Democratic Accountability and the Use of Force in International Law

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Contents

Figures

Tables

1 Broaching the issues

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The attacks on the World Trade Center in New York and the Pentagon in the Washington, DC area on September 11, 2001 were a sobering reminder that the use of force to destroy is still very much a part of life. The instruments of war may have changed and the field of battle been redefined, but the use of force to change the existing political order cannot yet be relegated to history. For the United States, September 11 was a further reminder of one of the principal functions of government – protection of its citizens. For the world, this event added the dimension of states waging war against a non-state enemy. Applying traditional methods and means to fighting a global but non-state threat and attack will engage lawyers, analysts, and policy makers for some time.

International responses to September 11 showed how the world had changed since 1941, the last time the United States was attacked from abroad on its territory. In 2001, the United Nations Security Council invoked Chapter VII and the North Atlantic Council took action under Article 5 to authorize US measures to counter a threat to the peace and restore stability to the North Atlantic area. The US government paid close attention to the reactions, not only of its own citizens, but of a diverse global public opinion, to the attacks and its response to them. Almost immediately, officials around the world began to think about how the United Nations could contribute to nation-building and post-conflict reconstruction. All of these elements – non-state actors, global public opinion, international institutions – will play major roles in the political order of the early twenty-first century.

Since the end of the Second World War, states have sought to limit their right to use military force unilaterally and to establish ways in which military forces could be used for collective purposes under the auspices of international institutions. This book is about both of these trends, but especially about a question that has largely been ignored in the literature on using military forces under the auspices of international institutions: how to ensure democratic accountability. The gap in the literature is striking, because establishing and maintaining democratic accountability in the

use of military forces has been a major aspect of the historical develop-
ment of modern democratic governments. When democracies unilater-
ally used their military forces in the twentieth century, for example, when
French forces were embroiled in Algeria and US forces were enmeshed
in Vietnam, accountability was an issue.

Establishing the monopoly of coercion was a crucial feature of the cre-
ation of modern states. Ensuring that there would be accountability to
citizens for the use of military forces was a central component of the
struggle to establish democratic forms of government. But now decisions
about the uses of military forces are made in international institutions
far from the representative structures that democratic governments have
relied upon to provide accountability. Giving international institutions
authority to deploy military forces is a matter that has historically pro-
voked heated debate in the United States and other democracies. How is
democratic accountability maintained in these cases?

The failure to examine issues of democratic accountability when mili-
tary forces are used under the auspices of international institutions may
stem from several sources. When plans to give international institutions
the authority to use military forces were first conceived, their advocates
thought that the threat to use force would deter potential aggressors,
or that peaceful settlement or sanctions would cause an aggressor to pull
back. They did not focus on issues arising out of the actual use of military
forces.

Traditionally, political theorists regarded democracy as a system of
governance within a state's territorial limits, while international law as-
sumed that international problems were fundamentally different from
domestic ones and not susceptible to the same democratic processes and
institutions of governance. However, experience with the uses of military
forces under the auspices of international institutions since the Second
World War shows otherwise. Enhancing democratic accountability will
ultimately be crucial for the effective operation of international institu-
tions, because democracies are the major military powers of the early
twenty-first century.

The North Atlantic Treaty Organization (NATO)'s Operation Allied
Force in Kosovo in 1999 brought into sharp relief several fundamental
issues. What justifies intervention in an intra-state conflict? Is authoriza-
tion by the United Nations Security Council (UNSC) essential for general
acceptance of the legitimacy of the use of military forces? Is the autho-
rization of a body such as the North Atlantic Council (NAC) sufficient
for those countries taking part in the operation? How do non-NATO
members see such actions? When do national legislatures have to take
specific action to authorize participation of their country's military forces

in international operations? To whom are military commanders responsible? What laws govern the conduct of military personnel participating in such operations? What is the individual responsibility of officials who make decisions about using military forces under the auspices of international institutions, and of military personnel who take part in international operations? Practice in these areas has outpaced scholarly analysis and understanding of the issues involved, especially with the prospect of establishing an International Criminal Court following adoption of its Statute in 1998. With the Statute's entry into force in July 2002, the ICC is expected to become operational in 2003.[1]

This book is a step toward filling this gap in the literature. It first specifies the problem, concentrating on the experience of nine democracies – Canada, France, Germany, India, Japan, Norway, Russia, the United Kingdom, and the United States. Each has some form of democratic government, though all fall short of fully meeting abstract criteria for democracy. The historic route taken by each country to establish democratic institutions has varied, and this is a factor in understanding the requirements and operation of democratic accountability in each of the nine cases. Russia is the most recent democracy of the nine.

All nine countries have contributed military forces to operations conducted under the auspices of international institutions, although Germany and Japan joined the ranks of contributing countries only in the 1990s, and Japan's contribution has been restricted. The participation of most or all of them is essential to any large-scale military operation in the opening decades of the twenty-first century.

This chapter first explores the concept of democratic accountability, and next examines how the founders of contemporary international institutions thought they would be involved in using military forces. Drawing on the history of how international institutions actually have been involved, a typology of uses of military forces is created. The issues of democratic accountability that have arisen when military forces have been used under the auspices of international institutions are discussed, and these issues are grouped under broad headings. Using the typology of military forces and the list of democratic accountability issues, a matrix that provides a framework for analyzing the experiences of the nine countries is created, and it is demonstrated why these nine countries provide a good sample for analyzing the issues. Finally, the detailed analyses that follow are introduced.

