell to the Northern Alliance.[102] Despite the effort of the Special Representative of the U.N. Secretary-General for Afghanistan to attribute his proposals to other local and regional actors,[103] the Representative for Singapore stressed that, in face of the situation in the country, the Council should act swiftly and formulate the principles that would guide the political process and avoid disasters.[104] Thus, the risk of terrorism, and risks triggered by the intervention itself and by the breakdown of the previous regime needed to be managed by concerted action of the international community.

Following up its relevant resolutions under Chapter VII, the Council did not limit itself to proposing principles for a new political negotiation process; the Council actually formulated the fundamental constitutional principles of the new legal order of the country. In Resolution 1378, the Security Council defined its objectives of uprooting terrorism, completing the political process, and catalyzing domestic constitutional and political reform.[105] Pursuant to the Resolution, it was determined that the new government of Afghanistan should be "broad-based, multi-ethnic and fully representative," "should respect the human rights of all Afghan people, regardless of gender, ethnicity or religion," and "should respect Afghanistan's international obligations, including by cooperating fully in international efforts to combat terrorism and illicit drug trafficking within and from Afghanistan."[106] The Bonn Agreements of December 5, 2001, concluded among all major Afghan political parties, adopted these principles and incorporated them into the foundational instruments of the new State.[107] On the following day, the U.N. Security Council

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work with the U.N. to support a post-Taliban government that represents all of the Afghan people.

Sean Murphy, *Contemporary Practice of the United States*, 96 AM. J. INT'L L., 237, 249–50 (2002).

102. *See, e.g.*, U.N. SCOR, 56th Sess., 4414th mtg., U.N. Doc. S/PV.4414 (Nov. 13, 2001).

103. *See id.* at 3–4 (statement of Lakhdar Brahimi).

104. *Id.* at 12 (statement of S. Jayakumar).

105. *See* S.C. Res. 1378, pmbl., U.N. Doc.. S/RES/1378 (Nov. 14, 2001).

106. *Id.* para. 1 of the oper. part (including principles for the transitional legal order of the country).

107. *See* Letter from the Sec'y-Gen. to the President of the Sec. Council, U.N. Doc. . S/2001/1154 (Dec. 5, 2001).

endorsed the agreements and incorporated them into a resolution on the restoration of peace.[108]

The intervention in Afghanistan assumed a hegemonic character, in that the exercise of the right of self-defense had the objectives of preventing the risk of further terrorist attacks, enforcing regime change, and creating a political and societal environment considered conducive to the eradication of terrorism. It can be argued that the military action progressively assumed the character of an intervention upon invitation, as the Northern Alliance was able to control a considerable part of the territory, assume power, and retroactively authorize the intervention.[109]

The intervening powers and the United Nations followed parallel paths of action designed to suppress the threat of terrorism. The United Nations conferred legitimacy, but not explicit legality, upon the military operation of the United States and its allies; the United States pursued the objectives of the United Nations with respect to the fight against terrorism;[110] and the United Nations supported the project of democratization and state-building in Afghanistan. Without a doubt, the legality or legitimacy of the operation can be supported on multiple grounds and for multiple reasons; at a minimum it can be said that the intervention was legitimate, but burdened with some uncertainties with regard to its legality.[111] This tension is perhaps best reconciled by assessing

108. S.C. Res. 1383, pmbl. ¶ 5, U.N. Doc. S/RES/1383 (Dec. 6, 2001).

109. *Cf.* Michael Byers, *Terrorism, the Use of Force and International Law After September 11*, 51 INT'L & COMP. L.Q., 401, 403–04 (2002) (discussing intervention by invitation as a possible legal justification for the use of force against Afghanistan). On intervention upon invitation, see generally GEORG NOLTE, EINGREIFEN AUF EINLADUNG (Springer 1999).

110. *See, e.g.*, S.C. Res. 1368, pmbl.¶ 2, *supra* note 93 (stating that the Security Council is "determined to combat *by all means* threats to international peace and security caused by terrorist acts") (emphasis added); *see also* S.C. Res. 1373, pmbl. ¶ 5, U.N. Doc. S/RES/1373 (Sept. 28, 2001) ("[r]eaffirming the need to combat *by all means, in accordance with the Charter of the United Nations*, threats to international peace and security caused by terrorist acts") (emphasis added).

111. On the legality of the use of force against terrorism and against Afghanistan, see Byers, *supra* note 109; Andreas Fischer-Lescano, *Redefining Sovereignty via International Constitutional Moments? The Case of Afghanistan*, *in* REDEFINING SOVEREIGNTY: THE USE OF FORCE AFTER THE COLD WAR 335–64 (Michael Bothe et al. eds., Transnational Publishers 2005); Marcelo G. Kohen, *The Use of Force by the United States After the End of the Cold War, and Its Impact on International Law*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW, *supra* note 4, at 204–11. *See also* W. Michael Reisman, Jonathan L. Charney & Thomas M. Franck, *Editorial Comments*, 95 AM. J. INT'L L., 833–43 (2001).

the use of force against Afghanistan as a form of forcible countermeasures for the restoration of peace, whereby democratic governance and domestic reform would be considered as remedies corresponding to guarantees of non-repetition of terrorist activities.[112]

C. IRAQ (2003)

Despite the failure of the United States and its allies to stabilize the situation in Iraq, the lack of any findings that this country possessed weapons of mass destruction (WMD), and the absence of an explicit authorization for the use of force, there are numerous "legitimacy indicators" in pertinent Security Council resolutions as well as in the reports of its subsidiary weapons inspection organs (i.e., UNSCOM, UNMOVIC).[113] More than in any other case of hegemonic intervention, the elements of uncertainty, risk containment, and regime change are visible on all levels of the international community's response and of the United States' stance towards Iraq.

The "root causes" for the legitimacy of the intervention are related to the breach of confidence between UNSCOM and Iraq in the mid 1990's.[114] The uncertainties with respect to the existence of WMD and to programs for manufacturing such weapons, as well as the obstruction and suspension of inspections over a long period of time, significantly contributed to the escalation of tensions between Iraq and the international community. In response, the Security Council requested that Iraq comply with its disarmament obligations and disclose its programs, threatening further sanctions and measures.

It is important to distinguish between moments of pre-war and post-war legitimacy.[115] Pre-war, the international

112. Art. 30(b) of the ILC Articles on international state responsibility provides that "[t]he State responsible for the internationally wrongful act is under an obligation . . . [t]o offer appropriate assurances and guarantees of non-repetition, if circumstances so require." G.A. Res. 56/83, *supra* note 43 , Annex, art. 30(b).

