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Peace-Building

JOHN LINARELLI*

Development is the most secure basis for peace.¹

I. INTRODUCTION

The end of the Cold War has presented the United Nations with significant opportunities. The development of peace through law rather than through self-interested unilateral military action by states is, and should be, one of the most important agendas of the United Nations.² In his *Agenda for Peace*,³ United Nations Secretary General Boutros Boutros-Ghali identified post-conflict peace-building as an integral part of the United Nations' efforts to maintain international peace and security. As explained by one author, "[t]he United Nations must develop the ability to address the root causes of the ethnic strife, poverty, and anarchy that give rise to the need for multilateral peace operations," and such operations "should be viewed as crisis management of the last resort."⁴ Indeed, at the Dumbarton Oaks Conference in 1944, the United States, Great Britain, and the then Soviet Union articulated the very foundations of the United Nations to be "both to prevent aggression and to remove the political, economic and social causes of war through the close and continuing collaboration of all peace-loving peoples."⁵ History has demonstrated that military operations cannot create peace, but at most can stabilize a conflict so that peace-building

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1. *An Agenda for Development: Report of the Secretary General*, U.N. GAOR, 48th Sess., Agenda Item 91, U.N. Doc. A/48/935 (1994) [hereinafter *Agenda for Development*].

2. Myres S. McDougal, *Law and Peace*, 18 DENVER J. INT'L L. & POL'Y 1 (1989).

3. Boutros Boutros-Ghali, *Agenda for Peace: Report of the Secretary General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992* [hereinafter *Agenda for Peace*].

4. GARY S. SHARP, SR., *UNITED NATIONS PEACE OPERATIONS: A COLLECTION OF PRIMARY DOCUMENTS AND READINGS GOVERNING THE CONDUCT OF MULTILATERAL PEACE OPERATIONS* xiii (1995).

5. DEPARTMENT OF PUBLIC INFORMATION, *UNITED NATIONS, EVERYONE'S UNITED NATIONS: A HANDBOOK ON THE WORK OF THE UNITED NATIONS* 8 (10th ed. 1986).

can be given an opportunity to work.⁶ With the shortcomings of peace-building efforts in Somalia⁷ and ongoing efforts to build a democratic state in Haiti, it is unknown whether the United Nations in the post Cold War period will by itself prove able to conduct credible and effective peace-building activities.

Peace-building as well as preventive diplomacy are viewed, in the United Nations scheme, as adjuncts to peace-keeping and peace-making efforts under Chapters VI and VII of the United Nations Charter.⁸ In essence, these functions can be viewed as part of a seamless web of activities designed to create the conditions for long-term peace and ultimately to maintain peace. The preferred view is that peace-building should occur prior to a conflict as a preventive measure as well as after a conflict to avoid recurrence of the conflict.⁹ As explained in *Agenda for Peace*:

[T]he concept of peace-building as the construction of a new environment should be viewed as the counterpart of preventive diplomacy, which seeks to avoid the breakdown of peaceful conditions. When conflict breaks out, mutually reinforcing efforts at peace-making and peace-keeping come into play. Once these have achieved their objectives, only sustained, cooperative work to deal with underlying economic, social, cultural and humanitarian problems can place an achieved peace on a durable foundation. Preventive diplomacy is to avoid a crisis; post-conflict peace-building is to prevent a recurrence.¹⁰

This article will explore the theoretical and pragmatic foundations for peace-building.¹¹ It will examine the possibilities for "an integrated approach to human security" proposed by the Secretary General in his *Agenda for Peace*.¹²

A comprehensive definition of peace-building is not possible. No definition could fully encompass all of the relevant differences that

6. This point was suggested by Lieutenant Colonel Gary S. Sharp, Sr. Deputy Counsel, Office of the Joint Chiefs of Staff, U.S. Department of Defense and Adjunct Professor, Georgetown University Law Center. All points as referenced herein were made by Professor Sharp in a purely personal capacity.

7. The United Nations undertook peace-building in Somalia as part of UNOSOM II, its last effort in Somalia. This effort is widely perceived to have been unsuccessful. This is in contrast to United Nations humanitarian relief efforts in Operation Restore Hope, designed to alleviate mass starvation in the country. Operation Restore Hope is widely perceived to be successful. See JOHN L. HIRSCH & ROBERT B. OAKLEY, *SOMALIA AND OPERATION RESTORE HOPE* 49, 101 (1995).

8. See *Agenda for Peace*, *supra* note 3, at 11.

9. This point was suggested by Professor Gary S. Sharp, Sr., *supra* note 6.

10. *Agenda for Peace*, *supra* note 3, at 33.

11. It is beyond the scope of this article to address the "doability" of achieving peace-building initiatives. The enormity of this task should not be downplayed. I leave this topic to other articles and other authors.

12. *Agenda for Peace*, *supra* note 3, at 8.

exist in rebuilding failed states. Each situation tends to pose difficulties based on historical circumstances of the country and region. Section II will nevertheless seek to define the concept in general terms by identifying substantive criteria that can be used to delimit the concept. These criteria have their basis in empirical and theoretical analysis of events and situations that mitigate or minimize conflict among nations and, hence, build peace. Section II will show remarkable congruences between domestic economic development and minimization of civil and international conflict. It is very important to define norms to govern peace-building in order to, among other things, avoid intervention in the domestic affairs of states and to critically assess what should be done to rehabilitate failed states and place them on the path of sound economic, political, and social development.

Section III will address the legal authority for the United Nations' conduct of peace-building initiatives. It will examine the state of international law on the subject and attempt to interpret some arguments and principles in conjunction with one another that have heretofore not been considered contemporaneously. It will examine whether the Security Council has the authority to impose peace-building, or whether other organizations, both inside and outside of the United Nations, should undertake peace-building. Section III will address the structural inadequacies in the presently ordered international system. These inadequacies prevent comprehensive peace-building efforts on a multilateral scale. Section IV of the article will provide concluding observations.

II. PEACE-BUILDING CRITERIA — THE STATE OF EMERGING NORMS

The United Nations Secretary General has described peace-building as "action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict."¹³ What are the norms which govern peace-building? Can one articulate which "action" and "structures" will "tend to strengthen and solidify peace in order to avoid a relapse into conflict?"¹⁴ This section

13. *Id.* at 11; Agenda for Development, *supra* note 1, at 6.

