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DISCUSSION IN THE SECURITY COUNCIL ON ENVIRONMENTAL INTERVENTION IN UKRAINE

*Linda A. Malone**

Although, the following discussion is fictional, it describes actual events. The information in this Essay is true and current as of February 7, 1994, and is documented in sources on file with the Author. Japan and Germany are not currently permanent members of the Security Council so only nine, not ten votes, are presently required by article 27 for approval of resolutions.

Ms. Jarring (Sweden): The Security Council has before it a draft resolution calling for enforcement action against Ukraine to counter the perceived danger posed by the continued operation of two reactors at Chernobyl and the deterioration of the two nonoperational reactors. Ukraine has engaged in environmental and military blackmail for several years over control of its nuclear hazards, its parliament demanding "material compensation" of three billion dollars in foreign aid for its "material wealth" of strategic nuclear weapons. Since 1991 the global community has pressured the country to relinquish the 1800 strategic nuclear warheads from 176 intercontinental missiles and from air-launched cruise missiles that it retained after the disintegration of the Soviet Union. The warheads themselves are reportedly decaying and improperly maintained. The Ukrainian Parliament has yet to ratify the nuclear Non-Proliferation Treaty (NPT), and initially imposed thirteen conditions on its ratification of the START I nuclear arms reduction treaty before implementation would begin. START I was not ratified until February 4, 1994 and full compliance remains uncertain.

The immediate danger to which the resolution is addressed, however, is the hazardous operation and maintenance of the civilian reactors at Chernobyl. Of the four original reactors at Chernobyl, the wreckage of the unit where the 1986 accident occurred is leaking radioactive waste into the Pripyat marshlands. A fire prompted the closure of a second unit. Ukraine has not abandoned its intention to restart that unit. In-

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deed, despite assertions to the contrary in 1991 and 1992, Ukraine announced its decision in 1993 to continue operation of the remaining two units that lack containment structures. Ukraine asserts an intention to shut down the reactors at some point in the undefined future as a justification for its failure to spend money in improving them. Meanwhile, the country's chaotic economy holds little promise of improvement in the near future. The ongoing Chernobyl clean up already consumes more than ten percent of the national budget. Radiation meters routinely show radiation five to ten times normal background levels and, at some spots, readings up to 5000 times higher than normal have been recorded. The most highly radioactive waste from the accident is buried in over 600 dump sites dug quickly after the disaster. In the summer of 1993, 6000 hectares of highly contaminated pine forest caught fire, spewing radioactive dust over the area. Monitoring of health and environmental data from the last accident must be done immediately if the impact of these problems is ever to be assessed accurately.

Against this background, continued operation of the reactors is a disaster waiting to happen. Officials discovered in the fall of 1993 that thieves apparently stole two uranium-filled reactor control rods from Chernobyl, but they are not even sure what year the theft took place. Security is nonexistent, safety standards are lax, and the morale and qualifications of personnel are low. Indeed, the manager of the Chernobyl plant in 1986 had previously been in charge of a heating plant. The more highly qualified workers have left since that time due to rapidly deteriorating working conditions and living standards. Smuggling of low-grade nuclear fuel and "dual use" metals, which can have industrial or nuclear weapon application, have been documented by United States and German officials. A report of Russia's Foreign Intelligence Service noted "the growing interest of international organized crime structures in conducting illegal trade on fissionable and other especially dangerous material, documentation on [weapons of mass destruction] technology, and individual units for the manufacture of nuclear devices."¹ No one fully knows what nuclear facilities exist in the former republics of the Soviet Union. Fifty-megawatt nuclear research reactors were recently "discovered" on military bases at Kazakhstan's Semipalatinsk test range and Ukraine's Sevastapol naval base.

The draft resolution that I should like to place before the Council reads as follows:

1. See Steve Coll, *Nuclear Goods Traded in Post-Soviet Bazaar*, WASH. POST, May 15, 1993, at A18.

The Security Council,

Recalling the accident of April 26, 1986, at the Chernobyl Nuclear Power Plant, which resulted in a release,

Expressing grave alarm at reports of improper and inadequate maintenance and operation of the plant, deterioration in these conditions, and in the structures themselves,

Determining that this situation constitutes a threat to international peace and security,

Committing to take effective measures to eliminate the imminent risk of another accident occurring,

Believing that the establishment of a committee of experts will contribute to ensuring that such risk is eliminated,

Acting under chapter VII of the Charter of the United Nations,

1. *Resolves* to appoint a committee of experts who, with the assistance of the International Atomic Energy Agency (IAEA), shall investigate, as well as receive and hear evidence, statements, and testimonies on the conditions of operation and maintenance of the four Chernobyl nuclear reactors, and who shall report to the Security Council at the earliest possible time on the measures to be taken in order to ensure that any unreasonable risk of an accident occurring is eliminated;

2. *Requests* the Secretary-General to implement urgently the present resolution and, in particular, to make practical arrangements for the effective functioning of the committee at the earliest time and to report periodically to the Council.

The Security Council does not have to wait to act until an invasion has begun or a nuclear accident has occurred. Whatever degree of imminence is necessary for states to act in individual or collective self-defense need not exist for there to be a "threat to peace" within the meaning of chapter VII.² The Security Council was created to avert, as well as to remedy, disaster. If Ukraine is unwilling to act in an environmentally responsible manner with respect to these hazards, it is the responsibility of the Council to compel complete inspection and even mandate closure if warranted by the conditions.

2. See U.N. CHARTER arts. 39-51. Article 39 provides that "the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measure shall be taken . . . to maintain or restore international peace and security." U.N. CHARTER art. 39.