113. The United Nations Special Commission (UNSCOM) was established in order to monitor the disarmament of Iraq by S.C. Res. 687, ¶ 9, U.N. Doc. S/RES/687 (Apr. 3, 1991). It was replaced by the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) established by S.C. Res. 1284, ¶ 1, U.N. Doc. S/RES/1284 (Dec. 17, 1999).

114. Achilles Skordas, *La Commission spéciale des Nations Unies*, *in* L' EFFECTIVITE DES ORGANISATIONS INTERNATIONALES: MECANISMES DE SUIVI ET DE CONTROLE 59, 75-77 (H.Ruiz-Fabri, L.-A. Sicilianos, & J.-M. Sorel eds., 2000).

115. I chose the term "war" instead of "armed conflict" in order to distinguish the hostilities between the international coalition and the former Iraqi regime of

community was concerned with the risk of Iraq possessing WMD; post-war, legitimacy was built principally on the self-determination of the people of Iraq.[116]

1. Pre-war Legitimacy

Though the UN Security Council did not explicitly authorize the use of force against Iraq, Resolution 1441/2002 contained grounds upon which to assert the legitimacy of the intervention. Under its terms, "the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations."[117] In the preamble, the Council recalled, "that its resolution 678/1990 authorized Member States to use all necessary means to uphold and implement its resolution 660/1990 . . . and all relevant resolutions subsequent to resolution 660/1990 and to restore international peace and security in the area."[118] The significance of that provision is that it was the second time since the termination of hostilities in 1991[119] that a UNSC resolution mentioned Resolution 678/1990 again.[120]

With Resolution 1441/2002, the Security Council established that Iraq had been and remained in "material breach" of previous resolutions, including Resolutions 686, 687, and 688/1991.[121] In particular, the Council referred to the failure of Iraq to comply with its commitments with regard to terrorism, disarmament, and repression of the civilian population.[122] Notably, Resolution 688 had indeed linked the restoration of peace with domestic political reform.[123] Moreover, Resolution 1441 afforded Iraq "a final opportunity to comply

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Mar.-Apr. 2003 from the wider, still ongoing, conflict within Iraq.

116. The question of legality or illegality of the intervention generated a broad and spirited academic debate. *See Agora: Future Implications of the Iraq Conflict*, 97 AM. J. INT'L L. 553, 803 (2003).

117. S.C. Res. 1441, ¶ 13, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

118. *Id.* pmbl. ¶ 4.

119. S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991).

120. S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990) was mentioned only once between 1991 and 2002, in the preamble of S.C. Res. 949, U.N. Doc. S/RES/949 (Oct. 15, 1994).

121. S.C. Res. 1441, *supra* note 117, pmbl. ¶ 9, oper. part ¶ 1.

122. *Id.*

123. S.C. Res. 688, ¶ 2, U.N. Doc. S/RES/688 (Apr. 5, 1991) provided that Iraq should "as a contribution to removing the threat to international peace and security in the region, immediately end this repression, and in the same context expresses the hope that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected."

with its disarmament obligations" and to provide UNMOVIC, IAEA and the Council "not later than 30 days from the date of this resolution, a currently accurate, full, and complete declaration of all aspects of its programmes" to develop WMD.[124] Thus, Iraq's obligation pursuant to Resolution 1441 was largely procedural, and related to the declaration of its programs for the development of WMD. Hans Blix stated to the Security Council sixty days later that "[r]egrettably, [Iraq's] 12,000 page declaration . . . [did] not seem to contain any new evidence that would eliminate the questions or reduce their number."[125] Though in subsequent reports he welcomed the more cooperative stance of the Iraqi authorities, an UNMOVIC Working Document on "Unresolved Disarmament Issues" dated March 6, 2003, less than two weeks before the war, stressed that Iraq might possess WMD. With respect to anthrax, for instance, the document made an exemplary statement of risk assessment:

> Based on all the available evidence, the strong presumption is that about 10,000 litres of anthrax was not destroyed and may still exist. As a liquid suspension, anthrax spores produced 15 years ago could still be viable today if properly stored. Iraq experimented with the drying of anthrax simulants and if anthrax had been dried, then it could be stored indefinitely.[126]

This document was prepared under Resolution 1284/1999 and not under Resolution 1441/2002, but this does not undercut the value of the risk assessment it provided at the critical period preceding the war.[127]

Moreover, Resolution 1441/2002 provided that the Council should convene immediately upon receipt of the reports of the UNMOVIC/IAEA "in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and

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124. S.C. Res. 1441, *supra* note 117, ¶ 2-3.

125. U.N. SCOR, 58th Sess., 4692d mtg. at 5, U.N. Doc. S/PV.4692 (Jan. 27, 2003).

126. U.N. Monitoring, Verification and Inspection Comm'n [UNMOVIC], *Working Document: Unresolved Disarmament Issues Iraq's Proscribed Weapons Programmes*, 98 (Mar. 6, 2003), *available at* http://www.un.org/Depts/unmovic/new/documents/cluster_document.pdf (*last accessed* on 05/12/07)

127. See also the assessment of the Commission on anthrax in the Report it submitted to the UN Security Council after the war, *Thirteenth Quarterly Report of the Executive Chairman of the United Nations Monitoring, Verification and Inspection Commission*, paras. 13,92-96, , U.N. Doc. S/2003/580 (May 30, 2003).

security."[128] The Council did not refer to the necessity for a second resolution authorizing the use of force against Iraq. Although this question has been strongly disputed and debated later, the discussion in the Council during the adoption of Resolution 1441 was everything but equivocal. The US representative was very explicit that a second resolution authorizing the use of force would be politically desirable, but not necessary, since Resolution 1441 contained such an authorization.[129] The French, Russian and Chinese representatives interpreted the resolution differently, but formulated their positions in a cautious manner.[130] The representatives of Mexico and Syria were more emphatic that a second resolution was necessary for the lawful recourse to the use of force.[131]

By adopting a resolution with such an ambiguous formulation, and given the overall context of the crisis and the firm position of the United States, the members of the Council acquiesced to the risk of establishing expectations that an authorization was indeed part of the resolution. The subsequent practice of the US and the UK, seeking a second resolution, and their failure,[132] is a strong indication that it would not be appropriate to interpret Resolution 1441/2002 as conferring an explicit, even if conditional, authorization for the use of force. However, both the resolution and the UNMOVIC practice before the initiation of hostilities offered substantial legitimacy moments for the intervention, by stressing the existence of major risks arising from the ambiguity and incalculability of Iraq's policies.[133]

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128. S.C. Res. 1441, *supra* note 117, ¶ 12.