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[1] See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF. 183/10 (1998).

Tenets of democracy: participation in decision-making and accountability

Democracy is a term used to describe both a set of ideals and historical and contemporary political systems. As an ideal, democracy involves two basic principles, the rule of law and majority rule. The rule of law means that political authority is exercised according to predetermined law.[2] In the sense in which this term is used in this book, it is sometimes referred to as constitutionalism, a principle designed to prevent the arbitrary and capricious exercise of authority. Concern for the rule of law is especially acute with respect to the use of coercive power. Majority rule is a principle for decision-making. When there is disagreement about policy or a course of action, the disagreement is settled by voting, and the votes of the majority prevail.[3] Majority rule respects human equality. It may be preferred as a principle for settling disagreements for this reason, or simply because of the difficulty of gaining widespread acceptance for any other principle.

Conflicts arise in the application of the two basic principles of democracy. Rigid adherence to an unchanging rule of law can frustrate majority rule. Ensuring that there are modalities for changing the basic constitutional law is essential to successful democratic systems. At the same time, because majority rule can conflict with the rule of law, democratic ideals generally involve some limits on it – for instance, the protection of basic human rights and minority views.

Starting with Aristotle, political theorists elaborated democratic ideals and designed institutions to promote them. For 200 years, states have developed and tried to perfect such institutions. The modern movement to achieve democratic ideals in governance dates at least from Magna Carta (1215), and includes the Petition of Rights (1628), the United States Bill of Rights (1789), and the French National Assembly's Declaration of the Rights of Man and Citizen (1789).

The movement to realize democratic ideals gained strength and momentum in the second half of the twentieth century, beginning with the UN General Assembly's adoption of the Universal Declaration of Human Rights on December 10, 1948. The Declaration proclaims human equality and forbids discrimination. It includes the rights of freedom of information, association, assembly, participation, speech, and movement. It calls for periodic elections. It specifies civil rights that are to be protected.

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[2] Vernon Bogdanor (ed.), *The Blackwell Encyclopaedia of Political Science* (Oxford, Basil Blackwell, 1991), pp. 547–8.
[3] *Ibid.*, pp. 350–1.

The broad provisions of the Declaration were subsequently incorporated into the legally binding International Covenants on Civil and Political Rights and Economic and Social Rights, to which more than 140 states were parties in 2001.

Beyond these UN instruments, democratic ideals were embodied in a number of other important international documents after the Second World War. They included the European Convention on Human Rights and its Protocols, the 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe (CSCE), the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights. The Charter of Paris for a New Europe, adopted by the CSCE in 1990, was an important step in the movement toward the realization of democratic ideals. It contained an almost textbook-like definition of democracy: "Democratic Government is based on the will of the people, expressed regularly through free and fair elections. Democracy has as its foundation respect for the human person and the rule of law."[4]

Modern states embody a number of institutional variations that have been developed to achieve democratic ideals. The institutions and practices of democracy are an evolving phenomenon, and all states fall short of fully meeting democratic ideals. Only in the twentieth century did they begin to allow all adults, regardless of gender, race, or financial means, to participate in political life. Most modern polities involve large numbers of individuals, and democratic participation is only possible through representation. To ensure that representatives are responsive to public wishes, they are chosen in periodic elections based on universal adult suffrage. Elections are an important means to ensure democratic accountability.

Although some states had some democratic characteristics for centuries, the development of democratic governments is a product of the twentieth century. The trend accelerated sharply with the fall of the Berlin Wall in 1989 and the collapse of communism in the Soviet Union in 1991. In 1987, there were fewer than 70 democratic states; by 2000, 120 states had governments that by broad criteria could be called democratic.[5] In 2000, democracies constituted almost 60 percent of the states in the world, and included more than 60 percent of the world's population. The trend toward democracy was one of the most prominent developments of the late twentieth century.

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[4] Cited in American Society of International Law (1991) 30 *International Legal Materials* 190.
[5] Roger Kaplan (ed.), "The Comparative Survey of Freedom: 2000, Freedom around the World" (2001) 28 *Freedom Review* 1.

In June 2000, the foreign ministers of more than 100 democratic states participated in the World Forum on Democracy, in Warsaw, Poland, a non-governmental conference convened by Freedom House. In the Warsaw Declaration, "Toward a Community of Democracies," they agreed to respect and uphold two core democratic principles of particular relevance to this study:

- that the legislature be duly elected and transparent and accountable to the people;
- that civilian, democratic control over the military be established and preserved.[6]

The researchers of this study expect that the increase in the number of democracies will broaden the use of domestic democratic procedures in decisions to deploy and use military forces. This will, in turn, have an effect on the way in which international institutions meet the demands placed upon them to deal with threats to the peace, but also lead to demands that they themselves become democratically accountable.