Ms. Mironova (Ukraine): First and foremost, every state has a right to decide matters of vital national security free from outside interference. Ukraine wants to be responsible for its own self-defense, rather than be dependent upon the assistance of other states. There are many elements of the former Soviet Union's government as well as right-wing nationalists who continue to vie for control of Russia's future. The draft resolution before us is a thinly veiled attempt by some members of this Council to dictate how Ukraine should resolve these sensitive issues of strategic national defense. The enforcement powers of this Council are broad but not limitless. However expansive the terms "breach of peace" or "act of aggression" may be, they have never been interpreted to encompass a state's failure to ratify a disarmament treaty or to abide by its terms. If so, we submit that many members of this Council are subject to sanctions—nonnuclear and nuclear states for their failure to ratify the NPT, and nuclear states for their failure to pursue a "treaty on general and complete disarmament under strict and effective international control" as required by article VI of that treaty.³

Even more clearly, the three key terms in chapter VII⁴ have never been used to justify enforcement action against a state to counter an environmental threat in the absence of military conflict. Even if this resolution emanated solely from concern over continued operation of the Chernobyl reactors, the decision to continue operation is integral to our state's right to pursue its own development. Principle 2 of the Rio Declaration,⁵ the updated version of principle 21 of the Stockholm Declaration,⁶ not only reaffirms the right to development, but strengthens it. It provides that states have the sovereign right to exploit their own resources "pursuant to their own environmental and development policies."⁷ Under principle 6 the needs of developing countries must be given "special priority."⁸ Principle 11, which requires states to enact ef-

3. Treaty on the Non-proliferation of Nuclear Weapons, Mar. 5, 1970, 729 U.N.T.S. 169, 173.

4. The three key terms are: (1) threat to the peace; (2) breach of the peace; and (3) act of aggression. See U.N. CHARTER art. 39.

5. *The Rio Declaration on Environment and Development*, princ. 2, U.N. Doc. A/Conf.151/Rev.1 13 (1992) [hereinafter *Rio Declaration*], reprinted in *THE EARTH SUMMIT: THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT (UNCED)* 118, 118 (1993) [hereinafter *EARTH SUMMIT*].

6. Stockholm Declaration of the United Nations Conference on the Human Environment, June 1, 1972, princ. 21, U.N. Doc. A/CONF. 48/14 (1972), reprinted in 11 I.L.M. 1416 (1972).

7. *Rio Declaration*, supra note 5, princ. 2, reprinted in *EARTH SUMMIT*, supra note 5, at 118.

8. *Id.* princ. 6, reprinted in *EARTH SUMMIT*, supra note 5, at 119.

fective environmental legislation, specifically notes that “[s]tandards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.”⁹ The current economic crisis and the country’s need for power and heat mandate continued dependence on these plants at this time. We cannot afford to complete new reactors under construction or pay to import oil and gas from Russia or elsewhere.

There is no justification for singling out Ukraine on any grounds. Of the three former Soviet republics that retained nuclear weapons, Belarus was the first to ratify START I and accept status as a nonnuclear party to the NPT. Kazakhstan, the first Moslem state to be an independent nuclear power, ratified START I but did not ratify the NPT until December 1993. Neither state—as a nonnuclear state—has completed a comprehensive safeguards agreement with the IAEA. In a gesture of our good faith, at the end of 1993, we began dismantling the ten-warhead SS-24 missiles targeted at North American sites, and on February 4, 1994 our parliament ratified START I.

Russia has eleven reactors identical to the one that exploded in Chernobyl. The RBMKs, the oldest Russian reactors, have no containment structures and are operating throughout the former Soviet bloc. A 1993 World Bank-International Energy Agency report to the Group of Seven economic summit stated that seven percent of all electrical-generating capacity in Russia, Armenia, Bulgaria, Lithuania, Slovakia, and Ukraine is derived from RBMKs or the somewhat less dangerous VVER reactors. Russia is attempting to demonstrate that some of the RBMKs operating there can be upgraded to approximate Western safety standards. Russia has ten, known “secret cities” like Chelyabinsk-70, Tomsk-7, and Krasnoyarsk-26, with a total population of about one million living amid reactors and stockpiles of nuclear materials and waste, which are still unmarked on any map. In 1993 alone there were at least three accidents in Russian nuclear facilities that resulted in releases of radioactivity. The Mayak plutonium-producing plant at Kyshtym alone, the source of two accidents in 1957 and 1967 affecting 450,000 people in an area the size of Maryland, is storing in unsecured conditions radioactive materials equivalent to the fallout from twenty Chernobyl disasters.

Outside the former Soviet bloc, there are a number of states whose decisions regarding civilian use of nuclear energy have raised serious environmental concerns. To give just one example, France, Russia, Japan, and Britain each have programs to extract plutonium from used fuel to

9. *Id.* princ. 11, reprinted in *EARTH SUMMIT*, *supra* note 5, at 119-20.

generate energy, despite criticism that reprocessing is environmentally unsound and adds to the world stockpile of weapons-grade plutonium.

Mr. Yablokov (Russia): Although we do have eleven reactors like that which exploded at Chernobyl, unlike Ukraine we have worked to fix many design faults, install new computers, and improve safety procedures and equipment.

The right to development in principle 21 of the Stockholm Declaration, and principle 2 of the Rio Declaration, which Ukraine cites in its defense, is qualified by an obligation to ensure that "activities within their [states'] jurisdiction and control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction."¹⁰ In contrast to the Stockholm Declaration, the Rio Declaration also adopts the "precautionary approach" to environmental problems for measures to be taken against threats of serious or irreversible damage even in the face of scientific uncertainty. More specifically, principle 19 requires states to "provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith."¹¹

Moreover, back-and-forth recitation of these often competing principles of the right to development and the obligation to preserve the environment only confuses the question of the Security Council's authority to intervene in this case. The prohibition in article 2, paragraph 7 of the Charter against intervention in any state's domestic affairs contains an explicit exception for application of enforcement measures under chapter VII.¹² We are left, once again, with whatever limitations are imposed in the key terms of chapter VII or the delineated purposes of the United Nations.