129. The U.S. representative stated, "If the Security Council fails to act decisively in the event of further Iraqi violations, this resolution does not constrain any Member State from acting to defend itself against the threat posed by Iraq or to enforce relevant United Nations resolutions and protect world peace and security." U.N. SCOR, 57th Sess., 4644th mtg. at 3, U.N. Doc. S/PV.4644 (Nov. 8, 2002).

130. *Id.* at 5-13. These three members reiterated their common position in a public statement following the session of the UNSC. *See* Pierre Klein, *Opération Iraqi Freedom: Peut-on admettre l' argument de l' "autorisation implicite" du Conseil de Sécurité?*, REVUE BELGE DE DROIT INTERNATIONAL, 205, 217 (2003).

131. U.N. SCOR, 57th Sess., 4644th mtg. at 6-10, U.N. Doc. S/PV.4644 (Nov. 8, 2002). On the interpretation of the Security Council resolutions, see also Efthymios Papastavridis, *Interpretation of Security Council Resolutions Under Chapter VII in the Aftermath of the Iraqi Crisis*, 56 INT'L & COMP. L.Q. 83 (2007).

132. Sean Murphy, *Contemporary Practice of the United States Relating to International Law*, 97 AM J. INT'L L. 419, 423-24 (2003).

133. This ambiguity seems to have had structural reasons. A recent study based on primary sources (Iraqi documents and prisoners interviews) revealed that it was

2. Post-war Legitimacy

The Security Council's stance after the end of the war reaffirms the UN's indirect, albeit unwilling, endorsement of the US interventionist policies. In a second round of resolutions, the legitimacy of the intervention was affirmed on three categories of grounds: a) de-legitimation of the authority of the previous Iraqi regime; b) explicit authorization for the continued presence of the Coalition armed forces in Iraq; and c) constitutional legitimacy, in support of self-determination of the Iraqi people.

UNSC Resolution 1483/2003 was adopted under Chapter VII on May 22, 2003, nearly a month after the occupation of Iraq. It de-legitimized the previous regime, by requiring all UN member states to freeze funds, other assets or economic resources of the previous Government, of Saddam Hussein or of senior officials of the former Iraqi regime and their immediate family members.[134] In a further step, UNSC Resolution 1511/2003 put the violent activities against the occupying powers within the broader context of combating terrorism, by invoking, in the same paragraph of the preamble, Resolutions 1483 and 1500/2003, together with Resolution 1373/2001.[135] Moreover, UNSC Resolution 1511/2003 explicitly authorized the presence of the Coalition forces in Iraq and the eventual use of force for the maintenance of stability in the country.[136]

The Security Council also conferred constitutional legitimacy to the intervention through its support to constitutional reconstruction of the country and its institutions. In that way, the new state of affairs brought about by the intervention was deemed to promote the international interest of peace and stability, as defined by the Council. UNSC

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part of the strategy of the Iraqi regime not to dispel the doubts surrounding the existence of weapons of mass destruction. *See* Kevin Woods, James Lacey, & Williamson Murray, *Saddam's Delusions: The View from the Inside*, 85 FOREIGN AFF. 3., 2, 5-8 (2006). In parallel, for a sharp critique of the politicization of intelligence by the U.S. administration during the time preceding the invasion of Iraq, see Paul R. Pillar, *Intelligence, Policy, and the War in Iraq*, 85 FOREIGN AFF. 2., 15 (2006).

134. S.C. Res. 1483, ¶ 23, U.N. Doc. S/RES/1483 (May 23, 2003).

135. S.C. Res. 1511, pmbl. ¶¶ 1, 5, U.N. Doc. S/RES/1511 (October 16, 2003). In a recent Statement of its President, the Security Council condemned in the strongest terms the terrorist attacks in Iraq, rejecting thus any notion that they might constitute acts of legitimate insurgency, U.N. Doc. S/PRST/2007/11 (April 13, 2007).

136. S.C. Res. 1511, *supra* note 135, ¶¶ 13, 15. The Security Council extended the presence of the multinational force in Iraq until the end of 2007 upon request of the Iraqi government, S.C. Res. 1723, U.N. Doc. S/RES/1723 (November 28, 2006)

Resolution 1483/2003 sought to accomplish a broad range of objectives in this context: lifting the UN sanctions against Iraq;[137] calling upon the occupying powers to support the Iraqi people by the establishment of a representative government based on the rule of law;[138] and authorizing these powers to disburse the funds in the Development Fund of Iraq for the economic reconstruction of the country.[139]

Some of these provisions conferred upon the occupying powers rights that exceed the limitations imposed by Article 43 of the Hague Regulations and Article 64 of the Geneva Convention IV, which states that "the penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the occupying power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention." The provision describes the continuity of the legal system on the occupied territory; according to the authoritative Commentary of the ICRC, Art. 64 secures not only the criminal law but the totality of the legal order of the occupied territory, including its constitution. [140]

Nonetheless, the legislation adopted by the Coalition Provisional Authority (CPA) was directed toward a radical transformation of the political and legal system of Iraq. This legislation had a clear "constitutional basis" in UNSC Resolution 1483/2003, which is referred to in the preamble of regulations and orders adopted by the CPA. Moreover, this legislation provided for the establishment of a free market economy in Iraq. [141]

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137. S.C. Res. 1483, *supra* note 134, ¶ 10.

138. *Id.* pmbl. ¶ 5, and oper. part ¶¶ 4, 8c.

139. *Id.* ¶ 14.

140. *See* the *Commentary* on that article *at* http://www.icrc.org/ihl.nsf/COM/380-600071?OpenDocument (*last accessed* on 05/12/07). On the problematic relationship between state-building and law of occupation, see, e.g., Brett H. McGurk, *Revisiting the Law of Nation-Building: Iraq in Transition*, 45 VA. J. INT'L L. 451 (2005); Antonio F. Perez, *Legal Frameworks for Economic Transition in Iraq – Occupation Under the Law of War vs. Global Governance Under the Law of Peace*, 18 TRANSNAT'L L. 53 (2005).

141. The preamble of the CPA Order 39 on Foreign Investment the CPA Administration states the following:

> Acting in a manner consistent with the Report of the Secretary General to the Security Council of July 17, 2003, concerning the need for the development of Iraq and its transition from a non-transparent centrally planned economy to a market economy characterized by sustainable economic growth through the establishment of a dynamic private sector, and the need to enact institutional and legal reforms to give it effect.