In all democratic states, elected representatives make policies that affect individual lives. Formal arrangements for making these decisions broadly divide into two types, parliamentary and presidential systems. In the former, executive and legislative authority is fused, and while parliamentary assent is necessary for the adoption of laws, this frequently is assured through disciplined political parties comprising the government majority or coalition. In the latter, legislative assent is much more problematic. In both types of systems, however, ultimate accountability is assured through regular elections. Voters choose individuals or parties on the basis of expectations about the decisions that they will make in office, and they can remove from office those with whose decisions they do not agree.

Efforts to realize democratic ideals have taken place primarily within the context of territorially defined states and smaller political units, such as municipalities. Political theorists have given relatively little thought to the impact on democratic accountability when important state functions are shared with international institutions. But ensuring that their decision-making accords with democratic tenets becomes increasingly important as international institutions gain authority. The legitimacy of international decisions and their acceptance by the citizens of democratic (and to some degree all) states depend on it.

The principle of the rule of law exists in international law, created through treaties and custom, as domestic law is created through legislation

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[6] "Final Warsaw Declaration: Toward a Community of Democracies," Warsaw, Poland (June 27, 2000) at the US Department of State's website, www.state.gov/www/global.

and practice. Determining whether individual, institutional, and state be-
havior is in accord with international law is no more problematic than
determining whether individual and collective behavior is in accord with
domestic law. In both systems, laws are not always followed, but violations
of the law do not imply that it does not exist.

Majority rule was, however, not a principle of classical international
law. Intergovernmental international institutions are associations of states.
Because of the doctrine of sovereign equality of states, decisions in such
international institutions historically required unanimity. Gradually, some
organizations, such as the European Union (EU), have introduced major-
ity voting for some decisions, but they remain the exception to the rule.
Most international institutions are still comprised of states, a sizeable
number of which are not democracies.

The historically undemocratic character of international relations and
international law exacerbates the task of realizing the tenet of majority
rule in international institutions. International law assumes that: (1) the
executive undertakes and manages a state's international commitments;
(2) decisions that emerge from domestic democratic processes are not
acceptable reasons for failure to comply with international obligations;
and (3) the powers of a government "to bind a state for the future
seem to be virtually unlimited."[7] When international institutions and
the law they generated were geared to coordinating state actions, with
limited direct effect on individual citizens, democratic accountability
concerns were minimal. As international law and institutions have broad-
ened and deepened their spheres of competence, and substantial member
state resources have been required to carry out their decisions, this has
changed.

To become democratic, international institutions will most likely re-
quire new concepts and experience with the implementation of those
concepts. As the research team explore the application of majority rule
to international institutions, we should not think only in terms of analo-
gies with political systems currently existing within states. Lessons drawn
from states' experience may not be directly applicable to international
institutions.

The work of Robert A. Dahl may be particularly helpful in concep-
tualizing the issues facing international institutions. According to Dahl,
"a key characteristic of democracy is the continuing responsiveness of
the government to the preferences of its citizens, considered as political

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[7] James Crawford, "Democracy and International Law" (1994) 64 *The British Yearbook of International Law* 118.

equals."[8] He identified five criteria[9] of a democratic polity:

Effective participation: All members must have equal and effective opportunities for making their views known before a policy is adopted.

Voting equality: Every member must have an equal and effective opportunity to vote, and all votes must be counted as equal.

Enlightened understanding: Each member must have equal and effective opportunities for learning about relevant alternative policies and their likely consequences.

Control of the agenda: Members must have the exclusive opportunity to decide how and, if they choose, what matters are to be placed on the agenda; policies are always open to change.

Inclusion of adults: Adult permanent residents exercise fully the rights implied by the first four criteria.

It is relatively easy to apply Dahl's criteria to decision-making within small groups of people. Applying them to large populous states is more complicated, because representative, rather than direct, democracy becomes involved and raises issues about the relationship between representatives and constituents. Applying them to international institutions is even more difficult. The criteria nevertheless provide guidelines for evaluating the democratic accountability of institutions at all levels. The task of this book is to see if these criteria are met when military forces are used under the auspices of international institutions and, if so, how well.

Dahl was pessimistic that international institutions can provide citizens with opportunities for "political participation, influence, and control roughly equivalent in effectiveness to those already existing in democratic countries." He was also skeptical that citizens could become as concerned and informed about decisions taken in international institutions as they are about those made by their own government. He doubted that an appropriate scheme for representation could be created that would give equal weight to each individual without creating a situation in which smaller democracies with particular interests and problems would be constantly outvoted by more populous countries. In international institutions, "bargaining, hierarchy, and markets determine the outcomes. Except to ratify the results, democratic processes hardly play a role."[10]

[8] Robert A. Dahl, *Polyarchy: Participation and Opposition* (New Haven, CT, Yale University Press, 1971), p. 1.

[9] Robert A. Dahl, *On Democracy* (New Haven, CT, Yale University Press, 1998), pp. 37–8.

[10] *Ibid.*, p. 115; also Robert A. Dahl, "Can International Organizations be Democratic? A Skeptic's View," in Ian Shapiro and Casiano Hacker-Cordón (eds.), *Democracy's Edges* (Cambridge, Cambridge University Press, 1999), pp. 19–36.