There is no question that the "threat to peace" language authorizes anticipatory action by the Security Council, but that begs the question of whether the situation at Chernobyl is the type of situation appropriately addressed as a threat to peace. We are not concerned here with an actual accident that may or may not present a danger of transboundary radiation. Nor is this a case of deliberate infliction of environmental damage

10. *Id.* princ. 2, reprinted in EARTH SUMMIT, *supra* note 5, at 118.

11. *Id.* princ. 19, reprinted in EARTH SUMMIT, *supra* note 5, at 121.

12. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. CHARTER art. 2, para. 7 (emphasis added).

that might coincide with a threat to peace or breach of peace and, perhaps, even an act of aggression. At most, we are evaluating the risk of an accident with a risk of transboundary impact. How many other reactors in how many other countries pose the same danger? The potential for abuse of this authority is too great and the immediate justification too weak.

Mr. Hamada (Japan): Ukraine's contention that the Council has never taken enforcement action against a state for failure to be a party to or abide by a disarmament treaty overlooked the debate over imposition of economic sanctions on North Korea, prompted by its announcement of its intention to withdraw from the Non-Proliferation Treaty. Although North Korea's offer of unrestricted inspections of five of seven nuclear-related sites averted sanctions in 1993; several events prolonged the debate. These included the continuing crisis over the IAEA's declaration in 1994 that safeguards against new plutonium production were broken, North Korea's resistance to allowing inspection of a reactor in Yongbyon containing spent fuel and a nearby facility for reprocessing the plutonium-laden spent fuel, its ambiguity in allowing full inspection of its other declared nuclear sites, its refusal to permit a special inspection by the IAEA of two military facilities, and its renewed threats to withdraw from the NPT. The two military facilities have never been open to international inspectors and are suspected of harboring nuclear wastes that might provide evidence of how much plutonium for bombs has been produced. Although Japan wishes to pursue diplomatic negotiations first, with sanctions as a last resort, this body clearly has the authority to take chapter VII enforcement action against North Korea should negotiations fail, or against Ukraine in the situation at hand.

Ms. Siegel (United States): In 1993 the United States and Ukraine signed an agreement providing \$175 million for dismantlement of nuclear weapons in addition to a pledge of \$155 million in economic assistance, both approved by Congress. This economic assistance is not, however, unique. When Kazakhstan ratified the NPT, we signed an accord guaranteeing payment of at least seventy million dollars to destroy the silos housing that state's 104 SS-18 missiles, each equipped with ten warheads. We promised another \$14.5 million to improve responses to nuclear accidents, to create communications channels for reporting nuclear-related information, to safeguard warheads from theft and terrorism, and to tighten controls on exports of nuclear-related materials. On January 14, 1994 Ukraine signed an accord to dismantle its nuclear arsenal within seven years in return for an array of potential economic assistance, technical assistance, and security guarantees from the United

States, as well as debt forgiveness for energy imports from Russia. Shortly afterwards, its parliament approved the accord and ratified START I.

The United States has demonstrated its commitment to doing everything possible to minimize the risks of a global nuclear disaster. Accordingly, we viewed North Korea's announced intention to withdraw from the NPT as a matter of the utmost gravity. In 1989 the Yongbyon reactor was shut down for 100 days, at which time North Korea admitted diverting spent nuclear fuel to plutonium production. IAEA inspections of the reactor and the processing facility in 1992 indicated that North Korea made substantially more bomb-grade plutonium than it acknowledged and turned over to the IAEA. Radioactive measurements from nuclear particles on plant equipment and waste storage bins indicate preprocessing of fuel in 1989, 1991, and 1992.

Fuel cannot be withdrawn unless the reactor is shut down, and U.S. intelligence satellites can detect another cooling in the Pyongyang reactor. IAEA inspectors must, however, conduct their own full inspections of the reactor and nearby laboratory for reprocessing of spent fuel, as well as special inspections of the two military sites where North Korea may have hidden wastes from the extra reprocessing. Refueling of the Pyongyang reactor is imminent. The IAEA needs to make detailed measurements of radioactive emissions from the spent fuel withdrawn from the reactor to assess how long it has been in the reactor. That assessment would, in turn, enable inspectors to calculate how much spent fuel was replaced in 1989 and thus how much was used to make weapons-grade plutonium.

With both the situations in North Korea and Ukraine, the United States wished to pursue diplomatic initiatives first and foremost, but we have been disappointed in the progress of our initiatives. Regretfully, we see the proposed resolution as a necessary step at this juncture to expedite resolution of a rapidly deteriorating situation in Ukraine. Although properly characterized as an enforcement action because its fulfillment is not predicated on Ukraine's consent, I want to emphasize that the resolution is coercive only insofar as Ukraine refuses to cooperate with the good faith efforts of this Council to assist the State in alleviating this environmental hazard.

Mr. Liu (China): If anything, the Korean crisis is an example of how this Council must be circumspect in the use of its chapter VII enforcement powers. After inflammatory statements by the American President regarding U.S. retaliation, former U.S. Defense Secretary Les Aspin acknowledged in 1993 that the situation with respect to North

Korea's possible production of a nuclear device had not changed dramatically since 1989. Article X of the NPT recognizes the right of a state to withdraw if it decides that extraordinary events related to the subject matter of the treaty have jeopardized its supreme interests.¹³ China has favored an appropriate settlement to achieve a nonnuclear Korean peninsula, including withdrawal of U.S. nuclear forces, through dialogue, not sanctions. We do not think the Council's involvement in the matter will contribute to the settlement of that issue and find the reference to the matter, in *this* context, inappropriate.