Furthermore, UNSC Resolutions 1500 and 1511/2003 explicitly conferred legitimacy to the new regime of Iraq, by recognizing the Iraqi Governing Council as "broadly representative"[142] and by stating that it "embodies the sovereignty of the State of Iraq during the transitional period until an internationally recognized, representative government is established and assumes the responsibilities of the Authority."[143] Despite the progression of Iraq to full sovereignty and democratic governance,[144] the complexities of the situation became apparent over time through a series of adverse developments, including the intensification of the civil conflict,[145] and the violation of human rights by the occupying powers.[146] Nonetheless, these factors are not capable of transforming the intervention into an illegitimate and illegal aggression.[147]

CPA Order 39, pmbl. CPA/ORD/19 September 2003/39. *See* inter alia, Trade Liberalization Policy 2004, CPA Order 54, pmbl., CPA/ORD/24 February 2004/54; Trade Bank of Iraq, CPA Order 20, CPA/ORD/17 July 2003/20; Measures to Ensure the Independence of the Central Bank of Iraq, CPA Order 18, CPA/ORD/07 July 2003/18. *See also* Alan Audi, note, *Iraq's New Investment Law and the Standard of Civilization: A Case Study on the Limits of International Law*, 93 GEO. L. J. , 335 (2004).

142. S.C. Res. 1500, ¶ 1, S/RES/1500 (August 14, 2003).

143. S.C. Res. 1511, *supra* note 135, ¶ 4.

144. On the new democratic Constitution of Iraq, see Nathan Brown, *Carnegie Endowment for International Peace, The Final Draft of the Iraqi Constitution – Analysis and Commentary*, http://www.carnegieendowment.org/files/FinalDraftSept16.pdf (*last accessed* on 05/12/07). *See also*, Report of the Public International Law and Policy Group and the Century Foundation, *Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations*, 39 NEW ENG. L. REV. 53 (2004); Brown, *supra* note 25.

145. The National Intelligence Council of the United States made the following assessment in January, 2007:

> The Intelligence Community judges that the term 'civil war' does not adequately capture the complexity of the conflict in Iraq, which includes extensive Shia-on-Shia violence, al-Qa'ida and Sunni insurgent attacks on Coalition forces, and widespread criminally motivated violence. Nonetheless, the term 'civil war' accurately describes key elements of the Iraqi conflict, including the hardening of ethno-secterian identities, a sea change in the character of violence, ethno-sectarian mobilization, and population displacements.

NAT'L INTELLIGENCE COUNCIL, NAT'L INTELLIGENCE ESTIMATE, PROSPECTS FOR IRAQ'S STABILITY: A CHALLENGING ROAD AHEAD, 7 (2007).

146. *Supra* note 65.

147. *But see* Joseph Betz, *America's 2003 War of Aggression Against Iraq*, 9 Nexus J. Op., 145 (2004) (basing the character of the intervention as aggression on arguments of a legal and of ethical order).

3. Conclusion

The UN system conferred legitimacy to the 2003 intervention in Iraq, albeit hesitantly. The intervention exhibits elements of "forcible countermeasures for the restoration of peace," as it was undertaken with the purpose of enforcing the UN resolutions on the disarmament of Iraq, in the mistaken belief that Iraq had not fully disarmed at that time. The further practice of the UN Security Council under Chapter VII shows clearly the support of the international community for the efforts of the intervening powers to promote nation-building and democratization in Iraq. Taking into account the de-legitimation of the previous regime through the pertinent resolutions, the conclusion may be drawn, that, in legal terms, the intervention has not constituted a threat to the peace under the UN Charter, but a means for restoring peace in the region.

D. ISRAEL V. HEZBOLLAH (2006)

José Alvarez, President of the American Society of International Law (ASIL), framed the 2006 armed conflict as one between Israel and Hezbollah, and not between Israel and Lebanon.[148] This interpretation is affirmed by the practice of the UN Security Council, which called for a full cessation of hostilities between Israel and Hezbollah.[149] Though under the rules of international state responsibility Hezbollah's acts can be attributed to the state of Lebanon,[150] this is beyond the point: As is to be seen, the tenor of the Security Council resolutions is

148. *The Guns of August*, 22 ASIL NEWSLETTER 5., 1 (2006). See also the contributions of Frederic Kirgis, Douglass Cassel, Richard Falk et al, focusing in particular on the potential violation of the principle of proportionality, On the complex history of Lebanon and its relationship with Israel and the other countries of the region, see Fouad Ajami, *Lebanon and its Inheritors*, 63 FOREIGN AFF. 778 (1984-1985); *Lebanon: Country Profile*, 1 INT'L J. REFUGEE L., 331 (1989); Louis René Beres, *Israel, Lebanon and Hizbullah: A Jurisprudential Assessment*, 14 ARIZ. J. INT'L & COMP. L. 141 (1997); Itamar Rabinovich, *Israel, Syria, and Lebanon*, 45 INT'L J. 529 (1989-1990).

149. S.C. Res. 1701, ¶ 1, S/RES/1701 (August 11, 2006).

150. Hezbollah participates in the Lebanese political system and, before the 2006, exercised control over the Southern part of the country. *See* Daniel Byman, *Should Hezbollah Be Next?*, 82 FOREIGN AFF. 54 (2003); Daniel Byman, *Hezbollah's Dilemma*, April 13, 2005 (author's update), *available at* http://www.foreignaffairs.org/20050413faupdate84277/daniel-byman/hezbollah-s-dilemma.html (*last accessed* on 05/12/07); Joshua Slomich, *The Ta'if Accord: Legalizing the Syrian Occupation of Lebanon*, 22 SUFFOLK TRANSNAT'L L.REV. 619, 633 (1998-1999). *See also* G.A. Res. 56/83, Annex, arts . 4-11, *supra* note 43. (ILC articles on state responsibility, relating to the attribution of a conduct to a state).

that the actions of Hezbollah have, in principle, generated the threat to the peace, while Israel's role was considered as more ambiguous, at least from a normative standpoint. It needs therefore to be explored, whether Israel's attack against Hezbollah constituted a hegemonic intervention that had the purpose to restore peace in the region.

First, there are clear indications that Israel's military action in 2006 grossly violated the principle of proportionality. Second, the United Nations, not least the ICJ,[151] had stressed the responsibility of this state for major violations of international law that have contributed to the worsening of the overall situation in the Middle East. Moreover, Israel cannot seriously claim the authority of enforcing reform in an Arab country. Third, taking into account Hezbollah's participation in the Lebanese political system,[152] it is not clear, whether the organization's activities can be positioned within the rationale of the system of terror, as defined above.[153] If Hezbollah acts within the decentralized military system,[154] and not within the terror system, the conflict may have only regional impact and significance, which, despite its complexity, may, in the assessment of the Security Council, not necessarily constitute a global threat.