Not all democratic theorists are as pessimistic as Dahl. Some argue that the growth and increasing influence of non-governmental organizations (NGOs) and transnational associations and movements have infused elements of democracy into international negotiations and institutions. They suggest that the role of NGOs should be enhanced to make international institutions more democratic.

David Held is one democratic theorist who acknowledges that existing international institutions fall short of meeting democratic criteria, but he is hopeful that "cosmopolitan democracy" can be established through the transformation of these institutions.[11] Held would: "Seek the creation of an effective transnational legislative and executive, at regional and global levels, bound by and operating within the terms of the basic democratic law."[12] He would make international institutions more transparent, extensively use referenda, and create an assembly of democratic nations as an adjunct to the UN General Assembly. Held's is a program of reform, however, not a description of existing institutions.

Most analysts agree with Robert O. Keohane's assessment that a "democratic deficit" exists in many important contemporary international institutions.[13] A significant literature has developed about the "democratic deficit" in the European Union and how to deal with it.[14] Since the EU may become a federal state, suggested reforms often resemble institutions and procedures within such states as the Federal Republic of Germany.

Global and regional intergovernmental institutions are significantly different from the EU. Universal-membership international institutions such as the UN include important states that do not have democratic governments, but whose cooperation is essential to solving global problems. The world has not yet discovered how to ensure that decisions made under international auspices incorporate tenets of accountability applied within democratic states.

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[11] See Daniele Archibugi and David Held (eds.), *Cosmopolitan Democracy: An Agenda for a New World Order* (Cambridge, MA, Polity Press, 1995); David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford, Stanford University Press, 1995); and David Held, "The Transformation of Political Community: Rethinking Democracy in the Context of Globalization" in Shapiro and Hacker-Cordón (eds.), *Democracy's Edges*, pp. 113–26.

[12] Held, *Democracy and the Global Order*, p. 272.

[13] Robert O. Keohane, "International Institutions: Can Interdependence Work?" (1998) 110 *Foreign Policy* 82–96.

[14] See Eric Stein, "International Integration and Democracy: No Love at First Sight" (2001) 95(3) *American Journal of International Law* 489–534 and Joseph Weiler, *The Constitution of Europe: Do the New Clothes have an Emperor? And Other Essays on European Integration* (Cambridge, Cambridge University Press, 1999).

The case studies in this book explore the experiences of nine democracies that have used military forces to implement the decisions of international institutions. The analyses focus on democratic accountability, domestically and internationally. Have existing practices been modified? Are new practices being developed? Do changes and developments in practices weaken or strengthen democratic accountability measured as "continuing responsiveness" to the preferences of citizens? What steps are needed to enhance democratic accountability? Answers to these questions require a three-fold analysis of decision-making: in international institutions, in national institutions, and at the nexus of the two.

Effectiveness and decision-making are closely related. Unless there is popular support for the use of military forces under the auspices of international institutions, democracies are unlikely to provide adequate resources for a sufficient length of time to accomplish collective goals. Such support in democracies is linked to citizens' belief that decisions have been taken in ways that accord with democratic accountability. This need not imply that the UN establish a directly elected assembly. It does imply the dissemination of clear information about the purposes of a proposed action, ample opportunity for debate, and procedures that make officials who participate in decision-making on the use of force and its implementation accountable.

In all political systems, decisions to deploy and use military forces are among the most important that can be taken. Democracies have gone to great lengths to ensure democratic accountability in such decisions. National constitutions frequently contain special provisions specifying how and by whom they are to be made.

In the closing decades of the twentieth century, there was a general trend "toward subordinating war powers to constitutional control," including "greater parliamentary control over the decision to introduce troops into situations of actual or potential hostilities."[15] But constitutional provisions provide only a framework for establishing democratic accountability. Each political culture has its own issues affecting democratic accountability with respect to the use of military forces. Citizens of democracies want to understand and approve the purposes for which *their* military forces are being used.[16]

How do trends toward democratization within states, basic constitutional understandings about the use of military forces, and national

[15] Lori Fisler Damrosch, "Is There a General Trend in Constitutional Democracies toward Parliamentary Control over War-and-peace Decisions?" (1996) *American Society of International Law, Proceedings of the 90th Annual Meeting* 36–40.

[16] See John Mueller, *Retreat from Doomsday: The Obsolescence of Major War* (New York, Basic Books, 1989).

political debates and developments affect efforts to use military forces under international auspices? The book's answer begins with the history of efforts to limit (or prohibit) states' unilateral use of force, and to shift the monopoly of coercion to international institutions.

Using military forces under the auspices of international institutions: from proposals to practices

Twentieth-century statesmen sought to establish an international institutional framework that would centralize decision-making about the use of force, create a system for the pacific settlement of disputes, and establish a pool of military forces available to thwart actions that violated an agreed status quo. From the Covenant of the League of Nations (1919) through the Kellogg-Briand Pact (1928) and the United Nations Charter (1945), states worked to fashion an international legal and institutional system to achieve these goals.