14. Agenda for Peace, *supra* note 3, at 11. A related question is whether the United Nations must wait for a conflict, and resolve the conflict, before it engages in peace-building. The Secretary General's definition may be unduly narrow. His definition skirts the issue of whether peace-building in the absence of conflict would result in intervention in violation of Article 2 (7) of the Charter. A "conflict" can be defined to be almost anything to the creative draftsman, although to give the term an overtly political meaning could threaten the credibility of the Security Council. In my view, given current social science and international relations studies on the issue of what constitutes a threat to international peace and security, namely non-democratic public order, it would seem that peace-building should not have to wait for the existence and termination of a conflict. See *infra* part III.A. A policy-oriented definition of peace-building would be something like "realization of community expectations about peace and security," with the United Nations Charter and other international

tries to fill in the details of what peace-building should entail based on legally-centered analytical principles.

In order to derive norms governing peace-building, two points should be assessed. First, the identified norms are policies, or basic principles, rather than rules. An excessively rule-based order would be unduly difficult to describe and apply. There is no set of rules that could be applied successfully in every peace-building effort. Each situation poses unique problems. There are, however, certain characteristics or properties, that, when present, could result in effective peace-building. The more important of these characteristics are examined in this section.

Second, norms should be segregated from *tasks*. For example, a peace-building norm may be to ensure the human rights associated with security of the individual; another may be promote sustainable agricultural development. A task intended to implement these norms would be the clearing of mines from a country. The United Nations has undertaken a number of peace-building efforts, beginning virtually from its creation forward.¹⁵ A good deal of these efforts were undertaken during the decolonization process and by assisting states in the transition from trust territory status.¹⁶ The tasks that the United Nations has undertaken include election monitoring, establishment of conditions for elections by beginning the reconstruction of civil society, rehabilitation of physical infrastructure, repatriation and resettlement of refugees, supervision and monitoring of cease fires, disarming of armed factions, mine-clearing, and training and supervision of law enforcement personnel.¹⁷

These are the initial tasks in peace-building. Established development thinking holds that development is a long-term process, particularly in lesser developed countries marred by armed conflict. These countries suffer from egregious problems relating to poverty and to lack of development. Serious peace-building efforts would have to reflect a coherent development strategy based on achievement of goals or norms that promote peace. Set forth below are the most important norms that the above tasks and other, longer term efforts should strive to meet in order to promote international peace and security.

A. *Good Governance and Democracy*

International relations theorists have asserted that non-democratic national orders constitute a threat to international peace and securi-

documents providing guidance on what those community expectations would be.

15. See Sonia K. Han, Note, *Building A Peace That Lasts: The United Nations And Post-Civil War Peace-Building*, 26 N.Y.U.J. INT'L L. & POL. 837 (1994).

16. *Id.* at 841.

17. *Id.* at 847-49.

ty because non-democratic regimes tend to go to war with one another. As explained by Professor John N. Moore:

[L]iberal democracy and the rule of law (in the broadest sense) are valuable to the new world order centrally and fundamentally because an impressive body of human knowledge now tells us unmistakably that there is a *direct* correlation between these concepts and: human rights, the avoidance of government-sponsored "democide" (the massive killing of a nation's own population and the most extreme human rights failure of government), vigorous economic progress, and the avoidance of a synergy that has produced the major international wars of this century. In short, the spread of liberal democracy, or at least the minimization of totalitarianism, is of the greatest importance in realizing fundamental human aspirations.¹⁸

These conclusions are based on the empirical analysis of Professor Rudy Rummel, Professor Bruce Russett, and others.¹⁹ The propositions of these scholars have not gone unchallenged.²⁰ One study in the international relations area suggests that states in the early stages of democratization are more likely to engage in military conflict than states that have had no change in regime.²¹ This new evidence, or interpretation of old evidence, does not alter the basic proposition that states which have completed the transition to democracy virtually never engage in military conflict with each other. These competing conclusions on the empirical data also suggest that the reconciliation of this data may be based on how one defines democracy. A democracy that reflects significant and enduring participatory pluralism, in which citizens have the ability and actually do more than merely vote in elections and in which rule of law is of importance to the state and reflects democratic values, provides the basis for a mature democracy highly unlikely to engage in, or at least start, armed conflict. Elections alone do not qualify a country as a democracy;²² there must be some other long-term indicia. Haiti held presidential, parliamentary, and

18. John N. Moore, *Morality and the Rule of Law in the Foreign Policy of the Democracies 1-2* (Nov. 14, 1991) (unpublished manuscript, on file with the author, prepared for the Andrew R. Cecil Lectures on Moral Values in a Free Society, University of Texas at Dallas); see also Robert F. Turner, *Haiti and the Growth of a Democracy Entitlement, in THE UNITED NATIONS AT FIFTY: SOVEREIGNTY, PEACEKEEPING, AND HUMAN RIGHTS* 18, 23-24 (Don M. Snider & Stuart J.D. Schwartzstein eds., 1995).

19. RUDY J. RUMMEL, *DEADLIER THAN WAR: NON-FREEDOM* (1986); RUDY J. RUMMEL, *DEATH BY GOVERNMENT* (1994); BRUCE M. RUSSETT, *GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD* (1993).

20. See JOHN N. MOORE ET AL., *NATIONAL SECURITY LAW 77-78* (1990).

21. Edward D. Mansfield & Jack Snyder, *Democratization and War*, 74 *FOREIGN AFF.* 79, 79-80 (May/June 1995).

22. See Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 *HARV. INT'L L.J.* 1 (1995); Tom Farer, *The Hierarchy of Human Rights*, 8 *AM. U. J. INT'L L. & POL'Y* 115, 116-17 (1992).

local elections in 1990. These elections did not make Haiti a democracy by any stretch of the concept, particularly since the elected President, Jean Bertrande Aristide, was forcibly removed from office by the Haitian military less than one year later.²³

International relations theorists have avoided normative conclusions about preferences in governing political systems, leaving the tasks of norm prescription to others. International law scholars have taken on the task and have found an emerging norm of democratic governance.²⁴ Although this democratic norm is nascent and not without its detractors, it has been persuasively argued that democratically elected governments may in some cases provide legitimacy to a government on the international level.²⁵

Recent events in Haiti provide significant support for the democratic norm. On July 31, 1994, the Security Council voted 12-0 to pass Resolution 940 which, among other things, authorized force "to use all necessary means to facilitate the departure from Haiti of the military leadership . . . [and] the prompt return of the legitimately elected President"²⁶ and directed United Nations officials to "assist the legitimate constitutional authorities of Haiti in establishing an environment conducive to the organization of free and fair legislative elections,"²⁷ to be monitored by the United Nations and the Organization of American States. China, a permanent member of the Security Council, abstained and its delegate expressed concern that the Resolution created a "dangerous precedent."²⁸

23. Oversight of the State Department's Country Reports on Human Rights Practices for 1993 and U.S. Human Rights Policy: Hearings before the Subcomm. on International Security, International Organizations and Human Rights of the House Comm. on Foreign Affairs, 103d Cong., 2d Sess. II (1994).

24. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 47 (1992) [hereinafter *Democratic Governance*]; Ibrahim J. Gassama, *World Order in the Post-Cold War Era: The Relevance and Role of the United Nations After Fifty Years*, 20 BROOK. J. INT'L L. 255 (1994); Richard Lee Gaines, *On the Road to a Pax U.N.: Using the Peace Tools at Our Disposal in a Post-Cold War World*, 25 N.Y.U.J. INT'L L. & POL. 543, 585 (1993); Thomas M. Franck, *United Nations Based Prospects for a New Global Order*, 22 N.Y.U.J. INT'L L. & POL. 601, 621 (1990) [hereinafter *New Global Order*].

25. *Democratic Governance*, *supra* note 24. Because of the overwhelming number of burgeoning democracies today in the United Nations, given the demise of the Cold War, it is apparently much easier today to make an argument for a democratic norm, or against an authoritarian regime. The major "norm blocker" in this effort is China — approximately one in four people are still governed by an authoritarian regime. If sovereignty is based on the contemporary notions of popular sovereignty of people legitimizing governments through proper elections, China and other authoritarian regimes are in violation of international law.

26. Turner, *supra* note 18, at 21-22.

27. *Id.*

28. *Id.* at 22.

The Universal Declaration of Human Rights mandates that popular government is an internationally protected human right. Article 21(1) provides that "[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives."²⁹ Article 21(3) of the Universal Declaration provides as follows:

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.³⁰

Philosophers and ethicists have proffered further normative justification for democracy. Immanuel Kant posited that peace could be predicated upon a "pacific union" of democratic states.³¹ Democracy has been asserted by one historian to be an ethical standard.³²

The United Nations itself has recognized the relationship of democracy to peace. In fact, in its peace-building initiatives to date, the United Nations has proffered participatory democracy as the model for building post-conflict societies.³³ In *Agenda for Peace*, the Secretary General explained as follows:

There is an obvious connection between democratic practices — such as the rule of law and transparency in decision-making — and the achievement of true peace and security in any new and stable political order. These elements of good governance need to be promoted at all levels of international and national political communities.³⁴

The Secretary General has also stated:

There can be no flowering of development without the parallel advance of another key concept: democratization. Peace is a prerequisite to development; democracy is essential if development is to succeed over the long term.

The real development of a State must be based on the participation of its population; that requires human rights and democracy.³⁵

29. Universal Declaration of Human Rights, art. 21 ¶1, U.N. GAOR, 3d Sess., 217A (III), pt. 1, at 75, U.N. doc. A/777 (1948).

30. Universal Declaration of Human Rights, art. 21 ¶3, U.N. GAOR, d. Sess., 217A (III), pt. 1, at 75, U.N. doc. A/777 (1948).

31. IMMANUEL KANT, *PERPETUAL PEACE* (1795).

32. James T. Johnson, *Is Democracy an Ethical Standard?* 4 *ETHICS IN INT'L AFF.* 1, 17 (1990). "Democracy as an ethical standard for life in political community is the counterpart of freedom as an ethical standard in the life of the individual — both are needed for the moral life within the conditions of history as we know it." *Id.*

33. Han, *supra* note 15, at 837-38.

34. *Agenda for Peace*, *supra* note 3, at 34.

35. Boutros Boutros-Ghali, Report on the World of the Organization from the Forty-Seventh to the Forty-Eighth Session of the General Assembly 2-3 (1993), *quoted in* Michael Stopford, *Locating the Balance: The United Nations and the New*

The Secretary General extends the Moore/Rummel analysis of democracy as necessary for peace maintenance by finding that democracy is necessary for development as well. Democracy has two interrelated dimensions — domestic and international — governance/development and maintenance of peace. The interconnection between democracy and development is explained in *Agenda for Development* as follows:

Democracy and development are linked in fundamental ways. They are linked because democracy provides the only long-term basis for managing competing ethnic, religious, and cultural interests in a way that minimizes the risk of violent internal conflict. They are linked because democracy is inherently attached to the question of governance, which has an impact on all aspects of development efforts. They are linked because democracy is a fundamental human right, the advancement of which is itself an important measure of development. They are linked because people's participation in the decision-making processes which affect their lives is a basic tenet of development.³⁶

It is significant that the Secretary General relates democracy to good governance. In this manner, political difficulties with the promotion of democracy may be defused. The World Bank imposes the concept of good governance on the developing countries, although the Bank is precluded by its Articles of Agreement from involvement in political affairs and does not require that states be democratic in order to qualify for financing.³⁷ The Bank justifies conditions relating to governance as affecting the ability of a country to administer and pay back World Bank loans and as affecting the ability of a country to effect economic development.³⁸ The United Nations appears to be borrowing the governance concept, which has been interpreted as non-political in order to mitigate criticism.³⁹ The relationship between development and democracy is similar in robustness to the relationship between peace and democracy. Empirical studies have shown that "no substantial famine has ever occurred in a country with a democratic form of government and a free press."⁴⁰ Current thinking in development economics suggests that democratic pluralism and the small entrepreneur are the engines of development. Participatory pluralism has been shown to be a motivator of economic development.⁴¹ A civil

World Disorder, 34 VA. J. INT'L L. 685, 687 (1994).

36. *Agenda for Development*, *supra* note 1, at 22.

37. See *infra* note 162 and accompanying text.

38. *Id.*

39. But see Jonathan Cahn, *Challenging the New Imperial Authority: The World Bank and the Democratization of Development*, 6 HARV. HUM. RTS. J. 159 (1993).

