Detlev Vagts has recently reminded us of the characteristics of what he termed "hegemonic international law" (HIL). ... International lawyers have downplayed the possibility that hegemonic power can be exercised at the collective or global level, given the "egalitarian" and "participatory" precepts of modern international law and organization. ... Like the hegemon, which has suggested that international human rights may impose unwise constraints on the war against terrorism and has been reluctant to expose its own unilateral actions to human rights scrutiny, the Council has hesitated to acknowledge that its counterterrorist efforts may be subject to treaty or customary international law constraints, including those required under international human rights and international humanitarian law. ... Finally, since the lists of identified individuals issued to date by the 1267 Sanctions Committee appear to be limited to alleged members of the Taliban or Al Qaeda, these efforts appear to respond primarily to the terrorist threats posed to the hegemon and its allies but not to other such threats. ... There are limits on global HIL precisely because it requires collective action, and even the hegemon cannot always successfully exert its hegemonic power. ... Resolution 687 emerges, in hindsight, as an instrument of collective HIL. ... Global HIL results from the privileged position accorded to the hegemon under the existing rules and institutions of international law. ...
Council that are surveyed here—its counterterrorism efforts, its preapproval of self-defense against the Taliban, and its affirmation of the state of affairs in postconflict Iraq—are cases in point. International lawyers have justifiably praised these demonstrations of multilateral cooperation achieved through law. The Council's efforts with respect to counterterrorism, for example, are worthy attempts to act preventively; to depart from Council precedents and respond with "smart," proportionate sanctions; to adopt an effective "carrot and stick" approach likely to entice states to adopt compatible counterterrorism legislation of their own while deploying Council sanctions for identified terrorists; and to encourage states to adopt a uniform definition of the crime of terrorism without imposing one from the top down. These and the other Council actions discussed here, like additional U.S.-led initiatives in fields as diverse as the environment and trade, are complex phenomena: exemplars of laudable "leadership" as well as "institutionalized supremacy." n6 I focus on the negative aspects of these Council actions because so far they have received less attention. Revisiting Vagts's HIL in this context deepens our understanding of what promises to be a continuing feature of our world and encourages reassessment of prescriptions for multilateral action.

I. THE COUNCIL'S COUNTERTERRORISM EFFORTS

The counterterrorism efforts of the UN Security Council and its Counter-Terrorism Committee (CTC) pursuant to Resolution 1373, together with the related efforts of its 1267 Sanctions Committee, present the clearest examples of that body's new "legislative" phase. n7 In this case, the Council is no longer responding with discrete action directed at a particular state because of a concrete threat to the peace arising from a specific incident. n8 As Paul Szasz notes, the Council's legally binding orders regarding counterterrorism—imposing financial sanctions on designated individuals and organizations and a welter of other obligations on states—are that rare phenomenon in international law: legally binding regulation, backed by the possibility of real enforcement action, imposed on all states by a global international organ engaged in a continuous legislative enterprise by virtue of delegated power and subject to no geographic or temporal limitation. n9 These Council resolutions circumvent the "vehicle [*870] of trade among nations," namely the multilateral treaty. n10 In Resolution 1373 the Council selected certain provisions of the then recently concluded International Convention for the Suppression of the Financing of Terrorism, added to others, and omitted other portions of the Convention (such as the explicit deference to other requirements of international law, including the rights due persons charged with terrorism-related offenses, the rights of extradited persons, the requisites of international humanitarian law, and the provisions on judicial dispute settlement). n11 The Council did not limit itself to the measures specified in that consensus document, did not bother with an international negotiation to which all states and relevant nongovernmental organizations (NGOs) would be invited, and chose not to wait until that Convention secured sufficient state parties to enter into effect. n12

The Council's resort to legislation evinces global HIL in action. In contrast to the legal harmonization efforts of the International Law Commission or the United Nations Commission on International Trade Law (UNCITRAL), the CTC's work is led by experts not evidently chosen on the basis of a need to represent all the diverse legal cultures of the world or their scholarly qualifications in international law. n13 While the secrecy that shrouds the operations of the CTC makes assessments difficult, its efforts to examine the unprecedented number of state reports filed in response to the Council's demands and to come up with a template of model counterterrorism national legislation have been guided, to date, by the United States and its closest allies. No one has yet countered the suggestion, made by U.S. government officials when the CTC was established, that it was aimed at globally exporting U.S. counterterrorism legislation, particularly the U.S. PATRIOT Act. n14 Further, the CTC's efforts are backed by a legally binding Chapter VII order to states to implement through their domestic law the many obligations enumerated in Resolution 1373. Unlike the ILC and UNCITRAL, the CTC can count on the threat of economic sanctions or military action to buttress its efforts. Whether or not the Council chooses to use sticks rather than carrots, its CTC is ideally placed to serve as the hegemon's instrument to achieve expeditious change in domestic, and not merely international, law.

As with other types of HIL, the CTC operates outside the context of the rest of international law. As would be expected, the CTC reflects the priorities of the hegemon and elevates security over other concerns. It has resisted efforts by NGOs and the UN commissioner for human rights to retain, among its seven principal experts charged with examining state reports, an expert on international human rights. n15 The CTC has so far not asked states whether their [*876] counterterrorist efforts conform with their other treaty obligations or have generated any human rights concerns, a predictable product of the committee's nonconfrontational "capacity building" approach. n16 Under the circumstances, understandable fears have been expressed that the template counterterrorist legislation that the committee will ultimately recommend, either as uniform law for all or as part
of its efforts to assist particular states' efforts to comply with the many demands of Resolution 1373, will not be sufficiently sensitive to human rights concerns. n17 Whether or not that proves to be the case, the Council's demands that states file reports to the CTC identifying their own counterterrorism efforts have produced some predictably opportunistic reports, including from reliable human rights violators, purportedly justifying both old and new repressive national measures directed at ill-defined "saboteurs" as well as "terrorists," and extending to their own nationals and resident aliens as well as those seeking to enter. n18

The 1267 Sanctions Committee constitutes an even clearer instrument of global HIL. The procedures by which individuals and organizations are identified as alleged terrorists or fellow travelers subject to binding financial sanctions, which are hardly transparent, inure to the benefit of the powerful: those Council members with substantial counterterrorism expertise and resources. n19 Although other member states of that committee can object to individuals or organizations sought to be listed by that committee's two leading members, the United States and the United Kingdom, their relative lack of power, resources, and expertise make them unlikely or ineffective candidates for this role. Further, as the Swedish government representative discovered when he tried to challenge the listing of three Somali nationals living in Sweden, the committee's procedures require an appeal to the state that initially listed the individual, in that instance the United States through the Office of Foreign Assets Control, and that state can demand any relevant information and block any attempted de-listing. n20 Thus, those branded as terrorists before the world and ostensibly by the world now bear the burden of [*877] proof before political bodies should they want to lift freeze orders on their property comparable to those imposed under the criminal law. n21