Mr. Draper (United Kingdom): North Korea justified its announced intention to withdraw from the NPT as a measure of self-defense in the exercise of its sovereignty. The United Kingdom questioned at the time whether North Korea's allegations of U.S. aggression and IAEA bias constituted "extraordinary events related to the subject matter of the treaty." In the current situation, once again we have a state asserting that the path it pursues is a protected exercise of national sovereignty. The claimed "right to development" is often asserted but never defined. When Russia asserts that we are not dealing with a situation where an accident has occurred, its representative ignores the fact that Europe and the United Kingdom in particular have already been the victims of one accident at Chernobyl, and conditions have only worsened since that time. We are not willing to wait for a next time.

Mr. Graves (France): The situation with North Korea, and what enforcement measures were or are being debated, is hardly precedent in the Ukrainian situation. The Korean peninsula has been an area of special concern to the U.N. ever since the General Assembly's recognition in 1948 of the government of the Republic of Korea as the only lawful government in Korea, and the Security Council resolution in 1950 condemning the North Korean invasion of South Korea as a breach of peace and recommending that members furnish forces to assist the Republic under the "unified command" of the United States.¹⁴ Moreover, the Security Council's recent concern with North Korea was not simply a question of North Korea's failure to abide by the NPT. The escalation of tension between North and South Korea over North Korea's possible development of nuclear weapons carried with it a very real danger of military conflict, accompanied by, at one time, a threat of U.S. retaliation by President Clinton if North Korea attacked South Korea with or without nuclear weapons.

13. Treaty on the Non-Proliferation of Nuclear Weapons, Mar. 5, 1970, art. 10, 729 U.N.T.S. 169, 175.

14. Security Council Resolution 84, July 7, 1950, para. 3, U.N. Doc. No. S/1588 (1950).

The position of North Korea—purportedly premised on the partiality of IAEA inspections and its impermissible investigation into military secrets—presents the traditional scenario of potential military conflict encompassed by the terms “threat to peace” or “breach of peace” under chapter VII. At no point has any member of this Council predicated enforcement action on the environmental threat posed by the graphite reactors in North Korea, like those at Chernobyl. If this body is primarily concerned about the arsenal of nuclear weapons in Ukraine or its failure to ratify the NPT, the declaration should so state and be debated on those grounds rather than be put forward as environmental intervention.

France has been a leader in the development of safe, responsible use of nuclear energy. It is not for this body to decide which sources of energy a state should utilize. If this resolution is to be adopted, it must be premised upon more than the environmental risks associated with nuclear energy or, for that matter, the risks inherent in any energy development. If, however, this discussion demonstrates that Chernobyl presents an unusual and unjustifiable risk of transboundary harm, we are prepared to support the resolution.

Mr. Schulte (Germany): Germany has, on a number of occasions, specifically requested that the RBMK reactors in operation throughout the Commonwealth of Independent States, be closed down immediately. The Western nuclear industry has indicated willingness to assist in retrofitting other reactors to continue their operation more safely, but on the condition that it be indemnified against claims for compensation if nuclear damage were to be caused by installations to which their supplies and services have been provided. As things now stand, if an accident were to occur, suppliers might be liable as a matter of domestic product liability law or, in cases of supplier fault, general tort law. The CIS and most East European states, unlike many Western states, have not enacted special nuclear liability legislation placing liability solely on the operator of a nuclear installation. Nor are most of these states parties to either the Paris Convention on Third Party Liability in the Field of Nuclear Energy¹⁵ or to the Vienna Convention on Civil Liability for Nuclear Damage,¹⁶ which similarly limit liability to the operator. Security Council intervention in the Ukrainian situation would allow the Western nuclear

15. Paris Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, *reprinted in* INTERNATIONAL CONVENTIONS ON CIVIL LIABILITY FOR NUCLEAR DAMAGE (International Atomic Energy Agency Legal Series No. 4, rev. ed. 1976).

16. Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, *reprinted in* INTERNATIONAL CONVENTIONS ON CIVIL LIABILITY FOR NUCLEAR DAMAGE, *supra* note 15.

industry to provide its expertise to improve safety without incurring liability in the event of a nuclear accident.

Mr. Khan (Pakistan): As the Security Council has become more active in taking enforcement measures, the stated grounds in its resolutions for doing so have become less clear and—more often than not—unstated. When economic sanctions were imposed on Southern Rhodesia in 1966, the Security Council was quite specific that it was acting pursuant to articles 39¹⁷ and 41.¹⁸ Since then, in authorizing forces in Somalia and Kuwait, in establishing “safe areas” in Bosnia, in imposing sanctions on Haiti, and in establishing a war crimes tribunal for former Yugoslavia, to give just a few examples, the Council has stated only that it was “acting under chapter VII.” The broad-based authorization of chapter VII has been used to justify sanctions based on such diverse actions as Libya’s refusal to turn over to Scotland or the United States suspects in the Lockerbie bombing and the UNITA rebels’ continuing attacks in violation of a U.N.-brokered peace accord.

The Security Council is a political body, in which mixed motivations for action are inevitable. It would be futile to try to inquire into the motivation behind each resolution and vote. The Rhodesian sanctions, the Security Council’s first exercise of chapter VII enforcement powers, is illustrative. Discussion in the Council focused on whether the risk of violent reaction by Rhodesian Africans, neighboring states, or the United Kingdom was concrete enough to constitute a threat to peace. Yet the underlying concern was a human rights concern for the disenfranchisement of ninety-four percent of Rhodesia’s population by the white regime. It would take twenty-six years before the Security Council would explicitly acknowledge taking enforcement action based on humanitarian concerns in the case of Somalia. The representative from France states that energy concerns cannot be the predicate for enforcement action, and yet one could argue that the most expansive enforcement action ever taken, the war against Iraq, was driven by such concerns rather than the aggression against Kuwait.

17. U.N. CHARTER art. 39 “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” *Id.*

18. U.N. CHARTER art. 41.

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Id.