40. Jon Elster, *The Impact of Constitutions on Economic Performance*, in PROCEEDINGS OF THE WORLD BANK ANNUAL CONFERENCE ON DEVELOPMENT ECONOMICS 209, 213 (Michael Bruno & Boris Pleskovic eds., 1994).

41. See James H. Weaver & Kevin M. O'Keefe, *Whither Development Economics?*,

society is necessary for economic development; a country cannot truly have laws and a legal system, which are necessary for development and for a market-oriented economic system necessary for development, without democracy.⁴² Democracy can be viewed as necessary to the development of a legal system that will be complementary and beneficial to economic development.

B. *Sustainable Development*

Contemporary thought on issues of the development of nations identify sustainable development as the goal of development efforts.⁴³ Principles of sustainable development require that development policies "incorporate environmental considerations."⁴⁴ Sustainable development is viewed as "inherently an intergenerational question as well as an intragenerational question."⁴⁵ In other words, sustainable development "relies on a commitment to equity with future generations."⁴⁶ The United Nations' *Agenda for Development* sets forth a strong commitment to sustainable development.⁴⁷ Certainly, sustainable development must be a norm in peace-building.

Sustainable development policies may be implemented through environmental assessment procedures developed by the United Nations with the broad-based support of its members. All of the development banks now make environmental assessments in their lending processes. The United Nations may refer to the experiences of the development banks for guidance. In any process of developing and applying environmental assessment procedures, attempts to encourage the target state to implement environmental assessment should be maximized. Responsibility of the target state should serve to maximize popular participation by the indigenous population of the target state and should serve to result in local solutions to environmental problems. In this sense, the United Nations can promote participatory pluralism in addition to environmental protection.⁴⁸ The probability of compliance

SAIS REV. 113 (1991); John Linarelli, *The European Bank for Reconstruction and Development: Legal and Policy Issues*, 18 B.C. INT'L & COMP. L. REV. 361, 364-65 (1995); Thomas M. Franck, *The New Development: Can American Law and Legal Institutions Help Developing Countries?*, 1972 WIS. L. REV. 767, 773 (1972); see generally HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (1989).

42. See David M. Trubeck, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L. J. 1, 6-10 (1972).

43. Edith Brown Weiss, *In Fairness to Future Generations and Sustainable Development*, 8 AM. U. J. INT'L L. & POL'Y 19 (1992); see Linarelli, *supra* note 41, at 370-73.

44. *Agenda for Development*, *supra* note 1, at 14.

45. Weiss, *supra* note 43, at 19 (emphasis in original).

46. *Id.*

47. *Agenda for Development*, *supra* note 1, at 13-17.

48. See Han, *supra* note 15, at 853.

should increase with the involvement of the local populace in decisions affecting their own welfare and the welfare of their succeeding generations. This approach should also serve to alleviate the "confidence crisis" that is perceived to be ongoing in the developing countries.⁴⁹

The maximization of local popular participation in environmental decision-making does not mean that the target state should bear sole responsibility for the costs of environmental protection. Environmental problems inevitably involve externalities; countries other than the target state may benefit significantly from environmental projects in the target state. Environmental problems do not respect political boundaries.⁵⁰

C. *Human Rights*

Peace and respect for human rights are closely interconnected. Professor Myres McDougal has described the relationship between peace and human rights as follows:

The most relevant conception of peace must make reference to the least possible application of violence and coercion to the individual human being and to the freedom of access of the individual to all cherished values. For community members and their decision-makers alike, a viable conception of peace cannot today be limited to reference to a mere absence of armed, and international, conflict. The peace demanded by contemporary humankind is not that of the concentration camp (however large) or that of the living dead (whatever the community).⁵¹

Peace thus may be broadly based on "optimum order" rather than on "minimum order," that is, on "the greatest access of the individual human being to the shaping and sharing of all of the values of human dignity."⁵² In this sense, sovereignty is "popular sovereignty" held by individuals and not by a state or in substance by the elites of a state.⁵³

Development and respect for human rights are also closely interconnected. As explained by Ibrahim F.I. Shihata, General Counsel of the World Bank, "the essence of development encompasses not only higher incomes but also better education, higher standards of health and nutrition, less poverty, a cleaner environment, more equality of opportunity, greater individual freedom and a richer cultural life."⁵⁴

49. This point was made by Abdikarim A. Omar, former Ambassador of Somalia to the United States, in a presentation in the course, United Nations Peace Operations, held at the Georgetown University Law Center in Summer 1995.

50. See Linarelli, *supra* note 41, at 372-73.

51. McDougal, *supra* note 2, at 5.

52. *Id.* at 6.

53. W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 *FORDHAM INT'L L. J.* 794, 795 (1995).

54. Ibrahim F. I. Shihata, *Human Rights, Development, and International Finan-*

According to Mr. Shihata, "a guarantee of human rights protection does not merely relate to development but is central to the development process."⁵⁵ Human rights protections in the development process thus refer to economic and social rights as well as civil and political rights.

Without human rights protections, economic growth cannot be achieved in the long-term. An effective human rights system protects the rights of labor and industry. Certain human rights, such as freedom of speech, have a routing-out function as they serve to publicize corruption and governmental abuses of power. A strong sense of civil society is vital to any truly free economic system; without it, economic freedom could degenerate into unprincipled greed. Capitalism must be regulated by the mores and ethics of a society.

The United Nations Charter provides ample authority for human rights promotion as an important role in peace-building. The purposes and principles set forth in Articles 1 and 2 of the Charter reflect human rights, economic, and social concerns as well as concerns over the maintenance of international peace and security.⁵⁶ As explained by one authoritative text:

In the preamble of the Charter, the peoples of the United Nations have reaffirmed their "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small," and their determination "to promote social progress and better standards of life in larger freedom." Article 1 of the Charter lists among the main purposes of the United Nations the achievement of international cooperation "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Similarly, in accordance with Article 55 of the Charter, the United Nations has the duty to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." In Article 56, all Members of the United Nations "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

The Charter of the United Nations contains also significant grants of power to various organ of the United Nations. Thus, under Article 13, the General Assembly has the duty to initiate studies and make recommendations for the purpose of "assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Responsibility for the discharge of the functions set forth in Chapter IX of the Char-

cial Institutions, 8 AM. U. J. INT'L L. & POL'Y 27, 28 (1992).

