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CONTENTS

European-American Consortium for Legal Education (EACLE)

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The 2003 EACLE organizational meeting was held, on April 26, at Hotel New York in Rotterdam, hosted by the Erasmus University Rotterdam. The meeting was attended by: Prof. Robert Dinerstein (American), Prof. Michael Hayes (Baltimore), Prof. Dr. Ellen Hey (Erasmus; chair), Prof. Dr. Jay Hickey (Hofstra), Prof. Julien Ku (Hofstra), Dr. Math Noortmann (Erasmus), Jarna Petman (Helsinki), Prof. Dr. Tim Sellers (Baltimore) and Prof. Dr. Edward Somers (Gent). Eliska Kutenicova, LLM student at Erasmus, acted as rapporteur.

This report provides a short summary of the history of EACLE and a report of the main points discussed at the EACLE organizational meeting.

I. EACLE

EACLE is a framework for cooperation between six law schools, three of which are located in Europe and three in the United States of America. EACLE aims to foster trans-Atlantic legal cooperation. The participating law schools are those of American University (USA),

the University of Baltimore (USA), Erasmus University Rotterdam (The Netherlands), the University of Ghent (Belgium), the University of Helsinki (Finland), and Hofstra University (USA).

EACLE's main goal is to promote legal education by strengthening trans-Atlantic academic relations. The tools used in the process are divided into three areas: (1) student exchange, (2) faculty exchange, and (3) the organization of an annual seminar.

II. HISTORY

The 'EACLE concept' was conceived in 1999 during discussions between members of staff of the University of Baltimore and the Erasmus University. The idea was to establish a framework for mutual cooperation in which a limited number of universities would participate. The candidates for inclusion in the framework were chosen from among law schools that had already collaborated in the past. The underlying idea was to build upon already existing contacts and to take them one step further by incorporating subsequent cooperation into a semi-institutionalized flexible framework.

The mission statement of the EACLE includes the promotion of high quality legal education and research within a flexible framework. The concept of flexibility guides cooperation within the Consortium and enables the Consortium to adapt to the needs of present and future participants.

EACLE

The first official EACLE meeting and seminar were to have been held in Rotterdam in September 2001. These gatherings had to be postponed due to the unfortunate events of September 11 of that year. The first meeting and seminar were instead held in Baltimore in 2002, with a second meeting and seminar being held in Rotterdam in 2003. During the academic year 2002/2003 staff exchange took place and further preparations for student exchanges were made, to be implemented during the academic year 2003/2004.

III. ACTIVITIES

Three activities form the core of the Consortium's business: faculty exchange, student exchange and a regular annual conference. Each of these activities is discussed briefly below.

A. Student Exchange

Bearing in mind the importance of intercultural and inter-academic experience for students, an important part of EACLE's work is to be directed at the establishment of a functioning regular sustainable student exchange network. The main goal is to provide students with as many possibilities for carrying out part of their studies abroad as possible.

Student-exchange will take place on the basis of the formula that per year each law school accepts up to two students from its partner law school for the duration of a

semester. Students participating in such exchanges shall not be charged a tuition fee by their partner institutions. Each year pairs of one American and one European law school are defined. Students will be exchanged between these two institutions. Ideally, student exchanges all take place during the second semester. For the academic year 2003/2004 it was agreed that each participating institution will accept two students. This agreement does not preclude the possibility of two participating law schools negotiating further student exchanges on a bilateral basis. It was agreed that it would not be problematic if a participating school was a 'student-exporter' one year and as 'student- importer' the next year. The academic year 2003/2004 is the first year in which student-exchanges will take place. The following institutions have been paired to give effect to student exchange during the academic year 2003/2004: American and Helsinki, Baltimore and Erasmus and Hofstra and Ghent.

The home institution selects the students for the exchange, taking into account that students must have completed a significant part of their legal studies in order to be able to profit from an exchange. No tuition fee is charged overseas for students engaged in the exchange, while students are expected to cover all of their travel and living expenses.

An important issue in relation to student exchange is the recognition of credits earned at the host institution. Recent changes in the rules of the American Bar Association (ABA) have facilitated recognition of such credits: ABA pre-approval of a study abroad program is no longer required for small-scale exchanges. Grades,

however, are still not transferable; instead a 'pass' or 'fail' is marked on the record.

B. Faculty Exchange

In order to promote academic cooperation, encourage research, and expose students to various methods of teaching, regular exchange of faculty members has been one of the essential forms of cooperation within the EACLE framework. The idea is for one European university and one corresponding American university to exchange faculty members on reciprocal basis, for a limited duration ranging from few weeks to several months. The partner universities shall rotate annually and, in principle, shall be the same as those for student exchange.

The scope of the activities performed by the visiting professor depends on the demands and requirements of the host institution as well as his/her skills. Activities can include teaching courses (possibilities include teaching an entire course during the whole semester, giving several lectures within different courses, teaching in conjunction with the counterpart, teaching undergraduate, graduate, and LL.M. course), conducting workshops for faculty members, undertaking research, contributing to common projects as well as further academic cooperation. Preferably faculty exchanges should take place during the fall semester so as to have the output ready prior to the annual EACLE seminar in the spring.

Each home institution covers the traveling expenses of its members of staff engaged in the exchange. The host institution covers the cost of accommodation, subject to the proviso that this only covers shorter stays. The host institution is not required to provide remuneration for the activities conducted by the guest staff member. In exceptional cases, such as for example teaching in an L.L.M. program or teaching a full course or where the exchange is not reciprocated arrangements may be made to pay the visiting staff.

In 2002, the exchange of faculty members was undertaken between Erasmus and American, Ghent and Baltimore, Helsinki and Hofstra. The agreed pairing for academic year 2003/2004, in line with that, for student exchange is as follows: American and Helsinki, Baltimore and Erasmus, and Hofstra and Ghent.

C. Annual Seminars

The third element of cooperation within the EACLE framework consists of an annual academic seminar. Seminars take place in May and usually last one day. A selected number of speakers, from the participating institutions, address issues related to the topic of the seminar, with other members of staff of the participating institutions as well as additional faculty members of the hosting institution taking part in discussions.

The integrating factor between the academic exchange of faculty members and the annual seminar should ideally be the topic of the seminar. The idea is to select a topic for the annual seminar and to also focus the content of the staff-exchange on that topic. This means that the topic has to be broad enough to attract

experts from various fields of law and yet, narrow enough to focus the discussion on a particular issue. So far the following topics have been chosen for the seminar: in 2002 "federalism" (Baltimore); in 2003 "security" (Erasmus). The institution that hosts the seminar proposes a topic for the seminar. The proceedings of both seminars will be published in *Ius Gentium*.

As stated above, seminars usually take place in the spring, back-to-back with the EACLE organizational meeting. This allows an evaluation of the current academic year to take place and planning for the next year to begin.

The agreed financial arrangements for the seminar are as follows. The host institution covers the expenses for accommodation for up to two people per participating institution. While the participation of more than two members of staff per university is encouraged, the additional expenses involved in their accommodation are to be covered by the home institution. Their home institutions cover travel expenses for all participants.

Hofstra University hosted the third EACLE seminar, on May 21, 2004. The topic for the 2004 seminar was "Evolving legal personality". The proceedings of the third seminar will probably be published in the *Hofstra Law and Policy Symposium*.

It was agreed that in future, it might be viable to explore the possibility of developing a self-standing publication for EACLE in which seminar proceedings as well as other papers can be published.

IV. FUTURE EXPANSION OF THE CONSORTIUM

Participating institutions will explore the possibility of expanding the Consortium with one law school from each of the two continents. On the European side, the expansion should take place in southern or eastern direction (eastwards being preferred); on the American side expansion in westerly direction was preferred. Several potential new participants were discussed. Proposals for candidates will be made for a new American partner by the American participants and for a new European partner by the European participants.

In addition, Hofstra University has proposed the establishment of an EACLE website that could include papers presented at EACLE seminars, summary reports, links to the participating laws schools and the LL.M. programs offered by these law schools. The website could also serve as a means for sharing information among participants more in general. Hofstra and American offered to explore the possibility of their IT office taking on tasks in this respect. It was agreed that Hofstra would take the initiative.

The importance of smooth processes for obtaining working permits and students visas for those engaged in the exchange programs was emphasized.

The possibility of establishing an in-depth program of exchanges concluded with a combined or joint degree is to be further explored.

EACLE

Preemptive War and The Legal Limits of National Security Policy

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> We fight, as we always fight, for a just peace – a peace that favors liberty. We will defend the peace against the threats from terrorists and tyrants. We will preserve the peace by building good relations among the great powers. And we will extend the peace by encouraging free and open societies on every continent.[1]

Terrorism has always been an ominous threat lurking in our midst, but before September 11, 2001 many Americans could get through most days without thinking about when the next attack would occur. Post 9-11, American lifestyles have changed dramatically. United States citizens once enjoyed comparative immunity from pain and suffering. Prior to 9-11, Americans could effectively shelter themselves from the rest of the world oblivious to the strife that exists elsewhere. But all the material comforts of the United States could not keep its citizens from facing the hor-

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[1] George W. Bush, *The National Security Strategy of the United States of America* 1(Sept. 17, 2002) hereinafter *Strategy.*

rific events of September 11, 2001. That day forced the United States as a society to confront the evil that exists in this world and the reality that life is too precious and vulnerable to take for granted.

In September, 2002, President George W. Bush introduced a new National Security Strategy to deal with the unconventional way of fighting in which terrorists specialize.[2] President Bush said that, "Rogue states and terrorists do not seek to attack us using conventional means… Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction."[3] The President proposed to respond to terrorism by going on the offensive against terrorists.[4] The President proposed to strike the terrorists first, before they kill innocent and unsuspecting victims.[5]

This discussion will examine the constitutionality of the United States National Security Strategy ("Strategy") published by President Bush on September 17, 2002, and its implications in international law. Although his strategy sounds noble, the "preemptive strike" method that it proposes has stirred up controversy, both within the United States and in the broader international community.

Because the United States Constitution specifically empowers Congress to define and punish felonies against the law of nations,[6] the constitutionality of the President's strategy is questionable. The President's

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[2] *Id.*
[3] *Id.* at 15.
[4] *Id.*
[5] *Id.*
[6] U.S. CONST. ART. I, § 8, Cl. 10

authority to define and punish terrorism, a felony against the law of nations, derives entirely from authority delegated by Congress.[7] If Congress has neither delegated this authority to the president, nor itself redefined the customary international laws concerning the use force, then the Bush doctrine is illegal and contrary to the United States Constitution, regardless of whether the doctrine is an effective national security strategy.

Even if Congress has delegated power to punish felonies against the law of nations to the executive branch, there are still dangers that could result from the Bush doctrine's implementation. In evaluating the dangers of implementation of the Bush doctrine, this discussion will describe the Bush Doctrine's impact on international relationships.

The next part of this discussion will consider the background of the Bush doctrine, acceptable uses of force under international law, the Delegation Doctrine, International Emergency Economic Powers Act (IEEPA), the War Powers Resolution (WPR), and former President Reagan's approach to national security. Part II of this discussion will analyze the constitutionality of the Bush Doctrine based on the background provided in Part I. Part III will explain what should follow.

I. BACKGROUND

A. The "Bush Doctrine"

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[7] *See infra* Part I.B.

The "Bush Doctrine" is the preemptive strike concept enumerated in President George W. Bush's National Security Strategy.[8] The Bush doctrine changed the United States' usual stance that warfare should always be purely a defensive response to the use of force, into a more proactive policy of preemptively striking[9] nations that harbor terrorists[10] and/or produce weapons of mass destruction.[11]

The President's strategy has its roots in the first Bush administration.[12] After the Persian Gulf War, officials in the administration of President George H.W. Bush "drafted a policy statement asserting that the United States reserved the right to use preemptive strikes to stop rogue states from developing weapons of mass destruction."[13]

President Bush stated that he wanted the United States to target rogue states that manufacture weapons of mass destruction,[14] nations that harbor terrorists,[15] and the terrorists[16] themselves. In his National Security Strategy, President Bush acknowledged that the customary international attitude[17] toward preemp-

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[8] *See generally Strategy.*
[9] *Id.* at 15.
[10] *Id.* at 5.
[11] *Id.* at 14.
[12] Michael Dobbs, *North Korea Tests Bush's Policy of Preemption* WASH. POST, January 6, 2003, at A1.
[13] *Id.* citing the Defense Planning Guidance draft by Paul D. Wolfowitz.
[14] *Strategy* at 15.
[15] *Id.* at 5.
[16] *Id.*
[17] *See* Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 Colum. J. Transnat. L. 293 (1991). "Customary international law, and event he interpretation of a treaty may … change in response to new needs and new insights." *Id.* at 311.

tive strikes has been that such strikes are permissible only in the face of an imminent threat, but argued that changed circumstances require a more active response.[18]

B. Ways in which a State May Engage in the Use of Force Under International Law

Under customary international law, long before the signing of the United Nations Charter, a doctrine developed in the case of *The Caroline*[19] governing the rules of warfare regarding self-defense against a foreign threat. The Caroline itself was an American ship set on fire and sunk by British soldiers during the Canadian rebellion of 1837.[20] The Caroline's crew were American citizens and several died.[21] Later, when one of the British instigators was arrested and tried in New York, the British demanded his release, claiming that the use of force was a necessary act of self-defense committed in service of Great Britain.[22]

The *Caroline* incident inspired a series of letters between Daniel Webster, United States Secretary of State and the British Foreign Minister.[23] Both the British and United States governments agreed that acts of self-defense may sometimes warrant the use of

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[18] *Strategy* at 15.
[19] "The Caroline," 2 MOORE, DIGEST OF INTERNATIONAL LAW (1906), HYDE, INTERNATIONAL LAW 239 (1945).
[20] *Id.*
[21] *Id.*
[22] People v. McLeod, 25 Wend. 483, 1841 N.Y. LEXIS 240 (1841). The soldier was then tried and acquitted anyway. *Id*.
[23] "The Caroline," 2 MOORE, DIGEST OF INTERNATIONAL LAW (1906), HYDE, INTERNATIONAL LAW 239 (1945).

force.[24] The United States, however, denied that the circumstances justified the force used in sinking the Caroline.[25] In his correspondence with the British Minister regarding the appropriateness of the use of force, Secretary of State Webster limited the need for self-defense to situations in which the necessity is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[26]

The Paquete Habana[27] case before the United States Supreme Court established that when there is a lack of specific instruction from the executive or legislative, United States courts will determine the content of international law by looking to internationally recognized sources of law.[28] Such factors include international customs, the writings of learned commentators and the opinions of courts.[29]

The United States Court of Appeals for the Second Circuit in the case of *Filartiga v. Pena-Irala,*[30] still followed the *Paquete Habana* rationale by noting that modern authorities also cite the same sources for the "law of nations."[31]

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[24] *Id.*
[25] *Id.*
[26] "The Caroline," 2 MOORE, DIGEST OF INTERNATIONAL LAW (1906), HYDE, INTERNATIONAL LAW 239 (1945)(citing Mr. Webster's letter to the British Minister on August 6, 1942).
[27] 175 U.S. 677 (1900).
[28] *Id.*
[29] *Id.*
[30] 630 F..2d 876, (2d Cir. 1980).
[31] *Id*. at 881 (citing the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, Art. 38, June 26, 1945). These sources are laid out in Article 38 of the Statute of the International Court of Justice, which mentions:

> 1. "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states";

In a separate concurring opinion in the case of *Tel-Oren v. Libyan Arab Republic*,[32] Judge Edwards recognized that the "law of nations" includes internationally-accepted norms that prohibit such acts as state-practiced, encouraged, or condoned: "(a) genocide; (b) slavery or [the] slave trade; (c) the murder or causing the disappearance of individuals; (d) torture or other cruel, inhuman or degrading treatment or punishment; (e) prolonged arbitrary detention; (f) systematic racial discrimination; (g) consistent patterns of gross violations of internationally recognized human rights."[33]

In the case of the *Charming Betsy*,[34] the United States Supreme Court established the doctrine that customary international law and statutes will always be interpreted, as much as possible, so that they do not conflict.[35] The Court made it clear that so far as the judiciary is concerned, Congress can define the content of the law of nations.[36]

In the present day, more explicit restriction on the

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2. "international custom, as evidence of a general practice accepted as law";

3. "the general principles of law recognized by civilized nations";

4. "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law".

[32] 726 F.2d 774, 777 (D.C. Cir. 1984).

[33] *Id. at* 781 *citing* RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REVISED) §702.

[34] Murray v. The Schooner Charming Betsy, 6 U.S. 64 (1804).

[35] *Id.*

[36] *Id.*

use of force can be found in the United Nations Charter and the United States Constitution. Under the United Nations Charter, the use of force is prohibited against the "territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[37] The use of force is explicitly permitted, however, in situations requiring self-defense.[38]

The international community did not respond warmly to the United States' decision to strike preemptively against Iraq. For instance, the German justice minister likened President Bush's policies in Iraq, to those of Adolf Hitler.[39] The United States was also criticized for targeting Iraq when a seemingly more significant threat was being carried out by North Korea's withdrawal from the nuclear Non-Proliferation Treaty.[40] President Bush had identified three nations as the axis of evil, including North Korea, in his State of the Union address in 2002.[41] Critics speculated that the President focused on Iraq because it was an easier target than North Korea.[42] United States officials maintained that "different

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[37] United Nations Charter Art. 2(4).
[38] United Nations Charter Art. 51. If the United States, for example, intended to engage in the use of force in the name of self-defense, it could do this without violating international law under Art. 51 of the U.N. Charter. In order to be valid under the United States Constitution, however, the United States Congress must declare war or acquiesce to the President's command. U.S. CONST. ART. I, § 8. *See infra* Part I.C.
[39] Richard Wolfe, Haig Simonian and Hugh Williamson, *US-German Relations 'Poisoned' by Hitler Comments*, FINANCIAL TIMES, Sept. 21-22, 2002, at A1.
[40] Michael Dobbs, *North Korea Tests Bush's Policy of Preemption*, WASH. POST, Jan. 6, 2003, at A1.
[41] *Id.*
[42] *Id.*

circumstances require different strategies" as the reason for targeting Iraq rather than North Korea.[43]

C. The Delegation Doctrine

The "delegation doctrine" is the doctrine that although a power was enumerated as belonging to Congress in the United States Constitution, Congress has the authority to transfer some of that power to other branches of government. [44]

In *Field v. Clark*,[45] the Supreme Court held that Congress could delegate power regarding tariff and trade legislation.[46] At issue in *Field* was the validity of a federal statute[47] containing a section permitting the president to ignore the provisions of the rest of the act if in his wisdom it seemed best to do so.[48] The act assigned tariffs to sugar, molasses, coffee, tea and hides imported from various places.[49] Section three of

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[43] *Id.*
[44] JOHN H. JACKSON, ET. AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 72 (4th ed., West 2002).
[45] 143 U.S. 649 (1892).
[46] *Id.*
[47] *Id.* The statute's validity was in question because Congress had not properly kept a journal regarding passage of the statute. Appellants argued that even though the act had been signed by the speaker of the house, president of the senate, and United States president, before being handed to the Secretary of State, it was invalid because the house journal did not reflect all the details of the passage required by Art. I, Section 7 of the United States Constitution. The court held that it would be more harmful to create precedent making an act unenforceable because it was not verified properly by parole evidence than to depend upon the fact that the speaker and senate president's signatures are in fact indicative of the act's passage by Congress. *Id.* at 675.
[48] *Id.* at 680.
[49] 143 U.S. 649.

the act permitted the president to suspend the remaining provisions of the act for as long as he deemed necessary.[50]

In *J.W. Hampton v. United States,*[51] the Supreme Court held constitutional a statute that enabled Congress to delegate power authorizing the chief executive to carry out Congress's purpose.[52] The Congressional act in question permitted the president to raise tariffs when he thought it appropriate.[53] J.W. Hampton brought the claim because it was charged two cents higher than the tariff rate prescribed by legislation.[54] The rate had been raised by proclamation of the president.[55] The court held that the rate was valid and the congressional act authorizing the increase was constitutional.[56] Because the President was not enacting legislation, and only embellishing legislation already in existence, he was not in violation of the constitution.[57]

Congress has only delegated authority to the executive in a limited set of circumstances. For example, during wartime, the President has been permitted

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[50] *Id.*
[51] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).
[52] *Id.* at 409.
[53] *Id.* at 401 (citing 6 U.S.C. §315).
[54] *Id.* at 400.
[55] *Id.*
[56] *Id.* at 409. If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under congressional authority. *Id.*
[57] *J.W. Hampton* at 408.

to control transportation systems for needs related to an emergency.[58]

Since the early cases establishing the Delegation Doctrine, the principle has expanded to include situations in which Congress does not specifically set forth legislation permitting the delegation. Such action has been regarded as constitutional as long as Congress has not "occupied the field" in question.[59]

In *Youngstown Sheet & Tube Co. v. Sawyer,*[60] President Harry S. Truman was found to have exceeded his legitimate powers when he attempted to seize steel mills during a strike.[61] Steel workers throughout the country announced their intention to strike after several months of negotiations between the United Steel-workers' Union and mill management.[62]

President Truman issued an executive order to the Secretary of Commerce to take control of most of the steel mills nationwide, immediately, and summoned all the steel-workers back to work.[63] The steel com-

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[58] 10 U.S.C.A. §2644 (2004), which states:

> In time of war, the President, through the Secretary of Defense, may take possession and assume control of all or part of any system of transportation to transport troops, war material, and equipment, or for other purposes related to the emergency. So far as necessary, he may use the system to the exclusion of other traffic. *Id.*

[59] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (holding that Congress has power over commerce and has not delegated that power to the president).