The Security Council has already considered environmental concerns within the scope of its chapter VII authority, albeit in a military context. Resolution 687, which officially ended the Persian Gulf War between Iraq and the United Nations Coalition Force, included environmental remedies against Iraq.¹⁹ Paragraph 16 states that Iraq is liable under international law for any direct loss, including environmental damage and depletion of natural resources.²⁰ Paragraph 18 creates a fund to pay compensation for claims that fall within paragraph 16, and establishes a commission that will administer the fund.²¹ Under paragraph 19, the Secretary-General is directed to present a recommendation to the Security Council within thirty days of the adoption of Resolution 687 with mechanisms for the administration of the fund, and in particular, for determining the appropriate level of Iraq's contribution to the fund.²² Global interdependency in the so-called new world order has made every crisis with potential international repercussions a "threat to international peace." In truth, the only limitation on this Council's powers are the votes necessary to adopt any substantive resolution.

Mr. Vitelli (Italy): There are legal and practical limitations on the enforcement powers of the Council beyond the voting requirements of article 27.²³ In *initiating* action, every international organization must act within the confines of its stated purposes, or its actions are *ultra vires*. The stated purposes of the United Nations in article 1 are maintenance of international peace and security, development of equal rights and self-determination of peoples, and promotion of human rights.²⁴ Environmental intervention raises serious implications of *ultra vires* action. Even though the creation of the United Nations Operation in Somalia (UNOSOM) was in keeping with those purposes, the difficulties faced by that mission highlight the practical difficulties involved in determining the *scope* of authorized action. What began as a humanitarian mission became at times a military confrontation with Mohammed Farah Aideed's forces. Confusion in authority resulted in a vastly overextended

19. Security Council Resolution 687, Apr. 3, 1991, para. 16, U.N. Doc. No. S/RES/687 (1991).

20. *Id.*

21. *Id.* para. 18.

22. *Id.* para. 19.

23. Each Security Council member has one vote; nine affirmative votes are required for Security Council procedural decisions; and nine affirmative votes are required for all other decisions including the concurring votes of permanent members, except that, in decisions under Chapter VI and under article 52(3), a party to a dispute shall abstain. U.N. CHARTER art. 27.

24. U.N. CHARTER art. 1, paras. 1-3.

and incohesive operation to make peace, establish a political process, and rebuild a nation.

Peace-enforcement operations raise entirely new difficulties from traditional peacekeeping operations. The United Nations is facing a severe fiscal crisis. For instance, the United States alone in the fall of 1993 owed more than nine hundred million dollars. In August 1993 the U.N. Headquarters staff, with fewer than eighty full-time employees, was overseeing 80,000 troops in fourteen separate operations. At this time as never before, the Security Council must be circumspect in exercising its powers and, when it does act, must write clearer mandates and set firm guidelines for the inception and termination of U.N. involvement. This is, however, a generic problem for every chapter VII enforcement action and not one that precludes our support for initial authorization of this action given the likelihood of the harm occurring and the extraordinary risks posed by nuclear accidents.

Mr. Bogdan (Nauru): Increasingly, global and regional human rights documents have included a right to a healthful environment. Almost every national constitution revised or adopted since 1960 has recognized environmental concerns in some way. Although neither the Stockholm nor Rio Declarations proclaims a right to a healthy environment, environmental degradation impedes a number of established human rights including the right to life, right to health, right to adequate working conditions, right to privacy, right to an adequate standard of living, and right to information and participation in decision making. In a 1990 proposal to the Commission on Human Rights, Ukraine itself proposed a definition of environmental human rights which included the right to participate in the solution of problems connected with technology that might endanger the lives and health of people. If the Security Council's powers are circumscribed only by the purposes set forth in the Charter, protection of the global community from environmental disaster falls within protection of human rights.

Mr. Odhiambo (Kenya): In 1967 the United Kingdom bombed a Liberian oil tanker, the *Torrey Canyon*, which was grounded on the high seas, in order to reduce pollution of its coasts. The customary law of the sea, at least since that time, has arguably included a right of intervention when a threat of pollution of a state's coastal zone presents a grave and imminent danger. This right of intervention seems to have been predicated on either the principle of necessity or self-defense. With the doctrine of necessity having fallen into disfavor in the post-Charter legal

regime after the *Corfu Channel* case,²⁵ this right of intervention may be the harbinger of an expanded notion of self-defense or a new concept of self-protection that goes beyond military attacks to encompass grave risk of material environmental damage. If the right is triggered by risk alone, however imminent, is it anticipatory self-defense—a principle as severely questioned and debatable as necessity? Should environmental self-protection, if recognized, be defined by its own set of factors for its actual exercise—such as the extent and probability of injury, the likelihood that protected measures will be effective, and the nature and extent of environmental damage, if any, that might be caused by these protective measures? Or are the traditional prerequisites for the actual exercise of self-defense—necessity and proportionality—sufficient?

Of course, chapter VII does not limit the Security Council's powers to those that a state would have when acting under article 51 in self-defense.²⁶ The Security Council can authorize a state or states to use force, even when the individual or collective use of force without such authorization would be illegal. If, however, there is a right or even nascent right of environmental self-protection for states individually—even in the narrow context of maritime disasters—recognizing environmental risk as a threat to peace within the meaning of chapter VII becomes a smaller step than it might appear.

Mr. Machado (Brazil): Whatever the merits of the draft resolution before us, discussion of a right of individual or collective environmental self-protection is inappropriate and frightening in its ramifications. Ecological security is tantamount to military security. Article 51 preserves a right of self-defense to states in the absence of Security Council action. Surely no one would claim that a state could unilaterally use force to respond to a perceived threat to its environment if the Security Council has not acted.