As befits global HIL, the Council's procedures for imposing counterterrorism sanctions on individuals are indeterminate in significant ways. The dossiers on those subject to financial sanctions are not made public, supposedly to protect confidential informants and the privacy of individuals. Indeed, it is not clear either how much information other members of the 1267 Sanctions Committee are entitled to demand or whether they even ask for much information, especially when the hegemon insists on expeditious action. The work of that committee, largely unbound by transparent procedural rules and not subject to third-party appeal (except to the committee itself), seems ideally suited to hegemonic patron-client action. Neither the public nor other noncommittee members know whether the committee's determinations are premised on carefully considered dossiers subject to identifiable standards of proof (whether preponderance of the evidence, beyond a reasonable doubt, or some other consistent standard) or whether it works instead on the basis of implicit/explicit nonreciprocal threats characteristic of HIL. n22 Moreover, considerable, presumably intended ambiguity surrounds what the Council is actually doing when it imposes sanctions on identified individuals. It remains unclear whether the Council's sanctions are intended to be comparable to a temporary deprivation of property (which would normally be subject to minimal and quite flexible procedural constraints on state action) or are more akin to a criminal measure that ought in principle to trigger the full panoply of rights due defendants, as under Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the European Convention for the Protection of Human Rights. n23 The Council, apparently unconcerned about protecting individuals from state action that it is demanding, leaves such questions to the discretion of states (or their courts); but Resolution 1373's distinct demand that states criminalize, under their domestic law, the actions of terrorists in their midst and bring them "to justice" suggests that the Council believes that its own imposition of financial sanctions on individuals would not be tantamount to a criminal penalty subject to full due process. n24

The difficulties with the Council's imposition of sanctions have not gone unnoticed by NGOs and other UN members. Indeed, even a UN monitoring group, established pursuant to Council Resolution 1363, complained in its second report, issued on September 19, 2002, that the 1267 Sanctions Committee listed individuals without sufficient information, failed to respond quickly to inquiries, had not clarified its procedures for submitting names or for verifying information about persons on the list, lacked guidelines for listing and de-listing, and operated [*878] without sufficient transparency to permit adequate assessment. n25 While the Council now permits individuals who prove their innocence to be de-listed and has accepted the possibility of some humanitarian exceptions to the scope of its sanctions (but only at the discretion of those states generous enough to permit them), it has not accepted the basic premise that those whom it stigmatizes as terrorists ought to be entitled to impartial or judicial scrutiny prior to being targeted for sanctions. n26

The Council's counterterrorist efforts coincide with the hegemon's perceived self-interests. Resolution 1373, itself a striking example of collective intervention of indefinite duration in what was formerly the internal affairs of states, shrinks from recognizing legal limits on the action it mandates. Like the hegemon, which has suggested
that international human rights may impose unwise constraints on the war against terrorism, n27 and has been reluctant to expose its own unilateral actions to human rights scrutiny, n28 the Council has hesitated to acknowledge that its counterterrorist efforts may be subject to treaty or customary international law constraints, including those required under international human rights and international humanitarian law. n29 Of course, the Council, uniquely positioned to rely on UN Charter Article 103 if necessary to trump inconvenient treaty law and (to date) not clearly subject to judicial review, is ideally suited to serve these ends. Having the Council compel what are, at least in terms of their effects on individuals, de facto criminal sanctions without due process of law helps to avoid more embarrassing (if time-tested) resorts to unilateral breaches of treaty and customary law. To the extent that the hegemon can rely on the Council's turn to HIL, it need not resort to its own (presumably less legitimate) declaration of national emergency under Article 4 of the ICCPR to achieve the same ends. n30 In addition, since the Council has not defined, here or elsewhere, the crimes to which its sanctions presumably apply (whether under the rubric of "terrorism" or of "facilitating" it), the decisions reached by the 1267 Sanctions Committee will prove difficult for its targets to challenge. n31 Finally, since the lists of identified individuals issued to date by the 1267 Sanctions Committee appear to be limited to alleged members of the Taliban or Al Qaeda, these efforts appear to respond primarily to the terrorist threats posed to the hegemon and its allies but not to other such threats. Although the Council purports to be waging a global war against terrorism, its efforts smack of the lack of reciprocity that characterizes HIL.

[*879] II. THE COUNCIL AND THE DEFENSIVE USE OF FORCE

Global HIL may emerge other than through Council resolutions that exhibit Szasz's legislative characteristics. Both on September 12, 2001, and on September 28, just days prior to the U.S. military action in Afghanistan, the Council, presumably referring to the United States and its announced threats to act militarily against Al Qaeda wherever it operates, affirmed the right of individual and collective self-defense. n32 Through these statements the Council went out of its way to give its prior consent to the invocation of self-defense by the United States itself. But unlike Resolution 1373, these brief preambular affirmations were not undertaken with an eye to any express general legislative effect. They were not directed at the membership as a whole and did not legally bind anyone to do anything. Especially if taken as simply approving of one country's anticipated reaction to a discrete event--as intended only to deal with the expected U.S. action in Afghanistan--these affirmations are the quintessential Council action. They evince collective acquiescence in a member's self-help in a discrete case consistent with the Council's anticipated role under Article 51.

But approval in a discrete case may not be all that these preambular paragraphs portend. Given the legislative efforts in at least one of those resolutions (1373) and the tendency for many of the Council's actions to be read as having broader normative effect, n33 the prospective endorsement of individual and collective self-defense by the Council, together with its later acquiescence in Operation Enduring Freedom, may signal, depending on how the Council's license comes to be interpreted by its licensee, the advent of three new general rules with respect to defensive force in the age of terrorism:

1. Terrorist violence, at least when of the scale of the events of September 11, 2001, and even when undertaken by a nonstate actor, may constitute an "armed attack" for purposes of UN Charter Article 51.

2. A state's assistance to, harboring of, or post hoc ratification of violent acts undertaken by individuals within its territory, or perhaps even mere negligence in controlling such individuals, may make that state responsible for those acts and justify military action against it. In other words, such state action (or inaction) may constitute a breach of the state's own duty not to violate UN Charter Article 2(4).

3. The right to respond with military force against both terrorist individuals and harboring states does not become impermissible retaliation or illegal anticipatory self-defense, or exceed the rules of proportionality, merely because the threat of continued terrorist attack remains clandestine and unpredictable (as it has been since 9/11).

None of these rules had been previously endorsed, at least clearly, by international bodies such as the Security Council or the World Court. n34 Whether the new rules are wise or necessary [*880] for "world public order" generally, or only as applied to Afghanistan in September of 2001, is not my concern here. To the extent that these new rules (together with the U.S. action in Afghanistan) remain controversial notwithstanding the Council's statements, as claimed by some European international lawyers, n35 the controversy stems from
the largely unacknowledged fact that the Council's endorsement of self-defense in Resolutions 1368 and 1373 partakes of global HIL.

Like many other recent Council actions in an increasingly unipolar world, these pronouncements were instigated or strongly encouraged by the United States. n36 Such Council products inevitably raise concerns that they were brought about by hegemonic power: expressions of loyalty to the patron undertaken in the expectation of continued guarantees of security or economic assistance. n37 While the Council's actions here might indeed have resulted from initial shock and worldwide revulsion against the 9/11 attacks, the U.S. ability to buy votes on the Council through the sheer exercise of power is one of the abiding inevitable characteristics of the post-Cold War United Nations. In view of the oft-noted tendency of the Council to be extremely selective in its application of rules of conduct and its more recent history of responding promptly and effectively (if at all) only when U.S. concerns are paramount, we are entitled to be skeptical about whether the new implicit rules regarding the use of defensive force will prove to be fully reciprocal. Further, even if these new rules are intended and prove to be reciprocal, they demonstrate the hegemon's power, via the Council, to promote new Charter (and presumably customary) international law. These Council actions, after all, are lawyers' Exhibit A in making the case that the rules regarding the defensive use of force have changed since 9/11. n38 One suspects that had those attacks occurred elsewhere, particularly in a third state that is not an ally of the United States, Exhibit A would probably not now exist—as international law and its institutions would not have reacted as quickly, if at all.