[60] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[61] *See Id.*

[62] *Id.* at 582-83.

[63] *Youngstown* at 583 (citing Executive Order 10340).

panies went to the district court seeking a preliminary injunction to stop the Secretary of Commerce from carrying out the President's executive order, complaining that the President's actions were unconstitutional and amounted to an act of legislation.[64]

The government argued that as Commander-in-Chief of the military, the President had implied constitutional authority to protect the national security of the United States, which would surely be adversely affected if the steel industry were shut down for any length of time.[65] Notwithstanding the President's capacity as Commander-in-Chief, and his reports to Congress of his action concerning the steel workers' strike, the President was found to have crossed the line between executive and legislative powers in his seizure of the steel mills.[66] The Supreme Court found Congress had already "occupied the field" concerning the steel mills[67] and the President was powerless to control the workers or the industry.[68]

D. President Ronald Reagan's National Security Strategy

During the Reagan era, the National Security Strat-

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[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* at 587. Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities. *Id.*
[68] *Id.*

egy reflected United States' interests at the time.

> The United States, in cooperation with its allies, must seek to deter any aggression that could threaten that security and, should deterrence fail, must be prepared to repel or defeat any military attack and end the conflict on terms favorable to the United States, its interests, and its allies.[69]

The Reagan administration set goals of deterrence, not attack. Reagan's strategy stated the goal was specifically "[t]o deter hostile attack on the United States, its citizens, military forces, or allies and to *defeat attack if deterrence fails*."[70] Contrary to the Bush doctrine, President Reagan's goal sought deterrence, not preemption.

In 1988, President Reagan declared that the principle threat to the United States' national security came from the Soviet Union.[71] The Soviet government had sought to create tension among the allied countries.[72] President Reagan's strategy anticipated that the Soviet Union would seek to manipulate public opinion to weaken relations between allied countries and the United States.[73] The Reagan administration also feared that Iran's propensity for terrorist attacks and subversion would ultimately benefit the Soviet Un-

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[69] Ronald Reagan, *The National Security Strategy of the United States of America*, 3 (January 1988) hereinafter *Reagan's Strategy*.
[70] *Id.* at 4 (emphasis added).
[71] *Id.* at 5.
[72] *Id.*
[73] *Id.*

ion.[74]

Even in the face of terrorism and the Cold War, President Reagan's strategy focused on a strong military presence to deter enemies from attacking the United States.[75] His strategy did not include threatening enemies with the use of force before being attacked. It was President Reagan's belief that the United States should not "seek to deal with the threat from the Soviet Union unaided. A system of vigorous alliance is essential to deterrence…."[76]

E. War Powers Resolution and Resulting Challenges to Presidential Action By Individual Members of Congress

In the "War Powers Resolution" (WPR), Congress set forth its intent to fulfill the Constitution's goal of combining efforts of Congress and the President in determining when to enter into military action.[77] Three areas exist in which the President may call military troops into action: "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."[78] Subsequent legislative history of the WPR revealed Congress's intent that the 1973 act be strictly adhered to.[79]

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[74] *Id.*
[75] *Reagan's strategy* at 18.
[76] *Id.*
[77] War Powers Resolution (Pub. L. 93-148, Nov. 7, 1973, 87 Stat. 555).
[78] *Id.*
[79] *See* Adherence to the War Powers Resolution Act Sept. 8, 1980, P.L. 96-342, Title X, § 1008, 94 Stat. 1122. Congress stated that without the Resolution, the "United States foreign and defense policies could be

In 1983, Congress passed a joint resolution[80] regarding the multinational force in Lebanon, authorizing the President to continue offering United States military support to the multinational operation in Lebanon.[81] The resolution required the President to report to Congress no less than once every three months to update Congress on the situation in Lebanon.[82] In the Resolution, Congress gave specific requirements for the information to be included in the quarterly updates.[83] Thus, the President did not act alone in dealing with the conflict in Lebanon.

In *Clinton v. Campbell*,[84] allegations against the President revolved around the President's action in Kosovo in 1999.[85] Under the WPR, the President is required to submit written notice to Congress, within 48 hours of United States' troops entering into con-

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subject to misinterpretation" and that therefore the Resolution must be adhered to strictly.

[80] *See* Multinational Force in Lebanon Resolution Act Oct. 12, 1983, P.L. 98-119, 97 Stat. 805.

[81] *Id.*

[82] *Id.* at Sec. 4.

[83] *Id.* requiring the following items be reported quarterly: (1) the activities being performed by the Multinational Force in Lebanon; (2) the present composition of the Multinational Force in Lebanon, including a description of the responsibilities and deployment of the armed forces of each participating country;(3) the results of efforts to reduce and eventually eliminate the Multinational Force in Lebanon;(4) how continued United States participation in the Multinational Force in Lebanon is advancing United States foreign policy interests in the Middle East; and (5) what progress has occurred toward national political reconciliation among all Lebanese groups.
Id.

[84] 203 F.3d 19 (DC. Cir. 2000).

[85] *Id.*

flict.[86] The Congressional members who brought suit against the President did not dispute that President Clinton complied with the notice requirement.[87] Rather, the members contended that the President violated the WPR when he failed to remove troops after 60 days.[88] Without Congressional approval, the President allowed troops to remain in Kosovo for 79 days.[89] The court dismissed the case on the grounds that the Congressmen had legislative remedies to resolve the issue.[90]

F. Presidential Power Under the International Emergency Economic Powers Act (IEEPA)

In *Dames & Moore v. Regan*[91], the Supreme Court held that President Carter was authorized to make a deal with Iran, exchanging assets for hostages, via IEEPA.[92] The Court explained that Congress cannot possibly anticipate every eventuality for which the President would use the act and therefore Congress's failure expressly to delegate authority to the President did not imply Congress's disapproval of presidential actions taken, particularly, in matters of foreign policy and national security.[93] Ultimately, the Court held that Congress had acquiesced to President Carter's negotiation with Iran, exchanging hostages for Ira-

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[86] *Id.* at 20.
[87] *Id.*
[88] *Id.* Under the WPR, a President must remove troops within 60 days of entering into conflict, or get permission from Congress to continue with the war effort. *Id.*
[89] *Id.*
[90] *Clinton* at 20.
[91] 453 U.S. 654 (1981).
[92] *Id.* at 669-70 (citing 50 U.S.C. §1702).
[93] *Id.* at 678 (citing Haig v. Agee, 453 U.S. 280 (1981)).

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II. ANALYSIS

If President Bush were to order preemptive strikes without first obtaining Congressional approval, he would be violating the United States Constitution in two ways: either (1) by usurping Congress's role in defining and punishing "felonies against the law of nations;"[94] or (2) by usurping Congress's power to declare war.[95] Preemptive war would not, however, in itself violate the United States Constitution, were it properly approved by Congress. Nor would it violate the United Nations Charter, if taken pursuant to a Security Council mandate or as a legitimate act of self-defense.

The tenth clause of Art. I, Sec. 8 of the United States Constitution states that Congress has the power to "define and punish" felonies against the "law of nations."[96] The concept of the "law of nations" reaches back to Hugo Grotius, who said that the "law of nations" is the law that "people ought to obey in the absence of a higher authority."[97]

The Bush doctrine declares that the United States will preemptively strike any enemy that knowingly harbors, or provides aid to, terrorists.[98] By defining the enemies as states that knowingly harbor or provide aid to terrorists, and setting a goal of striking

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[94] U.S. Const. Art. I, § 8, cl. 10.
[95] U.S. Const. Art. I, Sec.8, cl. 11.
[96] U.S. CONST. ART. I, §.8, cl. 10.
[97] LORI F. DAMROSCH, ET AL., INTERNATIONAL LAW CASES AND MATERIALS xxx (4th ed., West 2001).
[98] *See Strategy* at 5.

those enemies preemptively, the President is "defining and punishing" the enemy without proper Congressional authorization.

A. The "Delegation Doctrine" Fails to Support the Bush Doctrine's Constitutionality

The "delegation doctrine" is the principle that the Congress of the United States has the power to delegate some of its powers, as enumerated in the United States Constitution, to other branches of government.[99]

Since the early cases establishing the delegation doctrine, the principle has expanded to include situations in which Congress does not specifically set forth legislation permitting the delegation, but also has not "occupied the field" in question.[100]

In *Chicago & Southern Air Lines v. Waterman S.S. Corp.*,[101] the Court held that the President of the United States retains broad discretionary powers in matters concerning foreign policy.[102] The President has the freedom to direct the nation's involvement in

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[99] JOHN H. JACKSON, ET. AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 72 (4th ed., West 2002).

[100] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (holding that Congress has power over commerce and has not delegated that power to the President).

[101] 333 U.S. 103, 111 (1948), which stated, "the President alone has the power to speak or listen as a representative of the Nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates." *Id. quoting* United States v. Curtiss-Wright Export Corp ., 299 U.S. 304, 319 (1936).

[102] *Id.*

foreign policy.[103]

The Bush doctrine reflects this freedom of policy making. Congress cannot delegate power with one hand and take it back with the other. The question here is whether Congress has actually delegated authority to the President to create a policy of preemptive military strikes.

Most international law litigation in United States courts has centered on civil actions regarding violations against the law of nations, under the Alien Tort Claims Act and Foreign Sovereign Immunities Act.[104] This is not to say that Congress should not, or would not, also have control over the way in which violators of the law of nations are punished militarily. In fact, given Congress's enumerated power to declare war,[105] it is reasonable to assume that Congress should have power to define and punish violations of international law in a military context as well.

In *Haig v. Agee*,[106] the Court gave deference to the executive branch, stating that, "the generally accepted view" has been that "foreign policy was the province and responsibility of the Executive."[107] The issue in *Haig* concerned loyalty, and a threat to national security, involving a United States government agent.[108] The executive branch was given great deference because the agent was controlled by the executive

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[103] *Id.*
[104] *See* Tel-Oren, 726 F. 2d 774, Tachiana v. Mugabe, 234 F. Supp. 2d. 401 (2002) (S.D.N.Y. 2002).
[105] U.S. CONST. ART. I, Sec. 8, Cl. 11.
[106] 430 U.S. 280 (1981).
[107] *Id.* at 293-94.
[108] *Id.*

branch.[109] Issues involving citizens and the power of the executive branch to exercise control over citizens as threats to national security, are different from cases involving enemies of the United States and how to punish them. In *Haig*, the Court did not intend to give the President broad license to take control over all issues of foreign policy and national security, including those that will lead American men and women into battle.

B. The War Powers Resolution May Not Be A Reliable Enforcement Mechanism to Hold the President Accountable to the Constitutional Use of Force

The War Powers Resolution may be useless if no remedy is available to enforce it.[110] In *Campbell v. Clinton*,[111] the court dismissed the claim of the Presi-

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[109] *Id.*

[110] *See* Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000) (holding Congressmen could not seek relief for President Clinton's alleged violation of the War Powers Resolution because the Congressmen lacked standing). *See also* Kucinich v. Bush, 2002 U.S. Dist. LEXIS 24691 (DC Dist. 2002), which held that the complaining Congressmen had no standing to challenge President Bush's unilateral decision to terminate the Anti-Ballistic Missile Treaty made with the Soviet Union. *Id.* Even though the Soviet Union has dissolved, the Congressmen in opposition to the President argue that the removal of the United States from a treaty must be done by Congress, not the President alone. *Id.* Just as treaties are required to have two-thirds vote of the Senate to support them, removal of the United States from such treaties should have Congressional support. *Id.* The court found that because the Congressmen had already attempted to pass a resolution condemning the President's unilateral action and that resolution had failed, the Congressmen had already used their legislative remedy. *Id.* The court likened the case to the *Campbell* case and others, finding Congressmen did not have standing to bring a cause of action on behalf of an injury caused to every member of Congress. *Id.*

[111] 203 F.3d 19 (D.C. Cir. 2000).

dent's opponents because they lacked standing.[112] The court's decision represents a political bottleneck that prevents disputes between the President and Congress from being resolved judicially.

The problem with the court dismissing the Congressmen's claim for lack of standing is that the Congressmen retain no other option for relief. Unlike other situations in which the court has dismissed members' claims for lack of standing,[113] a president's violation of the WPR is not something that can be relieved by a legislative remedy. In fact, the legislature has already spoken to the issue in creating the WPR. Therefore, the problem lies in the enforcement of the resolution. Enforcement issues are properly placed before the judiciary. The court erroneously dismissed members' claim in *Campbell*.

If the President were to carry out the Bush doctrine without the support of Congress, society would be endangered because: (1) the action would violate the WPR; and (2) the judiciary will not enforce the WPR.

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[112] *Id.*

[113] *See* Raines v. Byrd, 521 U.S. 811(1997), which held that because Congressmen had an opportunity to vote against the alleged unconstitutional Line Item Veto Act, and therefore had a legislative remedy to eventually repeal the act, judicial remedy was unnecessary. The Congressmen involved in *Raines* likened their institutional injury to *Coleman v. Miller*, stating that they had a "plain, direct and adequate interest in maintaining the effectiveness of their votes,' sufficient to establish standing." *Id.* at 822 (quoting Coleman v. Miller, 307 U.S. 433, 438 (1939)). *See also* Chenoweth v. Clinton, 181 F.3d 112, 115 (D.C. Cir. 1999) (holding that a President's creation of a program under the executive branch rather than by statute, can be challenged through Congress and did not necessitate a judicial remedy).

The danger posed by an inactive judiciary when a President begins to act unilaterally is that there is no leash on the President's power. The case of *Marbury v. Madison,*[114] has long been recognized as having established the importance of judicial review.[115] The judiciary's authority to declare certain legislation unconstitutional, after *Marbury,* makes the judicial branch of the government the final protector and enforcer of the United States Constitution. The judiciary should step forward and intervene when a President violates or exceeds his constitutional authority. As noted by one contemporary journalist, "[i]t has never been more important for judges to perform [their] duty unflinchingly."[116]

C. Eventuality of the Bush Doctrine Usurping Congress's Power to Declare War

If President Bush preemptively strikes nations that develop weapons of mass destruction or nations harboring terrorists, without Congressional direction or approval, he would usurp Congress's power to declare war.[117] The constitution specifically enumerates the

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[114] 5 U.S. 137 (1803) (finding the judiciary's legislative authority to issue writs of mandamus to the executive was unconstitutional).
[115] *Id*. "It is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177.
[116] Anthony Lewis, *Marbury v. Madison v. Ashcroft,* N.Y. TIMES, February 24, 2003, at A17, referring to the duty of the judiciary to "say what the law is," *quoting* Marbury v. Madison, 5 U.S. 137 (1803).
[117] U.S. CONST. ART. I, §.8, cl. 11.

power to declare war as belonging to Congress, not the President.[118]

Proponents of the Bush doctrine would argue that as Commander-in-Chief of the military,[119] the President has inherent power to decide when to strike an enemy. But, as James Madison explained in the Federalist Papers, "it is not possible to give each department an equal power of self-defence."[120] Madison went on to observe that in a "republican government, the legislative authority necessarily predominates."[121] The power to define and punish enemies was accorded to the legislative branch for a reason. The Commander-in-Chief should not be able to act unilaterally.

In the case of *Youngstown Sheet & Tube Co. v. Sawyer*,[122] the Supreme Court held that President Truman's attempt to encroach on Congressional powers by asserting his prerogative as "commander-in-chief," was unconstitutional.[123] The Court held that it could not "hold that the commander in chief of the armed forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production."[124] The Court also held that "[t]his is a job for the nation's lawmakers, not for its military authorities."[125]

Some constitutional scholars read the Constitution

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[118] *Id.*
[119] U.S. CONST. ART. 2.
[120] James Madison, The Federalist Papers No. 51.
[121] *Id.*
[122] 343 U.S. 579 (1952).
[123] *Id* at 587.
[124] *Id.*
[125] *Id.*

and construe it strictly, as James Madison did, respecting the central meaning of the words that were specifically chosen for the constitution, and not supplementing them with more modern concerns.[126]

Under the strict constructionist point of view,[127] Congress alone has the power to punish violators of the law of nations and to declare war, because the Constitution specifically conveys that power to Congress. Exercise of the Bush doctrine apart from Congressional support would be unconstitutional because the powers in Article I of the United States Constitution are specifically given to Congress, not the executive branch.

This "strict constructionist" view of the Constitution, however, may not be what the framers actually intended. Thomas Jefferson admitted that even though he was not "an advocate for frequent changes in laws and institutions,"[128] change has its place. Jefferson observed in a letter to Samuel Kercheval, "[a]s [laws and institutions] become more and more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times."[129]

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[126] *See* Morell E. Mullins, Sr., *Coming to Terms with Strict and Liberal Construction*, 64 Alb. L. Rev. 9 (2000) defining strict construction as "construction of a statute or other instrument according to its letter, which recognizes nothing that is not expressed, takes the language used in its exact and technical meaning, and admits no equitable considerations or implications." *Id.* at 20.

[127] *Id.*

[128] Words of Thomas Jefferson inscribed on the Jefferson Memorial, Washington, D.C. taken from his letter to Samuel Kercheval, July 12, 1816. *Available at* http://www.nps.gov/thje/memorial/inscript.htm.

[129] *Id.*

Jefferson likened the prospect of unchanging laws and institutions to requiring "a man to wear still the coat which fitted him when a boy."[130]

Jefferson's logic applies to the acceptable method of warfare. Times have changed. "Rogue states",[131] as defined by President Bush in his National Security Strategy, do not always have a conventional military. As evidenced by countless terrorist attacks worldwide, some states engage in terrorist activity as opposed to conventional warfare.[132] Preemptive strikes are not consistent with conventional warfare, and if used without Congressional direction and/or support, could be dangerous. But, with unconventional enemies, and the support of Congress, an Executive decision to strike preemptively a nation that poses an imminent threat would be a legitimate act of self-defense.

D. The Attack of Iraq as Self-Defense

If the "war against terror"[133] is in fact a "war", then the President's preemptive strike policy could be seen as mobilizing war materials and personnel.[134] But be-

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[130] *Id.*
[131] *Strategy* at 13.
[132] *Id.* at 5.
[133] John F. Harris, Mike Allen, *President Details Global War on Terrorists and Supporters; Bush Tells Nations to Take Sides as N.Y. Toll Climbs Past 6,000*, THE WASHINGTON POST, Sept. 21, 2001, at A1, reporting on President Bush's address on Sept. 20, 2001.
[134] Congress has delegated some of its power regarding war to the President. For example, the President is authorized control over transportation in times of war. 10 U.S.C.A. §2644: "In time of war, the President, through the Secretary of Defense, may take possession and assume control of all or part of any system of transportation to transport troops, war mate-

cause the Strategy does not mention the "war on terror" this argument is not persuasive.

On the other hand, Congress has delegated to the President, under IEEPA, broad power to defend the United States against "any unsual and extraordinary threat…if the president declares a national emergency with respect to such threat."[135] This power is only applicable with respect to that threat which the president has declared a national emergency.[136] "Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency with respect to such threat."[137] If the Bush doctrine is a response to the national emergency declared after the attacks of September 11, 2001, it is unclear whether subsequent preemptive strikes against enemies were an extension of the original national emergency or whether the strikes were in response to a new national emergency. Construed broadly, power to respond to the threat of terrorism in the United States and abroad could include any method of eliminating the terrorist threat. The President's Strategy is certainly one method of eliminating terrorism. The IEEPA, however, requires the President to act within a certain time frame.[138]

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rial, and equipment, or for other purposes related to the emergency. So far as necessary, he may use the system to the exclusion of other traffic." *Id.*

[135] 50 U.S.C. §1701(a) (2004).

[136] *Id.*

[137] 50 U.S.C. §1701(b) (2004).

[138] 50 U.S.C. §(b), (d) (2004), which states that each six months after the emergency is declared, the houses of Congress will discuss whether to terminate the emergency, or that the emergency will automatically be terminated if the president does not either publish the emergency in the Federal Register or provide Congress with a continuation notice.

Some might also argue that when Congress passed the National Security Act, it delegated its power to define and punish violations of the law of nations because the act requires every United States President to submit an annual memo regarding his or her national security strategy.[139] By requiring Presidents to report their national security strategies, Congress has arguably acquiesced to the strategies designed by each President.

Typically, when a party acquiesces to another party's actions, the effect is the same as if the party had approved the actions or delegated the actions.[140] Therefore, if Congress has acquiesced to any United States President's national security strategy by enforcing the National Security Act, then the Bush doctrine is constitutional if Congress is permitted to delegate its powers regarding the military.

It is now widely accepted that Congress may delegate power to the President in the areas of international trade and agreements.[141] Not surprisingly, the rationale for this is that the authorized spokesperson for the United States in international affairs must be credible when he or she makes agreements with foreign nations.[142] But, unlike international trade agree-

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[139] *See generally* National Security Act, 50 U.S.C. §404a (2004).

[140] For example, in employer/agency relationships, if an employer acquiesces to its employee's actions, it has shown approval and will be liable for torts evolving from the action. Similarly, in a corporation, if one board member acquiesces to other board members' suggestions, then that board member is held liable for any resulting breach of fiduciary duty.

[141] *See J.W. Hampton*, 276 U.S. 394, *Field*, 143 U.S. 649.

[142] *See* JOHN H. JACKSON, ET. AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 72 (4th ed., West 2002). There are various types

ments, war and preemptive strikes are not areas in which the President needs to be in such complete control.

War should require participation of more than one body in making decisions. Although the President is the Commander-in-Chief, he or she should not be allotted sole discretion to decide when and where to strike. Because retaliation for such a strike occurs against the American people as a whole, the people have a right to be heard through their congressional representatives. Regardless of the Delegation Doctrine, if the President intends to carry out any threats to use force, Congress should also approve the action.