In the absence of military conflict or deliberate infliction of environmental damage, allowing enforcement action by the Security Council against a perceived environmental threat would be a particularly one-sided authority. Countries without the veto power might find themselves subject to enforcement action for mismanagement of a natural resource within national boundaries, but would the permanent members allow en-

25. The *Corfu Channel* Case (Alb v. U.K.), 1949 I.C.J. 4 (Apr. 9).

26. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." U.N. CHARTER art. 51.

enforcement action for their damage to a vital global resource such as the earth's atmosphere? The answer is obvious.

The President (Mr. Urquiola, Cuba): There is another troublesome matter yet to be addressed since the proposed resolution is being put forward in response to a perceived environmental risk and not an actual accident. By its terms, enforcement action under article 42 only may be taken “[s]hould the Security Council consider that measures provided for in article 41 would be inadequate or have proved to be inadequate.”²⁷ There has been no discussion or determination on this issue. Cuba opposed Resolution 678²⁸ authorizing the use of force against Iraq on precisely those grounds: that no determination had been made that article 41 sanctions were inadequate.

Mr. Tan (Malaysia): There are several possible responses to the representative from Cuba with respect to the adoption of Resolution 678 and its precedential value in this context. In authorizing force against Iraq, this Council may not have been utilizing article 42—the resolution stated only that the Council was acting pursuant to chapter VII. Perhaps the general authority of chapter VII was an adequate legal ground, or perhaps the Council was recognizing the right of states to engage in collective self-defense against Iraq under article 51 and thus not authorizing U.N. enforcement action at all. Either justification avoids the problematic determinations of whether the Council can take article 42 action before the completion of article 43 agreements on contribution of forces²⁹ and whether article 41 sanctions are adequate.

Even if article 42 was being applied in Resolution 678, members in favor of the resolution may have determined the economic sanctions would be inadequate without having made an explicit determination to that effect. In any event, it is far from clear that the inadequacy of article 41 sanctions is an absolute prerequisite to article 42 enforcement action, or that this resolution is pursuant to article 42.

The President: The text of chapter VII speaks for itself. Article 42 is the only provision in the Charter that authorizes the U.N. to take “action by air, sea, or land forces,”³⁰ and article 42 only authorizes such action if article 41 measures are found to be inadequate.³¹ The absence

27. *Id.* art. 42.

28. Security Council Resolution 678, Nov. 29, 1990, U.N. Doc. No. S/RES/678 (1990).

29. U.N. CHARTER art. 43, para. 1. Article 43 requires all U.N. members “make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.” *Id.*

30. *Id.* art. 42.

31. *Id.* art. 41.

of article 43 agreements does not preclude action being taken under article 42, as evidenced by article 106, which specifies one method for gathering of a Security Council force "[p]ending the coming into force" of article 43 agreements.³² The Council is not precluded from garnering forces in alternative ways, as article 42 states that action by U.N. forces "may include . . . operations by . . . forces of Members of the United Nations."³³ A state is not obligated, however, to provide forces under article 42 unless it has concluded an article 43 agreement.

If Resolution 678 is viewed as merely Council recognition of collective self-defense, the Council's discussion of the adequacy of economic sanctions was odd indeed because it has always been assumed that the prerequisite of "necessity" for self-defense is satisfied by a large-scale, illegal armed attack. Reliance on the penumbra of chapter VII as authorization for coercive force is a truly frightening prospect, since such reliance would only be necessary in cases when the use of coercion failed to fall within the almost limitless authorization of a "threat to peace, breach of the peace, or act of aggression."³⁴ Sweden's resolution authorizes access by U.N.-authorized personnel to the plant site without Ukraine's consent, and as such goes beyond the type of sanctions not involving the use of force contemplated within article 41. Unless and until the Council has determined that article 41 measures are inadequate to remedy the environmental situation in Ukraine, Cuba cannot endorse the proposed resolution.

Mr. Azouka (Nigeria): Whatever ambiguity pervades Resolution 678, the resolution before us is even more flawed, as the preceding discussion illustrates. Sweden characterizes this resolution as calling for "enforcement action." Yet there is nothing in the resolution that indicates the specific provisions on which the resolution is grounded—only the regrettably common usage of the phrase "acting under chapter VII." This phrase was utilized when the International Tribunal for the former Yugoslavia was established on May 25, 1993, the most recent analogy to what Sweden proposes in its resolution. The Report of the Secretary-General of May 3, 1993³⁵ on the proposed establishment of such a tribunal concluded that the Tribunal was properly established under chapter VII (presumably article 41) *and* under article 29 of chapter V, which

32. *Id.* art. 106.

33. *Id.* art. 42 (emphasis added).

34. *Id.* art. 39.

35. Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. Doc. S/25704 (May 3, 1993), reprinted in 32 I.L.M. 1159 (1993).

grants the Security Council power to establish “such subsidiary organs as it deems necessary for the performance of its functions.”³⁶ Is the proposed resolution enforcement action under article 42, in which case the President has raised a relevant concern about article 41 sanctions, or is it enforcement action under article 41 or the general authority of chapter VII, in which case we need not be concerned with the adequacy or inadequacy of article 41 sanctions before approving the resolution?

There is yet another possible justification for the resolution under chapter VII. When the Council makes a determination under article 39 that there is a threat to peace, as the proposed resolution does, article 40 authorizes the Council to “call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable”³⁷ before making a recommendation under article 39 or making a decision under article 41 or 42. The words “call upon” raise their own problem of interpretation. These words are often used in resolutions in the sense of “recommend”—and article 40 cryptically states its measures are without prejudice to the rights of the parties concerned—although in article 41 the term is clearly synonymous with “order.” Whatever the legal effect of provisional measures, the intent of article 40 is to authorize the Council to call for measures to prevent a threat to peace from developing into a breach of peace, a power appropriate to the conditions in the Ukraine we are considering today.