These efforts were shaped by the doctrine of collective security, intended to replace the classical balance of power's unilateral state action and ad hoc alliances. States would instead find security in their membership in a universal organization. Woodrow Wilson argued that: "There must now be, not a balance of power, not one powerful group of nations set off against another, but a single overwhelming group of nations who shall be the trustee of the peace of the world."[17]

The doctrine of collective security drew on peace plans advocated since the formation of the Westphalian state system in the seventeenth century,[18] for the combined force of all states to thwart the unlawful use of force. Wilson and other advocates of collective security were chiefly concerned with preventing cross-border attacks on the political independence and territorial integrity of states. More recently, states have begun to expand the bases for using combined force to address other violations of international law, such as those against human rights.

A collective security system assumes that states that have committed themselves to use military forces will do so automatically in specific situations without further domestic debate. The executive of the state will participate in the international collective decision-making process, but

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[17] Woodrow Wilson, *War and Peace* (ed. by Ray Stanard Baker and William E. Dodd), (8 vols., New York, Harper and Brothers, 1927), vol. I, p. 343.

[18] Such peace plans included those of Jeremy Bentham, *A Plan for an Universal and Perpetual Peace*, 1789; Immanuel Kant, *Eternal Peace and Other International Essays* (trans. by W. Hastie) (Boston, MA, The World Peace Foundation, 1914); and Jean-Jacques Rousseau, *A Lasting Peace through the Federation of Europe and the State of War* (trans. by C. E. Vaughan) (London, Constable, 1917).

the basic decision will be the determination by an international institution that a state's action constituted aggression or a threat to the peace, warranting a collective response.

There is thus an inherent tension between the expectations of collective security and the demand for democratic accountability with respect to decisions to deploy and use military forces. It was reflected in the domestic political debates required in the United States to gain legislative and public support for the security systems provided for in the League of Nations Covenant and UN Charter. The tension has been evident whenever international institutions have been called upon to take action involving military forces.

The League of Nations

While neither the UN Charter nor the League of Nations Covenant embodied a pure collective security system, both were steps in that direction. The essential provision in the League of Nations Covenant was Article 10, which stated:

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

Wilson and other proponents hoped that the threat of concerted action in Article 10 would provide the necessary protection for small powers against the ambitions of the large ones.

The US president had wanted a stronger, automatic commitment, but other major powers, including the United Kingdom and France, were opposed. British Prime Minister David Lloyd George realized that:

The probable effect of including in the constitution of the League of Nations obligations to go to war in certain stated conditions will be to make it impossible for any nation to join the League, for no nation will commit itself in such a vital manner except by the free decision of its own Government and of its own Parliament, and no Government and no Parliament can come to such a decision except after an examination of the facts at the time when the decision has to be made. The attempt to impose obligations of this kind . . . will either end in their being nugatory or in the destruction of the League itself. The thing that really matters is that the nations should remain in continuous consultation under a system which enables them to come to prompt decisions on world problems as they arise from day to day.[19]

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[19] Cited in Kalevi J. Holsti, *Peace and War: Armed Conflicts and International Order 1648–1989* (Cambridge, Cambridge University Press, 1991), p. 195.

As Secretary of State Robert Lansing had warned it might, even the commitment in Article 10 proved to be too strong for many in the US Senate. Led by Henry Cabot Lodge, the Senate sought to add a reservation to the United States' ratification of the Versailles Treaty (containing the Covenant) that required prior congressional approval for the deployment of US military forces. Wilson adamantly opposed any reservation to the Covenant, and asked his supporters in the Senate not to compromise. As a result, the Senate failed to give its advice and consent to the Versailles Treaty and the United States did not join the League of Nations.[20]

The tension between trying to provide a virtually automatic use of military forces for collective purposes and maintaining democratic accountability within states was evident even at this early stage. The United States objected to any obligation to commit US forces without an opportunity for congressional debate. There is a continuing question whether any US president can delegate powers entrusted to him through a constitutional grant of authority,[21] as Michael Glennon discusses in chapter 14.

To deter military aggression, collective security postulated that the use of military forces under international auspices would be automatic and swift. If governments and legislatures insisted on the right to authorize (or deny), case by case, the use of their forces, then the commitment would be neither swift nor automatic. In fact, the League's failure to react effectively to the invasions of Manchuria and Ethiopia discredited it, and after the Second World War, it was replaced by a new security system.[22]

The United Nations

The United Nations Charter went further than the Covenant in establishing a system of collective security. It was designed to correct perceived weaknesses of the League system and did so in two ways. First, the Charter concentrated decision-making on action to counter threats to the peace in the Security Council. Secondly, it provided the means to carry out the Council's decisions.

Article 2(4) of the Charter requires members to "refrain . . . from the threat or use of force against the territorial integrity or political independence of any state." To support this requirement, the Charter provided

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[20] The treaty failed to win the necessary two-thirds majority, with forty-nine senators for approval and thirty-five against. Wilson's supporters who refused to accept any reservations cast twenty-three of the thirty-five votes. F. P. Walters, *A History of the League of Nations* (London, Oxford University Press, 1952), p. 71.

[21] Thomas M. Franck, *The Tethered Presidency: Congressional Restraints on Executive Power* (New York, New York University Press, 1981).