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of international agreements that the United States may enter into. The "treaty" is but one of several, and is actually the most difficult to enter into. When entering into a "treaty" the President negotiates with the foreign government, but then must return to the United States' Senate and get two-thirds approval from the Senate for the international agreement. Thus, treaty negotiations may be challenging for the President if he has to tell the other leader that the deal they make is not certain until he confirms it with the Senate back home. The President's credibility could very well be doubted in such circumstances. As a way to get past this hurdle, "fast track" legislation has evolved. In "fast track" legislation, the President negotiates with the foreign government, including a disclaimer that the Senate must approve. The Senate agrees to approve or disapprove the treaty within 90 days. The Senate also agrees not to change any of the terms of the agreement. Another type of international agreement the President may enter into is the "executive agreement", where the President gets permission in advance from the Senate, to enter into an agreement, then goes and negotiates with the foreign government, and is not bound by any requirement to return to the Senate for permission. This type of agreement is difficult to achieve because the Senate is not likely to give the President unlimited discretion. One of the long-standing areas in which the President has been delegated power to engage in international agreements is the President's authority to authorize flight schedules. The rationale is that the leaders of the various countries should be in control of who is allowed to fly in and out of their airspace.

E. Challenges to Ridding the World of Evil

Just three days after the attacks of September 11, 2001, President Bush said the United States' "responsibility to history is clear: to answer these attacks and rid the world of evil."[143]

While the goal of ridding the world of terrorism may sound desirable, the new Bush doctrine is fraught with problems that may have grave consequences.

First, determining the identity of a target could be problematic because terrorists hide themselves and live in several different countries. Secondly, attacking a target when there is no "imminent threat" goes against customary international law.[144]

Customary international law permits preemptive strikes only when the perceived threat is imminent.[145] Article 2 (4) of the United Nations Charter states that, "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[146] Any unilateral

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[143] President George W. Bush, Washington, D.C. (The National Cathedral), Sept. 14, 2001, printed in *Strategy* at 5.
[144] *Strategy* at 15*, see also* "The Caroline"*, supra* note 21.
[145] *Id.*
[146] The Charter of the United Nations (1945). Established at the close of World War II, replacing the League of Nations, the primary purpose of

threat to use force against a state violates the United Nations Charter, unless the action is taken in self-defense. The only way for a state to escape responsibility for violating the United Nations Charter in this way would be to claim self-defense, or collective self-defense.[147]

President Bush's Strategy justifies preemptive military strikes as necessary to protect the United States against terrorists.[148] In his Strategy, President Bush said "[w]e must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."[149] Another plausible theory is that customary international law should apply a "necessity" standard rather than an "imminence" standard for a country's reasonable belief of a need for deadly self-defense.[150] The international

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the United Nations is to "maintain international peace and security." U.N. Charter, Art. 1 (1).

[147] See U.N. Charter, Art. 51, which states that nothing in the Charter should prohibit a nation from acting in self-defense if an armed attack has occurred against the member nation, "until the Security Counsel has taken measures to maintain peace and security." Regarding Iraq, the Security Counsel took measures to resolve the Iraqi conflict by resolving to send in weapons inspectors in November 2002, and allowing inspectors extended time to investigate in February, 2003.

[148] *Strategy* at 5.

[149] *Strategy* at 15.

[150] A developing theory in United States criminal law suggests that battered women who kill their sleeping spouses do so out of necessity and that "necessity" rather than "imminence" should be the appropriate standard when analyzing the reasonableness of defendant's belief of the need for deadly self-defense. *See* Jeffery B. Murdoch, *Is imminence really necessity? Reconciling Traditional Self-Defense Doctrine with the Battered Spouse Syndrome*, 20 N. Ill. U. L. Rev. 191 (2000), *compare* JOSHUA DRESSLER, CASES AND MATERIALS IN CRIMINAL LAW 527 (3rd ed., West 2003) arguing that preemptive self-defense on an international level is analogous to a battered wife's justification for preemptive self-defense against her "rogue and terrorist partner." The sleeping spouse who wakes

law doctrine of "*rebus sic stantibus*"[151] might apply if fundamental circumstances addressed by the United Nations Charter have changed and the former, narrow definition of self-defense is no longer effective.

Historically, the use of force in anticipatory self-defense has been considered acceptable only in one circumstance, in the case of "surprise nuclear attack."[152] Now that groups of terrorists, and not necessarily national governments, present the biggest threat to the United States,[153] the Bush doctrine seeks to rid the world of terrorist threat. In doing so, the United Nations Charter must either be interpreted differently, or abandoned altogether.

The reason that the Bush administration gives for its new doctrine is that terrorists do not wage "just" wars.[154] Terrorists do not declare war before they attack, they simply attack first and take credit for disaster later. The Bush doctrine attempts to conquer and deter terrorist activity.[155]

Those in opposition to the Bush doctrine respond that an International Criminal Court (ICC) is now in place to punish terrorists and other war criminals.[156]

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up and abuses may be analogous to a sleeping terrorist who wakes up and kills.

[151] Fundamental principles of an idea or pact have changed and should not be respected anymore.

[152] LOUIS HENKIN, HOW NATIONS BEHAVE, 143-45 (2nd ed. 1979).

[153] *Strategy* at 5.

[154] *Id*.

[155] *See generally Strategy.*

[156] Jacqueline Ann Carberry, *TERRORISM: A Global Phenomenon Mandating a Unified International Response*, 6 Ind. J. Global Leg. Stud. 685, 718 (1999).

Because the United States has not joined the ICC, however, it cannot bring criminals before the ICC.[157] In fact, United States military action may actually lead to the prosecution of United States citizens.[158] President Bush has promised to protect American military personnel against such prosecution because the ICC jurisdiction does not extend to American citizens.[159]

Professor Joseph Nye, Jr., of Harvard University has argued that "prevention makes sense against terrorists but is unwise as a doctrine against states."[160] Professor Nye's opinion is thoughtful, yet unrealistic, because it is almost impossible to know where to strike against the terrorists themselves. It seems inconceivable that the United States government could successfully single out terrorists only, preemptively striking them and not the nations in which they live. Preemptive strikes would almost never reach the actual terrorists themselves and would destroy innocent lives in the process.

The Bush administration and Professor Nye of Harvard, assert that long before the existence of the current administration, John F. Kennedy was prepared to act preemptively during the Cuban Missile

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[157] *Id.*

[158] Art. 8(2)(b)(iv) of the Rome Statute defines a war crime as "intentionally launching an attack in the knowledge that such attack will cause… widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated." *Id.*

[159] *Strategy* at 31.

[160] Michael Dobbs, *North Korea Tests Bush's Policy of Preemption*, WASH. POST, Jan. 6, 2003, at A1.

Crisis.[161] At the time, President Kennedy chose not to strike Cuba because it would cause an immediate confrontation with the Soviet Union.[162] The Bush administration argues that Kennedy's "blockade of Cuba was tantamount to an act of war and provides a good analogy for what Bush is trying to achieve in his policy toward Iraq" and other rogue nations.[163]

President Bush's Strategy asserts that the United States is fighting a different type of enemy.[164] Thus, according to the Bush doctrine, terrorism must be battled differently today than it has been in the past.[165]

Before September 11, 2001, no terrorist threat had reached the degree of current threats.[166] That is precisely why President Bush says it is time to redefine the concept of an imminent threat.[167]

F. Bush doctrine's survival in the face of interna-

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[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Strategy* at 1. President Bush says, "America is now threatened less by conquering states than we are by failing ones. We are menaced less by fleets and armies than by catastrophic technologies in the hands of the embittered few. We must defeat these threats to our Nation, allies, and friends." *Id, see also Strategy at 15.*
[165] *Id.*
[166] *See* Tim Weiner, *Terrorism's Worldwide Toll Was High in 1996, United States Report Says*, THE NEW YORK TIMES, May 1, 1997, at A9. "International terrorist attacks killed 311 people worldwide last year, one of the highest death tolls recorded, the State Department said today in its annual report on political terror." Compare to the final death toll from the Sept. 11, 2001, attacks on the World Trade Center, which reached 2,749. *Nation in Brief*, WASH. POST, Jan. 24, 2004, at A20.
[167] *See supra* note 145 and accompanying text.

tional opposition

Some international critics say that the Bush doctrine is not effective because President Bush has not been consistent in its application.[168] For instance, President Bush has named three nations as the "axis of evil,"[169] yet he only plans to preemptively strike one of those enemies should it produce weapons of mass destruction. "[T]he paradox of preemption is that it can be applied only to a country that is too weak to retaliate effectively," says Michael Dobbs of *The Washington Post*.[170]

North Korea's withdrawal from the Non-Proliferation Treaty[171] tested the Bush doctrine.[172] President Bush stated in his National Security Strategy that the United States would not make deals with rogue states that manufactured weapons of mass destruction, nor would it make deals with terrorists.[173] Reluctance to strike against North Korea makes the United States National Security Strategy appear less credible. However, a nation's choice to focus its efforts on one enemy at a time is probably more an exercise of wisdom than of weakness.

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[168] Michael Dobbs, *North Korea Tests Bush's Policy of Preemption*, WASH. POST, Jan. 6, 2003, at A1.
[169] *Id.* citing President Bush's State of the Union Address in 2002 where he named Iran, Iraq, and North Korea as the "axis of evil".
[170] Michael Dobbs, *North Korea Tests Bush's Policy of Preemption*, WASH. POST, Jan. 6, 2003, at A1.
[171] Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty) 21 U.S. Stat. 483, TIAS 6839, 729 UNTS 161 (Signed 1 July 1968; entered into force: 5 March 1970).
[172] *See* Peter Spiegel and Guy Dinmore, *Washington Pulls its punches as a rogue state thumbs its nose*, FINANCIAL TIMES WEEKEND EDITION, Jan. 11-12, 2003, at A1.
[173] *Strategy* at 5.

III. CONCLUSION

The Bush doctrine should be accepted as constitutional so long as Congress supports the use of force. When Congress expresses its approval of such measures preemptive action will not usurp Congress's power to declare war or to define and punish violations of the law of nations.

In engaging in a preemptive strike, the United States has changed the customary rules of warfare by redefining the standard of self-defense. Such a change could result in damaged relationships between the United States and foreign countries, which could in turn lead to lack of respect for the United States overseas and cause problems in trade and other projects of the United States. The risk, however, is one that the President has the authority to take. With Congress's blessing, the President can engage in very bold foreign policy initiatives, including the use of force to promote democracy and human rights overseas.

Donna M. Davis

Improving Security Through Reducing Employee Rights

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In the name of security, there have recently been many reductions or amendments of rights. The most widely publicized and discussed of these, in the United States, have concerned civil liberties. Less well-known, but also important, are reductions of employee rights, particularly rights of representation and employment security.

Even these rights have a constitutional aspect. Government employee unions have claimed the new legislation violates employees' due process rights under the United States' Constitution. And, in fact, under American constitutional law, whether a government employee has a right to due process does depend on how much employment security is granted that employee by statute.

I make no claim, however, that these rights are as long-established or highly valued as civil liberties. Private sector employees, as most airport screeners were until recently, have had representation rights for less than 70 years. United States government employees have had representation rights for only about

40 years, and those rights have been codified only since 1978.

I. WHAT HAS HAPPENED

A. Using Existing Law to Reduce Employee Rights

Invoking powers granted to the President under the 25-year old Federal Service Labor Management Relations Act, President Bush in January 2002 issued an executive order removing the union representation rights of more than 500 Justice Department lawyers and clerks, who up until then were either represented by unions or involved in organizing unions. President Bush feared that union contracts could interfere with the national-security duties of these employees.[1]

In October 2002, President Bush became the first president in 25 years to use his power under the private sector Labor Management Relations Act (LMRA) to declare that a work stoppage was a "national emergency."[2] In early October, the President determined that an ongoing "lockout" of West Coast dockworkers by their employers would, if it continued, "imperil the national health or safety."[3] As a

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[1] *See* Exec. Or. 13252, 67 Fed. Reg. 1601 (Jan. 11, 2002).
[2] *See* Exec. Or. 13275, Creating a Board of Inquiry to Report on Certain Labor Disputes Affecting the Maritime Industry of the United States, 67 Fed. Reg. 62869 (October 9, 2002).
[3] *Id.*

result, the President appointed a board of inquiry on the dispute, which reported within a day that the dispute was unlikely to be resolved reasonably soon.[4] President Bush then directed his Justice Department to go to court to get an injunction against work stoppages by the dockworkers or their employers.[5] To support its request for the injunction, the Bush Administration submitted several "declarations" by Cabinet secretaries, including one from Defense Secretary Donald Rumsfeld that asserted that the "cumulative effect of delays, or lack of sufficient shipping capacity when needed," that could result from work stoppages in the longshore negotiations, "would adversely affect our ability to deliver military cargo to overseas destinations as required, and jeopardize the defense effort and the Global War on Terrorism."[6] The court expressly relied on these national security concerns in granting the injunction.[7] Within two months, the longshore union and the employers' association agreed to a contract that was, according to union negotiators, less favorable to employees than it would have been without the Presidential intervention.

The Bush Administration's use of existing law to restrict employee representation rights continued in

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[4] *Id.*
[5] President George W. Bush, October 8, 2002 Letter to the Attorney General Directing Action on the Labor Disputes Affecting Pacific Coast Ports, 2002 Public Papers of the Presidents (October 14, 2002).
[6] *See United States v. Pacific Maritime Ass'n*, 229 F. Supp. 2d 1008, 1013-14 (N.D. Cal. 2002).
[7] *Id.* at 1015-15.

2003. In January 2003, the director of the National Imagery and Mapping Agency used powers granted by the statute creating that agency to terminate representation rights for more than 1,000 employees who previously had been represented by unions for more than twenty years.[8]

B. New Statute Reducing Employee Rights: Aviation and Transportation Security Act (ATSA)

The first of the recent security laws that affected employee rights was the Aviation and Transportation Security Act, or ATSA.[9] ATSA was enacted less than two months after the September 11 attacks, on November 19, 2001.

Before ATSA, most of the thousands of airport security employees around the U.S. were *not* United States government employees, but were employees of the airports or, more likely, of private corporations retained by the airports.

In recent years, American trade unions had achieved considerable success in organizing thousands of privately employed airport security employees. Then came ATSA, which executed *de*privatiza-

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[8] Stephen Barr, *National Security Concerns Wipe Out Union Rights at Mapping Agency*, WASH. POST, February 10, 2003, at B02.
[9] Pub. L. No. 107-71, 115 Stat. 597 (2001)(codified as amended at 49 U.S.C.S. §§ 114-115 (2002).

tion. ATSA granted all authority over employment of airport security personnel to the head of a new United States government agency, the Transportation Security Administration (TSA). The head of the TSA was also the Under Secretary for Security in the US government's Department of Transportation.[10]

Under ATSA, the private airport security positions were to be replaced, and within about a year actually *were* replaced, by newly hired employees of the TSA. When the TSA hired approximately 64,000 airport security workers, no preference was given to the individuals who held those positions before ATSA. In fact, only about 15% of the new TSA employees were "holdovers" from the private airport security employees.

Thousands of the private airport security workers were not even eligible to be hired by the TSA, because of new qualifications that ATSA had established for the positions. One qualification that excluded many workers was that security workers were required to be United States citizens. This had an especially large impact on the unionized security workers, because unions had achieved much of their organizing success with *immigrant* workers.[11]

As some of the immigrant employees who lost their jobs pointed out, there is no United States citizenship

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[10] *See* 49 U.S.C.S.. §114 (2002).
[11] *See* David Bacon, *In the Name of National Security*, THE AMERICAN PROSPECT, October 21, 2002, at 15.

requirement for being a member of the United States military. Many non-citizen soldiers recently saw action in the war in Iraq. Nonetheless, immigrants are now barred from airport security positions.

As of the beginning of 2003, ATSA's effect on employee representation was dramatic, but it was indirect. Thousands of private employees who *were* represented by unions were replaced by thousands of newly hired U.S. government employees. And as new hires, they were not represented by unions – yet.

However, many unions who had represented the private security workers, and many other unions that mostly represent government employees, began organizing the new government security workers. Their organizing proceeded rapidly, and they succeeded in scheduling several elections for employees to decide on union representation, in airports all over the country.

Then, on January 9, 2003, the head of the TSA, retired Admiral James Loy, issued an order that barred all TSA employees from being represented by any union in bargaining with their employer. Admiral Loy's order stated that "Collective bargaining is not compatible with the flexibility required to wage the war against terrorism."[12] TSA spokesperson Chris Ratigan was even more blunt, saying "collective bargaining would be incompatible with the nation's

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[12] Christopher Marquis, *Airline Security; U.S. Transportation Leader Acts to Stop Screeners' Union Effort*, N.Y. TIMES, January 9, 2003, at A12.

safety."[13] As a result of Admiral Loy's order, all the union elections were canceled.

Admiral Loy claimed that ATSA gave him the authority to prohibit bargaining representation for TSA employees. Unions dispute that, and within a few days the American Federation of Government Employees union filed a lawsuit challenging Admiral Loy's authority to issue the order.[14] That suit is pending in a federal court in the District of Columbia.

The union that filed the suit, the American Federation of Government Employees, has continued to enroll airport security workers into its membership, and has announced plans to represent workers in individual grievances. So far, the TSA has accepted that ATSA gives workers the right to such "grievance representation." But the TSA has held firm to its position that, under ATSA, it does not have to allow union representation in bargaining.[15]

The disagreement over ATSA, and even the meaning of ATSA, may now be moot. The TSA, and all its airport security employees, are being moved into the new Department of Homeland Security. And so their rights, and the rights of more than 100,000 employees, are now governed by the Homeland Security Act, which was enacted on November 25, 2002.

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[13] David Bacon, *Screened out: How 'fighting terrorism' became a bludgeon in Bush's assault on labor*, THE NATION, May 12, 2003, at 19.
[14] *Id.*
[15] Tom Ramstack, *Defiant airport screeners join union*, WASH. TIMES, March 4, 2003, at A01.

C. New Law Reducing Employee Rights: The Homeland Security Act

The Homeland Security Act[16] has been justifiably called the largest reorganization of the United States government in more than a half-century. It takes 22 agencies, scattered throughout the government, and 170,000 workers employed by those agencies, and places them in a newly established Department of Homeland Security.

About 48,000 of those workers are currently represented by unions.[17] And tens of thousands more, including the airport security workers discussed above, were rapidly joining unions. And *all* the 170,000 workers had various employment rights guaranteed by statutes. Now, the union representation, and all those employment protections, are put in question by the Homeland Security Act.

President Bush, in numerous speeches arguing for this legislation, often said that it would give him and his administrators the same power over employee rights that past Presidents have possessed. That is not quite accurate. If the new Homeland Security de-

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[16] 107 Pub. L. No. 296, 116 Stat. 2135 (2002).
[17] Liz Boch, *Federal labor unions took beating in '02*, THE CAPITAL (Annapolis, MD), December 22, 2002, at B1.

partment was governed by the same laws as most United States government departments, then the President could remove employees' rights to union representation *if* the President determined that the employees worked for an entity with the primary function of intelligence, investigative or national security work *and* representation rights could not be applied in a manner consistent with national security.[18]

The Homeland Security Act gives the President much broader authority to waive representation rights of employees in that Department. The waiver applies to all employees in that department, no matter what the "primary function" of their employer is. And the President need not show that representation rights cannot be applied consistently with national security; the President can waive such rights whenever he determines they would have a "substantial adverse impact" on the department's ability to protect Homeland Security.[19]

In speeches before and after the establishment of the Department, President Bush has strongly signaled that he is likely to waive representation rights in many if not all cases. He has constantly emphasized that management of the Department must be flexible, and he has almost as constantly stated that representation rights would impose inflexibility.

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[18] *See* 5 U.S.C.S. § 7103(b) (2003).
[19] Homeland Security Act, Pub. L. No. 107-296 at §842(c).

Even if the President does not waive the representation rights of some Homeland Security employees, the ability of their representatives to bargain on their behalf will *not* be the same as exists for other U.S. government employees. Rather than allowing the existing law on such bargaining to apply, the Homeland Security Act contains its own provisions on what it calls "collaboration with employee representatives," and these provisions essentially state that the Secretary of Homeland Security should make proposals on personnel practices and receive recommendations on its proposals from unions, but then the Secretary of Homeland Security will have ultimate authority over what will be implemented.[20]

This is very different from most US government agencies, where a neutral third party, such as an arbitrator or the Federal Services Impasses Panel, gets involved in resolving bargaining issues between unions and the government employer. By contrast, in Homeland Security, if there is a deadlock, the employer will essentially decide what to do.

Going beyond representation rights, to other employee protections, the Homeland Security Act again takes away rights that other U.S. government employees have. For most U.S. government employees, before they can be disciplined, or laid off permanently or temporarily, or have their pay reduced, their employer must follow defined procedures, including

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[20] *See* Homeland Security Act, Pub. L. No. 107-296, at §841 (codified at 5 U.S.C.S. §9701 (2003)).

30-days advance notice and explanation of reasons. In addition, these and other employer decisions that adversely affect an employee can be appealed to an adjudicatory body called the Merit Systems Protection Board.

Under the Homeland Security Act, all these protections are gone. In their stead, the Secretary of Homeland Security is granted the authority to, "establish a human resources management system." Thus, most of the rules on employee representation and employee protections in the Homeland Security Department will be defined by the Department itself, a process that will be completed by the end of this year. But even after the Department has adopted such rules, the Homeland Security Act gives the Department continuing authority to amend and redefine those rules. In that sense, the Department will not even be bound to follow the rules that it prescribes.

In sum, the employer, the Homeland Security Department, will itself decide to a large extent how much due process, how much right to representation, how much protection it wants to allow to its own employees. No other non-military agency in the American government has that much ability to limit the rights of its employees.