Article 39 offers yet another alternative—a clearly nonbinding “recommendation” to maintain or restore international peace and security. The resolution as currently drafted sheds little light on whether the Council is mandating or recommending compliance with its terms. In the *Certain Expenses* case³⁸ the International Court of Justice indicated that the peacekeeping forces in the Middle East and Congo did not constitute enforcement action because they were not directed against a state without its consent. The resolution does not explicitly call for anything that necessitates Ukraine’s consent or, a fortiori, imposes measures without that state’s consent. Investigation and gathering of evidence on conditions at the plant do not necessarily entail mandatory on-site inspections or compulsory production of documents. Likewise, the committee’s report on “measures to be taken” need not mean that the committee itself, or the Council, is empowered to take such measures without further resolutions. As there is nothing in the resolution that explicitly calls for measures to be taken without Ukraine’s consent, the resolution

36. *Id.* art. 29.

37. *Id.* art. 40.

38. *Certain Expenses of The United Nations*, 1962 I.C.J. 151 (July 20).

need not be predicated on either article 41 or 42. The question remains whether the Council would be calling for provisional measures under article 40, which may or may not be binding on Ukraine, or would be making a recommendation under article 39, which is not binding. In either case the provisional measures or recommendations would not be enforcement measures and therefore would not fall within the exception to the prohibition in article 2(7) on intervention in the domestic jurisdiction of any state.³⁹

If the resolution is viewed by this Council as enforcement action under chapter VII, it suffers from the same flaw that has generated so much controversy over the actions taken in Somalia and Kuwait. Legitimacy of Security Council action must start with clearly articulated legal grounds for action *and* clearly articulated goals and limits for such action. How far does this resolution go? Can the Committee or Council mandate closure or dismantling of the reactors, as Sweden has suggested? Could either body assume control of operation of the reactors? Although we have discussed what limits there are to initial authorization of enforcement action, what prescribes the limits or duration of such action?

Also of relevance to the resolution now before us is article 34 of chapter VI, which authorizes the Council to "investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether [it] is likely to endanger the maintenance of international peace and security"⁴⁰ and, if it so determines, to recommend appropriate remedies under article 36(1).⁴¹ Sweden may do well to consider whether the conditions at Chernobyl are in reality a *potential* threat to peace, better addressed under chapter VI in the manner described in article 34. Because the proposed resolution as drafted specifically finds a threat to peace and states that the Council is acting pursuant to chapter VII, amendment would be necessary to address this crisis under the more limited parameters of chapter VI.

Given these concerns, and the inchoate nature of the perceived danger at this time, this dispute is more appropriately addressed on a regional basis as contemplated under chapter VIII of the Charter.⁴² The

39. U.N. CHARTER art. 2, para 7.

40. *Id.* art. 34.

41. "The Security Council may at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustments." *Id.* art. 36, para. 1.

42. U.N. Members "shall make every effort to achieve pacific settlement of local disputes through regional arrangements or by such regional agencies before referring them to the Security Council." U.N. CHARTER art. 52. Chapter VIII continues that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization

Pan-European Energy Charter and the Nuclear Energy Protocol constitute one regional attempt to address the wide-ranging potential nuclear crisis of the entire Commonwealth of Independent States. However, once the Security Council embarks on any enforcement action, the possibilities for resolution by negotiation are diminished. Often, the enforcement action assumes a life of its own, more easily expanded than limited or curtailed. The Ukrainian crisis is not yet at that point of urgency.

The President: Regardless of whether the resolution calls for enforcement action or not, the resolution before us is clearly a substantive matter governed by the voting procedures of article 27, paragraph 3, requiring the concurring votes of each of the permanent members. The Council will now vote on the draft resolution:

A vote was taken by show of hands as follows:

In favor: France, Germany, Italy, Japan, Kenya, Malaysia, Nauru, Sweden, United Kingdom, United States

Against: Brazil, Cuba, Nigeria, Russia, Ukraine

Abstaining: People's Republic of China, Pakistan

The President: In accordance with the principle established by the Security Council on resolutions subject to the unanimity rule, abstention by a permanent member of the Council does not necessarily render the Council's decision invalid. Since I, as President, as well as representative of Cuba, consider the resolution to be one of substance, I rule that the resolution is rejected because one of the permanent members of the Security Council voted against it.

Ms. Jarring (Sweden): The representative from Nigeria has touched on an issue of some importance as to whether this resolution might be more appropriately limited in its application. In light of the previous votes, I now propose an amendment to our resolution. The language of the resolution as amended would read as follows:

of the Security Council." U.N. CHARTER art. 53. Article 54 further provides that the Security Council shall be kept informed of such regional solutions. *Id.* art. 54.

The Security Council,

Recalling the accident of April 26, 1986, at the Chernobyl Nuclear Power Plant, which resulted in a release of radiation throughout the former Soviet Union, Europe, and much of North America,

Considering the loss of life, property, economic disruption and fear caused by that release,

Expressing grave alarm at reports of improper and inadequate maintenance and operation of the plant, deterioration in these conditions, and in the structures themselves,

Committing to take effective measures to eliminate the imminent risk of another accident occurring,

Believing that the establishment of a committee of experts will contribute to ensuring that such risk is eliminated,

1. *Resolves* to appoint a committee of experts with the assistance of the International Atomic Energy Agency to receive or to hear such evidence, statements, and testimonies, and to conduct such inquiries as it may find necessary on the conditions of operation and maintenance of the four Chernobyl nuclear reactors, and to report to the Security Council at the earliest possible time;

2. *Requests* the Secretary-General to implement urgently the present resolution and, in particular, to make practical arrangements for the effective functioning of the committee at the earliest time, and to report periodically to the Council.

It is our position that the committee is being established under article 29,⁴³ under the heading "Procedure," as a subsidiary organ to assist the Security Council, and its task is confined to an inquiry and not an investigation; that is, it must receive information from the government concerned rather than seek facts itself on its own initiative. I move this resolution and ask that it be voted on at once, if there is no discussion.