[*881] Unless new constraints emerge, the three new rules are also exceptionally indeterminate, as would be expected of HIL. Since the Council does not, in its Resolutions 1368 or 1373 (or elsewhere), define terrorism, states generally (but more probably the hegemon) remain free to determine for themselves just what constitutes a nonstate act to which they may forcefully respond under rule 1. Similarly undefined is the level of evidence needed to prove an actionable ongoing threat of terrorism, or indeed whether the victim state needs to present such evidence prior to taking action under rule 3. n39 And freed from the relative confines of the International Law Commission's articles on state responsibility, rule 2's rules for attribution are purposely vague, lying somewhere beyond the Taliban's apparently sufficient connections to Al Qaeda but (one hopes) not extending as far as Secretary of Defense Rumsfeld would apparently have them go, that is, to license military action whenever "we don't know what we don't know." n40

Notice, too, the coincidence between Council action and the hegemon's perceived self-interest. While we can only guess how far the international community, or more specifically the Security Council, will go in endorsing or acquiescing in defensive actions pursuant to these ostensible rules, it is strikingly useful for the hegemon to have achieved this collective endorsement of its "inherent" rights. The Council's suggestion that military action directed at a harborer of terrorism is licensed by an inherent right is far more valuable to the hegemon than prior Council actions that recognized that particular terrorists' actions were discrete threats to international peace. n41 The latter imply that the hegemon needs to get Council authorization prior to responding with force on a case-by-case basis, that use of force against terrorism generally demands a nuanced examination by the collective security arm of the United Nations, and that the Council may actually impose conditions on the use of force or the goals sought to be achieved.

Since the new rules license recurrent projections of military force based on auto-interpretation and since they endorse unilateral military action, they are ideally suited to hegemonic sensibilities. n42 As Franck indicates, it was not essential for the Council to recognize the inherent right of the United States to use force; n43 therefore, no one will think it inappropriate if it fails to do so the next time the United States purports to act consistently with these new rules. This is the ideal form of collective legitimation for those powerful enough to deploy military force whenever it suits them: the hegemon gets to cite the Council's precedent for an inherent right that it can deploy in the future solely at its discretion. Like other open-ended Council actions (such as the Iraqi sanctions under Resolution 687), this license can be limited only by further Council action—whichever of course requires the hegemon's (highly unlikely) acquiescence. Obviously, the hegemon could have attempted to make these changes to (or clarifications of) existing law through unilateral action, but having the Council do so accords greater legitimacy to the effort. It may also help to achieve a change in the law more quickly, rendering largely moot debates about the viability of "instant custom."

Having the Council, as opposed to some other international body, endorse these rules is significant for other reasons. As noted, whether the Council is acting only on a case-by-case basis, or whether it is intending to proclaim new general rules for defensive force, remains ambiguous. This ambiguity is useful in itself to a
hegemon that may as yet be unsure about whether it needs these rules or whether they will prove more troublesome than they are worth, particularly if used by others in ways not consistent with the hegemon's interests. The Council's [*882] ambiguous action permits deniability. Only the hegemon knows for sure whether the Council is engaged in promulgating new rules on force.

In addition, since the new rules, to the extent that they exist, are being expressed by a political body (as opposed to the International Law Commission or the International Court of Justice), no one expects that body to spell out their normative bases, possible limits, or consequences. Neither the Council--nor the hegemon--can be blamed for the resulting indeterminacies. n44 We simply do not know whether the premise is that the new threats posed by undeterable nonstate actors or the possible use by terrorists of weapons of mass destruction are so novel that the old rules no longer retain the confidence of states. We do not know whether, if harboring or giving comfort to undefined terrorists that present undefined threats can trigger military retaliation, the new rules embrace "preemptive action" intent on toppling a regime that so harbors or gives comfort (although the Council's apparent advance endorsement and acquiescence in the toppling of the Taliban regime suggest that at least some cases of "regime change" are now permissible). These uncertainties play directly into the ever-present threat of continued military action that the hegemon has broadcast as part of its new National Security Strategy. n45 The combined effect of the hegemon's announced preemptive force doctrine and the Council's possible endorsement of new defensive rules is to leave future "rogue" nations uncertain about whether the hegemon, with or without the Council, will act against them if they fail to cooperate in the hegemon's war on terrorism to the latter's satisfaction.

Of course, collective HIL faces limits not faced by unilateral HIL. Even the hegemon has to worry about the impact on the Council's legitimacy and the willingness of others to assist it in the future (as with respect to policing postwar Iraq or waging the broader war on terrorism). As is suggested by the Council's reluctance to sign up for Operation Iraqi Freedom, the contention that inherent self-defense justifies military action whenever one state is alleged to be insufficiently cooperative in the war against terrorism, or is amassing weapons of mass destruction (WMDs) with no demonstrated intent to use them against any specific target, has been regarded by other Council members as going too far--at least to date. There are limits on global HIL precisely because it requires collective action, and even the hegemon cannot always successfully exert its hegemonic power. For the moment it appears that, despite the wave of sympathy engendered by 9/11, the Council will not extend its support to a total revamping of the Charter's rules on force fully in line with the Bush administration's preemptive doctrine. Apparently, enough permanent and nonpermanent members fear that this doctrine will open up a hole in the Charter large enough to return us to "war," as the term was understood before the era of the UN Charter or the preceding Kellogg-Briand pact--when nations had entered into no international legal constraints on when to wage war.

III. THE COUNCIL AND IRAQ

Those who suggest that the most effective counterweight to U.S. unilateralism is the Security Council can point to the winter of 2003, when the Council bravely (if ineffectually) refused to acquiesce in the U.S. invasion of Iraq despite forceful, highly public U.S. patron-client pressures. [*883] But the Council's efforts with respect to Iraq--from Resolution 687 n46 to the present day--remain in progress. One of its most recent pronouncements, Resolution 1483, is a study in deliberate ambiguity. Blending the Council's legislative prowess with case-by-case specificity, it may yet become, depending on future developments, the latest example of global HIL.

Resolution 1483's operative paragraphs, directed at "the Authority," purport to affirm the existent rights and responsibilities of the United States and the United Kingdom under international humanitarian law, but whether the Council is faithful to the relevant law of occupation is far from clear. n47 While the Council suggests, obliquely, that, under relevant law, the United States and the United Kingdom are responsible for any violations of the many duties of an occupying power, the resolution gives these powers carte blanche without suggesting whether or how they will be held to any of the relevant obligations under international humanitarian law, from protection of Iraqi cultural and other forms of property to avoidance of cruel or inhuman forms of punishment or forcible transfers of persons. n48 Apart from calling for review of its implementation one year hence--part of the price the United States was forced to pay for its passage--Resolution 1483 does not establish any independent mechanism for ensuring that the Authority meets its obligations.