II. THEORIES EXPLAINING WHY IT HAPPENED

The reduction of representation rights for thousands of employees was certainly not an inevitable consequence of increasing security in response to the attacks of September 11. Rather, the Bush Administration and Congress chose to diminish such rights. The remainder of the paper will explore some possible reasons why they did so.

Of course, defenders of those choices could assert simply that they were made because they were right. Even if that is correct, however, there should be some explanation of the beliefs and reasoning that led policymakers to the conclusion that reducing representation rights was the proper course.

There are at least three theories why the Bush Administration or Congress or both chose to eliminate employee rights and protections as part of the effort to improve security. These three theories are interrelated and there is considerable overlap among them. Nonetheless, there are three distinct threads of reasoning that appeared to contribute to the conclusion that employee representation and protections should be cut back.

A. Perpetual State of War

Bush Administration officials and other United States government leaders constantly refer to a "war on terrorism" that is "continuous" and unending.

Improving Security

President Bush himself has said that "there will be no more business as usual" because of "unique and constant threats."

A common complaint already being raised by employees moved into the new Homeland Security department is that their employers treat them like soldiers, not employees. In the Netherlands, of course, categorizing persons as soldiers would not necessarily exclude them from rights to representation, because the Netherlands has a history of soldiers and military personnel who are unionized. But in the United States, soldiers have no such right of representation. And "military employment" is understood to mean absolute authority of officers and other "management" and complete obedience to management by the soldiers, with no opportunity to appeal or "bargain over" orders.

Managers in the new Department of Homeland Security, many of whom are retired military officers, often apply the military model. They have been "deploying" and "redeploying" Department employees with little or no notice, and with no restrictions on where workers can be sent.[21] This is much closer to how military personnel are treated than how Department employees were usually treated in their old agencies.

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[21] T. Shawn Taylor, *In the name of homeland security; Fed workers say they're treated as soldiers under new department*, CHI. TRIB., March 9, 2003, at C5.

The reliance on the military model in employee relations may not only be for operational purposes, but also serves a symbolic function. In that sense, it may be similar to the "war on drugs" that the Reagan Administration declared in the 1980s. One of the first steps that the federal government took in waging that "war" was to subject thousands of their own employees to random drug testing. Through litigation, including numerous cases before the United States Supreme Court, it was revealed that one of the government's main purposes for drug testing was to "set an example" – that by testing its own employees, the government was showing it was serious about combating drug use, and modeling how other employers, schools and other entities could combat it as well.

The idea that the military model should be applied to all sorts of American workers has already been picked up on by some politicians. For example, in April 2003, the most senior Republican U.S. Senator, Ted Stevens of Alaska, argued that local police and firefighters should not be paid for overtime work because soldiers are not paid for overtime work.[22]

B. Belief in Managerial Discretion

There is some evidence that the Bush Administration regarded the newly created security agencies,

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[22] Robert Hardt Jr., *Pol urges unpaid cop overtime*, NEWSDAY, April 2, 2003, at O10.

particularly the Department of Homeland Security, as a wedge for government-wide reforms to increase management flexibility, and correspondingly reduce employee rights and protections. Mitch Daniels, director of the U.S. Office of Management and Budget, wrote that Congress's decisions on the homeland security department can "eventually help us untie managerial talent across the executive branch."[23] Tom Ridge, the Homeland Security Secretary, said during hearings over the creation of the Department that managers must have maximum flexibility, or the Department would not be worth creating.[24]

These statements, and many similar ones, are revealing. They are often phrased as though increasing managerial flexibility was the *purpose* of reorganizing agencies into the new Homeland Security Department. Other possible benefits from the reorganization, many of which seem more directly related to enhancing security, such as increasing information flows between agencies, and improving effectiveness by coordinating efforts and decreasing redundancy, have been given lower priority than managerial flexibility.

In fact, officials in the Homeland Security department and throughout the federal government have constantly declared that the "guiding principles" of

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[23] *See* Stephen Barr, *Homeland Security Debate Highlights Split over Union Rights*, WASH. POST, September 4, 2002, at B02.
[24] See H.R. Select Comm., *Homeland Security Department: Hearings on H.R. 3231*, 107th Cong. (July 15, 2002)(written statement of Governor Tom Ridge, Director, Office of Homeland Security).

the Department are "flexibility," "agility," and the like. By contrast, concepts like employee input, or employer-employee cooperation, or even high employee morale are *never* mentioned as desirable goals in the Homeland Security department or any security agency. The lack of interest in employee participation is unsurprising, given that even months before September 11, 2001, President Bush revoked an executive order under which federal agencies had been operating labor-management partnership councils. But what is surprising is that flexibility has been emphasized far more than other goals that one would expect to be important to management, such as high standards for employee performance or greater job requirements demanded from employees.

The author proposes that the reason that standards and job requirements have not been emphasized is in part because they are objective factors. As objective factors, they could be set by Congress, and they could be satisfied in any number of ways, and some of those ways would not involve increasing the power of managers.

However, where the guiding principle is flexibility, that necessarily requires managerial discretion, which leads to greater managerial power.

This effort to maximize managerial flexibility is now spreading into other parts of the government. In April, Defense Secretary Donald Rumsfeld sent a proposal to Congress that provided that most of the personnel policies created for the new Homeland Se-

curity Department should be applied to the more than 600,000 civilian employees of the Department of Defense.[25] If this proposal is adopted, then more than half of all U.S. government employees would no longer be covered by the representation rights and other employee protections they have enjoyed for decades.

The idea that managerial flexibility is the key to organizational success was very strong in business literature and even the popular press during the 1990s economic boom in the United States. Though the strength of the idea in the U.S. private sector has recently waned, along with the U.S. economy, the idea appears to have retained its vitality in the Bush Administration. This may result from the fact that the Bush Administration, as its members frequently point out, is headed by the first President with a Masters in Business Administration, and the Administration prides itself on being "run like a corporation." One can only hope that the federal government's experiment in maximizing managerial flexibility will have better results than similar approaches in private companies like Enron and Worldcom.

C. Political Expediency

No explanation of why employee rights and protections have been cut back in the name of security

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[25] Christopher Lee, *Rumsfeld Urges Overhaul of Pentagon Civil Service*, WASH. POST, April 23, 2003, at A33.

would be complete without examining the politics of the issue.

Most directly, the relation of employee rights and security was used as a campaign issue against Democrats in the 2002 Congressional elections. In speeches by President Bush and others, and in campaign advertisements, Democratic Senators were criticized for their position that employees moved into the Department of Homeland Security should retain their representation rights and other protections. After the elections, Republicans credited this issue as a key to the defeat of some Democratic incumbents, particularly of Senator Max Cleland of Georgia.

Decreasing the number of employees represented by unions furthers another political goal of the Administration's party: reducing members' financial contributions to their unions, which in turn are among the largest financial contributors to the Democratic Party and its candidates. Republicans are sometimes open about this goal: in 1992, then-House of Representatives Speaker Newt Gingrich wrote a letter to the Secretary of Labor urging increased reporting by unions of their dues expenditures, in order to "weaken our opponents and encourage our allies."[26] Former adviser to Republican Presidents, and sometime Republican Presidential candidate, Pat Buchanan has advocated efforts to encourage union-represented

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[26] *See* E.J. Dionne Jr., *Disabling Organized Labor*, WASH. POST, April 18, 2003, at A21.

employees to withhold portions of their dues, again with the goal of decreasing union contributions to the Democratic party.

The political goal of reducing union membership can even explain some otherwise puzzling inconsistencies in Bush Administration policy. The Bush Administration is presently involved in a major effort to "privatize" 425,000 federal government jobs, by having them performed by private contractors.[27] By contrast, as discussed above, the Bush Administration "deprivatized" thousands of airport security screeners. The one consistent theme in these conflicting policies is that they will reduce union representation. As explained above, many of the private airport screeners were unionized or were organizing unions, and after those jobs were brought into a federal agency, that agency barred the workers from unionizing. Meanwhile, most of the federal employees whose jobs are targets of privatization are members of government-employee unions, and under current law if those jobs are moved into the private sector, the employees who hold them would start work without union representation.

In sum, the reductions of employee representation and employee protections that have been effectuated in the name of security advance three goals that the Bush Administration, and the Republican majority in Congress, see as desirable: (1) promoting the idea that the country is in a

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[27] *See* Christopher Lee, *U.S. to Speed Up Job 'Outsourcing'*, WASH. POST, November 15, 2002, at A31.

continuous state of war; (2) maximizing the flexibility of government managers; and (3) decreasing union membership. Whether the changes will also do anything to actually improve security is far more questionable.

Challenges to Security Council Monopoly Power Over the Use of Force in Enforcement Actions: The Case of Regional Organizations

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I. INTRODUCTION.

The controversy between the United Nations Security Council and the "Coalition of the Willing" (led by the United States and the United Kingdom) over the use of force in Iraq underscores challenges to the central role of the Security Council in authorizing the use of force that have taken place since the U. N. Charter was written in 1945.[1] That is, there has been

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[1]Forty-nine states were publicly and formally committed to the Coalition. Contributions of Coalition members included direct military participation, logistical and intelligence support, specialized chemical/biological response teams, over-flight rights, humanitarian and reconstruction aid, and political support. The coalition members were: Afghanistan, Albania, Angola, Australia, Azerbaijan, Bulgaria, Columbia, Costa Rica, Czech Republic, Denmark, Dominican Republic, El Salvador, Eritrea, Estonia, Ethiopia, Georgia, Honduras, Hungary, Iceland, Italy, Japan, Kuwait, Latvia, Lithuania, Macedonia, Marshall Islands, Micronesia, Mongolia, Netherlands, Nicaragua, Palau, Panama, Philippines, Poland, Portugal, Romania, Rwanda, Singapore, Slovakia,

a long and continuing tension between the words of the United Nations Charter and the practice of regional organizations and regional arrangements that test some of the fundamental notions about the collective security system known since the creation of the United Nations.[2] Under the words of the United Nations Charter, the Security Council has primary responsibility to maintain international peace and security and to make decisions about the use of force in enforcement actions. The Iraq crisis may well be the most recent and controversial challenge to the role of the Security Council; however, it has not been the only one.

The present Iraq controversy over the role of the Security Council presents an opportunity to consider other occasions over the years that have challenged Security Council authority and the cumulative effect of those challenges. Over the past half-century, regional organizations, not the Security Council, have been the primary users of force in enforcement actions. This dichotomy between Charter words and reality has led some to assert those uses of force violate the U.N. Charter and that Security Council authorization is needed for the use of force by re-

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Solomon Islands, South Korea, Spain, Tonga, Turkey, Uganda, Ukraine, United Kingdom, United States, Uzbekistan. *See* http://whitehouse.gov/infocus/iraq/news/20030327-10.html last visited on May 15, 2003. More states supported materially the Coalition either non-publically and/or informally. (*e.g.* Qatar, The United Arab Emirates, Israel, and Saudi Arabia etc..).

[2]*See* definition of regional organizations and regional arrangements, *infra* p. 82-84.

gional organizations[3], and others to suggest that the Security Council has simply become irrelevant.[4]

This article explores whether either characterization is any longer accurate or appropriate. That is, does subsequent regional organization behavior and Security Council inaction or after-the-fact approval toward that behavior indicate that perhaps the meaning of the Charter has changed? Does the Charter no longer mean that the Security Council has monopoly power over enforcement actions? May regional organizations lawfully take enforcement actions independently of the Security Council - except perhaps in the very narrow circumstance where the Security Council by resolution explicitly denies authorization to a regional organization prior to an enforcement action? If so, what becomes of the fundamental goal of accountability to the *global* collective in the use of force that lies behind Charter words? If regional organizations may never lawfully take enforcement action without Security Council authorization, and if the Security Council does not act, then a strong incentive arises in regional organizations to find other legal grounds for the use of force, especially where a regional organization feels compelled to act. This, in turn, may unacceptably stretch other legal doctrines enlisted to justify non-enforcement-action-use-of-

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[3] *E.g.*, N. D. WHITE, THE LAW OF INTERNATIONAL ORGANIZATIONS 204 (1996) ("When…regional organization(s)..(are) planning an action which is not entirely defensive, they must have approval of the Security Council for such an operation.").

[4] *E.g.* MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO (2001) at 98. "…[T]he [Security] Council is…a mere conference of states with no power to mandate action…".

force to unacceptable limits, for example in robust peacekeeping, in anticipatory self-defense, and in humanitarian intervention.[5]

This article addresses those questions in Section II by briefly laying out the original Charter scheme on use of force and collective security reflected in Charter words and by defining both enforcement actions and regional organizations. Section III examines several instances of the use of force by regional organizations and their potential cumulative impact on the meaning of the Charter. Section IV comments on some of the implications of a changed meaning of the Charter and suggests that guidelines or criteria be articulated for regional organizations to follow where enforcement action is taken independently of explicit prior Security Council authorization in order to provide a requisite measure of accountability to the global collective. Section V concludes that the meaning of the Charter may have changed and that regional organizations may now presumptively be entitled under the Charter to take otherwise appropriate enforcement actions unless the Security Council explicitly denies authorization. That conclusion would not dispense with the obligation of regional organizations to report to the Security Council,[6] or with the option of regional organizations to obtain prior authorization of the Security Council for an enforcement action.[7] It also would not challenge the existing substantive limits on the use of force in other circumstances.

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[5] *Infra* at 117.
[6] Article 54 of the U.N. Charter.
[7] Article 53 of the U. N. Charter.

II. "ENFORCEMENT ACTIONS", "REGIONAL ORGANIZATIONS" AND THE CHARTER USE-OF-FORCE SCHEME.

A. The Charter Scheme on Use of force.

The question of the relationship of regional organizations and global organizations over the use or threat of force, arose with the establishment of global political organizations in the last century - first the League of Nations after World War 1 and later the United Nations at the close of World War II. Article 2(4), Article 51, and Chapters VII and VIII of the U.N. Charter broadly reflect part of a sensible compromise at the time in the area of collective security between the "universalists," favoring "supremacy" of the U.N. over regional organizations, and the "regionalists," favoring regional organization autonomy with a limited "supervisory" role for the U.N.[8] While "[t]he whole emphasis of the Charter (was and) is on collective action in the sense of action undertaken by the collectivity of states and authorized by the United Nations itself,"[9] the question posed by the contrasting positions of the universalists and regionalists that persists today was: To what extent did the Charter embrace *decentralized* collective action?

The compromise on collective security struck a half century ago, which is formally reflected in the words of the U.N. Charter, was an attempt to avoid conflict on collective security arrangements between the

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[8] Waldemar Hummer and Michael Schweitzer, *Chapter VII: Regional Arrangements, Article 52*, in THE CHARTER OF THE UNITED NATIONS, 679, 686.

[9] D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 218 (1958).

United Nations and existing regional organizations (such as the OAS) and emerging collective self-defense organizations (such as NATO and the Warsaw Pact). The starting place is Article 2(4) of the U.N. Charter, which comprehensively and strictly prohibits member states from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

An exception was made to this blanket prohibition on the use of force by states in Article 2(4) in cases of unilateral or collective self-defense. The exception was accomplished through Article 51, which was inserted into the Charter in Chapter VII. Article 51 acknowledged that states have the inherent right to use or threaten force in "individual or collective self-defense if an armed attack occurs."[10] However, it is a temporary right because the right to use or threaten force lasts only "until the Security Council has taken measures necessary to maintain international peace and security."[11] Under Article 51, regional organizations may use or threaten force without prior authorization of the Security Council until the Security Council by resolution seizes the matter.

Regional organizations may also use or threaten force under the authority of the Security Council in

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[10] *Id. See also* IAN BROWNLIE, THE USE OF FORCE BY STATES AND INTERNATIONAL LAW (1963).

[11] Article 51 of the UN Charter provides in relevant part: Nothing in the present Charter Shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

Chapters VII and VIII of the Charter. The Security Council itself may use force under Articles 39 and 42 of Chapter VII "to maintain or restore international peace and security." Here, the Security Council, once seized of a matter under Chapter VII, may call on members, including regional organizations, to provide needed military forces.[12] Whether specific Security Council authorization is needed for regional organizations to use or threaten force under Chapter VII after the Security Council is seized of a matter is an unsettled question because the Charter does not address the matter and Security Council resolutions often are unclear. For example in Iraq, the Security Council acted under Chapter VII, but never specified who would decide whether Security Council resolutions had been breached triggering enforcement.[13] To the extent that prior explicit Security Council authorization is found unnecessary under Chapter VII, it also calls into question whether prior explicit Security Council authorization may be needed under Chapter VIII.

Regional organizations also may use or threaten force in enforcement actions under Article 53 of Chapter VIII.[14] Here, however, the plain words and original meaning of the article require that regional

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[12] Under Article 43, the U.N. Charter contemplated agreements between the Security Council and members governing the disposition and use of member forces. Since no Article 43 agreements have been concluded, member forces have been provided on a voluntary basis. *See* Derek W. Bowett, *International Military Force*, 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1267 (Rudolf Bernhardt ed. 1995).

[13] *See* Thomas Franck, *Inspections and Their Enforcement: A Modest Proposal*, 96 AM. J. INT'L LAW 899, (2002).

[14] Article 53 of the U.N. Charter provides in relevant part that "no enforcement actions shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council…".

organizations must have prior explicit Security Council authorization. The criterion for authorization is the same under Chapters VII and VIII; that is, there must be a breach of the peace, a threat to the peace, or an act of aggression in which the use or threat of force is needed to maintain or restore international peace and security.

The Security Council authorization requirement of Article 53 reflects the genuine concern at the time it was written that isolated or polarized regional organizations that were emerging, especially regional military alliances and counter-alliances (like NATO and the Warsaw Pact), might act for their own ends, without accountability, and without the requisite interest in international peace and security. If regional autonomy were to develop "too far," there might not be "any real guarantee" that regional organizations would be "subject to the safeguards of world opinion" which are reflected "in UN organs."[15] Another part of the concern was that if Security Council authorization was not made mandatory under Article 53, a member of the Security Council either could deliberately veto Security Council action under Chapter VII, or could veto a denial of authorization to use force under Chapter VIII. This would free a regional organization over which the vetoing state had dominance to act without accountability to the global-collective. For example, the United States certainly would have vetoed a resolution introduced to the Security Council to either seize the Cuban Missile Crisis in 1962 under Chapter VII or to deny authorization to the OAS to take enforcement action under Article 53 of Chapter

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[15] BOWETT, *infra* note 18, at 164.

VIII. The suggestion in this article that enforcement action now may be taken under Chapter VIII unless the Security Council explicitly denies authorization reduces the impact of a veto but does not dispense with it. A permanent member could, of course, veto any resolution denying authorization to take enforcement actions.

B. Enforcement Actions and Regional Organizations.

Enforcement actions are not defined in the U.N. Charter. This article focuses on actions covering the use of military force rather than dealing with all actions envisaged under Articles 41 and 42 of the U.N. Charter. For purposes of this article, enforcement actions are coercive, non-consensual, use-of-force measures addressed to a breach of the peace, threat to the peace, or an act of aggression taken in an effort to maintain or restore international peace and security.[16]

The emphasis here is not on the technical procedure under which enforcement action is taken by a regional organization but objectively on whether force is, in fact, used. For example, in the 1962 Cuban missile crisis, the U.S. State Department asserted that no Security Council authorization was needed because the quarantine imposed by military means technically was not an enforcement action.[17] According to the State Department, a resolution by the Organ of Consultation of the OAS under the Rio Treaty could only "recommend" that members participate in the

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[16] *See* Certain Expenses of the United Nations, 1962 I.C.J. 151.

[17] *See* ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW (1987) 141.

quarantine and could not obligate members to use or threaten force. The State Department asserted that unless a regional organization could *obligate* members to take action there is no enforcement action.[18] Under the definition used in this article, the OAS military quarantine was an enforcement action and would not escape Chapter VIII on a technicality.

Not included in enforcement actions are economic and diplomatic sanctions, like trade sanctions and the severance of diplomatic relations, because these and similar measures fall short of the use of force and have always been acknowledged not to be within the monopoly power of the Security Council. That is, such non-use-of-force measures may be imposed unilaterally or collectively by states without Security Council authorization.

The Charter also does not define regional organizations. This article accepts a broad definition of regional organizations as less-than-global, state-based entities or associations that need not be treaty-based and that may include geographically, politically, or economically oriented organizations. It would seem

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[18] This notion that enforcement actions do not embrace uses or threats of force by regional organizations that are taken under a recommendation rather than an obligation has been rightly rejected. *See* D.W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS, at 163-164 (4th ed. 1984); Michael Akehurst, *Enforcement Action by Regional Agencies, With Special Reference to the Organization of American States,* 52 BRIT. Y.B. INT'L L. 175, 185-86, WHITE, *supra* note 3 at 214-15(1996). This argument was also abandoned by State Department lawyers in later law journal articles. Those articles conceded that the OAS action was an Article 53 enforcement action but that the Security Council either had "acquiesced" in OAS action or had *ex post facto* authorized the OAS action.

inappropriate to adopt a limiting definition when the Charter leaves the term open-ended and undefined. With regard specifically to enforcement actions, the Charter refers generously to "regional arrangements or agencies" rather than formally, or in limited fashion, to regional "organizations" or "institutions."[19] A broad definitional approach to regional organizations focuses appropriately on function rather than form.[20] That is, the focus of the Charter is, as it should be, on the Security Council and not on the authority, structure, or processes of regional organizations *qua* regional organizations. Thus, under regional organizations as defined in this article, states acting multilaterally but not in conformance with the "constitution" of some regional organization, (like the NATO use of force in Kosovo[21] or the ECOWAS use of force in Liberia),[22] would nonetheless be considered within the ambit of the Charter with regard to enforcement actions. The definition used in this article would also include enforcement actions taken multilaterally by states without a formal organizational structure under "arrangements" like the "Coalition of the Willing."[23] Such coalitions of states and *ad hoc* multinational forces are a regular feature in collective actions under Chapter VII. For example, UNOSOM II was a multilateral coalition of willing states that replaced U.S.