[22] Townsend Hoopes and Douglas Brinkley, *FDR and the Creation of the UN* (New Haven, CT, Yale University Press, 1997) and Walters, *History of the League of Nations*.

in Chapter VI for the peaceful settlement of disputes, and in Chapter VII a system for taking collective action in the event that disputes were not settled peacefully. A finding by the Security Council under Article 39, Chapter VII, that there was a "threat to the peace, breach of the peace, or act of aggression" would trigger this system. Upon such a finding, the Council "shall make recommendations or decide what measures shall be taken." If it decides to use military force, Article 42 authorizes it to "Take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

Article 43 provided for special agreements between member states and the Security Council, by which members would make available "armed forces, assistance, and facilities, including rights of passage." These agreements were to have the advantage of defining, from the point of view of member states, the limits of their obligation to provide such assistance, and, from the point of view of the Council, the forces and facilities at its disposal for discharging its "primary responsibility," under Article 24, "for the maintenance of international peace and security."

The UN Charter in Article 23 designated five states – China, France, the Soviet Union, the United Kingdom, and the United States – as permanent members of the Security Council, giving them special status and responsibility within the organ charged with maintaining peace and security. A Military Staff Committee (Article 47), consisting of the chiefs of staff of the permanent members, or their representatives, was to advise the Council "on all questions relating to [its] military requirements for the maintenance of international peace and security," and "be responsible under the [UNSC] for the strategic direction of any armed forces placed at [its] disposal."

Had the United States ratified an Article 43 agreement "in accordance with [its] constitutional processes," as Article 43 specified, it would have satisfied tenets of democratic accountability with respect to the use of military forces made available under that agreement. The United Nations Participation Act (UNPA) of 1945 explicitly accepted this interpretation for the United States. Article 6 stated:

The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under Article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein: Provided, that nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed

forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements.

Over the years, the Charter's relatively clear vision of how military forces would be used by the UN has been substantially modified. Article 43 agreements were never completed. The Security Council has never had military forces at its call. The result has been that member states decide on a case-by-case basis whether to contribute their military forces to particular operations and what forces to contribute.[23] Nevertheless, from 1946 to 2000, military forces were used seventy-six times for a broad range of purposes under UN authorization. (The analysis below includes these seventy-six UN-authorized missions, plus the NATO-authorized Operation Allied Force.)

In addition to thwarting cross-border aggression in Korea and Kuwait, the case for which the doctrine of collective security was designed, these UN missions included several purposes that were not envisaged when the League Covenant and UN Charter were signed. Among these were maintaining cease-fire agreements, preventing genocide and serious violations of human rights, and restoring a democratically elected government. Many of the instances in which the UN deployed military forces involved intra-state rather than inter-state conflicts.

In fifty-four of the seventy-six cases, military forces were under UN command. The force commander was appointed by and reported to the Secretary-General. In the other twenty-two cases, the UN authorized individual states or coalitions of states to use military forces to achieve goals specified in resolutions adopted by the Security Council.[24] In these cases, the state or states conducting the operation used their own command structures. The authorizing resolutions requested that they keep the Security Council informed.

Of the seventy-six cases, military forces were used twenty times under the auspices of the UN from 1946 to 1990, and fifty-six times from January 1, 1990 through 2000. The end of the Cold War brought a dramatic increase in UN involvement in conflicts because of a renewed interest in using international institutions by those who were previously reluctant or unable to do so. Appendix A lists the cases in which military forces were used under UN and NATO auspices. It gives the name and

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[23] Jules Lobel and Michael Ratner, "Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime" (1999) 93(1) *American Journal of International Law* 124–54.

[24] Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford, Oxford University Press, 1999).

acronym for the operation, the operation's location, the resolution providing the initial authorization, whether or not the resolution referred to Chapter VII as a basis for its authority, and the command arrangements.

The North Atlantic Treaty

The North Atlantic Treaty Organization (NATO) is an international organization that embodies a traditional military alliance. Its founding treaty, signed in Washington, DC in 1949, claims legitimacy under Article 51 of the UN Charter, rather than Chapter VIII, which deals with regional arrangements. Article 51 allows states individually or collectively to act in self-defense "until the Security Council has taken measures necessary to maintain international peace and security." Invoking Chapter VIII would have created a closer link with the Security Council.

Unlike collective security, which is designed to counter any threat, NATO was designed to counter a very specific threat external to the organization. The key commitment in the North Atlantic Treaty is Article 5, by which:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and . . . each of them . . . will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force . . .

The phrasing of this article was deliberately different from the wording that had been used two years earlier in the Rio Pact, which committed the parties to assist each other in the event of an attack. In the 1940s, there was a greater likelihood of war in Europe than there was in the Americas, and Congress insisted on its prerogative to declare war.

There were originally no plans under the North Atlantic Treaty to base US armed forces in Europe. But with no West German armed forces and the deployment of French and British troops on colonial duty, the outbreak of the Korean War in 1950 led President Truman to appoint General Eisenhower as NATO's first Supreme Allied Commander, Europe (SACEUR), and to deploy US forces to Europe. The Cold War scenario postulated an attack by the USSR and its Warsaw Pact allies on West Germany. It was expected that US troops stationed in Europe would be immediately engaged, and Congress would be unlikely to object to their use of force to defend themselves and repel a Soviet invasion.