As is typical of global HIL, the Council imposes no other obligation on the Authority that might be appropriate in view of the evident need to restore and maintain international peace and security. The resolution
does not mention a detailed accounting, whether or not through the International Red Cross, of the number of (civilian or other) Iraqis killed in the recent conflict, even though such an accounting would surely be a necessary step toward the Council's announced goals; nor does it require any UN participation in the criminal accountability foreseen for Saddam Hussein and other high-level former Iraqi leaders. n49 While it has been hailed for bringing the United Nations back into Iraq, Resolution 1483 leaves the UN role in postwar Iraq extremely vague and uncertain, refusing even to concede to the United Nations those tasks within its established expertise, such as verifying and supervising a free and fair election. n50

[*884] While Resolution 1483 deliberately avoids any suggestion of post hoc Council approval of the U.S. invasion, it remains to be seen whether the Council will provide multilateral cover for the Authority's subsequent actions or indeed whether, as arguably occurred with respect to Kosovo, the Council will legitimate, post hoc, what was formerly illegitimate. n51 Even if no WMDs are found in sufficient amounts to revive the hegemon's arguments with respect to its alleged continuing authority to invade under Resolution 678, relevant Council precedents might yet be expanded to embrace the right of humanitarian intervention in the context of a regime that, while not likely engaged in genocide at the time of the U.S. invasion (pace Kosovo), was probably guilty of genocide in the past and was in any case an egregious violator of human rights. Through its actions with respect to Iraq, the Council may license military action undertaken without benefit of the backing of a regional organization (pace Kosovo and the Cuban missile crisis). n52 We should also not fully dismiss the possibility that, on the basis of its praise for "representative" government in Resolution 1483 and its prior actions with respect to Haiti, the Council might eventually establish legal precedents consistent with neo-Kantian arguments in favor of military action to topple illiberal or undemocratic regimes. n53

Even assuming that none of these clear examples of global HIL transpires, its actions to date with respect to Iraq suggest both the risks and limits of the Security Council as progenitor of HIL. Those who pin their hopes on the "egalitarian" or "participatory" principles of modern international law and organization need to recall, as Gerry Simpson cogently demonstrates in a historical account, that international law has always oscillated between treating states as sovereign equals and branding some as rogues outside the sphere of law. n54 The largely adverse reaction to the U.S. attempt to use the Council to authorize renewed military action against Iraq in March 2003 stems at least in part from the Council's own prior efforts to exercise collective HIL with respect to Iraq. Resolution 687, the "mother of all resolutions," was adopted at a unique bipolar moment in recent Council history: not only was U.S. unilateral power reaching its peak, but also hopes were riding high that the Council would finally "work as intended." To those committed to everything that HIL is not--to reciprocally applied, relatively precise rules--the legitimacy of Resolution 687 was questionable. n55

[*885] Resolution 687 emerges, in hindsight, as an instrument of collective HIL. Recall that it imposed, by fiat, duties on Iraq to destroy most of its weapons, including many that were not banned by any treaty to which Iraq was a party; that it selectively imposed on only one country in the region the nuclear freeze requirements that the General Assembly had urged for the entire Middle East; that it imposed, without benefit of due process or opportunity for rebuttal by Iraq, extensive financial liability for any and all consequences of the first Gulf war, reaching far beyond that permitted under then existing international law (such as for environmental damage); n56 and that it stipulated, again without benefit of judicial recourse or due process, boundary demarcations. Resolution 687 effectively put Iraqi sovereignty in receivership. The Council, and not any court, determined that Iraq had breached the law, imposed a system of reparations, and suspended sovereign rights. Like the instrument to trump sovereign rights that it was, that resolution imposed a foreign presence on Iraqi territory, deprived Iraq of a great deal of its oil revenues, required continued low-level economic war on its people, and arguably infringed Iraq's ability to engage in its own self-defense. n57 As Simpson reminds us, Resolution 687 criminalized the Iraqi regime no less than the war guilt clause did Germany in the Treaty of Versailles. n58 Like the typical criminal penalty, Resolution 687 stigmatized Iraq as a rogue nation, deprived it of rights and immunities, and marked this change in status through the application of extensive sanctions and ongoing surveillance. n59 The Council criminalized a regime without resorting to the usual methods, such as retributive provisions in a peace treaty imposed on the loser after a war (or, for that matter, cruder unilateral declarations proclaiming that some rogues belong to an "axis of evil"). It managed this feat in the ways the Council always has--by creative interpretations of its powers to maintain and restore the peace--even though the international community has resisted the idea that states (as such) or peoples (as a collective) are capable of committing international crimes. n60 All this was done by means of a perfectly lawful procedure sanctioned by egalitarian, participatory international law.
The problem for the hegemon, however, was that, even in 1991 and even as applied to an undisputed aggressor, the highly punitive reparations program of Versailles, never very popular with some Europeans, was giving way to greater sensitivity to the human rights of those residing in the "criminal" state and to a more targeted approach suggested by the individual responsibility model of Nuremberg. Others acceded to the harsh, one-sided demands contained in Resolution 687 both because the Nuremberg model of individual culpability was impossible to attain in view of the inaccessibility of the main culprits and because, in the unique context of that post-Gulf war moment, they assumed that the international community (namely, the revitalized Council itself) and not any single state, would take charge of supervising Iraq's criminalization. Most states that voted for Resolution 687 assumed that the international community, collectively through the Council, and not any one state, would suitably adjust the punishments as conditions warranted. n61

[*886] This was the legal mind-set that the United States walked into when it sought, in the winter of 2003, to transform Resolution 687 from a license to punish into a warrant to invade to impose "regime change." As is suggested by the growing international opposition to Iraqi sanctions, many members of the United Nations (and even of the Council) were already having second thoughts about the turn to the Versailles model long before the second Bush administration entered office. n62 That administration offended many when it suggested, before eventually turning to the United Nations, that there was no need for renewed Council authorization to use force. For members familiar with the deal struck in 1991, this step ventured too far in the direction of collective HIL rather than genuine multilateral consultation and cooperation.

While the Council has now lifted most of its economic sanctions on Iraq, it has by no means relinquished its hold over Iraqi sovereignty. Resolution 1483 retains the ban on the sale or supply of arms, extensive disarmament obligations, a modified "Oil-for-Food" Programme, and the requirement that 5 percent of all Iraqi oil proceeds be funneled into the UN Compensation Fund. Indeed, the Council goes out of its way to suggest that while any new Iraqi government has the sovereign right to review the continuing validity of preexisting oil contracts, it must remain financially liable for all debts resulting from the Gulf war that are still to be resolved before the UN Compensation Commission. n63 The Council retains a fondness for legislative acts only indirectly related to the need to restore international peace and security--so long as these do not constrain the hegemon. Thus, Resolution 1483 imposes a new duty on all states to facilitate the return of Iraqi cultural property and requires an independent auditing mechanism for Iraqi oil sales. n64 Whether or not the Council intends to legitimize Operation Iraqi Freedom, the fact is that the sovereignty of Iraq remains in de facto receivership not only because of its occupation by foreign powers but also because of the continuing actions by the Council itself.