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[19] Article 53 of the U.N. Charter provides in relevant part:
1. The Security Council shall, where appropriate, utilize such *regional arrangements or agencies* for enforcement action under its authority. (emphasis added).
[20] *See* BOWETT, *supra* note 18 at 10-12.
[21] *Infra* p. 104-106.
[22] *Infra* p. 102-103.
[23] *See* Thomas M. Franck, *"When, if ever, May States Deploy Military Force Without Prior Security Council Authorization?",* 5 WASH. U. J. L POL'Y 51, 55 (2001).

forces in Somalia[24] and UNPROFOR was an *ad hoc* coalition of the willing in the former Yugoslavia.[25] It would seem that the informal Coalition of the Willing of around 50 states that used force in Iraq would be as much a regional arrangement of states as a more formal but very much smaller organization like the Organization of Eastern Caribbean States (OECS) that used force in Grenada in 1983.[26] Politically, of course, the fewer states involved and the less representative those states are of the global community (whether acting within a paper organization or more informally), the greater the incentive, on the one hand, of those states to obtain prior authorization of the Security Council and, on the other hand, of the Security Council explicitly to deny authorization.

III. THE U.N. CHARTER MEANING ON ENFORCEMENT ACTIONS BY REGIONAL ORGANIZATIONS MAY HAVE CHANGED.

A. Changes in the Charter meanings.

As a general matter, it is not new to assert, as this article does, that regional organizations in certain circumstances may be entitled to take enforcement action unless the Security Council explicitly denies authorization to do so.[27] However, those assertions in

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[24] *See* S.C. RES 814, U.N.S.C.O.R., 48th Sess., 318th mtg. at 1, U.N. Doc. S/RES 814(1993).
[25] *See* S.C. Res 743, U.N. Scor 48th Sess. 3055th mtg. at 8, U.N. Doc S/RES/743 (1992).
[26] *See infra* p. 103-106.
[27] *See* John Norton Moore, *The Role of Regional Arrangements in the Maintenance of World Order*, in THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 122, 159-60 (Cyril E. Black and Richard A. Falk eds. 1971).

general have rested on the rather questionable ground of a "reasonableness" approach to Charter obligations, Charter meanings, and Charter applications.[28] This approach leaves the meaning of the Charter in the hands of an individual state or regional organization. Under a reasonableness approach, the Charter is viewed as a malleable document, open to differing interpretations depending on the circumstances and on the needs of individual member states or a regional organization.

The reasonableness (or common law approach) correctly has not been accepted by the majority of writers as a legitimate device for straying from the words of the Charter.[29] There are problems in applying, *mutatis mutandis*, the common law method to the UN Charter and to Article 53 in particular. In common law municipal systems, there are constitutionally binding legislatures and effective enforcement mechanisms for executive branches of government to reign in abusively interpretative members of common law society (courts, governmental agencies, or human and corporate citizens). However, no comparable international legislature or effective executive enforce-

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[28] *See* Abraham D. Sofaer, *International Law and Kosovo*, 36, STAN J. INT'L.L 1, 8 (2000); Abram Chayes, *A Common Lawyer Looks at International Law*, 78 HARV.L. REV. 1396(1964/65).

[29] *See* Akehurst, *supra* note 18, at 182 ("[T]he Security Council must *in all cases* order or authorize the [enforcement] action [under Article 53]."") (emphasis added); Erkki Kourula, *Peace-keeping & Regional Arrangements,* in UNITED NATIONS PEACE-KEEPING: LEGAL ESSAYS 95, 118 ("Authorization can *only* be given by the Security Council before a regional arrangement takes an enforcement action") (emphasis added); White, *supra* note 3, at 204 ("When a regional organization such as the . . .OAS . . . is planning an action which is not entirely defensive, they *must* have approval of the Security Council for such an operation.") (emphasis added).

ment mechanism exists in the international system. Under a common law approach applied to the plain words of the UN Charter, there is nothing systemic to keep UN members from bending Charter provisions beyond recognition on grounds of reasonableness, especially if the interpreting state is a Security Council permanent member that can veto any attempt by the Security Council to counter aberrant interpretations. The strongest states would tend to interpret the Charter as they pleased and the weakest states, dependent on others for economic and other aid, would be pressured to interpret the Charter the way the strong states demanded.

If the Charter is to be taken as accommodating regional organization enforcement actions taken without prior Security Council authorization it should be based on firmer ground than a reasonableness approach to Charter interpretation. One such ground would be because the Charter meaning has changed with regard to Security Council authorization.

Traditionally, changes in the meaning of a treaty such as the U. N. Charter have to be by amendment.[30] However, since it came into force in 1945, the meaning of the U. N. Charter, and in particular the voting procedures of the Security Council, clearly has changed in several respects without formal amendment. As a general matter, this is not a unique phenomenon in international treaty law and especially with treaties involving international institutions. Here, constituent treaties over time frequently come to reflect the international practice of states after the

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[30] *See,* Vienna Convention on the Law of Treaties, Art. 39.

treaty comes into force. Article 31 (3) (6) of the Vienna Convention on the Law of Treaties explicitly adopts the notion of the relevance of "subsequent practice" in accurately interpreting the meaning of any treaty. In addition, there have been instances where the meaning of a treaty has changed to accommodate subsequent customary international law.[31]

1. Security Council Voting.

The voting procedure of the Security Council according to the plain words of the Charter requires that decisions on substantive matters, like authorization to take enforcement action, have the affirmative vote of nine of the fifteen members "including the concurring votes" of the five permanent members.[32] Here, it would seem that the plain words "concurring vote" would require first an actual vote (yes or no) and second an affirmative vote. The words of the Charter on their face seem to preclude an abstention qualifying as a concurring vote of the Security Council on substantive matters. However, "[p]ractice reveals great flexibility in the application of" Security Council voting under the Charter.[33] This is certainly the case with concurring votes and abstentions - in which it is now unanimously accepted that abstention from voting by voluntary absence (like the Soviet Union absence from the Security Council in the case of Korea in 1950) and abstention from voting by a permanent

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[31] *See generally*, NANCY KONTOU, THE TERMINATION AND REVISION OF TREATIES IN THE LIGHT OF NEW CUSTOMARY INTERNATIONAL LAW (1994).

[32] Article 27 of the U. N. Charter. The five permanent members are China, France, Russia, the U.K., and the U.S.A.

[33] Stefan Brummer and Bruno Simma *Article 27, Voting* I THE CHARTER OF THE UNITED NATIONS, 476, 520 (Simma et al. eds. 2002).

member in attendance both constitute concurring votes of permanent members on substantive matters.[34]

The Charter also makes no mention about votes taken by consensus. Yet, the generally accepted view is that consensus decisions are "recognized" as a "permissible" form of making Security Council decisions at least where all members may comment on the matter and there is no expressed opposition to it.[35] That is, the Security Council President may now determine that a consensus on a matter has been achieved and that the matter will be pursued consistent with that consensus and without a formal vote.[36]

2. Security Council Inaction and The General Assembly.

The words of the U. N. Charter do not bestow upon the General Assembly any enforcement power under the Charter. The General Assembly is entitled only to "discuss" and "make recommendations" to the Security Council.[37] However, in the face of Security Council veto paralysis in 1950, the General Assembly acted to authorize the use of force under its Resolution on Uniting for Peace (RUP) procedure even though the Charter gave it no such authority. Under the RUP, the General Assembly may determine a

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[34] *Id*. at 449-52. Modification of the meaning of the Charter has been justified on a variety of grounds including the "widespread view" that the concurring vote provision of article 27 "has been modified by customary law" between the contracting parties. Other justifications for ignoring a strict view of the Charter's words include liberal treaty interpretation, waiver of voting rights, and spontaneous consent.

[35] *Id.*

[36] SIMMA, *supra* note 33, at 512-513.

[37] Article 10 of the U. N. Charter.

threat to the peace, breach of the peace, or act of aggression and may recommend the use of force by members "if the Security Council, because of lack of unanimity, fails to exercise its primary responsibility for the maintenance of international peace and security."[38] Thus, although not authorized by the U. N. Charter, an organ of the United Nations (i.e. The General Assembly) may share the enforcement action responsibility with the Security Council without Security Council authorization. It is not a great step to also say that enforcement action responsibility may be exercised by regional organizations in appropriate circumstances unless the Security Council denies authorization.

3. The Doctrine of Implied Powers.

The U.N. Charter does not confer by its words any authority upon the U.N. organization to bring an international claim. However, the International Court of Justice in the *Reparations* case implied the power of the organization to bring a reparations claim on behalf of a U.N. employee:[39] "Under international law, the Organization must be deemed to have those powers, which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."

The ability of the international community to ad-

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[38] G.A. 377 (V) November 3, 1950. *See also* Certain Expenses Case, *supra* note 16 at 163, *et seq*; BOWETT, *supra* note 18, at 49-52.

[39] Reparations for injuries suffered in the service of the United Nations, advisory opinion, [1949], ICJ at 182. *See generally* JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW, 67 (2002).

dress international peace and security through enforcement actions arguably is as "essential to the performance" of the U.N. Organization as making claims on behalf of employees. If so, then it might appropriately be an "implied power" of regional organizations to take enforcement action when needed in circumstances where the Security Council fails to act or fails to authorize others to act.

4. Peacekeeping.

Nowhere in the Charter is peacekeeping by the U.N. Organization or its members referred to. However, over the years since the Charter was adopted "a clear pattern" of "arrangements and operations have evolved" "which taken together" allow the Security Council, General Assembly and Secretary General to one degree or another to be involved in peacekeeping.[40] In fact, peacekeeping concepts have been expanded to include "robust peacekeeping" which is difficult to distinguish from enforcement actions.[41] If robust peace-keeping can be conducted by ad hoc forces, it is not very different from having regional organizations take enforcement actions.

Thus, U.N. Charter meanings have changed without amendment in voting by the Security Council, and in sharing responsibility in collective security matters. Viewed in that light, it would not be startling or unusual, as a general matter, to find that the Charter's authorization voting by the Security Council for enforcement actions by regional organizations has

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[40] MALCOLM N. SHAW, INTERNATIONAL LAW (4th Ed.) 846. *See*, KLABBERS, *supra* note 39 at 91.
[41] *See infra* 118.

similarly changed.

B. The Practice of the Security Council and Regional Organizations.

The practice of the Security Council and regional organizations supports a change in the U.N. Charter's meaning with regard to enforcement actions.

In the six decades since the U.N. Charter scheme on use of force was put in place, enforcement action has been taken on several occasions by regional organizations in ways that challenge the primary power of the Security Council as illustrated in the following seven examples.

1. Cuba 1962.

The most serious threat of mutually destructive nuclear force to date occurred during the Cuban missile crisis in 1962. In political terms, the crisis arguably was the most successful enforcement action undertaken by a regional organization. Nuclear war was averted. Nuclear missile facilities were removed from Cuba. Cuba was not invaded and its territorial sovereignty was guaranteed. In legal terms, the collective action of the Organization of American States (OAS) during the crisis directly challenged the primacy of the Security Council to authorize the use or threat of force by regional organizations in enforcement actions.

On October 15, 1962, the United States learned, primarily by military air reconnaissance, that the So-

viet Union and Cuba were installing Soviet medium and intermediate range ballistic missiles and missile facilities in Cuba for the first time.[42] These were surface-to-surface missiles that had an offensive capability, that were capable of carrying nuclear warheads, and that had ranges over a thousand miles. Previously, the U.S. government knew that Cuba was receiving from the Soviet Union defensive SAM surface-to-air antiaircraft missiles of limited range and other military arms.

The U.S. faced a legal dilemma. Cuba had not violated international law, and self-defense could not justify a unilateral use of force because no armed attack had occurred,[43] and the Soviet Union was guaranteed to veto a resolution authorizing the U.S. to take enforcement action under the U.N. Charter. Yet, because of the failed 1961 Bay of Pigs invasion of Cuba by U.S. armed and trained Cuban exiles undertaken in violation of international law, the U.S. wanted to find and articulate a legal justification for

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[42] The facts of the crisis are drawn from THE KENNEDY TAPES: INSIDE THE WHITE HOUSE DURING THE CUBAN MISSILE CRISIS (Ernest R. May and Philip D. Zelikow, eds.,1997); MICHAEL R. BESCHLOSS, THE CRISIS YEARS: KENNEDY AND KHRUSHCHEV, 1960-1963 (1991); ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW (University Press 1987); GRAHAM T. ALLISON, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS (Harper Collins 1971); ELIE ABEL, THE MISSILES OF OCTOBER (1969).

[43] *See* KENNEDY TAPES, *supra* note 42 at 197-98 (noting that Secretary of State Dean Rusk reportedly said that "a sudden air strike had no support in law or morality, and, therefore must be ruled out; *see* CHAYES, *supra* note 42, at 65 ("Intra-office discussions at the time emphasized that it would set a bad precedent if the United States were to rely on a self-defense theory ***[T]he central difficulty with the Article 51 argument was that it seemed to trivialize the whole effort at legal justification.").

an enforcement action in this crisis.[44]

The U.S. Government's options narrowed to taking regional collective enforcement action through the Organization of American States (OAS).

On October 22, 1962, President Kennedy declared on national television that the presence of the Soviet missiles on Cuban soil constituted "an explicit threat to the peace and security of all the Americas, in flagrant and deliberate defiance" of the Rio Treaty, and that any substantial increased possibility of the use, or sudden change in deployment, of nuclear weapons delivered by ballistic missiles "may well be regarded as a definite threat to the peace."[45] He announced "a strict quarantine on all offensive military equipment under shipment to Cuba," which, if found, would be "turned back," and he called for a meeting of the Organ of Consultation under articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty).[46]

On October 23, 1962, the Organ of Consultation provided for under the Rio Treaty and the OAS

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[44] Leonard Meeker, the acting legal advisor at the State Department during the crises, wrote later the U.S. government was "concerned that any actions to be taken by the United States should rest on the soundest foundation in law and should appear in that light to all the world, including the Government of the Soviet Union." Leonard C. Meeker, *Defensive Quarantine and the Law*, 57 AM J. INT'L LAW. 515 (1963); *See also* KENNEDY TAPES, *supra* note 42 at 170-72; CHAYES *supra* note 42 at 14-24, 30-35; LOUIS HENKIN, HOW NATIONS BEHAVE 280 (2 ed. 1979).

[45] 47 DEP'T ST. BULL. 715-16 (Nov. 12, 1962).

[46] *Id.* at 716-18.

Charter met and found that:[47] "Incontrovertible evidence has appeared that the Government of Cuba, despite repeated warnings, has secretly endangered the peace of the Continent by permitting the Sino-Soviet powers to have intermediate and middle-range missiles on its territory capable of carrying nuclear warheads."

It then unanimously adopted a resolution recommending "that the member states, in accordance with Articles 6 and 8 of the [Rio Treaty], take all measures, individually and collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military materiel and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent."

It also resolved to "inform the Security Council . . . in accordance with Article 54 [of Chapter VIII] of the Charter."[48] The OAS resolution endorsed the State Department's legal rationale by basing its authority on article 6, which addresses only non self-defense grounds for the use of force. If the OAS resolution was meant to rely on self-defense grounds, it would have had to invoke article 3 of the Rio Treaty dealing

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[47] *Id*. at 723. Cuba could not vote on the resolution because its government had been suspended from the OAS, although technically the *State* of Cuba was still an OAS member.

[48] *Id*. Article 54 of Chapter VIII of the U.N. Charter requires that the "Security Council shall at all times be kept fully informed" of actual or contemplated activities of regional organizations "for the maintenance of international peace and security."

with armed attacks and not article 6.[49] Thus, the *opinio juris* of the OAS and the United States at least was clear in rejecting self-defense as a justification for the quarantine and in accepting that Articles 52 and 54 of Chapter VIII of the U.N. Charter applied.

The United States issued a proclamation on the evening of October 23, 1962, to go into effect the next day.[50] The proclamation ordered U.S. armed forces "to interdict . . . the delivery of offensive weapons and associated materiel to Cuba." It also authorized the "designation . . . of prohibited or restricted [maritime] zones and of prescribed [travel] routes." Finally, it set out the operation of the quarantine as follows:

> Any vessel or craft which may be proceeding toward Cuba may be intercepted and may be directed to identify itself, its cargo, equipment and stores and its ports of call, to stop, to lie to, to submit to visit and search, or to proceed as directed. Any vessel or craft which it is believed is en route to Cuba and may be carrying prohibited materiel or may itself constitute such materiel shall, wherever possible, be directed to proceed to another destination of its own choice and shall be taken into custody if it fails or refuses to obey such directions. All vessels or craft taken into custody shall be sent into a port of the United States for appropriate disposition.

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[49] The text of the Rio Treaty is set out in 43 AM. J. INT'L L. Supp. at 53 (1949).

[50] *See* 47 DEP'T OF ST. BULL. *supra* note 45, at 717.

The United States, Cuba, and the Soviet Union all requested a meeting of the Security Council. The United States proposed and tabled a draft resolution that, among other things, called for withdrawal of all offensive weapons from Cuba. This proposed resolution would certainly have been vetoed by the Soviet Union. And, the United States would certainly have vetoed any proposed Security Council resolution sponsored by the Soviet Union and Cuba. The certainty that the Security Council would never authorize the OAS enforcement action pushed the OAS and the United States into the awkward position of asserting that the quarantine fell under Articles 52 and 54 of Chapter VIII of the U.N. Charter, but not Article 53. That awkwardness would be removed today if the Charter meaning on Security Council votes on authorization of enforcement action has changed.

Other OAS member nations (Argentina, the Dominican Republic, and Venezuela) joined the United States in carrying out the quarantine. In addition, Colombia, El Salvador, Costa Rica, Guatemala, Haiti, Honduras, and Nicaragua put their port facilities at the disposal of the quarantine forces.[51] During the quarantine, which lasted until November 20, 1962, Soviet vessels were boarded, inspected, and allowed to proceed. Soviet submarines were tracked. Other vessels changed course and did not enter restricted maritime zones and did not go to Cuba. No military force was used and no vessels were forcefully intercepted or seized. However, the threat that force would be used, if necessary, to enforce the quarantine was

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[51] *See* Akehurst, *supra* note 18, at 198.

clear and present throughout the crisis.[52]

The crisis ended when the Soviet Union agreed to stop putting missiles in Cuba and to remove missiles already there. The Soviet Union also agreed to allow its ships entering or leaving Cuba to be inspected.[53] The United States in turn guaranteed the territorial integrity of Cuba.

In the Cuban missile crisis, the OAS took enforcement action in recommending a quarantine on Soviet shipments of offensive military equipment to Cuba without Security Council authorization and the Security Council did not object due to the cold war guarantee of veto by the United States.

2. Lebanon 1976.

In June, 1976, the Arab League deployed a peacekeeping force (the Symbolic Arab Security Force) in Lebanon with the permission of the Lebanese government. However, in October, 1976 the Arab League transformed the Symbolic Arab Security Force into the Arab Deterrent Force. The tasks of the new force included "maintaining internal security," "removing all military installations" and "when necessary" "taking over public utilities and institutions" and "guarding military and civilian establishments."[54] This force was almost 30,000 soldiers strong and its functions included enforcement functions and its ac-

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[52] *See id*. at 199; Meeker, *supra* note 44, at 523. *But see*, HENKIN, *supra* note 44, at 299 ("The quarantine did not involve the actual use of force, and the threat of force in the background . . . was minimal . . .").

[53] *See* 47 DEP'T ST. BULL., *supra* note 45, at 741-47.

[54] *See* Istvan Pogany, THE ARAB LEAGUE AND PEACEKEEPING IN THE LEBANON, 83 (1987).

tions became an enforcement action using "military coercion beyond that in strict self-defense."[55] No Security Council authorization was obtained before or after the peacekeeping effort became an enforcement action.[56] The Security Council predictably never condemned the unauthorized enforcement action.

3. Grenada (1983).

In 1983, the OECS (Organization of Eastern Caribbean States) and the United States (not an OECS member) landed military forces in Grenada. At the time of the landing, there were about 1000 American citizens on the island. The OECS use of force came in the twilight of the cold war and the East-West political and ideology contest. The Security Council did not take any action to authorize or condemn the use of force by the OECS and the United States.[57] The OECS justified the use of force by asserting, after the fact, that the situation in Grenada (a military build-up by a Marxist government with support from Cuba and the Soviet Union) "posed a serious threat to the security of the OECS countries and other neighboring states."[58] The United States offered "three well established legal principles" as the legal basis for the use of force.[59] First, the Governor-General of Grenada was a lawful government authority of Grenada and lawfully invited the U.S. and OECS forces into Gre-

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[55] WHITE, *supra* note 3 at 216-7.
[56] *But see* POGANY, *supra* note 54 at 102("… the Arab Deterrent/Force…operations…did not amount to 'enforcement action' ").
[57] *See* G.A. Res. 38/7, 38 U.N. GAOR Supp. No. 47, U.N. Doc. A/38/L. 8 (1983).
[58] 83 DEP'T ST. BULL. 67, 68 (1983).
[59] Davis R. Robinson, *Letter from the Legal Advisor, United States Department* of *State*, 18 INT'L LAW. 381, 382 (1984).

nada to deal with "internal disorder as well as external threats." Second, the OECS was competent to use force "to maintain international peace and security." And, third, the United States was justified in "landing" "United States military forces" "to secure" the "evacuation" of U.S. nationals. Here, the United States stressed that it was not basing the U.S. use of force on unilateral or collective self-defense under Article 51 of the U.N. Charter or on the doctrine of humanitarian intervention.[60] However, others have justified the OECS and U.S. action in precisely those terms.[61] Those offered justifications correctly have been challenged as "unconvincing both individually and collectively."[62] The Grenada episode is probably most accurately viewed as an enforcement action. It was a use of force that was not undertaken in unilateral or collective self-defense. It also was not peacekeeping because no proper host-state invitation was extended and the military action was not politically neutral. The action is best characterized as an enforcement action in which Security Council authorization was necessary under the words of the Charter and not obtained in practice. The Governor-General of Grenada (a largely ceremonial post) issued the invitation to intervene to the OECS and to the United States after the fact and at a time when there was no effectively functioning government on the island. In

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[60] In rejecting self-defense justifications for the use of force in Grenada, the United States said this was "for the same reason that the United States eschewed . . . [self-defense] in response to the Cuban missile crisis." *Id.* at 385.