55. *Id.*

56. See Vera Gowlland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 INT'L & COMP. L. Q. 55, 91 (1994).

ter . . . is vested by Article 60 in the General Assembly, and "under the authority of the General Assembly, in the Economic and Social Council." In discharging this responsibility, the Economic and Social Council may, according to Article 62, "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all"⁵⁷

Indeed, a convincing argument can be made that certain human rights are *jus cogens* and must be respected regardless of the terms of the Charter.⁵⁸ It would be an impermissible leap of logic, however, to say that the United Nations and its member states are *obligated to enforce* peremptory norms. It would be problematic to have the United Nations involved in interpreting international law to determine when to override the Charter.

The United Nations, since the adoption of the Charter, has promoted human rights as an integral aspect of peace. It has promulgated the Universal Declaration of Human Rights,⁵⁹ the International Covenant on Civil and Political Rights,⁶⁰ the International Covenant on Economic, Social and Cultural Rights,⁶¹ and numerous other conventions, declarations, and resolutions promoting human rights. The United Nations in this manner has been one of the primary actors in the development of customary international law in the human rights area. Neither the United Nations nor other international institutions involved in peace-building could credibly ignore human rights issues in peace-building.

D. *Rule of Law*

Democratic governance and rule of law are closely related.⁶² Rule of law is separated here for purposes of analysis.

Rule of law, broadly defined, has a direct relationship to the maintenance of peace.⁶³ It operationalizes the most important characteristics of a participatory democracy and of a system designed to protect human rights. It facilitates stability, accountability, and credibility of regimes.⁶⁴ According to Professor McDougal:

The basic community policies that underlie conceptions of peace and human rights are in any democratic community the same poli-

57. Eighteenth Report of the Commission to Study the Organization of Peace, the United Nations and Human Rights, 1-4 (1968), *reprinted in* MOORE ET AL., *supra* note 20, at 676.

58. *See* Shihata, *supra* note 54, at 35.

59. *See* Turner, *supra* note 18.

60. G.A. Res. 2200, 21 GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966).

61. G.A. Res. 2200, 21 GAOR Supp. (No. 16), at 49, U.N. Doc. A/6316 (1966).

62. Moore, *supra* note 18, at 1, 5.

63. *Id.*

64. *Id.*

cies that underlie all law. Hence, it is no metaphor to conclude that peace and law may appropriately be described as one side of the coin (of community process and effective power) of which arbitrary violence and coercion are the other side.⁶⁵

Rule of law also has a direct relationship to development and hence to maintenance of peace. As one prominent scholar of law and development posits, "[l]ike a power grid or transportation network, modern law is viewed in the core conception as a functional prerequisite of an industrial economy."⁶⁶ There has been a serious decline in scholarly inquiry in law and development.⁶⁷ Nevertheless, law plays a significant role in the development of a nation-state, although its effects may be extremely difficult to identify, categorize and quantify. Despite the decline in scholarly inquiry, multilateral development institutions, such as the World Bank, and bilateral agencies, such as the U.S. Agency for International Development, continue to fund numerous projects for legal reform in developing countries.⁶⁸

Law is critical to the sustenance of a market-oriented economic system. A market-oriented economic system is currently viewed as the most promising economic system for development. Market institutions, such as commercial banking, central banks, currency, market pricing, market commodity distribution, and the commodification of real property, depend on law for their existence. Law is essential to the existence of such institutions. Law serves these institutions by identifying and preserving property rights and contract rights, and by defining and facilitating such concepts as negotiable instruments, commercial paper, juristic personhood, secured transactions, and title to real property. It makes for predictability "as a set of universal rules uniformly applied,"⁶⁹ which "encourages men to engage in new forms of economic activity and guarantees that the fruits of this activity will be protected."⁷⁰ Law "assures the individual that his decisions will be en-

65. McDougal, *supra* note 2, at 6.

66. Trubek, *supra* note 42, at 6.

67. See John H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977); Elliot Burg, *Law and Development: A Review of the Literature and a Critique of "Scholars in Self-Estrangement,"* 25 AM. J. COMP. L. 492 (1977); Philip von Mehren & Tim Sawers, *Revitalizing the Law and Development Movement: A Case Study of Title in Thailand*, 33 HARV. INT'L L. J. 67 (1992).

68. See HARRY BLAIR & GARY HANSEN, *WEIGHING IN ON THE SCALES OF JUSTICE: STRATEGIC APPROACHES FOR DONOR-SUPPORTED RULE OF LAW PROGRAMS, USAID PROGRAM AND OPERATIONS ASSESSMENT REPORT NO. 7* (1994); U.S. General Accounting Office, *FOREIGN ASSISTANCE: PROMOTING JUDICIAL REFORM TO STRENGTHEN DEMOCRACIES* (1993).

69. Trubek, *supra* note 42, at 7.

70. *Id.*

forced by state authority and that his acquisitions protected from the depredations of others.⁷¹

Moreover, law can serve as an instrument through which a state implements development plans.⁷² This role of law has been downplayed in recent years as development economists and planners have reasoned that economic growth is impracticable to manage and government intervention is sometimes worse than no, or limited, intervention despite good intentions.⁷³ This second role for law, however, still appears significant to the extent that it promotes an open, market-oriented economy. For example, given the intense competition of the capital importing countries for foreign capital, developing countries have been promulgating foreign investment laws that are favorable to the foreign investor and that serve to protect foreign investments within a country. Today's trend is privatization, not nationalization. Developing countries use law to attempt to direct foreign investment into their borders as part of their development plans, which include increasing foreign investment.

E. *Market-Oriented Economics and Liberalized Trade*

A substantial relationship exists between international trade policy and the prevention of armed conflict.⁷⁴ This relationship has been demonstrated in modern history leading to World War II. The Smoot Hawley Tariff Act, signed into law in June of 1930, dramatically increased United States tariffs in an unequivocal protectionist or isolationist approach to international relations.⁷⁵ The result was retaliation by trading partners of the United States. As other countries dramatically increased their tariffs, the volume of world trade substantially decreased, eventually leading to the Great Depression. The Great Depression was a substantial contributing factor to the decline of the political moderates in Japan and to the electoral victory of the Nazis in Germany.⁷⁶ A dire economic situation created the conditions for the rise of extreme, totalitarian or authoritarian, non-democratic regimes, which in turn started one of the most aggressive wars in recorded

71. *Id.*

72. *Id.*

73. See Clive Crook, *The Gains from Trade*, ECONOMIST, Sept. 23, 1989, at 25; Clive Crook, *Distracted by Debt*, ECONOMIST, Sept. 23, 1989, at 52.

74. JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 37 (1995).

75. RICHARD N. COOPER, TRADE POLICY AND FOREIGN POLICY 291-92, reprinted in JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 38 (1995); John Linarelli, *International Trade Relations and the Separation of Powers Under the United States Constitution*, 13 DICK. J. INT'L L. 203, 210 (1995).

76. COOPER, *supra* note 75.

history.⁷⁷ Thus, flawed protectionist trade policies can be viewed as one contributing cause of World War II.

U.S. leaders during World War II understood the close connection between protectionist trade policy and war. As explained by one State Department official in 1944:

We've seen that when a country gets starved out economically, its people are all too ready to follow the first dictator who may rise up and promise them all jobs. Trade conflict breeds non-cooperation, suspicion, bitterness. Nations which are economic enemies are not likely to remain political friends for long.⁷⁸

The United States at the end of World War II promoted the creation of three multilateral economic institutions — the International Bank for Reconstruction and Development (known as the World Bank), the International Monetary Fund (IMF), and the International Trade Organization. Only the first two of these organizations came into existence. The World Bank at the time served to rebuild war ravaged countries. The IMF was created to promote orderly fluctuations and adjustments of currencies and exchange rates. The International Trade Organization, however, did not come into existence because of the opposition of the U.S. Congress. The proposal of the United States Executive Branch for the creation of the International Trade Organization stated:

The fundamental choice is whether countries will struggle against each other for wealth and power, or work together for security and mutual advantage The experience of cooperation in the task of earning a living promotes both the habit and the techniques of common effort and helps make permanent the mutual confidence on which the peace depends.⁷⁹

In the post Cold War era, “economic diplomacy” has acquired increased prominence. “U.S. national security policy no longer focuses primarily on the conventional notions relating to the use of force, arms control and arms proliferation, national defense, and superpower conflict.”⁸⁰ There has been a dynamic linkage in United States foreign policy of international economic and non-economic relations.

National security provides an even less convincing justification for deviating from free trade principles. National security was even cited by Adam Smith for permitting the protection of certain strategic industries.⁸¹ Nevertheless, as linkages between free trade, mutually

77. *Id.*

78. U.S. Dept. of State, Commercial Policy Series 74, at 3 (Pub. no. 2104, 1944), quoted in JACKSON ET AL., *supra* note 74, at 38.

79. United States Proposals, Dept. of State Pub. No. 2411, at 1-2 (1946), quoted in JACKSON ET AL., *supra* note 74, at 38-39.

80. Linarelli, *supra* note 75, at 203.

81. JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF IN-

pursued, and conflict minimization become ever more apparent, the national security argument loses force.

The developing countries, which are the countries in which the United Nations peace-keeping efforts are most likely to occur, have moved quite steadily towards trade liberalization.⁸² The trend in the developing countries toward trade liberalization is consistent with trends in development economics toward privatization, private sector development, aggressive export orientation trade strategies, and the promotion of entrepreneurship, particularly the entrepreneurship of small and medium sized enterprises, as the engine of development.⁸³ Once again, these concepts reinforce and complement the ultimate goal of the creation and maintenance of a stable state. Entrepreneurship is also viewed as the engine of democratic pluralism.⁸⁴

Unfortunately, as the developing countries embrace trade liberalization, it appears that the developed countries' commitment to free trade may be diminishing.⁸⁵ A lack of commitment to trade liberalization on behalf of the developing countries would be a serious mistake. Such retrenchment often has its roots in politics, such as when one region of a developed country demands protection from a developing country's imports.⁸⁶ Despite the dangerous temptation to succumb to such protectionism, it is not in the long-term interests of peace-building. It appears dangerously reminiscent of the Smoot Hawley debacle.

F. *Structural Adjustment*

Closely related to the concept of building peace through trade is the concept of implementing structural adjustment in countries experiencing serious economic problems. Structural adjustment "refers to the process by which economic factors such as land, labor and capital are reallocated within a country as it adapts in order to function more efficiently as part of the global economy."⁸⁷ The structural adjustment process typically results in hardships to a country and its populace in the short-run, including unemployment, currency devaluation, and closing of inefficient industries.⁸⁸

The IMF and the World Bank, as part of their conditions for providing credits or loans to countries, may impose strict economic criteria

INTERNATIONAL ECONOMIC RELATIONS 18-19 (1992).

82. Bartram S. Brown, *Developing Countries in the International Trade Order*, 14 N. ILL. U. L. REV. 347, 374-75 (1994).

83. Linarelli, *supra* note 41, at 364-65.

84. *Id.*

85. Brown, *supra* note 82, at 374-75.

86. See Brown, *supra* note 82, at 365-69, 398-99. The author explains the deleterious economic effects of such protectionism.

87. *Id.* at 371.

88. *Id.*

that a country must meet in order for the country to draw on its loan or credit.⁸⁹ These conditions reflect an essentially capitalist view of the world and have been the subject of political consternation among the developing countries that view these conditions as an encroachment on sovereignty and a continuation of colonialism.⁹⁰ Nevertheless, structural adjustment is critical for long-run economic growth. Ultimately, structural adjustment will promote economic well-being and, hence, peace.