IV. CONCLUSION

The examples above are of global hegemonic law, and not (or not merely) of hegemony. All the Council actions discussed here, as well as others that could also be addressed, such as Resolution 1422 and its anticipated annual extensions requesting that the International Criminal Court (ICC) not commence any prosecution directed at any acts or omissions relating to UN-established or -authorized operations involving persons from a state that is not a party to the ICC, n65 are quite plausibly lawful. n66 Those resolutions addressed here are also, quite [*887] plausibly, necessary. The Council's counterterrorism efforts respond to the international community's continuing inability to agree on a single global definition of the crime of terrorism, as well as the piecemeal, incomplete nature of the existing counterterrorism conventions. Resolution 1373's affirmation of self-defense avoids unproductive debates in a context in which the United States was bound to respond unilaterally. Resolution 1483's continuing (and sometimes novel) interventions in what would normally be considered to fall under a state's domestic jurisdiction can be justified as a vital part of rebuilding a stable and viable Iraq and, like Resolution 687, as "necessary" to restore the peace. n67 Nor are the resolutions addressed here manifestly illegitimate in a political sense; all were adopted unanimously or nearly so. As with the imperialist bilateral treaties of another era, if these actions pose risks of hegemonic abuse or are the product of hegemonic power, it is not because, at least in these instances, the hegemon is violating existing law but because, like more common examples of HIL, these Council actions meld hegemonic power with law. n68 Global HIL results from the privileged position accorded to the hegemon under the existing rules and institutions of international law. n69

Diverse lessons are to be drawn from these examples of global HIL. The first is that, from a policy perspective, not all forms of hegemony are bad or equally so. Merely because P-1 is the principal proponent of a Council initiative does not mean that it should not be undertaken. The United States cannot and should not be barred from securing the Council's cooperation in the pursuit of the common good and the collective can hardly
be blamed for using the Council to avoid the potentially greater harm of unilateral HIL. Although global HIL is characterized by demonstrable power disparity, it may preclude the exercise of even greater power disparities. As defenders of the Council-generated ad hoc war crimes tribunals would be the first to argue, it may sometimes be necessary for Council members to use their exclusive legislative capacity to short-circuit arduous international treaty negotiations.

But the troubling features and risks posed by Council-generated HIL lead to a second lesson: it is not enough to urge the hegemon to use the United Nations. Those concerned about the risks of hegemony need to worry about how the hegemon uses the Organization, especially the Council. The risks that unilateral HIL poses to international law and its formal principles, such as sovereign equality, are grave, but they are obvious. The comparable challenges posed by global HIL, potentially no less serious, are unclear and novel. After all, the hegemon can do only so much to alter the fundamental sources of international obligation on its own. But when acting with the Council, the hegemon can do almost anything, while still appearing to be acting consistently with the Charter's vague Principles and Purposes. If the Council and the hegemon decide jointly to revise the rules relating to due process rights of individuals, defensive force, the rights of occupiers, or the jurisdiction of the ICC, the Council's legitimacy may be undermined, but it may not promptly "shatter." And if it does not, there appears to be little the rest of us could do about the resulting new rules. Moreover, unilateral action, particularly in defiance of established rules, historically generates resistance. As is suggested by the backlash generated by actions taken by other possible agents of global HIL (such as the International Monetary Fund), global HIL, even when it generates resistance, may undermine the legitimacy of the collective institutions deemed responsible, thus making it harder to manage multilateral solutions. Global HIL is more insidious than unilateral HIL precisely because blame for it is shared.

The third lesson is that, particularly when it is legislating (but not only then), the Security Council would be well-advised to be sure that what it does reflects the will of the international community as a whole, including states not represented on the Council and members of international civil society. This is so for the same reasons good legislators the world over consult relevant constituencies: to secure the benefits of a diversity of insights and viewpoints, improve the quality of legislation, and avoid repeating mistakes. Consultation and participation may require institutionalized mechanisms--such as Michael Reisman's suggestion of a Chapter VII Consultation Committee for Council/General Assembly interaction--as well as less formal approaches, such as greater attempts at transparency. Such mechanisms are also essential to securing continued multilateral cooperation in the future, whenever the hegemon and others require such cooperation. The Council will not forever remain a legitimate body for collective action if it is perceived as acting in accord with Morgenthau's words at the beginning of this Comment. Recognizing global HIL also urges caution with respect to recipes for reform that might make the Council only more subject to hegemonic capture.

The Council's actions surveyed here remain works in progress. The Council may yet recognize human rights and other limits on its counterterrorism efforts, refuse to acquiesce in overly expansive readings of inherent self-defense, or exercise greater control over Iraq's future. As the Council's tempering of the harshest aspects of its counterterrorism sanctions and the annual review imposed on the Authority in Iraq suggest, even in an increasingly unipolar world, the collective can influence what the hegemon can achieve through the Council and it behooves the hegemon to permit itself to be influenced--if it wants to have a legitimating and effective Council around for a long time to come.

Legal Topics:
For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsTerrorismGeneral OverviewInternational LawSovereign States & IndividualsHuman RightsTerrorismInternational Trade LawGeneral Overview

FOOTNOTES:


n3 See, e.g., Konrad Ginther, Hegemony, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 685, 687-88 (Rudolf Bernhardt ed., 1995) (discussing the "token" collective hegemony of the five permanent members of the Security Council and relegating collective HIL to exceptional instances of
limited scope, such as the privileges extended to nuclear powers in the Nuclear Non-Proliferation Treaty.

n4 Vagts, supra note 1, at 846.


n6 Indeed, as Ginther reminds us, that is characteristic of hegemony. Ginther, supra note 5, at 685. Environmentalists, for example, have praised those unilateral U.S. actions that support or promote environmental regimes. See, e.g., Daniel Bodansky, What's So Bad About Unilateral Action to Protect the Environment? 11 EUR. J. INT'L L. 339 (2000).

n7 The 1267 Sanctions Committee was established to monitor the Council’s sanctions directed at the Taliban. SC Res. 1267 (Oct. 15, 1999), 38 ILM 235 (2000). The Council later extended the mandate of that body to include individuals and organizations associated with Al Qaeda. SC Res. 1390 (Jan. 28, 2002); see also SC Res. 1373 (Sept. 28, 2001), 40 ILM 1278 (2001) (requiring states to prevent the financing of terrorist acts, bring terrorists to justice, improve border security and control traffic in arms, deny safe haven, and cooperate in criminal investigations and establishing the CTC to assess and assist states’ efforts). For a description of these counterterrorism efforts, see Ilias Bantekas, The International Law of Terrorist Financing, 97 AJIL 315 (2003); Rosand, supra note 5; Paul C. Szasz, The Security Council Starts Legislating, 96 AJIL 901 (2002).


n9 Szasz, supra note 7, at 901-02. While other intergovernmental organizations, such as the International Civil Aviation Organization (ICAO), operating on the basis of majority voting and opt-out procedures, are capable of producing quasi-legislative effects, see, e.g., Frederic L. Kirgis, Specialized Law-making Processes, in THE UNITED NATIONS AND INTERNATIONAL LAW 65 (Christopher C. Joyner ed., 1997), no other existing international mechanism pairs global legislative power capable of departing from preexisting treaty obligations with the possibility of enforcement via binding economic sanctions or military force. Further, all other examples of global legislative power in modern international organization entail much more narrowly defined lawmaking, as opposed to lawmaking triggered by undefined "threats" to international peace. Indeed, many have suggested that the power of the Council to define for itself what constitutes such vague threats is what makes its discretion impervious to judicial review.