[61] *See* John Norton Moore, *Grenada and the International Double Standard,* 78 AM J. INT'L L. 145, 153-56 (1984).

[62] Rein Mullerson, *Intervention By Invitation in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 127, 130 (Lori Fisler Damrosch & David Scheffer eds., 1991) (citing W.C. GILMORE,) GRENADA INTERVENTION: ANALYSIS & DOCUMENTATION 74 (1984).

addition, the OECS and U.S. military forces that took control of the island did not conduct operations under an implementing agreement by contending forces to keep the peace as would normally be required in traditional peacekeeping.

The Grenada episode is another example of Article 53 being ignored in reality, with the United States using a regional organization, the OECS to take enforcement action without Security Council authorization.[63] Whether that is an accurate characterization or not,[64] the Grenada episode emphasizes that reliance on the *words* of the Charter alone for the meaning of Article 53 induces alternative justifications and increasingly, and unfortunately, blurs the line between enforcement actions on the one hand and peacekeeping and self-defense on the other hand.

4. Liberia (1992).

In 1990, The Economic Community of West African States, (ECOWAS), became involved in a peacekeeping effort to implement a cease-fire between government and rebel forces in Liberia. Since this was a peacekeeping operation, no Security Council authorization was obtained and none was needed. However, during 1992, the ECOWAS peace-keeping forces, (ECOMOG (ECOWAS Monitoring Group)),

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[63] *See* White, *supra* note 3, at 21. *But see* Moore, *supra* note 61, at 156-57 (referring to the OECS and U.S. use of force as being justified on the interrelated grounds, of peacekeeping, self-defense, and humanitarian intervention).

[64] *See* Moore, *supra* note 61, at 156-57, (referring to the OECS and U.S. use of force as being justified on the interrelated grounds, of peacekeeping, self-defense, and humanitarian intervention).

became engaged in enforcement actions against the rebels. At the time that the peace-keeping effort was converted to an enforcement action, ECOWAS was operating without prior explicit Security Council authorization, arguably in violation of the plain words of Article 53.

On November 19, 1992, after the ECOWAS enforcement action began, the Security Council adopted a resolution which recalled "the provisions of Chapter VIII" and commended "ECOWAS for its efforts to restore peace, security and stability in Liberia."[65] The Security Council resolution seems to implicitly, and *ex post facto*, authorize the ECOWAS enforcement action. If so, this contravenes the plain words of Article 53 requiring prior explicit Security Council authorization.[66] As a practical matter, however, prior explicit authorization, in circumstances where peace-keeping is converted to enforcement action, may not always be possible. Nevertheless, the Liberia episode represents a further weakening of the primacy of the Security Council over regional organization enforcement actions.

This episode also illustrates the flexible attitude of the Security Council about the kinds of organizations that may take enforcement actions. ECOWAS is primarily an economic development and relations organization and was not authorized by its constitutional documents to use or threaten force in internal civil wars.

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[65] U.N. SCOR Res. 788, U.N. Doc S/RES/788 (1992).

[66] *See* MALCOLM N. SHAW, INTERNATIONAL LAW 886 (4th ed. 1997) ("While it is clear that the Security Council ultimately supported the action taken by ECOWAS, it is questionable whether the spirit and terms of Chapter VIII were fully complied with.").

5. Bosnia (1992-93).

In the early 1990s, NATO conducted various military operations in Bosnia at the behest of the Security Council under Chapter VII - enforcing arms embargoes, implementing sanctions, enforcing "no-fly" zones, providing close air support for the UN force (UNPROFOR), and delivering humanitarian assistance.[67] The Bosnia episode underscores that the Security Council was prepared to use NATO in enforcement actions even though NATO (as a defense organization) was "not acting within the powers of its own constituent treaty."[68] It also illustrates that the technical status of the regional organization may not bar regional organizations from engaging in enforcement actions under Chapter VIII as long as the organization's members are willing.

6. Kosovo (1999).

In 1999, NATO conducted a bombing air campaign and expelled Serbian forces from Kosovo. At the time, the Security Council was seized of the Kosovo matter by resolution under Chapter VII of the U.N. Charter.[69] However, the Security Council did not ex-

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[67] *See* U.N. SCOR Res. 770, U.N. Doc S/RES/770 (1992); 781,U.N. Doc S/RES/781 (1992); 816, U.N. Doc S/RES/816 (1993); 819, U.N. Doc S/RES/819 (1993);824, S/RES/824 (1993); 836, S/RES/836 (1993); 844, S/RES/844 (1993).

[68] WHITE, *supra* note 3, at 219. This tends to confirm the view that function trumps form in defining "regional agency or arrangements" for Chapter VIII purposes.

[69] U.N. SCOR Res. 1160, U.N. Doc. S/RES/1160 (1998) ("The Security Council . . . Acting Under Chapter VII of the Charter of the United Nations . . . Decides to remain seized of the matter."); *See also* U.N. SCOR Res. 1199, U.N. Doc. S/RES/1199 (1998); U.N.

plicitly authorize the use or threat of force by NATO. After the bombing and expulsions, the Security Council authorized by resolution substantial participation by NATO in *future* international security matters in Kosovo under Chapter VII.[70] However, the Security Council again did not address the prior bombing campaign and expulsion of Serbs.

The NATO use of force in Kosovo and the Security Council's failure to explicitly exercise its authorization functions under either Chapter VII or Chapter VIII of the Charter calls into question the need for Security Council authorization for regional organizations to engage in enforcement actions. The Security Council failed to directly react, before or after the fact, to the use of force by NATO. The Security Council's inaction might mean that Article 53 requirements will not be applied in all cases. It might also infer that the Security Council is prepared to accept that enforcement actions authorization may be implied and *ex post facto*.[71]

The Kosovo episode also seems to resurrect the arguments made by the U.S. lawyers during the Cuban missile crisis that Article 53 authorization can be implied. However, at the time of the Cuban missile cri-

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SCOR Res.1203, U.N. Doc S/RES/1203 (1998).

[70] U.N. SCOR Res. 1244, U.N. Doc. S/RES/1244 (1999) (stating that the Resolution "[a]uthorizes . . . relevant international organizations to establish the international security presence in Kosovo," including "substantial . . . [NATO] participation"). ANNEX II avers that "the Deployment in Kosovo" of NATO was "decided under Chapter VII of the Charter."

[71] *See supra* 89 for discussion of changes in Charter meaning under the doctrine of implied powers.

sis, the Security Council was paralyzed by the cold war threat of veto in a way that guaranteed inaction. The absence of state practice to the contrary and the cold war guaranteed veto made it arguably less inappropriate to imply authorization. This sort of argument lay dormant until the Kosovo episode. In Kosovo, the threat of veto by China or Russia prevented the introduction of a Security Council resolution to authorize the NATO bombing and expulsions ahead of time. However, there was no veto in the later resolutions embracing future NATO participation. In addition, the Security Council was already seized of the Kosovo matter under Chapter VII. Chapter VII, unlike Article 53 of Chapter VIII, does not explicitly require prior explicit Security Council authorization for regional organizations and their members to use force to carry out Security Council resolutions to maintain or restore international peace and security. Here, finding an implied or *ex post facto* authorization of the prior bombings seems less disturbing to the words of the Charter and to the paper primacy of the Security Council in collective security matters than perhaps implying authorization from Charter words alone under Chapter VIII.

7. Iraq 2003.

The use of force by the "Coalition of the Willing" in Iraq in 2003 fell under Chapter VII of the U.N. Charter, rather than Chapter VIII, because the Security Council was seized of the matter by Security Council resolutions.[72]

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[72] *See* Security Council Resolutions 678 and 687.

The Case for Regional Organizations

Under Chapter VII, the U.N. originally was supposed to have a standing "army" contributed by member states under special agreement.[73] However, this arrangement never came into being. Alternatively, the Security Council has relied instead on voluntary forces supplied on an *ad hoc* case by case basis. Thus, the Security Council regularly has relied on willing states to maintain and restore international peace and security. Here, the Security Council found Iraq to be a threat to international peace and security and indicated that it would enforce the obligatory controls that had been imposed on Iraq.[74] However, neither the U.N. Charter itself nor the relevant Security Council resolutions indicated who would determine (The Security Council or the Coalition of the Willing) when Iraq materially breached the resolutions or when members could use force to enforce those resolutions. Although not directly addressed by this article, it would appear that the uncertainty about enforcement of matters under Chapter VII would

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[73] Article 43 of the U.N. Charter provides:

> 1. All members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
> 2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general locations, and the nature of the facilities and assistance to be provided.
> 3. The agreement shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

[74] *Id.*

benefit from being remedied[75] as much as the uncertainty over authority over Chapter VIII has arguably been remedied by subsequent practice.

IV. IMPLICATIONS OF A CHANGE IN CHARTER MEANING.

A change in Charter meaning that allows regional organizations to take enforcement action without authorization of the Security Council has certain implications, which need to be addressed. First, such a change accommodates the reality that there is a far different collective security world today than existed in 1945. Second, a change in Charter meaning creates less pressure to unacceptably stretch other legal predicates for use of force to sidestep or avoid lack of Security Council authorization. And third, a change in Charter meaning creates a gap in accountability to the global collective that needs to be dealt with.

A. The Collective Security World has Changed since 1945.

In several significant respects, the world has changed since the U. N. Charter was adapted in 1945, all of which make a change in Charter meaning with regard to lawful enforcement actions taken by regional organizations more appropriate.

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[75] Franck, *supra* note 13 at 900, suggests a change in Security Council voting that would have the Security Council determine whether Chapter VII resolutions have been materially breached, but "to do so by a majority of nine of the fifteen, without a veto."

The Case for Regional Organizations

1. The End of the Cold War.

The end of the cold war and the dissolution of the Soviet Union brought an end to the paralysis of the Security Council that existed during the crisis. From 1945 to 1990 the veto was used well over 200 times. However, it has been used less than ten times since then.[76] It is more likely today that negotiated abstentions, rather than vetoes, will be used to express disapproval of Security Council actions. Thus, the Security Council is in a much better position than it was during the crisis to properly exercise its authorization function under Article 53 and under a changed Charter meaning.[77] The dissolution of the Soviet Union signaled the end of both the "empire" system of international governance and communism. It also heralded the movements toward democracy and market economies. Those developments have altered the focus of use-of-force concerns from conflicts between hemispheric military alliances (like in the Cuban missile crisis) to geographic regional strife, to internal unrest, civil wars, and humanitarian concerns. With that shift in focus, the demarcation line between Article 53 regional enforcement actions for which Security Council authorization is needed and other uses or threats of force has become blurred, and the appropriateness of continued monopoly power of the Security Council is questionable.

2. Increased Demands on the U.N. Organization.

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[76] *See* Richard Butler, *United Nations: The Security Council Isn't Performing*, INT'L HERALD TRIBUNE, Aug. 5, 1999, at 8.

[77] The "guarantee" of a veto by Russia, Germany and France in the Iraq situation harkens back to cold war days.

One result of a functioning Security Council has been a marked increase in the demands placed upon the U.N. Organization in collective security matters to provide forces to engage in enforcement actions, peacekeeping actions, and actions involving humanitarian concerns. In the area of peacekeeping alone, the U.N. has approved budgets for operations and observer missions in Angola, Iraq-Kuwait, Western Sahara, Cambodia, Guatemala, Croatia, Cyprus, Georgia, Tajikistan, Bosnia and Herzegovina, Haiti, Central African Republic, Sierra Leone, Kosovo, and East Timor.[78]

Those demands and other requirements strain the budget of the U.N. Organization and severely test the collective political will of U.N. members, which must supply the military forces and material, in circumstances where collective enforcement action may be needed to maintain or restore international peace and security. U.N. budgets in the 1990s for peacekeeping and peace-building activities around the world have ranged between 1.5 and almost 4 billion dollars.[79] As of May 1999, member states owed the U.N. as much as $2.6 billion. Over 30 members have been in arrears in their payment of U.N. dues, and the U.N. at times has even been forced to borrow from peacekeeping funds to cover overall budget shortfalls.[80] The twin impediments of lack of money and lack of collective political resolve increase the likelihood that, in future

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[78] *See* U.N. Press Release, U.N. Doc. GA/9726 (June 15, 2000).
[79] *See U.N. Peacekeeping*, U.N. Dep't of Public Information, U.N. Doc.DP/1851/Rev/ 9 (June 1999).
[80] *See The Financial Crisis*, U.N. Dep't of Public Information, U.N. Doc.DP/1815/Rev. 16 (June 1999).

circumstances where use of force is needed to maintain or restore international peace and security, the Security Council may not be able to seize a matter under Chapter VII, or, if seized, it may not have the resources to act. Here, regional organizations in appropriate circumstances ought to be asked, or ought to be allowed under the Charter, to take action under either Chapter VII or Chapter VIII without explicit Security Council authorization.

3. The Number and Nature of Regional Organizations has Changed.

The number of regional organizations has increased substantially in the decades since the Cuban missile crisis. In addition, the nature of regional organizations has changed.[81] Except for NATO, the old collective defense pacts that engendered much of the concern about regional organizations and the primacy of the Security Council in the early days of the UN are gone: the Warsaw Pact, ANZUS, SEATO, and CENTO.[82] Even NATO is now searching for its new role in the post-cold war world. Its membership is expanding to include former adversaries in central

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[81] *See* TOM NIEROP, SYSTEMS & REGIONS IN GLOBAL POLITICS: AN EMPIRICAL STUDY OF DIPLOMACY, INTERNATIONAL ORGANIZATION & TRADE, 1950-1991, 95-9 (1994); Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 1997 A.F. L. REV. 235, 235-36. 1997.

[82] The Warsaw Pact (Bulgaria, Czechoslovakia, the GDR, Hungary, Poland, Romania and the USSR) ended in 1991. The Security Treaty between Australia, New Zealand, and the United States is no longer in full operation due to the U.S. suspension of its security commitment to New Zealand and the establishment of a South Pacific Nuclear-Free Zone. The South East Asian Treaty Organization was dissolved in 1977. The Central Treaty Organization (Turkey, Iraq, Pakistan, Iran, and Great Britain) ceased operation in 1979.

and Eastern Europe and the states of the former USSR. NATO is also beginning to use or threaten force in non-self-defense situations, for example, in its activities in Bosnia and in its more recent bombing campaign in Kosovo. Other regional organizations, which have not had a use-of-force function, are becoming engaged in use-of-force activities. For example, the EU, at the 1999 Helsinki Summit, approved a European Security and Defense Initiative to field a European rapid-reaction force, and the OSCE (Organization for Security and Cooperation in Europe) has become a Chapter VIII regional agency or arrangement and has agreed to become involved in non use-of-force peacekeeping. And in 1990, ECOWAS (Economic Community of West Africa States) became involved in the use of force in Liberia.

In addition, the Security Council itself seems to find irrelevant a sharp distinction between Chapter VII regional organizations (like the OAS, the OAU and The Arab League) capable of taking enforcement actions against their own members, and other regional organizations (like NATO) which may be obligated under Article 48(2) of the U.N. Charter to take enforcement actions to maintain or restore international peace and security as noted above regarding enforcement actions in Somalia and the former Yugoslavia.

With the increasingly pivotal role regional organizations are beginning to play in trade, human rights, development, finance, and the environment, it is likely that their role in situations involving the use or threat of force properly will continue to increase and may become more autonomous.

4. The Change in the Nuclear Threat.

Over the past half century there has been a fundamental change in the nature and scope of the threat posed by nuclear weapons. In 1962, in the Cuban missile crisis, the threat posed to international peace and security was global nuclear war conducted by the opposing military alliances of the East and West, led respectively by the Soviet Union and the United States. Such threats gave considerable weight to arguments that the OAS quarantine could have been justified as a legitimate act of anticipatory self-defense. Today, however, the threat of mutually destructive global nuclear war that prompted the OAS quarantine has all but disappeared. Global nuclear warfare threats fueled by global political polarization have been replaced by threats of regional nuclear conflicts, for example, in the Indian subcontinent (India-Pakistan), the Middle East (Israel-Iraq), the Korean peninsula, and Eastern Europe and the states of the former Soviet Union. Even here, however, the direction is toward reduction and containment of the nuclear threat.

The signposts of the diminishing nuclear threat are apparent on many fronts. Nuclear arms reduction efforts are reflected in the SALT I and II (strategic arms limitation) agreements of the 1970s and the START I, II, and III (reduction and limitation of strategic offensive weapons) agreements of the 1990s. The 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) entered into force in 1970.[83] Today 187 states are party to the Treaty (only Cuba,

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[83] "The treaty on the Non-Proliferation of Nuclear Weapons (NPT) *available at http://disarmament.un.org/wmd/npt/npttext.html*, last visited, April 29, 2004.

India, Israel, and Pakistan are not). This treaty and other non-proliferation efforts have resulted in a continuing drop in the total number of nuclear weapons, in reductions in fissionable material for weapons, and in a shift to "tactical" nuclear weapons.

Efforts at nuclear weapons elimination are also reflected in the regional actions to eliminate nuclear weapons by declaring nuclear free zones. Latin American States did this in 1967.[84] Other nuclear free zones have been established in Antarctica, the South Pacific, Africa, and Southeast Asia.

Other efforts have been directed at stopping nuclear weapons tests. In 1973, Australia and New Zealand brought proceedings against France claiming violations of territorial sovereignty and violations of high seas rights caused by French nuclear tests on the South Pacific island of Muruoa.[85] In 1996, the I.C.J. ruled that it had jurisdiction but it declared the nuclear tests dispute moot in the light of France's unilateral suspension of nuclear tests. The I.C.J also has advised the General Assembly that international law neither authorized nor prohibited the threat or use of nuclear weapons and that, while generally contrary to the law of armed conflict and humanitarian law, it could not conclude whether the use or threat of nuclear weapons in an extreme case of self-defense to protect the very survival of a state was lawful or unlawful.[86] In 1996, the comprehensive Nuclear-Test-

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[84] *See* Treaty for the Prohibition of Nuclear Weapons in Latin America, February 14, 1967, 6 I.L.M. 521 (1967).

[85] The Nuclear Tests Case (Australia v. France) (Judgment), 1974 I.C.J. 253.

[86] 35 I.L.M. 809 (1996).

Ban Treaty opened for signature but China, India, Pakistan, North Korea, Russia, and the United States are not parties.

Despite the progress at nuclear disarmament over the past half century, the nuclear threat remains. There still exist some 35,000 nuclear weapons and many of those weapons are deployed. None of the known nuclear powers have dispensed with all their nuclear weapons. Clandestine nuclear weapons programs still exist and the threat of nuclear terrorism remains a possibility. Peaceful nuclear power generation and nuclear fuel reprocessing produce fissionable material that poses serious security threats. Those threats could require that regional organizations be able to legitimately act swiftly and decisively to use or threaten force in enforcement actions to maintain international peace and security.

B. Acceptance of a Change in Charter Meaning Creates less Incentive to Unacceptably Stretch Other Legal Predicates for Use of force.

Lack of acceptance of a measure of regional organization independent power to take enforcement action without Security Council authorization creates an incentive for regional organizations to stretch such use-of-force doctrines as anticipatory self defense, robust peacekeeping and humanitarian intervention beyond limits of acceptability.

1. Anticipatory Self-Defense.

Anticipatory self-defense is an international law doctrine that allows a state or regional organization to

use force without Security Council authorization in circumstances where there is no actual armed attack but where an attack is imminent and an immediate response is necessary. As with self-defense, any force used must be proportional to the threat posed.[87] If the Security Council refused or could not (because of a guaranteed veto) authorize an enforcement action in circumstances where a regional organization felt strongly that use of force was needed, it might seek legal justification by invoking a right of anticipatory self-defense. In turn, such reliance could potentially contort the doctrine to an unacceptable degree, thereby undermining international peace and security. The doctrine of anticipatory self-defense is controversial enough and is already being tested enough without it also being employed as a surrogate for Security Council authorization of an enforcement action by regional organizations. The latest iteration of anticipatory self-defense offered as a justification for the use of force without Security Council authorization is the doctrine of preemption, which would unacceptably dispense even with the immediacy requirement. An acceptance that regional organizations may take enforcement actions unless the Security Council denies authorization would reduce the incentive to abuse an otherwise legitimate doctrine of anticipatory self-defense.

2. Robust Peacekeeping.

In the area of peace-keeping, the concept of robust or muscular peace-keeping has evolved, which often is difficult to distinguish from enforcement actions.

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[87] *See* BOWETT *supra* note 9 at 118.