UNSC Resolution 1701/2006 was adopted at the conclusion of the armed conflict and determined that the situation in Lebanon constituted a threat to international peace and security.[155] The threat had three distinct components of tension that culminated in the Lebanese crisis of 2006: (1) the three-decades old conflict between Israel and Lebanon;[156] (2) the Syrian intervention in Lebanon;[157] and (3) the armed conflict in the summer of 2006 itself.[158] .

The first element of the threat to the peace relates to the military intervention of Israel in Lebanon that peaked with the 1982 war and its aftermath. Resolution 1701 recalled Resolution

151. *See* Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131, ¶ 163 (July 9, 2004).

152. *Supra* note 150.

153. *Supra,* Section IA.

154. *Id.*

155. S.C. Res. 1701, pmbl. ¶ 10 , U.N. Doc. S/RES/1701 (Aug. 11, 2006).

156. *Id.*, referencing S.C. Res. 425, U.N. Doc. S/RES/425 (Mar. 19, 1978), S.C. Res. 426, U.N. Doc S/RES/426 (Mar. 19, 1978), and S.C. Res. 520, U.N. Doc. S/RES/520 (Sept. 17, 1982).

157. *Id.*, referencing to S.C. Res. 1559, U.N. Doc S/RES/1559 (Sept. 2, 2004) and S.C. Res. 1680, U.N. Doc. S/RES/1680 (May 17, 2006).

158. *Id.* pmbl. ¶¶ 2-3.

425/1978, 426/1978, 520/1982, in which the Council had condemned the Israeli military activities in Lebanon and its incursions into Beirut, and had called upon Israel to cease its military action against Lebanon.[159] Although the President of the Security Council welcomed the withdrawal of Israel from Southern Lebanon in 2000,[160] the restoration of peace in the area had not been fully achieved; the mandate of UNIFIL was extended therefore over a number of years. In the last extension before the 2006 war, both the UN Security Council and the UN Secretary General determined that the armed activities of Hezbollah across the Israeli-Lebanese border were predominantly responsible for the ongoing threat to the peace.[161] The Council decided that UNIFIL's mandate should be extended until the end of July 2006, and that the peacekeepers should focus on the restoration of peace in the area, after having fulfilled the rest of their mandate, and having ensured the withdrawal of the Israeli troops from Lebanon.[162] The Council condemned "all acts of violence, including the latest serious incidents across the Blue Line initiated from the Lebanese side,"[163] reiterated "its call upon the Government of Lebanon to fully extend and exercise its sole and effective authority throughout the South,"[164] and encouraged UNIFIL to assist the Lebanese Government to assert this authority.[165] Therefore, the initial threat, as determined by UNSC Resolutions 425 and 426/1978, had mutated: the restoration of peace was obstructed by the armed activities of Hezbollah.

The second source of the threat to the peace was related to the intervention of Syria in Lebanon. In Resolution 1559/2004, the Council declared "its support for a free and fair electoral process in Lebanon's upcoming presidential election conducted according to Lebanese constitutional rules devised without foreign interference or influence,"[166] and noted its grave concern due to "the continued presence of armed militias in Lebanon,

159. *Id.* pmbl. ¶ 1.
160. Statement by the President of the Security Council, U.N. Doc. S/PRST/2000/21 (June 18, 2000).
161. S.C. Res. 1655, pmbl., U.N. Doc. S/RES/1655 (Jan. 31, 2006); *Report of the Secretary-General on the United Nations Interim Force in Lebanon*, U.N. Doc. S/2006/26 (Jan. 18, 2006).
162. S.C. Res. 1655, *supra* note 161, pmbl. ¶ 3.
163. *Id.* oper. part ¶ 4.
164. *Id.* ¶ 6.
165. *Id.* ¶ 10.
166. S.C. Res. 1559, *supra* note 157, ¶ 5.

which prevent the Lebanese Government from exercising its full sovereignty over all Lebanese territory."[167] It also noted "the determination of Lebanon to ensure the withdrawal of all non-Lebanese forces from Lebanon."[168] The Resolution called for the "disbanding and disarmament of all Lebanese and non-Lebanese militias."[169]

Later, in Resolution 1680/2006, the Council asked Syria to contribute to the restoration of peace by delineating its common border, and establishing diplomatic relations, with Lebanon. The Council stressed that some of the provisions of Resolution 1559/2004 had not been complied with, namely, *inter alia*, the "disbanding and disarming of Lebanese and non-Lebanese militias [and] the extension of the control of the Government of Lebanon over all its territory."[170] The Council also commended "the Government of Lebanon for undertaking measures against movements of arms into Lebanese territory and call[ed] on the Government of Syria to take similar measures."[171]

It can be inferred from the above that the presence and activities of the Hezbollah and Syria constitute major elements of the threat to the peace in the area; the disarmament of militias and the termination of movements of arms to these militias are measures considered by the Council as promoting the restoration of peace. The objective of the resolutions was to restore the full control of the Lebanese Government in the country through the disarmament of the various militias that were provoking armed clashes with Israel on a regular basis.

The third element of the threat, as determined by UNSC Resolution 1701/2006 was directly related with the 2006 armed conflict. The Council attributed to Hezbollah the responsibility for the conflict by expressing "its utmost concern at the continuing escalation of hostilities in Lebanon and in Israel since Hezbollah's attack on Israel on 12 July 2006."[172] It also emphasized "the need for an end to violence" and "the need to address urgently the causes that have given rise to the current crisis, including by the unconditional release of the abducted Israeli soldiers."[173] Thus, on the one hand, the Council did not

167. *Id.* pmbl. ¶ 4.
168. *Id.* pmbl. ¶ 3.
169. *Id.* oper. part ¶ 3 .
170. S.C. Res. 1680, *supra* note 157, pmbl. ¶ 3.
171. *Id.* oper. part ¶ 5.
172. S.C. Res. 1701, *supra* note 155, pmbl. ¶ 2.
173. *Id.* pmbl. ¶ 3.

directly consider the issue of the release of the soldier as a matter of negotiations; on the other, it "encouraged" the efforts for settling the issues of the Lebanese prisoners in Israel.[174] Far from being expressions of "comity," these provisions are indicative for the attribution of responsibility for the threat to the peace. Moreover, the Council welcomed the commitment of the Lebanese Government "to extend its authority over its territory, through its own *legitimate* armed forces."[175] Here, the Council directly stressed the "illegitimacy" of all other armed groups, including the Hezbollah.