As NATO developed its integrated military structure in the 1950s, it also sought to develop ways of ensuring democratic accountability. A chain of command was put in place, including mechanisms for ensuring

civilian control through the NATO Secretary General and the North Atlantic Council. Military exercises inculcated NATO personnel with the importance of adhering to norms regarding the conduct of war.

In the 1990s, NATO began to contemplate using its military forces outside the NATO area, as defined by Article 6 of the North Atlantic Treaty, and then did deploy its forces in eight "out of area" operations. (These are also listed in Appendix A.) As a result, issues of accountability with respect to the deployment and use of NATO's forces became more complex. Seven of these NATO-led operations were undertaken with the authorization of the UN Security Council. One – Operation Allied Force, the 1999 NATO air war in Kosovo – was authorized by the North Atlantic Council, with no explicit authorization by the UN.

Beyond the UN and NATO, other international institutions have authorized the deployment of military forces. They include the Organization of American States (OAS), the Organization of African Unity (OAU, now the African Union), the Organization for Security and Cooperation in Europe (OSCE, formerly CSCE), and the Economic Community of West African States (ECOWAS).

This study is limited to the use of military forces under the auspices of the UN and NATO because:

• the United Nations is universal in membership and central to issues of international peace and security; it has authorized the use of military forces on many occasions;
• NATO has an integrated military command structure and forces equipped and trained to carry out the full range of military operations; and
• NATO throughout its history has been principally composed of democracies, and in the 1990s was composed exclusively of democracies.

Uses of military forces under international auspices

Figure 1.1 shows the use of military forces authorized by the UN and NATO by the year of authorization. The substantial increase in number starting in 1988 is striking. As Edwin Smith describes in chapter 4, Mikhail Gorbachev in 1987 announced a change in Soviet policy toward using military forces under UN auspices, and this facilitated the authorization of such missions by the UNSC. In the following section, the years since the Second World War are divided into two periods, 1946–89 and 1990–2000, because of the way in which the end of the Cold War transformed world politics.

Because a single conflict often involves several different uses of forces authorizations, the number of authorizations exaggerates the number of
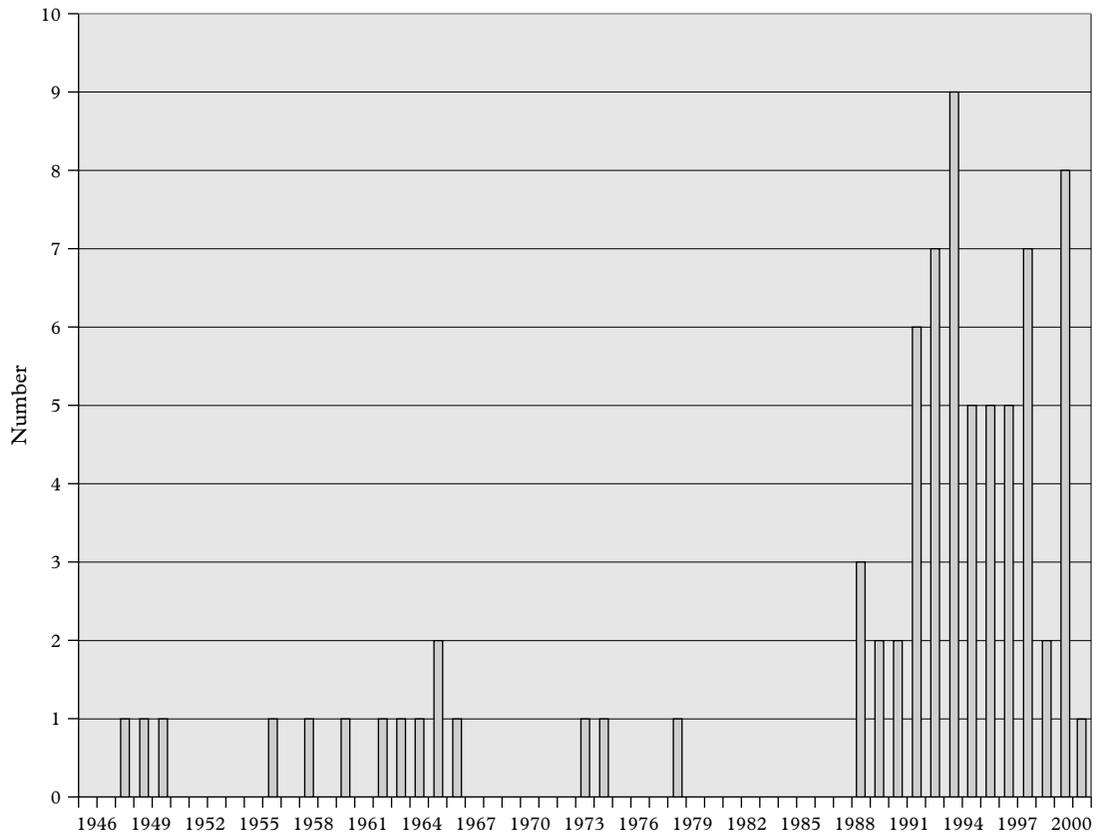
Figure 1.1 Number of uses of military forces by year of authorization (1945–2000).

conflicts in which the UN and NATO have been involved. The seventy-
seven authorizations from 1946 to 2000 concern thirty-two conflicts.
Nine of the conflicts were clear inter-state conflicts; twenty-three were
either exclusively or primarily intra-state, and their proportion increased
over time. Depending on how one counts, the UN and NATO authorized
the deployment of military forces in about half of the inter-state conflicts
and a third of the intra-state conflicts from 1946 to 2000.[25] Table A.2 of
Appendix A groups the conflicts by their nature and locale.