The Case for Regional Organizations

Under traditional notions of peacekeeping, the range of allowable use or threat of force by states or regional organizations was, at one end of the spectrum, limited to the right of self-defense under Article 51. At the other end, a use or threat of force could be used more generally to maintain law and order. In either case, forces could not be introduced without the consent of the host state or of the viable contending actors. The use of force in traditional peacekeeping efforts also had to be non-coercive and politically neutral.[88] Robust or muscular peace-keeping opens the door for regional organizations to avoid or bypass the Security Council authorization requirements of Article 53 by justifying their use of force as regional robust peace-keeping for which no Security Council authorization is needed.

In 1992, U.N. Secretary-General Boutros-Ghali's *Agenda for Peace* urged the greater involvement of regional organizations in intra-regional conflicts to help ease the financial and logistical burdens on the U.N.[89] In addition, that increased role for regional organizations was urged to include not only military support for traditional peace-keeping, but also for peace-building, peace-enforcement, and humanitarian

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[88] *See also* Certain Expenses Case, *supra* note 16, at 177; *See generally* Kourula, *supra* note 29, at 95; D.W. BOWETT, UNITED NATIONS FORCES 202 (1964) ("What . . . [is] really required . . . [is] the assertion of a right (which is not the right of self-defense but a more general right to maintain peace between rival factions) to act against any unit which . . . [begins] military action in defiance of . . . Security Council Resolutions.").

[89] Boutros Boutros-Ghali, *Agenda for Peace,* U.N. Doc. A/47/227, S/2411 (June 17, 1992), *reprinted in* 31 I.L.M. 953 (1992). *See also* Rosalyn Higgins, *United Nations Role in Maintaining International Peace: The Lessons of the First Fifty Years,* 16 N.Y.L. SCH. J. INT'L & COMP. L. 135, 141-42 (1996).

assistance. This expansion of peace-keeping functions crosses the traditional bright line between coercive enforcement actions and non-coercive peacekeeping.

3. Humanitarian Intervention.

Another area where use of force law may be unacceptably stretched concerns the doctrine of humanitarian intervention.[90] The doctrine of humanitarian intervention has a long and checkered past and remains controversial today.[91] It has been wrongly used throughout history, especially during the colonial era, as an excuse for stronger states to invade weaker states.

The principle concern, and danger, with an expanded embrace of humanitarian intervention as a predicate for the use or threat of force in absence of

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[90] *See*, Antonio Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Counterneasures in the World Community?*, 10 EUR, J. INT'LL. 23 (1999) Humanitarian Intervention is difficult to define. For purposes of this chapter it is the coercive use or threat of force unilaterally by states or by a regional organization to halt the mistreatment by a state of the state's nationals in a way that shocks the conscience of the global community. Humanitarian intervention does not include a use of force in a state by a member of a regional organization to protect citizens of that member state because this right is an aspect of self-defense. *See* E.C. STOWELL, INTERVENTION IN INTERNATIONAL LAW 53 (1921).

[91] S*ee* Jonathan Charney, *Anticipatory Humanitarian Intervention i n Kosovo*, 32 VAND. J. TRANSNAT'L L. 1231 (1999); Richard B. Bilder, *Kosovo and the "New Interventionism": Promise or Peril*?, 9 J.TRANSNAT'L L & POL'Y 153 (1999); Derek W. Bowett, *The Interrelation of Theories of Intervention and Self-Defense*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD 38, 44-46 (John Norton Moore ed., 1974); Ian Brownlie, *Humanitarian Intervention, in* LAW AND CIVIL WAR IN THE MODERN WORLD, 217; Richard B. Lillich, *Humanitarian Intervention*: *A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD *at* 229.

Security Council authorization is the very real risk of abuse by an intervening regional organization or one of its members. Those risks are accurately reflected in the following series of blunt questions, which sensibly call for caution in accepting humanitarian intervention as a stand alone exception to the prohibition of the use or threat of force against the territorial integrity or political independence of a state in Article 2(4) of the UN Charter:[92]

> . . . if NATO can decide on its own that Yugoslavia's treatment of its Kosovar Albanians warrants NATO's bombing, occupation, and de facto severance of Kosovo from Yugoslavia, why cannot every powerful nation or regional group, on the "mirror image" principle, do the same? Would the United States and NATO concede the Arab League's legal right to decide for itself that Israel's treatment of its Palestinian minority warranted the League's bombing of Israel? Can China decide that Indonesia's mistreatment of ethnic Chinese allows it to bomb Djakarta? Can Russia bomb Istanbul to make the Turks stop their effort to suppress the Kurdish separatist movement – hard to distinguish, incidentally, from Yugoslavia's efforts

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[92] Bilder, *supra* note 91, at 162-63.

> to suppress Kosovar Albanian separatism? And so on! Do we really want to say that the Charter and international law permit that kind of world? And if NATO flouts and bypasses the Charter's basic and most significant principles, how can it hope to later invoke those principles against other states? Or, if the United States and NATO do claim those Charter principles still apply, will there be, as cynics claim, one Charter and one international law for the weak and one very different and less demanding one for the strong?

Again, acceptance of a presumption that regional organizations may undertake enforcement actions unless the Security Council denies authorization reduces the incentive for regional organizations to invoke and unacceptably stretch the doctrine of humanitarian intervention at least where humanitarian concerns are part of the international peace and security equation.

C. A Change in Charter Meaning Leaves a Gap in Accountability to the Global Collective.

If regional organizations, as asserted in this article, may now take enforcement actions unless the Security Council explicitly denies authorization to do so, there is a vacuum in the collective security system. That is, regional organizations are primarily accountable to their member states and not to the global community as a whole. Thus, what is needed is some way to provide the requisite global accountability.

One way to achieve this is through the General Assembly. For example, when the U.S.S.R. intervened in Hungary in 1956, the Security Council was, of course, paralyzed by the prospect of a Soviet veto to any condemnation of the Soviet action. However, the General Assembly filled the accountability void by declaring that "armed force against the Hungarian people" by the U.S.S.R. violated the U.N. Charter and "the political independence of Hungary."[93] In addition, the emergence of the information age makes it virtually impossible for a regional organization to hide or effectively misrepresent a use-of-force action.

Reliance on the General Assembly alone to fill the accountability gap on a case by case basis may not be satisfying both because General Assembly resolutions are not binding and they tend to come after the fact or not at all in some individual cases. On the other hand, it has also been determined in *Expenses* case that the General Assembly shares collective security responsibilities, especially when the Security Council is unable to function because of the threat or promise of veto by a permanent member. Thus, the General Assembly could appropriately recommend some sort of standing criteria, guidelines, or assessment framework for regional organization enforcement actions. This would help to ensure a measure of predictable and significant accountability to the global community. Such criteria could identify the sorts of regional organizations that might be able to take enforcement actions, state the general circumstances under which enforcement actions might be undertaken, require a level of evidentiary factual support for an enforce-

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[93] G.A. Res. 1131, 11 U.N. G.A.O.R. Supp. No 17, (Dec. 12, 1956) *See* WHITE *supra* note 3, at 100-01.

ment action, and articulate the conditions under which enforcement actions should end. Importantly, they could also address the post enforcement obligation of the regional organization to ameliorate the consequences of the use of force.[94] Such criteria would also provide a standard by which regional organizations could decide whether they should take enforcement action.

In addition, of course, any State, NGO, or other international party could opine on the compliance of any regional organization with those criteria.

IV. CONCLUSION.

In the decades following adoption of the U.N. Charter, regional organizations have used force in a variety of circumstances without authorization of the Security Council. However, it is by no means clear that Security Council authorization is any longer a *sine qua non* to a legitimate use of force by a regional organization.

The U.N. Charter and the subsequent practice of states call into question whether specific Security Council authorization is any longer required under Chapter VIII. That is, as to Chapter VIII, the meaning of the U.N. Charter may be changed to embrace a presumption that would allow a regional organization to take otherwise appropriate enforcement action un-

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[94] The Dutch Advisory Council on International Affairs (AIV) and the Dutch Advisory Committee on Issues of Public International Law at the request of the Dutch Government issued a report entitled *Humanitarian Intervention,* which made similar recommendations when states unilaterally engage in humanitarian intervention.

less the Security explicitly votes to deny authorization. Such a presumption admittedly may complicate global accountability. However, any resulting vacuum in the accountability to the global collective could be filled by the General Assembly recommending criteria for enforcement actions. In this way, force will be more likely to be used and used in a timely manner to maintain and restore international peace and security.

The old meaning of the U.N. Charter meant that, more often than not, either no enforcement action was taken when needed or enforcement action was unduly delayed. Accepting a changed new meaning in the Charter should help assure that enforcement actions will be undertaken when needed and in a timely manner. Such a result cannot help but strengthen, rather than weaken, the maintenance and restoration of international peace and security.

The US Container Security Initiative: A Maritime Transport Security Measure or an (inter)National Public Security Measure?

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The attack on the Twin Towers has shockingly demonstrated that terrorists no longer hesitate to 'use' means of public transportation as weapons of mass destruction. Before 9/11 terrorists hijacked and targeted planes, trains and cruise ships in order to take the passengers and crew as hostages. The actual use of public transportation as *a weapon* of mass destruction however is something new.[1]

In reaction to the 9/11 attacks the United States Government reconsidered the security of air transportation, and also initiated a scheme for the security of maritime transport, in particular container trans-

[1] The idea to use public transportation for assault purposes, however, is not new. In 1985, members of the Palestine Liberation front, led by Mahmoud Abul Abbas, hijacked the Achillo Lauro in order to use the cruise ship for an assault on an Israelian naval basis. See, NRC Handelsblad April 16th 2003.

port. The so-called Container Security Initiative (hereinafter CSI) and the Custom-Trade Partnership against Terrorism (hereinafter C-TPAT) is built on the idea that container transport can only be secure if states, local harbor authorities, shipping companies and producers, became involved in controlling the transport chain which links production and consumption. In order to engage states and local harbor authorities in a security scheme that focuses on outbound cargo rather then incoming containers, a diplomatic effort to create network of bilateral agreements was successfully initiated, including the stationing of U.S. custom officers in foreign jurisdictions.

While there is little doubt that means of sea transport, especially container transport, constitutes a potential security threat, opinions differ with respect to the character of that threat as well as on the appropriateness of the means and methods employed by the U.S. Government.

The debate on the character of the threat is not merely a matter of risk assessment. The question whether container transport should be considered as a target or as a weapon is essential for the determination of whether the legal and technical countermeasures taken fall within the realm of sea transport security or (inter)national public security. The difference between these two forms of security is also crucial for the determination of the appropriate international legal setting; should international security measures be taken unilaterally, bilaterally or multilat-

erally?

The United States Government's decision to develop the CSI and C-TPAT along the bilateral track, became a thorn in the flesh of the Commission of the European Community. The Commission feared that it would be excluded from this specific international political and legal process and started a diplomatic counteroffensive stressing its authority in the field of transport and trade.

This study will analyze the positions of the U.S., the EC Commission and of the International maritime organizations and seek to demonstrate that:

1. there is no appropriate legal framework for strengthening international public security; and
2. the qualification of the CSI and C-TPAT as maritime transport security measures, must be understood as a tool in establishing the authority of the EC Commission over the EC member states.

Hereunder, I will discuss subsequently:

1. The ability of the United States to proceed unilaterally, within the legal framework of the law of the sea;
2. The character of the Container Security Initiative;
3. The position and role of the EC Commission; and

4. The position of the International Maritime Organization, which has been suggested as the appropriate international legal framework.

I. THE FREEDOM OF MARITIME TRANSPORT AND PUBLIC SECURITY IN THE LAW OF THE SEA

The use of the sea as a means of transport has not only provided coastal states with tremendous opportunities, but also has created grave dangers to their security. The reconciliation of economic and security interests has complicated the development of the law of the sea. Both opportunities and threats increase with the development of technical possibilities that accompany the processes of globalization. The dangers posed by the use of the sea as a means of transport can be divided in two broad categories.

First, coastal states have been the victim of shipping accidents, caused either by technical failure or by human negligence, which have had devastating effects on states' marine and coastal environments. Second, coastal states encounter security threats as a result of deliberate human action, such as naval attacks, pirate raids, and the illegal trafficking of drugs, weapons and human beings.

Traditionally, states have reacted to these threats by enlarging or redefining their jurisdictional powers. The breadth of the territorial sea has been enlarged, new

marine zones (such as the continuous zone and the EEZ) have been created and universal and extra-territorial jurisdictional powers have been recognized in treaties and customary international law.

The relationship between the enhancement of the means of transportation and the increase of public security risks is not new. In 1895, the famous German criminal lawyer Frans von Liszt observed that:

> We live in a time in which the professional thief or swindler feels as at home in Paris as in Vienna or London, in which rubles are printed in France or Great Britain and distributed in Germany, in which criminal gangs continuously operate in various states at the same time.[2]

The public security risk, which von Liszt observed more then one hundred years ago, is in no way comparable to the threats posed by international crime and terrorism, which we encounter today. The development of the means of transport, communications and weaponry has indeed provided the contemporary international criminal and terrorist with the same means and opportunities as law enforcement agencies. The question is whether the jurisdictional fortresses, which we have built over the last couple of hundred years, or the immunities we granted can still

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[2] Bresler F., Interpol (Dutch Translation), M& Puitgeverij 1992 p. 17.

be maintained. The developments in the field of the territorial sea are illustrative in this respect.

The cannon-shot rule illustrates the necessity of dominating maritime space, which poses a potential threat. With the improvement of the means of naval warfare, the territorial sea lost its function as a (military) security zone. At the same time the attention shifted from military to non-military security threats, such as smuggling and illegal immigration. Elihu Root's conclusion that "[m]erchant ships may pass and repass through the territorial sea because they do not threaten" would nowadays be considered as naïf.[3] The right of innocent passage of commercial shipping is carefully embedded in a framework of rights of the coastal state as listed in Section 3 of Part 2 of the United Nations Convention on the Law of the Sea.[4] The question whether passage is "innocent" or not is determined by an assessment of the risk the passage posses to the "good order and security" of the coastal state.[5] On the basis of a closer reading of Article 19, however, one must concluded that the territorial sea is a military security and customs zone rather then a public security zone. While it is true that Article 27 extends the criminal jurisdiction of the coastal state to foreign vessels, it does so only to the extent "the crime is of a kind to disturb *the peace of the country* or *the good order of the territorial sea*."[6] While the

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[3] Quoted from Churchill and Low p 88 (italics mn).
[4] *See* United Nations Convention on the Law of the Sea, http://www.un.org/Depts/los/.
[5] *Id.* Article 19.
[6] *Id.* Article 27.

drafters of UNCLOS may not have envisaged terrorist threats to the magnitude of the Twin Tower attacks, a policy-oriented or teleological interpretation of article 27 might very well turn this article into a tool for preventive enforcement actions for the maintenance of (inter)national public security.

An extensive use of article 27, however would also tend to undermine and eventually to outdate the regime of innocent passage, which seems to be a precondition for maritime trade. This could happen if the United States were forced to resort to unilateral enforcement measures. As soon as maritime transport itself becomes a serious public security threat, innocent passage will be an outdated concept in the law of the sea.

In order to avoid disruption of the existing regime of the territorial sea, new mechanisms have to be developed to prevent coastal state security risks. The basis for such a regime is to be found in the U.S. Container Security Initiative.

II. THE US CONTAINER SECURITY INITIATIVE AND THE CUSTOMS-TRADE PACT AGAINST TERRORISM

The CSI is less threatening to maritime trade then the extension of unilateral enforcement measures inside and outside the territorial sea. The CSI is also more innovative. The innovative aspects of the CSI

are to be found: (1) in the involvement of non-state actors such as harbor authorities and (in combination with C-TPAT) companies, and (2) in the development of a web of bilateral agreements, which directly engage governments.

This raises the question whether the CSI is a maritime security measure or an international public security measure. United States Governmental documents and officials have cited maritime transport and shipping security as well as national security and public order.[7] The determination of the predominant purpose will be necessary to assess the compatibility of the United States initiatives with pre-existing international legal arrangements and for the further development of an international public security regime.

This same ambivalence is present in the Dutch – United States Declaration of Principles Governing the Posting of United States Customs Officers at the Port of Rotterdam in the Netherlands, which was concluded on 25 June 2002.[8] The direct reference to " the need to deter, prevent and interdict any terrorist attempt to disrupt global trade…[and to] safeguard global maritime trade,"[9] which is made in the preamble of the declaration tends to distract from the real threat: which is "the need to deter, prevent, and inter-

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[7] *See* U.S. department of State, fact sheet 22 February 2002 at http://usinfo.state.gov/topical/pol/terror/02022505.htm

[8] *See* doc.no. 02-165aUK.doc at http://www.minfin.nl, It is understood that the ambivalence in the text of the Declaration is a result of the relatively haste in which it was drawn and concluded.

[9] *Id.*

dict any terrorist attempt *to make use of commercial shipping for their own schemes*."[10] It is the terrorists' "own schemes", which the public at large has learned to fear after the 9/11 attacks, not the possibility of disruption of global trade. We now know that these "schemes" are not confined to attacks on means of transport; they include the use of means of transport as a weapon.

The innovation of the United States initiative is the combination of the involvement of non-state actors and the establishment of a network of bilateral agreements. In the framework of these agreements, the Dutch Government and the Port of Rotterdam Authorities have agreed to co-operate with U.S. authorities in order "to help to ensure the identification, screening, and sealing of high-risk containers at the earliest possible opportunity."[11] Therefore, the Dutch and U.S. authorities have agreed "to station, on a pilot basis, U.S. Customs Service officers at Rotterdam to further this enhanced cooperation."[12] While the formal position of the United States Customs officers might trigger an interesting legal debate, the agreement does not raise fundamental question from the perspective of international law, which rests on the paradigm of 'state consent.'[13] It does show, however, that the reasons for giving or withholding con-

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[10] *Id.*
[11] *See supra* note 9.
[12] *Id.*
[13] According to the text of the declaration, the US custom service officers "work in accordance with the guidelines of the ministry of finance and under the authority of the Ambassador of the United States." *Id.*

sent are determined by the greater good of securing international public security instead of the traditional self-interests of sovereignty and jurisdiction.

The tripartite co-operation between the US, the Netherlands and the Port of Rotterdam within the framework of the CSI and the involvement of business in C-TPAT is exemplary of how public international law has progressed since the days of von Liszt and reveals the possibility that the international legal regime will be successful in developing international public security arrangements.

III. INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL PUBLIC SECURITY

Finally, one must consider the structures within which to develop an international public security regime in a multilateral context. It has been argued that at the European level such a regime should be developed within the framework of the European Community, and that at the global level the International Maritime Organization would be the appropriate forum.

A. The European Union

The ambiguity in the purpose of the US Initiative, has provided the Commission of the European Union with some arguments against the arrangements made

by the US Government and European Governments. The ambiguity in the declared purposes of the CSI makes it possible to characterize it as either a (maritime) trade security measure or public security measure. The choice between these two characterizations is a political rather then a legal choice. Why then does the European Commission stress the trade character of the United States initiative? The probable answer is that the position and authority of the Commission within the "constitutional order" of the EU gives the commission jurisdiction over trade issues, but not over public security.

The arguments of Commissioners Bolkenstein and de Palacio reinforce this presumption.[14] Commissioner Bolkenstein especially emphasized the unilateral nature of the initiative taken by the United States, and observed that three ports participating within this initiative (Rotterdam, Antwerp and Le Havre) were located within "the Community."[15] Commissioner Bolkenstein's observation is not as obvious as it seems, neither is his reference to the Community without purpose.

By locating Rotterdam in the Community, Commissioner Bolkenstein intends to place the US-Dutch-Rotterdam arrangement within the law of the European Community, thereby establishing the authority of the

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[14] *See* PV (2002) 1576 final 26 (17 July 2002) agenda item *21.2. Measures Taken By the United States on Container Security* (SEC (2002) 845 and /2).
[15] *Id.*

European Commission and excluding the member states from the process. Probably for the same reason, Commissioner de Palacio stressed "the risks of distortion of competition and discrimination between Member States that these individual arrangements were likely to involve."[16]

The emphasis on competition and trade is striking and clearly intentional.

The decision to position the trilateral co-operation within the narrow framework of the European Community and not within the broader framework of the European Union is not dictated by the European treaties but is a matter of political choice.

The Commission's approach can only be understood within the overall structure of the European Union and the allocation of powers and prerogatives between the *vieux souverain* (the member states) and the *nouveau souverain* (the Commission). The European Community's objective is to establish a common market and an economic and monetary union. The European Union, of which the EC is an integral part, on the other hand includes provisions concerning a common foreign and security policy as well as provisions concerning co-operation in justice and home affairs

"Preventing and combatting organized crime … in

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[16] *Id.*

particular terrorism" as means of enhancing public security is explicitly mentioned in Article 29 of Title IV of the Treaty of the European Union.[17] While a closer co-operation between police and custom authorities in the member states is included as a specific objective in article 29, article 33 explicitly stipulates that "this title does not affect the performance of the responsibilities of the member states with respect to the enforcement of public order and internal security."[18] If the CSI were to be characterized as a public security initiative and not as a trade security measure, the compatibility of the tripartite agreement could be evaluated in the light of title 4 of the European Union Treaty and not within the framework of the European Community, which would limit the Commission's authority to a considerable extent.