Resolution 1701/2006 did not explicitly determine the Israeli action as an "invasion" or "aggression," but as an element of the threat to the peace, as it acknowledged that the armed conflict itself "caused hundreds of deaths and injuries on both sides."[176] Moreover, the preamble of the resolution referred to the Statement of the President of the Council of July 30, 2006, in which the Council condemned the dozens of killings of civilians in Qana by Israel.[177] The Council also called for an immediate cessation of all Israeli "offensive military operations."[178] One possible interpretation would be that the Israeli military operation has been "offensive" as a whole. However, the provision was criticized by the representative of Lebanon for the exactly opposite reason, namely, because it allegedly indicated that Israel should cease only the "offensive" and not the "defensive" operations, and thus permitted Israel to use force, under conditions, without violating its obligations under the Resolution.[179]

The Israeli armed attack has indeed been deemed an element of the threat to the peace in the context of the Lebanese crisis. First, this is evidenced by the obligation of Israel to withdraw its armed forces from the country; unlike the intervening forces in Kosovo or Iraq, the Israeli army is not acceptable to the Security Council as a stabilizing force in Lebanon. Second, the Israeli attack undermined another objective of the international community, the restoration of the

174. *Id.* pmbl. ¶ 4.
175. *Id.* pmbl. ¶ 5 (emphasis added).
176. *Id.* pmbl. ¶ 2.
177. *Id.* pmbl. ¶ 1; Statement by the President of the Security Council, U.N. Doc. S/PRST/2006/35 (July 30, 2006).
178. S.C. Res. 1701, *supra* note 155, ¶ 1.
179. *See* U.N. SCOR, 61st Sess., 5508th mtg. at 4, U.N. Doc. S/PV.5508 (Aug. 8, 2006); U.N. SCOR, 61st Sess., 5511th mtg. at 19, U.N. Doc. S/PV.5511 (Aug. 11, 2006).

authority of the Lebanese government, by affecting its capacity to exercise effective control over the country. The Israeli intervention thus undercut the prospects of the long-term reform of the Lebanese political system, and strengthened the polarization of Lebanese society.[180]

As a consequence of the Israeli action, the Security Council took measures to contain the activities of Hezbollah. Under the terms of Security Council Resolution 1701, UNIFIL was strengthened through the addition of new forces and its mandate was enhanced. Lebanon agreed to deploy an armed force of 15,000 men in the South that would displace the Hezbollah from the Lebanese-Israeli border.[181] Moreover, Hezbollah became a target of sanctions under a Chapter VII resolution: the Council required "the disarmament of all armed groups in Lebanon, so that . . . there will be no weapons or authority in Lebanon other than that of the Lebanese State" and that there should be "no sales or supply of arms and related materiel to Lebanon except as authorized by its Government."[182] The resolution established that UNIFIL should assist the Lebanese government "to exercise its authority throughout the territory" and "to ensure that its area of operations is not utilized for hostile activities of any kind."[183] The Government of Lebanon was called upon "to secure its borders and other entry points to prevent the entry in Lebanon without its consent of arms or related materiel,"[184] and all states were required to impose an arms embargo against Hezbollah.[185] It remains to be seen whether and to what extent these provisions are effectively implemented, and what impact they will have on the volatile socio-political environment of the region.

In any event, these measures did not confer upon the Israeli military operation the character of a hegemonic intervention, since the use of force by Israel lacked any vision with respect to repressing the alleged terrorist threat, or to providing an impetus for domestic reform in Lebanon. Although Hezbollah's illegal actions triggered the armed conflict and its long-term aggressive strategy constitutes a major destabilizing factor in

180. On the complex situation in Lebanon after the 2006 armed conflict, see Paul Salem, *The Future of Lebanon*, 85 FOREIGN AFF. 6., 13 (2006).
181. S.C. Res. 1701, *supra* note 155, pmbl. ¶ 8.
182. *Id.* oper. part ¶ 8.
183. *Id.* ¶ 12.
184. *Id.* ¶ 14.
185. *Id.* ¶ 15.

the region, the Security Council positioned Israel's actions squarely within the network of actions that constituted the threat to peace and stability.[186] There is no indication in Security Council Resolution 1701 that the international community recognized any privileged or follow-up role for Israel in the Lebanese domestic affairs. Under these circumstances, the conclusion can be drawn Israel exercised non-proportionate armed reprisals or countermeasures[187] against Lebanon, triggered by Hezbollah's attack on July 12, 2006.[188] However, Israel is under no obligation to pay compensation for damages inflicted on Hezbollah during the armed conflict.

III. LEGITIMACY OF HEGEMONIC INTERVENTION: A GENERAL PRINCIPLE OF INTERNATIONAL LEGAL RELATIONS

This section presents a provisional sketch of the legal nature and legitimacy of hegemonic intervention, as it appears in international practice. Despite considerable ambiguity, and although the various elements of the principle are still in flux, its fundamental features are visible and real.

As the hegemonic use of force serves the attainment of the purposes of the international community, its legal nature can be explained as a hybrid form of "collective enforcement" and individual self-help, since the threat to the peace affects both the international interest and the interests of the intervening states. The form of "forcible countermeasures for the restoration of peace"[189] broadly corresponds to the rationale of the hegemonic intervention, even if particular aspects of the interventions could be viewed under alternative legal bases.[190]

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186. *See supra* note 177. As a consequence, Israel had to withdraw all of its forces from Lebanon within a short period of time. *See* S.C. Res. 1701, *supra* note 155, ¶ 2.

187. On this form of the use of force, see Oil Platforms (Islamic Republic of Iran v. U.S.), 2003 I.C.J. 161, 331 (Nov. 6, 2003) (Simma J, separate opinion, ¶¶ 12-14).

188. S.C. Res. 1701, *supra* note 181, pmbl. ¶ 2. On the implementation of the resolution, see the *Report of the Secretary-General on the Implementation of Security Council Resolution 1701 (2006)*, U.N. Doc. S/2007/147 (Mar. 14, 2007).

189. This form combines the notion of countermeasures not involving the use of force, G.A. Res. 56/83, Annex, arts. 49-54, *supra* note 43, with the notion of enforcement measures involving the use of force, U.N. Charter art. 42, in cases in which there is no explicit authorization by the UNSC. *See* also Cassese, *Ex iniuria ius oritur*, *supra* note 75; Cassese, *A Follow-Up*, *supra* note 75.