Ms. Mironova (Ukraine): The artificial line that has been drawn between an "inquiry" and an "investigation" is not convincing. Without the reference to chapter VII, the amended resolution at the very least calls for an investigation under article 34 of chapter VI, which is a substantive decision. Indeed, as previous comments would suggest, there is still room to consider the amended resolution as an exercise of the Council's powers under article 39 or 40.

43. *Id.* art. 29.

When the Charter of the United Nations was being drafted at the San Francisco conference, there was much discussion about the procedure the Security Council must follow when the question arises as to whether a resolution is of a procedural or of a substantive nature.⁴⁴ At that time there was also an agreement among the United States, United Kingdom, China, and the Union of Soviet Socialist Republics, with which France also associated itself, that stated that the question of whether a matter is substantive or procedural is itself a substantive question subject to veto power.⁴⁵

Mr. Bogdan (Nauru): It is not clear what binding effect, if any, the San Francisco Statement would have on those five states, much less on states not party to that agreement. As early as 1949 in an attempt to limit obstructionist use of the veto, the General Assembly in Resolution 267 (III) recommended to the Council that the establishment of a subsidiary organ was a procedural matter, although the "terms of reference" of such organs were not if the organ "were given authority to take steps which, if taken by the Security Council, would be subject to the veto or if the conferring of such authority would constitute a non-procedural decision."⁴⁶ The same resolution recommended that Council members seek to agree to forebear exercise of the veto on whether a matter is or is not procedural when a majority of votes have already been cast in favor of finding the matter to be procedural. I also would like to point out to the permanent members article 103, which states that in the event of a conflict between the U.N. Charter and any other agreement (such as the San Francisco Statement), a member's obligations under the Charter shall prevail.⁴⁷

The President: Even with the proposed amendments, this committee is being set up in connection with the performance of its function in the maintenance of international peace and security. As such, it is my opinion that the establishment of such a body is subject to the voting procedure of article 27, paragraph 3; that is to say it must be treated as a vote on a substantive question to which the unanimity rule applies. I now put to the vote the following question: Should the vote to be taken on the amended draft resolution be considered a procedural vote?

44. See Doc. 1149 III/11, 11 U.N.C.I.O. 103, 122-25 (1945); U.N. Doc. 922 III/1/44, 11 U.N.C.I.O. 454, 455 (1945); U.N. Doc. 897 III/1/42, 11 U.N.C.I.O. 430, 435, 438-440 (1945).

45. Doc. 852 III/1/37(1), 11 U.N.C.I.O. 710 (1945).

46. G.A. Res. 267 (III), 3d. Sess., 195th mtg., U.N. Doc. A/578 (1949), *reprinted in* 2 UNITED NATIONS RESOLUTIONS: RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY 252 (Dusan J. Djonovich ed., 1973).

47. U.N. CHARTER. art. 103.

A vote was taken by show of hands as follows:

In favor: Brazil, France,
Germany, Italy,
Japan, Kenya,
Malaysia, Nauru,
Nigeria, Pakistan,
Sweden, United
Kingdom, United
States

Against: Cuba, Russia,
Ukraine

Abstaining: People's Republic
of China

The President: I consider the vote which has just taken place as a decision to consider the vote on the resolution as one of substance because a permanent member cast a negative vote against consideration of the resolution as procedural. The substantive/procedural question is itself an issue of substance. If there are no other speakers I should like to proceed now to take a vote on the amended resolution submitted by Sweden.

A vote was taken by show of hands as follows:

In favor: Brazil, France,
Germany, Italy,
Japan, Kenya,
Malaysia, Nauru,
Pakistan, Sweden,
United Kingdom,
United States

Against: Cuba, Nigeria,
Russia, Ukraine

Abstaining: People's Republic
of China

The President: The result of the vote is as follows:

The draft resolution is rejected, having failed to obtain the concurring vote of a permanent member. Given the outcome of the vote, it is not necessary to determine whether Ukraine was required to abstain under article 27, paragraph 3 as a party to a dispute.

Ms. Jarring (Sweden): I must object to the President's interpretation of the vote on the amended resolution. The matter is clearly one of

procedure, and the President has thwarted the will of a majority of the Council by interpreting it to be otherwise. When a point of order is raised, the President must put to the vote the contested ruling. Under Rule 30 of our rules of procedure and the aforementioned resolution of the General Assembly, the President's ruling on a point of order shall stand unless overruled by a procedural vote of ten of the seventeen members of the Council.⁴⁸

The President: The question of whether a vote is procedural or substantive can only be decided by the Council by a positive vote in which the permanent members concur. The amended resolution is rejected because one of the permanent members of the Security Council voted against it.

Ms. Jarring (Sweden): I must reiterate that the President has thwarted the will of this Council. I therefore propose a simple draft resolution to this effect:

The Security Council.

Resolves that the matter of the conditions at Chernobyl be taken off the list of matters of which the Council is seized.

There is no question that removal of an item from our agenda is procedural, and frees the General Assembly to take up the matter under article 12. I move this resolution and ask that it be voted on at once, if there is no discussion.

A vote was taken by show of hands, and the resolution was adopted by thirteen votes to three.

<i>Votes for:</i>	Brazil, France, Germany, Italy, Japan, Kenya, Malaysia, Nauru, Nigeria, Pakistan, Sweden, United Kingdom, United States
<i>Votes against:</i>	Cuba, Russia, Ukraine
<i>Abstaining:</i>	People's Republic of China

48. See SYDNEY D. BAILEY, *THE PROCEDURE OF THE UN SECURITY COUNCIL* 100, 167 (2d ed. 1988).

The President: The Chernobyl matter is accordingly removed from the agenda of the Security Council.