n10 See Bruno Simma, From Bilateralism to Community Interest in International Law, 250 RECUEIL DES COURS 217, 323 (1994). Indeed, Bantekas describes Resolution 1373 as a "minitreaty." Bantekas, supra note 7, at 326.

n11 See Szasz, supra note 7, at 903. Compare International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, Arts. 9, 15, 17, 21, 39 ILM 270 (2000), with SC Res. 1373, supra note 7. As the comparison suggests, the Convention evinces greater concern for the rights of accused persons, as well as for potentially conflicting rules of international law. By contrast, the one explicit mention of human rights in Resolution 1373 urges states to exercise caution in respecting the rights of refugees to asylum. Id., para. 3(f), (g).
n12 See Szasz, supra note 7, at 903; see also Bantekas, supra note 7, at 326 (suggesting that the United States took advantage of sentiment stirred by the attacks of September 11, 2001, to impose measures that the Council would otherwise not have adopted and that states would otherwise not have agreed to via treaty).


n15 Rosand, supra note 5, at 340. While acknowledging that his work will interact with human rights concerns, the then chair of the CTC indicated that "monitoring performance against other international conventions, including human rights law, is outside the scope of the CTC's mandate." Presentation by Amb. Jeremy Greenstock, Chairman of the Counter-Terrorism Committee (CTC) at the Symposium: "Combating International Terrorism: The Contribution of the United Nations" (June 3-4, 2002), available at <http://www.un.org/spanish/docs/comites/1373/ViennaNotesF.htm>. But see Presentation Given to the Counter-Terrorism Committee by Bacre Ndiaye of the Office of the High Commissioner for Human Rights (Dec. 11, 2001), UN Doc. S/2001/1227, annex, at 4, available at <http://www.un.org/Docs/sc/committees/1373/1227e1.pdf> (noting "strong" human rights dimensions to several of the CTC's expert areas and requesting that those assisting the CTC have strong human rights expertise).


n19 See, e.g., Edith M. Lederer, UN Agrees on Returning Frozen Assets, AP, Aug. 16, 2002, available in 2002 WL 25670813 (indicating that the vast majority of the two hundred individuals identified on the Council's lists at that time were put there by the United States amid complaints that Washington had not explained its criteria for naming them); see also The Financial War on Terrorism: Hearing Before the Senate Comm. on Finance, 107th Cong. (Oct. 9, 2002) (statement of Alan Larson, under secretary of state for economic, business and agricultural affairs), available in 2002 WL 100237868 (describing listing procedures and those cooperating with U.S. efforts).


n23 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 222; see Helen Mountfield, Regulatory Expropriations in Europe, 11 N.Y.U. ENVTL. L.J. 136 (2002) (describing deferential approach taken in European Convention toward temporary deprivations of property by state action); see also Steiker, supra note 21; cf. Foti v. Italy, 56 Eur. Ct. H.R. (ser. A) (1982); Corigliano v. Italy, 57 Eur. Ct. H.R. (ser. A), para. 34 (1982) (noting that, apart from an official notification that a person has committed a criminal offense, a criminal "charge" for purposes of Article 6 of the European Convention may take the form of "other measures which carry the implication" that the individual has committed a criminal offense and which "substantially affect the situation of the suspect"); Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 203­05 (D.C. Cir. 2001) (stigmatizing effect of a terrorist penalty and impact are sufficient to trigger some guarantees of due process). Article 14(1) of the ICCPR provides in relevant part: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." This is notably the one provision in that article that applies both to criminal defendants and to civil suits. The rest of Article 14 (including the detailed rights to presumption of innocence, examination of witnesses, and trial without undue delay) applies only with respect to those charged with a crime.

n24 Resolution 1373, supra note 7, para. 2(e) (requiring as well that terrorist acts be "established as serious criminal offences in domestic laws and regulations"). This paragraph, unlike the freeze orders in paragraph 1 of the same resolution and those implemented under the 1267 Sanctions Committee, clearly anticipates the involvement of states' criminal justice systems, including presumably the applicability of rights due criminal defendants.


n26 See Larson, supra note 19; Lederer, supra note 19; see also SC Res. 1452, paras. 1, 5 (Dec. 20, 2002) (authorizing humanitarian exceptions for its counterterrorism financial sanctions on individuals). While that resolution bows to members' complaints that it was inhumane, particularly in the absence of due process, to deprive listed individuals of all forms of sustenance, including for basic expenses such as food and medical assistance, it authorizes such exceptions only to the extent that a state notifies the 1267 Sanctions Committee of its intent to apply this exception and the committee fails to object within forty-eight hours. As a result, the 1267 Sanctions Committee, and those who dominate it, remain free to deny such basic necessities to anyone at any time.

n27 See, e.g., Brief for the United States as Amicus Curiae, Doe v. Unocal, Nos. 00-56603, 00-56628 (9th Cir. 2003), available at <http://www.hrw.org/press/2003/05/doj050803.pdf>.

n28 See, e.g., Joan Fitzpatrick, Jurisdiction of Military Commissions and the Ambiguous War on Terrorism, 96 AJIL 345 (2002).

n29 Cf. SC Res. 1456, annex, para. 6 (Jan. 20, 2003) (nonbinding "Declaration" asserting that states must ensure that their counterterrorism measures are in accordance with international law, including international human rights, refugee, and humanitarian law).
n30 Despite its actions since 9/11, the U.S. government has not filed a derogation under Article 4 of the ICCPR, perhaps because of the limits imposed on such derogations and because giving such notice would in itself subject the United States to scrutiny. See Fitzpatrick, supra note 28, at 350-51.

n31 See, e.g., Case T-306/01 R, Aden v. Conseil de l'Union européenne, Order (Trib. 1e inst. May 7, 2002) (unsuccessful challenge to counterterrorism financial sanctions imposed on individual); Case C-84/95, Bosporus Haya Yollari Turizm ve Ticaret AS v. Minister for Trans., Energy & Communications, 1996 ECR 1-3953 (unsuccessful challenge to sanctions imposed on corporation). A national or international court asked to review the legality of financial sanctions imposed as a result of the Council's action would have little to review in any case since, as noted, the Council does not release a justification or documents associated with its targets and the targeted individuals have not been formally charged with a crime.

n32 SC Res. 1368, pmbl. (Sept. 12, 2001), 40 ILM 1277 (2001) ("recognizing the inherent right of individual or collective self-defence in accordance with the Charter"); SC Res. 1373, supra note 7, pmbl. ("reaffirming the inherent self-defence of individuals or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368"). Some have suggested that, in addition to the preambles of these resolutions, paragraph 2(b) of Resolution 1373 (indicating that all states shall "take the necessary steps to prevent the commission of terrorist acts") contains an "almost unlimited mandate to use force." Michael Byers, Terrorism, the Use of Force and International Law After 11 September, 51 INT'L & COMP. L.Q. 401, 402 (2002). But this would be an extraordinary requirement to use force and certainly a departure from the usual language by which the Council authorizes the use of force ("all necessary means"). The departure from that usual formula, in a resolution whose other operative paragraphs mandate only financial and criminal sanctions, strongly suggests that paragraph 2(b) was probably not intended to be a general mandate to use force.