190. *Cf.*, *e.g.*, S.C. Res. 661, pmbl. ¶¶ 5-7, U.N. Doc. S/RES/661 (Aug. 6, 1990) (stating that the Security Council acted under Chapter VII while simultaneously

Overall, these parallel and partial legal bases strengthen the rationale of the hegemonic intervention, and lend support to its legitimacy.

The hegemonic intervention does not generate international state responsibility for the intervening powers, because this would be inconsistent with Security Council resolutions and with the broader international legal interest. Reparations in favor of the target state or entity, and re-establishment of the *status-quo ante* would amount to the restoration of the threat to the peace. Instead, the intervening powers have the obligation to promote state-building and reconstruction of the territory through structural reform and through significant financial contributions. This is the logical consequence of an enforcement action that claims to safeguard global interests and promote domestic reform. If the intervening powers fail to provide the necessary assistance for reconstruction and take the necessary measures for the control of the source of the risks in the territory, the use of force may then lose its legitimacy and its privileged status in international law.

These features already create a predictable pattern of response of the international community toward major risks. It can be expected that, as long as the potential success of the hegemonic intervention would make everyone better off, and the potential failure would make everyone irreversibly worse off, the UN system would be induced to confer legitimacy to the hegemonic powers. This situation might change, if the "risk of failure" of the hegemonic use of force is transformed into quasi-certainty, or is radically transformed into an instrument of direct political domination by the major powers. That might be the case if the hegemonic powers change their policies and instead of "state-building," they orient themselves to direct and long-term occupation and administration of foreign territories.

The hegemonic intervention would then have lost its *raison-d'être* and would have been transformed into a wholly illegal and illegitimate use of force: the intervention would not provide support for the infrastructure of global societal pluralism, but would attempt to establish a hierarchically organized global political system equivalent to that of the colonial era. Instead of providing any support for imperialism of that kind, the member states of the Security Council might then invoke blocking the

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affirming the right of individual or collective self-defense under Article 51 of the United Nations Charter).

operation of the organ as the best alternative for the maintenance of international peace.

John Yoo developed a concept for intervention based on an international public goods approach that deserves some discussion. Yoo criticizes "imminence" as a necessary condition for the legitimate exercise of self-defense. Instead, he adopts the criterion of risk and stresses that the use of force by a state should be assessed "against the expected harm of an attack, as measured by probability and magnitude of harm."[191] He considers that the international legal system has developed a norm that states may use force in cases of breakdown of order, terrorism, or humanitarian crises without Security Council authorization.[192] He argues that such actions "are then judged ex post in the form of other nations' decisions to recognize the results of the intervention or to assist in bearing the cost."[193] He advocates a reform of the UN law on the use of force that would loosen the existing system and replace the *ex ante* rules on the use of force by *ex post* standards enabling the balancing of the relevant factors.[194]

Though Yoo seems to construe a risk-oriented interpretation and critique of international law, he, in fact, negates risk as uncertainty. By considering the risk of humanitarian crises or terrorist attacks as an ontologically given factor to be detected and affirmed by the intervening state, he normatively treats it as an ascertainable fact, instead of perceiving it as an assessment: the risk is not "out there", but in the decision itself! Thus, he disregards the complexity of risk cognizance and risk management as a collective communication process within the international community. It is questionable whether his categories would enable a distinction, even *ex post*, between a hegemonic intervention and a regional conflict involving the use of force against allegedly terrorist groups. Moreover, he does not take the inherent risks of hegemonic intervention into account; these risks are mirrored in the normative indeterminacy of the institution of "forcible countermeasures for the restoration of peace." Furthermore, if Yoo's balancing standard on the use of force were to be understood as a new primary rule of international law explicitly

191. John Yoo, *Force Rules: UN Reform and Intervention*, 6 CHI. J. INT'L L. 641, 652 (2005-2006).
192. *Id.* at 657.
193. *Id.*
194. *Id.* at 653.

conferring authority to intervene under the UN Charter, it would create a factual presumption in favour of the legality of intervention and first use of force. An *ex post* standard might indeed function, but only under the presumption that the hegemonic intervention is considered *prima facie* illegal.

It does not seem probable that the hegemonic intervention and the forcible countermeasures for the restoration of peace will assume the status of an enabling rule of international law any time soon. Among the main factors obstructing the emergence of new norms in the area of the law of the use of force is not only the lack of state consent, but the lack of *opinio juris* as well as the worldwide societal protest and scandalization due to the collateral and predictable violations of the international humanitarian law being the fallout of the hegemonic project.[195] The generally critical stance of the academic community of international law, and the inherent indeterminacy of the hegemonic intervention itself, are additional factors speaking against the stabilization of a new norm of international law. Last, but not least, the complexity of the objectives of the intervening powers, the high cost of the intervention, the long-term commitment of resources, the lack of capacity or willingness of local actors to cooperate with the hegemonic powers or with the international community for the restoration of peace, indicate the limits of the hegemonic intervention as an emerging institution of our era.[196] We may assume that another principal reason for the constrictions in the effectiveness of the hegemonic intervention is the enormity of the task of reforming the social structures at the periphery of the world society by force, or against the will of the local populations. Though evolution cannot be predicted, the recognition of the hegemonic use of force as a norm of international law seems to be in dead-end. Reform of the respective rules of the UN Charter, or codification of the existing practice, seems unlikely under these conditions.

However, hegemonic intervention is ingrained in the power

195. *See supra* Section IB(2) *in fine*.

196. On the challenges of the transition, see indicatively William Maley, *Democratic Governance and Post-Conflict Transitions*, 6 CHI. J. OF INT'L L. 683 (2005-2006); JAMES A. BAKER, III, LEE H. HAMILTON et al., THE IRAQ STUDY GROUP REPORT (2006); Derick W. Brinkerhoff & James B. Mayfield, *Democratic Governance in Iraq? Progress and Peril in Reforming State-Society Relations*, 25 PUB. ADMIN. AND DEV. 59 (2005); Dennis A. Rondinelli & John D. Montgomery, *Regime Change and Nation Building: Can Donors Restore Governance in Post-Conflict States?* 25 PUB. ADMIN. AND DEV. 15 (2005).

structure and in the normative architecture of the contemporary international system as a predictable and legitimate, even if desperate, pattern of response to unexpected eruptions of violence of global reach and to the emergence of mega-risks of similar nature. States need to affirm their authority and sovereignty by ensuring peace and stability through risk prevention; they cannot afford not to act in the face of the escalating and destabilizing activities of transnational actors. The Charter's standard on the law of the use of force faces difficulties to accommodate these new challenges.