A closer look at the guidelines adopted by the Commission reveals that the Commission does not consider the matter as an international public security issue. According to the Commission:

> as part of the strengthening of cooperation for combating terrorism in the United States, balanced bilateral relations be maintained based on reciprocity,
>
> that these problems be dealt with by the competent international organizations,

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[17] http://europa.eu.int/eur-lex/en/treaties.
[18] *Id.*

> that the security of European ports be assessed by Europeans, and
>
> that any agreement with the United States be concluded at European level and not at the level of individual Member States[19]

Commissioner de Palacio, who had already requested an opinion from the European Economic and Social Committee on the Security of Transport[20] even suggested taking legal action against the EU members states, who had signed the agreement.[21]

As yet, however, no complaint has been brought to the European Court of Justice by the Commission, although the number of agreements between the U.S. and EU member states has increased from 3 to 8. Instead the European Commission has entered into a dialogue with the U.S. Government in order to "come to an EU/US Co-operation agreement introducing security controls in container traffic."[22]

Several meetings have taken place between U.S. Authorities and the Commission since the latter formulated its initial standpoint. While the Commission recognizes that "[t]he major concern of the U.S. is the possibility of containers being used for terrorist attacks, be it through weapons of mass destruction directed to the ports of the United States or to the maritime transport

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[19] *Id.*

[20] Opinion of the European Economic and Social Committee on the 'Security of Transports', C61/174 OJEU, 14.3.2003 (2003/C61/28).

[21] *See* Newsletter from the European Parliament Committee on Regional Policy, Transport and Tourism, Number 11, 15 July 2002.

[22] *See:* http://europa.eu.int/comm/taxation_customs/customs/information_notes/containers_en

chain itself", the Commission only "shares the objective of improving maritime transport security and protection trade against any threat of terrorist attack."[23]

In March 2003, the Commission obtained the authorization of the EU Council of Ministers to negotiate with the United States on "transport security cooperation". In a subsequent press release, the Commission explained it position as follows:

> The Commission fully shares the concerns of the United States about improving security and considers that the most effective means to meet these concerns is by co-operation at EC level with the US. This Community-level approach would also prevent differential treatment of Member States and trade diversion within the EC. Another objective of the negotiations is to ensure that legitimate transatlantic trade is not hindered by the increased security arrangements and that control standards are equalized for U.S. and EC operators.[24]

It makes clear that the Commission still employs trade rhetoric, which can only be explained with respect to the prerogatives and authority of the Commission.

B. The International Maritime Organization

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[23] EU Press release memo/02/2002, 23 October 2002.
[24] EU Press release DN: IP/03/399, June 3, 2003.

In the Commission's meeting referred to in the previous paragraph, Commissioner De Palacio , argued that "provisions concerning the overall objective of security in maritime trade … [are] the responsibility of international organizations such as the International Maritime Organization."[25] However, Commissioner De Palacio's opinion that the IMO is the competent international organization must be seriously questioned for several reasons.

First of all, the IMO's responsibility for improving maritime safety must be interpreted in a narrow way. According to the latest IMO clarification of its objectives, the IMO is primarily concerned with "the safety of ships and those on board."[26] With respect to terrorist activities, IMO merely "promotes the intensification by Governments and industry of efforts to prevent and suppress unlawful acts which threaten the security of ships, [and] the safety of those on board."[27] This promotional effort is concerned *inter alia* with "terrorism *at* sea."[28] To the extent that IMO is mandated to design measures and procedures to prevent acts of terrorisms these measures can only relate to the threat to the security of passengers and the safety of ships.

The IMO does not have a good record of swift and effective action. The Achillo Lauro incident in 1983, provides a good example of how a maritime safety and

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[25] *See infra* note 13.
[26] Art. 2.1 of IMO resolution A.900(21) of 16 November 1999.
[27] *Id.* Art. 2.3.
[28] *Id.*

public security issues have been dealt with within the IMO. While the organization as such immediately voiced its concern about unlawful acts that threatened the safety of ships and the security of passengers and crews, it took almost a decade before a legal framework was created to deal with them. Even then, the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation did not establish rules concerned with the safety of cruise ships but created the jurisdictional power to prosecute is those who committing unlawful acts against ships.[29]

The reason for the IMO's cumbersome process in the field of maritime safety is twofold. First, the inherent conflict between the freedom of maritime shipping and trade on the one hand and maritime safety on the other. According to Hinz, the resistance of states against international interference in the freedom of maritime trade, is the predominant reason that the IMO got such a late start as compared with other 'functional' international organizations.[30] The second reason is to be found in Lagoni's argument that that IMO's "legislative" competence [to the extent that the IMO can be qualified as a "legislative" international organization] is largely restricted to the technical safety aspects of shipping.[31] The IMO can either adopt non-binding recommendations or promote the adoption of Conventions.[32] It lacks supranational authority and is unlikely to make a useful

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[29] *See* http://untreaty.un.org/English/Terrorism.asp.
[30] Hinz, Christoph, 50 Jaher Vereinte Nationen; Tatigkeit und Wirken der Internationale Seeschiffahrst-Organisation (IMO), 1997 at 15.
[31] Lagoni, Rainer, Die Internationale Seeschiffahrst-Organisation (IMO) als Rechtsetzungsorgan, in idem at 45 ff.
[32] *See* R.R. CHURCHILL AND A.V. LOWE, THE LAW OF THE SEA 23 (3rd Ed. 1999).

contribution to the field of public security.

IV. CONCLUSION

The question whether the United States Container Security Initiative should be characterized as a maritime transport and trade security initiative or a public security initiative to a large extent determines the framework in which legal and technical measures to counter the perceived threat should be developed. In theory, the United States government had four strategic options for developing and taking specific security measures. The United States could have proceeded unilaterally, bilaterally, multilaterally or in some combination of these tracks.

Unilateral action would lead to an intensified control regime within the United States' jurisdiction, including the territorial sea. Intensified security controls could also be envisaged beyond the twelve-mile zone. And, the United States government could have considered taking security measures with an extra-territorial effect. All of these measures would have hampered the freedom of transport and some would have created international upheaval.

The effectiveness and appropriateness of the multilateral track must be seriously questioned. In the absence of an international organization for public security issues, the next best option would be to create an organization for the sole purpose of promoting and increasing the technical safety of ships.

In first instance, the United States Government did not opt for either of these possibilities, but choose to proceed along the bilateral track, which proved to be

successful considering the number of states and port authorities, which have concluded agreements with the US. The United States' initiative and the European Union's reaction to it must be interpreted in the context of developments in the contemporary international legal order.

First, the classical concepts of state sovereignty, national jurisdiction and reciprocity have become less absolute in a globalizing international society, especially within the context of terrorism and public security.

Second, while states seem to develop an awareness concerning their diminishing sovereign powers, international organizations are increasingly stressing their own prerogatives and authority. A power struggle emerges between "le nouveau souverain"□(*i.e.* international organizations) and □le vieux souverain" (the states). While international organizations cannot be excluded from the global decision-making process, a power struggle between states and international organizations is detrimental to the development of a comprehensive international legal order.

Third, the Container Security Initiative in combination with the Custom-Trade Pact against Terrorism shows that non-state actors are no longer excluded from the process of formulation and implementation of global policies and law. The voluntary cooperation of port authorities, cargo transport companies and producers is essential in the production-consumption security chain. Their involvement should be obtained in all phases of the policy and law-making process: formulation, implementation and execution.

Math Noortmann

The European Commission's position with respect to the Container Security Initiative ("CSI"), has been dominated by its position in the design and implementation of the United States' initiative. The labeling of the CSI as a trade and transport security measure was a strategic decision rather than a decision taken on the basis of content and purpose. This seems in appropriate, given the seriousness of the questions at issue.

It goes without saying that it is justified to consider and address the possible effects of public security measures on free trade and transport. However, the two debates should not be confused. Maritime security is a matter of technical co-operation and standard-setting. Public security is a matter of policy and enforcement co-operation. In case of a conflict, public security should take precedence over free trade and transport.

The European Union Immigration and Asylum Law in the Light of International Security Concerns

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European Union (EU) immigration and asylum law and policy emerged as the logical outcome of the establishment of the European Internal Market and the subsequent abolition of internal border controls. The aim of the *internal market* was set out by the Single European Act.[1] As a consequence of Treaty renumbering, this provision is now to be found in Article 14 of the Treaty establishing the European Community (TEC), which requires that:

(1) "The Community shall adopt measures with the aim of progressively establishing the internal market…"; and,

(2) "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty…." [2]

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[1] The Single European Act entered into force on 1 July 1987.
[2] In the Single European Act as well as in Article 14 TEC the notion of the *internal market* appears. However, in Article 2 TEC the term *common market* is used. Evidently, this is a matter of terminology.

Olga Sidorenkova

European Union asylum and immigration law and policy were initially governed by an ad hoc co-operation between the Member States. Later on, the Treaty of Maastricht[3] introduced co-operation in the fields of justice and home affairs, including immigration and asylum, as matters of common interest. However, the intergovernmental character of the Union's decision-making procedures was retained, minimizing the role that EU institutions could play. The Treaty of Amsterdam[4] established for the first time a Community competence in the areas of immigration and asylum. There has been a transitional period of five years for the implementation of the tasks set up in the Treaty of Amsterdam. The transitional period will terminate on May 1, 2004.[5]

Putting the internal market into practice, requires the abolition of restrictions on the free movement of persons at the common borders between EU Member States (*internal borders of the EU).*[6] The sensitivity of this issue which is closely related to the state sovereignty of each Member State, has made it very difficult to reach an agreement between states about how to implement this requirement. Only five EU Member States signed the Schengen Agreement on the gradual abolition of checks at their common borders: the Benelux countries, Germany and France. The Schengen scheme

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[3] The Treaty of Maastricht entered into force on 1 November 1993.
[4] The Treaty of Amsterdam entered into force on 1 May 1999.
[5] This date thus corresponds with the date of the European Union enlargement.
[6] In this respect we are taking into consideration only one element of the four freedoms of the internal market – the free movement of persons.

of co-operation was therefore originally established outside the framework of the European Community. Other continental EU Member States later joined the Schengen agreement, but not the United Kingdom and Ireland. Two non-EU countries (Norway and Iceland) also signed an agreement of association. They did so because, as members of the Nordic Passport Union, they already had open borders with Sweden, Finland and Denmark. Had Norway and Iceland not become parties to the Schengen Agreement, the EU Member States that are members both of the Schengen and the Nordic Passport Union would have been open to entry without going through Schengen controls. This insecurity has been overcome by including Norway and Iceland in the Schengen zone.

The Schengen *acquis*[7] (the original Schengen Agreement, the Implementation Convention, as well as the Accession Protocols and Agreements to the Agreement and the Implementation Convention and Decisions and Declarations adopted by the Executive Committee established by the 1990 Implementation Convention) was integrated into the EU framework by a special Protocol annexed to the Treaty of Amsterdam. In reference to the policies of immigration and asylum, the most significant changes introduced by the Treaty of Amsterdam are as follows:

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[7] The term acquis means in general a body of common rights and obligations. This term is used in the European Union law, in relation to the European Community as *acquis communautaire.* The Community acquis comprises not only Community law in the strict sense, but also all acts adopted under the intergovernmental co-operation of the Member States. The jurisprudence of the Court of Justice is also a significant part of the acquis communautaire.

- the integration of the Schengen *acquis* into the framework of the EU *acquis*;[8]
- the introduction of the new Title IV EC Treaty (Visas, asylum, immigration and other policies related to free movement of persons); and
- the introduction of the concept of the "area of freedom, security and justice."

I. THE AREA OF FREEDOM, SECURITY AND JUSTICE

There is no precise definition in the European Treaties of the area of freedom, security, and justice. However, there are several provisions in the Treaties as well as in other key documents of the EU that touch upon it. For example: *Article 2 of the Treaty on the European Union* (TEU) sets up the *objectives of the Union*. One objective is "to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime." [9]

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[8] In this respect Art. 8 of the Protocol Integrating the Schengen acquis into the framework of the European Union is remarkable. It stipulates that for the purposes of the negotiations for the admission of new Member States into the European Union, the Schengen acquis and further measures taken by the institution within its scope shall be regarded as an acquis which must be accepted in full by all States candidates for admission.

[9] This Article points out the connection between security, free movement of persons and the external borders.

In a more concrete context, the concept of freedom, security and justice is applied in Title IV of the TEC concerning visas, asylum, immigration and other policies related to free movement of persons. Article 61 stipulates that in order to establish progressively an area of freedom, security and justice, the Council shall adopt within a specified period[10] measures aimed at ensuring the free movement of persons. This should take place in conjunction with directly related compensatory measures, respecting to the external border controls, asylum and immigration.

The European Council[11] held a special meeting on 15 and 16 October 1999 in Tampere, Finland. The meeting was dedicated primarily to the *creation of an area of freedom, security and justice in the European Union*. The main aim of the Tampere summit was to prepare a policy plan for the implementation of the common EU policies on asylum and immigration, as laid down in the Treaty of Amsterdam. The European Council is determined to develop the Union as an area of freedom, security and justice by making full use of the possibilities offered by the Treaty of Amsterdam. This in turns requires the Union to develop common policies on asy-

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[10] As mentioned above, the transitional period has been determined for five years after the entry into force of the Treaty of Amsterdam. That means it will terminate on May 1, 2004.

[11] The European Council shall bring together the Heads of State or Government of the Member States and the President of the Commission. They shall be assisted by the ministers for Foreign Affairs of the Member States and by a Member of the Commission. The European Council shall meet at least twice a year, under the chairmanship of the Head of State or Government of the Member State that holds the Presidency of the Council. The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof. (Article 4 TEU).

lum and immigration, while taking into account the need for consistent control of the Union's external borders to stop illegal immigration and to combat those who organize it and commit related international crimes.[12]

II. THE TREATY PROVISIONS ON ASYLUM AND IMMIGRATION

Article 63 of Title IV of the TEC, deals separately with asylum issues (paragraphs 1 and 2) and immigration issues (paragraphs 3 and 4).

A. Article 63 (ex Article 73k)

> The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:
>
> (1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:
>
> (a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States,
>
> (b) minimum standards on the reception of asylum seekers in Member States,

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[12] Presidency Conclusions, Tampere European Council, 15 and 16 October 1999.

(c) minimum standards with respect to the qualification of nationals of third countries as refugees,

(d) minimum standards on procedures in Member States for granting or withdrawing refugee status;

(2) Measures on refugees and displaced persons within the following areas:

(a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection,

(b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons;

(3) Measures on immigration policy within the following areas: conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion, illegal immigration and illegal residence, including repatriation of illegal residents;

(4) Measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member state may reside in other Member States.

Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are

compatible with this Treaty and with international agreements.

Measures to be adopted pursuant to points 2(b), 3(a) and 4 shall not be subject to the five-year period referred to above.

III. INTERNAL SECURITY OF THE EUROPEAN UNION AND THE ASYLUM LAW AND POLICY

No doubt there is a close link between immigration and asylum law and policy on the one hand and security on the other. In this respect I would like to focus particularly on the *link between the EU internal security and the asylum law and policy*. In this context security can be understood as:

1) safeguarding the internal security of the EU Member States, i.e. their citizens and those who reside within the EU;

2) the security of those who apply for asylum status in any of the EU Member States, when their security is endangered by their country of origin or previous residence.[13]

According to the Tampere Presidency Conclusions, the aim should be an *open and secure European Union*,

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[13] According to the Geneva Convention relating to the Status of Refugees (1951) a refugee is a person who owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments. The tragic events of September 11, 2001 moved the European Union to examine the *relationship between safeguarding internal security and complying with international protection obligations and instruments*. Safeguarding internal security and the fight against illegal immigration and crime should not, however, prevent those in genuine need of international protection from applying for asylum on the territory of any Member State of the European Union. All persons requesting asylum in the Member State responsible for assessing the claim should be granted access to a procedure enabling such assessment.[14] The reason for this is that rejecting asylum seekers without going through fair procedures can lead to "refoulement" (returning someone to danger).[15] This would not be in conformity with Article 4 of the Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status.[16]

Other European Union documents, relevant to the security element in asylum cases include:

- Conclusions adopted by the Council (Justice and Home Affairs) on 20 September 2001;
- Communication from the Commission to the Council and the European Parliament on the common asy-

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[14] Cf. Commission working document, COM (2001) 743 final.

[15] Pursuant to Article 33 (1) of the Geneva Convention on Refugees, no Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. This principle is known as the *non-refoulement*.

[16] Cf. COM (2000)578 final (basic principles and guarantees).

lum policy, introducing an open co-ordination method. First report by the Commission on the application of Communication COM (2000) 755 final of 22 November 2000;

- Commission working document on the relationship between safeguarding internal security and complying with international protection obligations and instruments.[17]

The Conclusions of the Extraordinary Justice and Home Affairs (JHA) Council of September 2001 remind the Member States that provisions already exist under the *Geneva Convention* for excluding those who may have been involved in crimes against humanity or crimes against the objectives of the United Nations (UN). The Conclusions have been presented as a way that ensures that terrorists do not enter EU territory via the asylum procedure. While welcoming the need to tighten EU security, it is crucial that measures introduced to deal with the threat to internal security are proportionate, effective and, above all, that they safeguard human rights. Such measures must therefore be considered as only a part of the war against terrorism and not the solution, especially as it seems unlikely that a terrorist would subject him- or herself to the scrutiny of the asylum procedure. The Commission's commitment to using only the Geneva Convention exclusion clauses (i.e. principally Art. 1 F) as a basis for rejecting an individual's claim for asylum is welcome, as is the Commission's statement that no automatic bars to the asylum procedure will be introduced. The exclusion clauses state that Member States must have "serious reasons" for believing an individual has been involved

[17] These documents can be found on www.europa.eu.int.

in war crimes, crimes against humanity and crimes contrary to the objectives of the UN in order to be excluded from protection under the Geneva Convention. Although there is no definition of "terrorist crimes", it seems that terrorism would be covered by the exclusion clauses.[18]

There is a provision on ensuring that policies are framed to promote the integration or inclusion of beneficiaries of international protection in a Member State. This is to be found in the Communication from the Commission to the Council and the European Parliament on the common asylum policy, introducing an open co-ordination method of 28.11.2001.[19] However, this guideline does not apply to asylum seekers and may be co-ordinated with the integration strategy for third-country nationals who are legally resident in the Member State.

IV. A CHALLENGE FOR THE FUTURE

The European Union policies on asylum and immigration are all relatively new. Each EU Member State already had its own policies based on the exercise of national sovereignty, but cooperation between them existed only on an ad hoc basis. The Treaty of Maastricht created a higher level of cooperation by promoting the policies on asylum and immigration as policies of common interest. Nevertheless, this field still retained an intergovernmental character. The Treaty of Amsterdam listed asylum and immigration policies as

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[18] European Parliament, Report on asylum: common procedure and internal security (2002/2053(COS)), 2 July 2002, FINAL A5-0257/2002, p.13.

[19] COM (2001) 710 final, p.19-20.

community questions, in introducing the new Title IV EC Treaty. Accordingly the role of the European Union institutions will increase in this area. Transitional arrangements concerning this issue are included in Articles 67 and 68 TEC. During the transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament. After this period the Council shall act on proposal from the Commission. The Commission shall examine any request made by a Member State that it submit a proposal to the Council. The Court of Justice has a jurisdiction in this area. However, it shall not have jurisdiction to rule on any measure or decision taken which concerns measures to ensure the absence of any controls on persons crossing the internal borders[20] or relating to the maintenance of law and order and the safeguarding of the internal security.

A review of European Union policies on asylum and immigration reveals their political sensitivity and rapid recent development. This holds true at both the national and the supranational level. In general, it seems that a restrictive approach has predominated in controlling access to EU territory. This reflects concerns about safeguarding the internal security of the European Union. The current EU legislation on asylum and immigration (taking into consideration also the draft legislation) is based primarily on the exclusion of individuals who might pose a threat to security. This should not, however, prevent those in the genuine need of international protection to enforce their rights – in this case the

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[20] Internal borders of the European Union mean the common borders between the Member States.

right to asylum, as it is proclaimed in the Charter of the Fundamental Rights of the European Union. Safeguarding the internal security of the European Union Member States should not be carried out to the disadvantage of such individuals. To find the right balance between these two important issues is a challenge for the present and the future EU Member States and for the enlarged Union itself.[21]

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[21] The next European Union enlargement is expected to take place on 1 May 2004 when the Treaty of Accession (signed on 16 April 2003 in Athens) will enter into force. The current accession countries are the Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

APPENDIX

TITLE 50. WAR AND NATIONAL DEFENSE CHAPTER 15. NATIONAL SECURITY COORDINATION FOR NATIONAL SECURITY 50 USCS § 404a (2004)

§ 404a. Annual National Security Strategy Report

(a) Transmittal to Congress.

(1) The President shall transmit to Congress each year a comprehensive report on the national security strategy of the United States (hereinafter in this section referred to as a "national security strategy report").

(2) The national security strategy report for any year shall be transmitted on the date on which the President submits to Congress the budget for the next fiscal year under section 1105 of title 31, United States Code.

(3) Not later than 150 days after the date on which a new President takes office, the President shall transmit to Congress a national security strategy

report under this section. That report shall be in addition to the report for that year transmitted at the time specified in paragraph (2).

(b) Contents. Each national security strategy report shall set forth the national security strategy of the United States and shall include a comprehensive description and discussion of the following:

(1) The worldwide interests, goals, and objectives of the United States that are vital to the national security of the United States.

(2) The foreign policy, worldwide commitments, and national defense capabilities of the United States necessary to deter aggression and to implement the national security strategy of the United States.

(3) The proposed short-term and long-term uses of the political, economic, military, and other elements of the national power of the United States to protect or promote the interests and achieve the goals and objectives referred to in paragraph (1).

(4) The adequacy of the capabilities of the United States to carry out the national security strategy of United States, including an evaluation of the balance among the capabilities of all elements of the national power of the United States to support the implementation of the national security strategy.

(5) Such other information as may be necessary to help inform Congress on matters relating to the national security strategy of the United States.

(c) Each national security strategy report shall be

transmitted in both a classified and an unclassified form.

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