n34 But see Thomas M. Franck, Terrorism and the Right of Self-Defense, 95 AJIL 839 (2001) (arguing that U.S. military action in Afghanistan required no adjustments to existing law). It is not entirely clear whether Franck would endorse the three general rules suggested in the text above or whether his arguments about the state of the law were intended to be limited to the particular facts of Afghanistan as of the fall of 2001. If intended as a statement of general law, some of Franck's assertions are dubious. He contends, for example, that the draft articles on state responsibility of the International Law Commission (ILC) "make it clear that a state is responsible for the consequences of permitting its territory to be used to injure another state." Id. at 841 (citing the draft articles as of the second reading). If this implies that the ILC's draft articles endorse a kind of strict liability standard on these kinds of questions, it is incorrect. The draft articles attribute the action of nonstate actors to states only in carefully delimited circumstances, as where those actors' conduct is directed or controlled by the state, the nonstate actors are exercising elements of governmental authority, or the state acknowledges or adopts the conduct in question. Draft Articles on Responsibility of States for Internationally Wrongful Acts, Arts. 8, 9, 11, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), available at <http://www.un.org/law/ilc/>; cf. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, paras. 86-93 (June 27) (requiring a demonstration of "effective control" to impute actions to a state); Prosecutor v. Tadic, Appeal Judgment, No. IT-94-1-A, para. 137 (July 15, 1999), 38 ILM 1518 (1999) (asking whether a state has a role in organizing, coordinating, or planning the military actions). It may be that neither the international judicial decisions cited nor the ILC's draft articles are the last word when it comes to the rules of attribution for terrorist acts, but if, under existing law, a state is subject to full-scale military defensive action against it simply because nonstate actors within it injure another state, this proposition requires considerably more documentation. As for Afghanistan, it is not altogether clear whether all U.S. actions during the course of that conflict were, in hindsight, legally justified. Cf. Mary Ellen O'Connell, Lawful Self-Defense to Terrorism, 63 U. PITT. L. REV. 889 (2002) (suggesting that not all U.S. actions during Operation Enduring Freedom met the requisites of proportionality).
n35 Franck, supra note 34, at 839.

n36 Note that President Bush had already announced, prior to approval of Resolution 1373, that the United States would no longer distinguish between terrorists and states harboring them. President George W. Bush, Address Before a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, 37 WKLY. COMP. PRES. DOC. 1347, 1349 (Sept. 24, 2001).

n37 See generally Burns H. Weston, Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy, 85 AJIL 516 (1991). While we have only fragmentary knowledge of how the United States (and other permanent members) regularly blandish other states so as to get their way within the Security Council, the drive to secure the Council’s permission to wage war on Iraq, both prior and subsequent to adoption of Resolution 1441 (Nov. 8, 2002), 42 ILM 250 (2003), reportedly included a multitude of economic and other threats directed at even the least-powerful members of the Council.

n38 Thus, even Franck, who argues that existing rules sufficed to justify Operation Enduring Freedom, relies on the Security Council for every one of his propositions of established law. Franck, supra note 34, at 839-42.

n39 Cf. id. at 842-43 (arguing that the state taking forceful defensive action needs to prove its case after the fact).


n42 See generally Byers, supra note 32, at 412.

n43 Franck, supra note 34, at 840.

n44 Indeed, as Professor Reisman indicates in another context, "the potential for abuse here does not derive from the power of a single state." W. Michael Reisman, Assessing Claims to Revise the Laws of War, 97 AJIL 82, 90 (2003). To paraphrase Reisman, the hegemon can always attribute the problematic ambiguities to a weak international legal system, which licenses the Council to undertake such action. This is global HIL, in short, that leaves no fingerprints. But see infra note 69.

n45 THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>; NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION (Dec. 2002), available at <http://www.whitehouse.gov/response/index.html>. As Reisman observes in the anodyne language of the Yale School, the doctrine to engage in preemptive force "contributes[ ] to minimum order by stabilizing the expectations of all actors as to the consequences of certain types of action and thus aid[s] in avoiding adventures and mistakes." Reisman, supra note 44, at 90. Notwithstanding the language of Article 2(4) of the UN Charter, under its security strategy the hegemon apparently retains the right to threaten any and all.


n47 See SC Res. 1483, paras. 4, 5 (May 22, 2003), 42 ILM 1016 (2003) (calling upon the Authority--namely, the United States and the United Kingdom--to promote the welfare of the Iraqi people consistently with the Charter and "other relevant international law"; and calling upon "all concerned" to comply fully with the Geneva Conventions of 1949 and the Hague Regulations of 1907). Whether this resolution was intended to be the equivalent of an adjudicative judgment that the United States and the United Kingdom are subject to the law governing occupying powers under the Geneva Conventions of 1949 and the Hague Regulations of 1907, see, e.g., Frederic L. Kirgis, Security Council Resolution 1483 on the Rebuilding of Iraq, ASIL INSIGHTS, May 2003, available at <http://www.asil.org/insights/insigh107.htm>, remains to be seen. With the possible exception of its provision for review a year hence, nothing in that resolution recognizes that under the relevant Geneva Convention, for example, lawful occupation normally extends for only a one-year period after the
"general close of military operations." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 6, 6 UST 3516, 75 UNTS 287 (stating that the Convention ceases to apply after the one-year period but providing that certain provisions continue to apply thereafter to the extent the occupier "exercises the functions of government"). Indeed, given the continuing violence in Iraq at least through the summer of 2003, it is not even clear that military operations have in fact ended despite prior U.S. statements to this effect.


n49 While Resolution 1483 affirms the need for criminal accountability for crimes committed (but only by the previous Iraqi regime and not by anyone else on Iraqi territory) and imposes a duty on states to freeze the assets of Saddam and other senior officials of the former regime, it steers clear of indicating how trials will be conducted, not mentioning any of the likely possible options or suggestions of involvement by the UN special representative or the international community as a whole. SC Res. 1483, supra note 47, para. 8. The Authority is left with full discretion about whether or not to conduct such trials itself (even through the application of U.S. military tribunals with no local Iraqi or UN participation), to implement a partial or full amnesty for such crimes, to undertake various forms of truth commissions, or to implement an Iraqi lustration program banning former Ba'ath Party members from certain positions in government or perhaps civil society more generally.

n50 Resolution 1483 recognizes a UN special representative with "independent responsibilities" but who needs to work with the Authority to "facilitate a process leading to an internationally recognized, representative government of Iraq." Id., para. 8 & 8(c). This ambiguous directive appears to be a studied effort to avoid any of the usual trigger words or preconditions for UN involvement in election supervision, thereby according the Authority wide latitude in administering Iraq and deciding its future. The resolution's treatment of UN responsibilities is less vague with respect to the UN role in "coordinating" humanitarian and reconstruction assistance. Id., para. 8(a); cf. para. 8(g) (directing that the United Nations merely "promote" the protection of human rights). But whether paragraph 8(g) contemplates that the UN special representative will be able to object, much less take any action in response, to any possible violations of applicable human rights or international humanitarian norms by the Authority remains to be seen. Cf. Kirgis, supra note 47.