Even if the lack of effectiveness leads to the reconsideration of the policies of intervention, in particular, of some aspects of its social engineering pillar, the possibility of undertaking a hegemonic intervention will be present at the horizon of the world community as a threat, a measure of last resort and as a possibility to reckon. A major failure, miscalculation or intelligence shortcoming, or even the catastrophic outcome of a military operation, is not, as such, capable of rendering the hegemonic intervention as interaction pattern in global society normatively obsolete. Since the intervention is legitimate as a risk-prevention mechanism, failure as a possible outcome is already built into the expectation structures of world societal actors.

The preventability of mega-harm arising from decentralized and transnational violence is intimately inter-connected with the eventuality of success or failure of the intervention. If acting under uncertainty is the basis of its legitimacy, then failure alone cannot de-legitimize the institution, but might even strengthen both the awareness of the risk and the need to improve intelligence, information gathering and planning.[197] Erosion of political support for a specific project does not imply erosion of the normative foundations of the hegemonic intervention as a whole, but leads rather to a stronger self-restraint on the part of the intervening powers.

As episodic interaction pattern, the hegemonic intervention has sought and found temporarily a secure place at the evolutionary stage of selection. For the time being, international jurisprudence does not seem to oppose its stabilization at that stage, and this is evidenced by the practice

197. *See* Elizabeth Rindskopf-Parker, *Intelligence and the Use of Force in the War on Terrorism*, 98 AM. SOC'Y INT'L L. PROCS. 147 (2004). *See also* Richard K. Betts, *The New Politics of Intelligence: Will Reforms Work This Time?* 83 FOREIGN AFF. 3., 2 (2004).

of the International Court of Justice. The ICJ did not have the opportunity to rule on the merits of the *Lockerbie* case, and to express itself on the possibility of judicial review of the decisions of the Security Council.[198] Moreover, the Court declined from deciding on the merits of the application of *Yugoslavia against NATO Member States* for the Kosovo intervention,[199] and in the *Oil Platforms* case it decided questions of the use of force on the basis of the bilateral Amity Treaty between Iran and the United States and not directly on the basis of the UN Charter.[200] The *Congo v. Uganda* case demonstrated the nature of predatory regional conflicts,[201] and made the contradistinction to the hegemonic use of force more plausible. Moreover, in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ declared a *non-liquet* with respect to recourse to nuclear strategy "in an extreme circumstance of self-defense, in which the very survival of a State is at stake".[202]

The clear dichotomy between legality and illegality is being progressively displaced by a broader balancing exercise among necessity, proportionality and enforcement of international objectives—but the general presumption is against the legality

198. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), Order, 2003 I.C.J. (Sept. 10, 2003). *See also* Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), Preliminary Objections 1998 I.C.J. 115 (Feb. 27, 1998).

199. Legality of Use of Force (Serb. & Mont. v. Belg.), Preliminary Objections, 2004 I.C.J. 279 (Dec. 15, 2004), and seven other similar cases brought by Yugoslavia against NATO member states. The Court held that it lacked jurisdiction to decide these cases, because at the time of the filing of the applications on April 29, 1999, Serbia and Montenegro was not a member of the United Nations, ¶79. However, in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herzeg. v. Serb. & Mont.), Preliminary Objections, 1996 I.C.J. 595 (July 11, 1996), the Court had decided that it had jurisdiction to entertain the claims of Bosnia and Herzegovina; later, in the same case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herzeg. v. Serb. & Mont.), Judgment, 2007 (Febr. 27, 2007), the Court, rejected Serbia's jurisdictional objection, which was based on the Legality of the Use of Force jurisprudence of 2004,by invoking the *res judicata* of its 1996 judgment (¶ 140)!

200. Oil Platforms (Islamic Republic of Iran v. U.S.), 2003 I.C.J. 161, 326 (November 6, 2003) (*see* the critique of Simma J separate opinion, ¶¶ 5-8).

201. *See* Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. (December 19, 2005).

202. Legality of the Threat or Use of Nuclear Weapons, Adv. Op., 1996 I.C.J. 226, 266, (July 8, 1996) ¶ 105(2)E; *see* also the critique of Achilles Skordas, *Epilegomena* to a Silence: Nuclear Weapons, Terrorism and the Moment of Concern, 6 J. CONFLICT & SEC. L. 191 (2001).

of the hegemonic intervention. The "forcible countermeasures for the restoration of peace" may, however, depending on the balancing exercise among the above normative factors, and considering risk and effectiveness of the operation, reach the threshold of legality in individual cases of hegemonic use of force. This is one of the most significant ramifications of the legitimacy of the hegemonic intervention. Indeed, as the form of forcible countermeasures may overlap with other established exceptions to the prohibition of the use of force (Arts. 42 and 51 of the UN Charter), it may advance their dynamic-evolutionary interpretation, or close gaps. Lastly, an intervention that does not enjoy any legally significant institutional support in the international community is both illegal and illegitimate.

In this sense, the legitimacy of hegemonic intervention should be considered as a general principle of international legal relations. Fragmented, precarious, flexible, as it might be, this principle reflects the foundational uncertainties and the stability deceptions of a pluralistic, non-hierarchical, spontaneous and turbulent global (dis)order.

CONCLUSION

There are strong reasons to consider the use of force against Yugoslavia (1999), Afghanistan (2001) and Iraq (2003) as legally privileged hegemonic interventions that were undertaken with the objective to restore international peace and security. The 2006 Israeli attack against the Hezbollah did not have a similar character, as it is evidenced by the response of the international community. The hegemonic intervention is not an evolutionary achievement, but rather the outcome of stalled evolution of the law of the use of force that has taken the form of a general principle of international legal relations. The practice of the United Nations reveals that the legitimacy of hegemonic intervention depends not so much on what states declare, but on how they interact in international institutions and how they in fact respond to major risks for global stability. Moreover, the hegemonic character of an intervention is not itself a given feature of a conflict, but it evolves together with the ongoing response of the international community over time. Legitimacy or illegitimacy is established by interpretations of international law, including Security Council resolutions, and state and societal practice. The output of this methodological inquiry is more than a purely academic exercise: it may contribute to the

clarification of rights and obligations of the parties involved in an armed conflict, despite the persisting uncertainties with regard to the character of the military operation as legal or illegal. This is, after all, the gain for conceptualizing a "privileged" form of the use of force.