Structural adjustment may prove necessary in order to mitigate the externalities of armed conflict. Armed conflict may result in shocks to the world economy. Countries dependent on resources from warring countries may suffer severe economic disadvantages. For example, Iraq's occupation of Kuwait in August 1990 caused a sharp increase in oil prices and a severe weakening of the balance of payments posture of many oil importing countries.⁹¹ Some countries were adversely affected by physical dislocations and lost receipts of remittances from their nationals working in Iraq and Kuwait.⁹² Countries in the process of structural adjustment had to adapt their policies to the changed circumstances.⁹³ After the conflict, reconstruction and recovery in the region was necessary.⁹⁴ Both the IMF and the World Bank played roles in alleviating the adverse economic consequences of the conflict.⁹⁵

G. *Deterrence Mechanisms to Avoid Reversion to Conflict*

In the nation-state ordered system of international relations that presently exists, deterrence plays a key role in maintaining peace. "[D]eterrence has served as a central component of governmental policies in this contemporary Charter era"⁹⁶ Professor Donald Kagen, a noted historian, has examined the causes of war since the Peloponnesian War to the contemporary period and concludes as follows on the importance of deterrence:

What seems to work best, even though imperfectly, is the possession by those states who wish to preserve the peace of the preponderant power and of the will to accept the burdens and responsibilities required to achieve that purpose. They must understand that no international situation is permanent, that part of their responsi-

89. PAUL B. STEPHAN III ET AL., *INTERNATIONAL BUSINESS AND ECONOMICS: LAW AND POLICY* 245-46 (1993).

90. *Id.*

91. DAVID M. CHENEY, *DEALING WITH THE UNEXPECTED: THE IMF'S RESPONSE TO THE MIDDLE EAST CRISIS* 1-2 (1991).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. MOORE ET AL., *supra* note 20, at 80.

bility is to accept and sometime even assist changes, some of which they will not like, guiding their achievement through peaceful channels, but always prepared to resist, with force if necessary, changes made by threats or violence that threaten the general peace. But this condition is not easy to achieve. In the first place, the natural distribution of power does not necessarily coincide with the needs of peacekeeping. Sometimes the balance is so close as to prevent effective deterrence and to make it tempting to risk war to gain or prevent a preponderance of power Sometimes the power and will are present but the responsible states are arrogant and careless.⁹⁷

An effective deterrence system could be implemented by one state or by a group of states. The United Nations, particularly the operation of the Security Council through Chapter VII of the Charter, could come to represent an effective deterrence mechanism.⁹⁸ Based on current events in Bosnia and previously in Somalia, it would appear that the United Nations has a long road ahead in order to become effective in this area. The primary burden thus falls upon individual states, either unilaterally or through the United Nations, to serve as the primary implementers of deterrence throughout the world.

H. *Disarmament and Nonproliferation*

Peace-building requires both disarmament and nonproliferation. The end of the Cold War and the advance of technology have resulted in more complex scenarios and in a multiplicity of actors with the ability to initiate armed conflict and, in some instances, to even initiate nuclear conflict.⁹⁹

An effective system of disarming states and of engaging states in nonproliferation obligations is plainly in the interests of peace-building. The United Nations has on occasion sought to disarm factions in a conflict.¹⁰⁰ In the case of Somalia, the United Nations has been criticized for not disarming the Somali factions at the outset of the Chapter VII operation in that country.¹⁰¹ This type of *ad hoc* disarmament is clearly prudent. But, disarmament as a peace-building effort must be extensive, systematic, and permanent in nature.

97. DONALD KAGAN, ON THE ORIGINS OF WAR AND THE PRESERVATION OF PEACE 570 (1995); see also JOHN N. MOORE, CRISIS IN THE GULF (1992).

98. See SHARP, *supra* note 4, at 82-85.

99. David A. Koplow & Philip G. Schrag, *Carrying a Big Carrot: Linking Multilateral Disarmament and Development Assistance*, 91 COLUM. L. REV. 993, 997-98 (1991).

100. See Han, *supra* note 15.

101. Remarks by Abdikarim A. Omar, former Ambassador of Somalia to the United States, in course, United Nations Peace Operations, held at the Georgetown University Law Center, Summer 1995.

Disarmament alone is not enough.¹⁰² There must exist the presence of other, more powerful factors, such as participatory pluralism and an effective deterrence system, in order to create the conditions for disarmament. As explained by one scholar, "[e]ffective security must precede disarmament."¹⁰³

III. STRUCTURAL INADEQUACIES IN INTERNATIONAL LAW AND INTERNATIONAL INSTITUTIONS¹⁰⁴

This section sets forth a critical examination of the authority and ability of the United Nations to credibly and effectively implement peace-building as defined in the preceding section. Can the United Nations implement or enforce the above norms in a manner that is lawful under international law? If not the United Nations, do other institutions exist that could lawfully implement all or some of these norms? As demonstrated below, serious structural inadequacies preclude the meaningful implementation of peace-building. The United Nations and other existing institutions were created at the end of World War II, at the beginning of the Cold War, and to implement the transition from the colonial period. The structure of these organizations and the principles upon which they are built are not grounded in the transformation to which the post Cold War era global community is witness in present times.¹⁰⁵

A. *The United Nations and the United Nations Charter*

1. The Potential Role of the Security Council

Attempting to apply the provisions of the United Nations Charter to a peace-building context presents some difficult questions. Can the Security Council deploy forces in order to implement or enforce the above norms? Is an unstable regime, characterized by a lack of democracy, sufficient reason for the Security Council to take some form of action? Does the Security Council have to use force, or can it undertake other, i.e. economic or social, measures?

There are two important chapters of the United Nations Charter for purposes of Security Council action. Chapter VI of the Charter, entitled "Pacific Settlement of Disputes," permits consensual, impartial activity initiated by the Security Council within a state.¹⁰⁶ The United Nations' personnel involved in a Chapter VI effort operate in a

102. MOORE ET AL., *supra* note 20, at 555.

103. *Id.*

104. The concept of structural inadequacies is from Koplow & Schrag, *supra* note 99, at 993.

105. See Donald F. McHenry, Ambassador, *Peacekeeping in the Post Cold War Era*, 19 S. ILL. U. L.J. 107 (1994).

106. U.N. CHARTER art. 36, ¶ 1.

country or region with the consent of the parties to the dispute and cannot take sides in the dispute.¹⁰⁷ The Security Council may only "recommend" actions to resolve the dispute.¹⁰⁸ As part of its Chapter VI functions, the Security Council "may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security."¹⁰⁹

In contrast to Chapter VI of the Charter, Chapter VII permits the Security Council to use coercive, non-consensual force on the basis of a finding under Article 39 of the Charter.¹¹⁰ Article 39 provides as follows:

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.¹¹¹

Article 41 provides for the implementation of sanctions not involving the use of force, such as economic sanctions;¹¹² Article 42 provides for the use of military force.¹¹³ Thus, the issue is whether the breach of the above norms, or the absence of characteristics in a state or region of these norms, could constitute a "threat to the peace, breach of the peace, or act of aggression,"¹¹⁴ allowing either economic or military "actions" under Chapter VII of the Charter.