n51 Cf. Anne-Marie Slaughter, Good Reasons for Going Around the U.N., N.Y. TIMES, Mar. 18, 2003, at A33 (arguing that the Iraqi war might be illegal but could still be legitimate). Kirgis suggests that the relative absence of a substantial UN presence in Iraq pursuant to Resolution 1483 serves to distinguish this case from that of Kosovo, where such involvement, welcomed by the Council in Resolution 1244 (June 10, 1999), 38 ILM 1451 (1999), arguably served to legitimate the 1999 bombing campaign there. Kirgis, supra note 47. But the failure of Resolution 1483 to authorize a comparable UN presence (or to put the UN special representative clearly in charge of the administration of Iraq) cuts both ways. Some might contend that the Council's acquiescence in the Authority's sole responsibility for Iraq not merely recognizes the status quo but acknowledges the Authority's legitimate rights to rule the state that has been invaded. In Resolution 1483 the Council appears to be acquiescing in an essentially new form of trusteeship, complete with regular reporting responsibilities. By not imposing a UN presence, the Council seems to be trusting the Authority more than it did NATO in the case of Kosovo. One does not cede such responsibility, one would assume, to aggressors.

n52 See, e.g., Anne-Marie Slaughter, A Chance to Reshape the U.N., WASH. POST, Apr. 13, 2003, at B7 (proposing a Council determination of threat to the peace in cases combining possession of WMDs, grave and systematic human rights abuses, and evidence of aggressive intent).

n53 See SC Res. 940 (July 31, 1994); see also FERNANDO R. TESON, A PHILOSOPHY OF INTERNATIONAL LAW 62-63 (1998).

n54 GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER (forthcoming 2004).

n55 This is perhaps the inevitable result of the Council's selectivity in responding to breaches of the Charter, especially when it comes to those violations committed by permanent members or by states.
allied with such members. While the invasion of Kuwait was a brazen violation of the Charter, no state, before or since, has been subjected to comparable restrictions on its sovereignty for violating international law. See generally Martti Koskenniemi, The Police in the Temple, 6 EUR. J. INT'L L. 325 (1995).

n56 Indeed, the lawmaking impact of the Council's establishment of the UN Compensation Commission may rival the legal impact of its establishment of the two ad hoc war crimes tribunals, even though the latter is more widely acknowledged than the former. See Veijo Heiskanen & Robert O'Brien, UN Compensation Commission Panel Sets Precedents on Government Claims, 82 AJIL 339 (1998).


n58 SIMPSON, supra note 54, ch. 8.

n59 Id.

n60 The ILC debated and ultimately rejected a provision on state crimes as part of its recently concluded effort to codify the rules governing state responsibility. See generally Symposium: The ILC's State Responsibility Articles, 96 AJIL 773 (2002).


n63 SC Res. 1483, supra note 47, paras. 16(b), 21.

n64 Id., paras. 7, 12, 20; see also Kirgis, supra note 47.

n65 SC Res. 1422 (July 12, 2002), 41 ILM 1276 (2002), renewed as SC Res. 1487 (June 12, 2003). That resolution, adopted as a result of U.S. pressures on a reluctant Council, see Sean D. Murphy, Contemporary Practice of the United States, 96 AJIL 725 (2002), takes the U.S. campaign against the International Criminal Court, formerly consisting of U.S. unilateral threats to deprive aid or other benefits to ICC state parties, efforts to negotiate bilateral agreements under Article 98 of the Rome Statute with ICC state parties, and passage of the American Servicemembers Protection Act, to the global level. On these other actions, see id., 93 AJIL 186 (1999), 96 AJIL 724 (2002), and 97 AJIL 200 (2003). Like Resolution 1373, this resolution and its anticipated annual extensions, undertaken not in response to any concrete or discrete threat to the peace or directed at any particular target state, have the effect of legislating globally, in this instance not by serving as an alternative to an international treaty not yet in effect but by amending one already in force. Moreover, it would be ironic, but wholly in line with global HIL, if the Council's expressed intent to renew Resolution 1422 annually committed permanent members not to exercise their veto powers to prevent such renewals. Cf. Franck, supra note 5 (proposing such an agreement in a wholly different context). Depending on what Resolution 1422 and its progeny mean by the UN "established or authorized operations" that it exempts from ICC jurisdiction, the Council may have achieved through the back door precisely the blanket exemption from ICC jurisdiction that the United States sought for itself during the negotiations on the Rome Statute. See, e.g., Carsten Stahn, The Ambiguities of Security Council Resolution 1422, 14 EUR. J. INT'L L. 85, 103-04 (2003) (suggesting that Operation Enduring Freedom might be embraced by the language of Resolution 1422); see also Salvatore Zappala, The Reaction of the US to the Entry into Force of the ICC Statute, 1 J. INT'L CRIM. JUST. 114 (2003).

n66 Indeed, eminent international lawyers have defended the legality of Resolution 687. E.g., Oscar Schachter, United Nations Law in the Gulf Conflict, 85 AJIL 452 (1991).

n67 See Kirgis, supra note 47.

n68 See Ginther, supra note 3, at 686; Vagts, supra note 1, at 846.

n69 This restates, in different fashion, a point recently made by Reisman. He suggests that blame for the risk of uncontrolled superpower abuse of the Bush administration's proclaimed preemptive self-
defense doctrine rests not with the hegemon but with the entire international community for building only weak central institutions and therefore reserving to each state a "droit naturel" to use unilateral force in self-defense. Reisman, supra note 44, at 90. For those who see the Council as doing the bidding of the hegemon, Reisman's argument seems Orwellian. Taken literally, it would appear to absolve the hegemon of any moral or political blame for global or unilateral HIL, while shifting the burden onto the "college of international lawyers" to solve the resulting problems through "legal creativity and factual realism." Id. It would appear to be more in line with factual realism to recognize that in these cases the hegemon is taking advantage of the acknowledged weaknesses in international law and that the solution to global HIL lies partly, if not wholly, in its hands.


n71 Cf. Tom J. Farer, Beyond the Charter Frame: Unilateralism or Condominium? 96 AJIL 359, 361 (2002) (expressing the view that a "condominium" under the Council would probably be short-lived and would soon "crack and finally shatter").

n72 For a cogent short history, see Jack Snyder, Imperial Temptations, NAT'L INTEREST, Spring 2003, at 29.


n74 Cf. Szasz, supra note 7, at 905 (making a similar plea).

n75 A Security Council that serves as something more than the mouthpiece of the hegemon may, for example, benefit from different views and expertise with respect to complex issues facing it, such as how best to engage in nation building in Iraq. See generally Peter M. Haas & Ernst B. Haas, Learning to Learn: Some Thoughts on Improving International Governance of the Global Problematique, in ISSUES IN GLOBAL GOVERNANCE: PAPERS WRITTEN FOR THE COMMISSION ON GLOBAL GOVERNANCE 295 (1995).


n78 Council prescriptions may need to address, for example, not only steps to lessen use of the veto, cf. Franck, supra note 5 (recommending measures to reduce the use of the veto), but also agreed limits on the Council's powers. See, e.g., Erika de Wet & Andre Nollkaemper, Review of Security Council Decisions by National Courts, 2002 GER. Y.B. INT'L L. 166.