The uses of military forces under international auspices since the Sec-
ond World War can be placed in five broad categories, based on: the
mandate of the operation, the rules of engagement given to the military
forces, whether or not they enter the territory of the state where they
operate with the consent of that state, and the number and types of mili-
tary personnel involved.[26] The missions cover a range of uses of military
forces from monitoring to full-scale war. The five categories are:

• monitoring and observation;
• traditional peacekeeping;
• peacekeeping plus state-building;
• force to ensure compliance with international mandates; and
• enforcement.

Monitoring and observation involves the positioning of troops, military
observers, and related personnel on one or both sides of a line between
entities that are or have been engaged in, or where there is a threat of,
armed conflict, with the primary objective of preventing (renewed) hos-
tilities. The observers are stationed with the consent of the host country
and are impartial. They carry no arms.

The first deployment of military forces under the auspices of the UN,
the 1948 United Nations Truce Supervision Organization (UNTSO),

[25] See Meredith Reid Sarkees, "The Correlates of War Data on War: An Update to 1997"
(2000) 18(1) *Conflict Management and Peace Science* 123–44. Sometimes the UN took
several actions with respect to what compilers of lists of conflicts have classified as one
conflict. Conversely, sometimes a single UN-authorized mission remained in an area
through several conflicts. Our effort to fit the two lists together in table A.2 provides at
best a rough approximation.

[26] This categorization draws heavily on the concepts developed in Gareth Evans, *Cooperat-
ing for Peace: The Global Agenda for the 1990s and Beyond* (St. Leonards, Allen & Unwin,
1993). It is related to but different from the categorization developed by Boutros Boutros-
Ghali in his *An Agenda for Peace* (New York, United Nations, 1992). More broadly,
it draws on the wide literature concerning peacekeeping, including: Paul F. Diehl,
International Peacekeeping (Baltimore, MD, The Johns Hopkins University Press, 1993);
William J. Durch (ed.), *UN Peacekeeping, American Policy, and the Uncivil Wars of the
1990s* (New York, St. Martin's Press, 1996); Ramesh Thakur and Carlyle A. Thayer
(eds.), *A Crisis in Expectations: UN Peacekeeping in the 1990s* (Boulder, CO, Westview,
1995); and James S. Sutterlin, *The United Nations and the Maintenance of International
Security: A Challenge to be Met* (Westport, CT, Praeger, 1995).

was a monitoring and observation mission to supervise the truce in Palestine. When Israel, Egypt, Jordan, Lebanon, and Syria concluded General Armistice Agreements in 1949, UNTSO's main responsibility became that of assisting the parties in supervising the application and observance of these agreements. UNTSO was still in existence in 2001. In the 1990s, it averaged 160 personnel, and cooperated with other UN missions in the Golan Heights, the Israel–Syria sector, and the Israel–Lebanon sector.

Eighteen of the seventy-six deployments of military forces under UN auspices from 1946 to 2000 were for the purpose of monitoring and observation. Nine of these missions began before January 1, 1990, and nine after that date. Monitoring and observation missions thus constituted 45 percent of the UN's twenty deployments before 1990, but only 15.8 percent of the fifty-six deployments from 1990 to 2000.

Traditional peacekeeping involves unarmed or lightly armed military contingents in the monitoring, supervision, and verification of cease-fire, withdrawal, buffer-zone, and related agreements, with the consent of the parties. It requires consent of the host country and impartiality; the use of military force, other than in personal or small unit self-defense, is incompatible with the concept.

The United Nations Emergency Force I (UNEF I), authorized in the 1956 Suez crisis, is the classic example of traditional peacekeeping. It was established to supervise the cessation of hostilities, including the withdrawal from Egyptian territory of the armed forces of France, Israel, and the United Kingdom, and after their withdrawal to serve as a buffer between Egyptian and Israeli forces. UNEF I was deployed with the consent of Egypt, was lightly armed, and authorized to fire only in self-defense. It differed from UNTSO and other monitoring and observation missions in that it was a much larger force, around 6,000, and entered a more volatile situation on the ground.

From 1946 to 2000, there were seven traditional peacekeeping forces, UNEF I and II, the United Nations Force in Cyprus (UNFICYP), the United Nations Disengagement Observer Force (UNDOF), the United Nations Interim Force in Lebanon (UNIFIL), the United Nations Iraq–Kuwait Observation Mission (UNIKOM), and the United Nations Preventive Deployment Force (UNPREDEP). The first five of these forces were originally deployed prior to 1990.

Peacekeeping plus state-building supplements traditional peacekeeping with activities such as election monitoring or organization, human rights protection, and civil administration functions or assistance during transition to independence or democracy.

The exemplar case of peacekeeping plus state-building was the United Nations Transitional Authority in Cambodia (UNTAC), authorized in