Two schools of thought exist on the interpretation of Chapter VII. One school of thought contends that Chapter VII should be relied upon to deal only with the more traditional acts of armed force and not to stop human rights violations, to depose a repressive regime, or to impose stability in a purely civil context.¹¹⁵ For purposes of analysis, I call this school of thought the "interpretivist" school.¹¹⁶

107. SHARP, *supra* note 4, at 37, 44.

108. *Id.*

109. U.N. CHARTER art. 34.

110. SHARP, *supra* note 4, at 37, 44.

111. U.N. CHARTER art. 39.

112. 112 U.N. CHARTER art. 41.

113. U.N. CHARTER art. 42.

114. U.N. CHARTER art. 39.

115. See ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 254-57 (1994); Michael J. Glennon, *Sovereignty and Community after Haiti: Rethinking Collective Use of Force*, 89 AM. J. INT'L L. 70 (1995); Oscar Schachter, Editorial Comment, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984).

116. See JOHN H. ELY, *DEMOCRACY AND MISTRUST* 11-40 (1980). The idea for the term "interpretivist" was drawn from Professor Ely's discussion of this term in the context of the U.S. Constitution.

There is a great deal of appeal to the interpretivist school. It is easily read to be consistent with core principles in the Charter. Article 24(1) of the Charter confers on the Security Council "primary responsibility for the maintenance of international peace and security"¹¹⁷ However, Article 24(2) provides that "[i]n discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations."¹¹⁸ The Purposes of the United Nations are set forth in Article 1 and its Principles in Article 2. Article 1 of the Charter provides, among other things, that the Purposes of the United Nations are to maintain international peace and security in accordance with the "principles of justice and international law."¹¹⁹ Article 2(7) of the Charter provides:

[n]othing 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.¹²⁰

Furthermore, Article 2(4) of the Charter provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."¹²¹

Rosalyn Higgins, recently appointed as a judge to the International Court of Justice,¹²² explains Article 39, in the context of human rights violations, as follows:

It is . . . clear that measures under Articles 41 and 42 depend upon there having been a finding under Article 39 of the existence of any threat to the peace, breach of the peace, or act of aggression. No matter how much one may wish it otherwise, no matter how policy-directed one might wish choice between alternative meanings to be, there is simply no getting away from the fact that the Charter *could* have allowed for sanctions for gross human-rights violations, but deliberately not do so. The only way in which economic or military sanctions for human-rights purposes could lawfully be mounted under the Charter is by the legal fiction that human-rights violations are causing a threat to international peace.¹²³

117. U.N. CHARTER art. 24 ¶ 1; see SHARP, *supra* note 4, at 37.

118. U.N. CHARTER art. 24 ¶ 2; see SHARP, *supra* note 4, at 37.

119. U.N. CHARTER art. 1 ¶ 1; see SHARP, *supra* note 4, at 37.

120. U.N. CHARTER art. 2 ¶ 7.

121. U.N. CHARTER art. 2 ¶ 4.

122. *ICJ Holds Special Elections; Unanimously Elects First Woman to the Court*, ASIL NEWSL., June-Aug. 1995, at 19.

123. HIGGINS, *supra* note 115, at 255 (emphasis in original).

Professor Higgins concludes that it is too early to determine whether a norm is emerging but that there is an "increasing tendency" for the Security Council to characterize humanitarian problems as threats to or breaches of the peace and to thus bring them within the scope of Chapter VII.¹²⁴

An analysis of the articles in Chapter VII, particularly Articles 41 and 42, indicates that Chapter VII was not intended to cover peace-building situations. A teleological interpretation of Chapter VII indicates that it is designed to address acts of armed aggression in an international conflict. For example, Article 41 allows for "interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication . . ." ¹²⁵ These are hardly measures that appear to be required for peace-building based on the above norms. Chapter VII seems designed mainly to deal with short-term international crises involving armed force.

A broad reading of Chapter VII to address human rights problems, repressive regimes, or humanitarian needs has been viewed as inconsistent with the principle of sovereignty.¹²⁶ In traditional international law parlance, the form and structure of a government, a government's tendency to commit human rights violations within its borders, and a government's respect for rule of law are irrelevant to triggering Chapter VII.¹²⁷ Indeed, the United Nations is in part "based on the principle of the sovereign equality of all its Members."¹²⁸ The core of the United Nations' collective security system is the sovereignty of the nation-state. Broadly based Security Council actions focused on domestic conditions in a country would, the argument goes, allow powerful states to interfere in the domestic affairs of weaker states.¹²⁹ As explained by Professor Michael Glennon in the context of Somalia, Haiti, and Rwanda, the terms necessary to trigger Article 39, namely, a breach of or threat to the peace:

. . . are left undefined by the Charter. At a minimum, breach of the peace would seem to imply some violation of sovereignty or cross-border intervention causing armed conflict, and a threat to the peace would thus entail the creation of an unreasonable risk of such an occurrence. Absent these elements, the possibility of Security Council interference in member states' internal affairs is too great, and the Charter flatly prohibits the United Nations from interfering in matters within the domestic jurisdiction of states. True,

124. *Id.* at 256-57.

125. U.N. CHARTER art. 41.

126. See Mark R. Hutchinson, *Restoring Hope: U.N. Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention*, 34 HARV. INT'L L.J. 624, 636 (1993).

127. Glennon, *supra* note 115, at 71.

128. U.N. CHARTER art. 2 ¶ 1.

129. Hutchinson, *supra* note 126, at 636.

this provision does indicate that it ought not to be construed as prejudicing the application of enforcement measure under chapter VII; but that proviso need merely be read as requiring that the two provisions be construed together, as allowing only those enforcement measures that do not conflict with a state's domestic jurisdiction.¹³⁰

Professor Glennon concludes that without "safeguards," which he argues do not yet exist, the United Nations should adhere to the principle of non-interference in domestic affairs of states.¹³¹ Professor Glennon's analysis is clearly grounded in the language of Article 2(4) which requires that members of the United Nations "refrain . . . from the threat or use of force against the territorial integrity or political independence of any state"¹³²

The second school of thought contends that Chapter VII covers a broad array of activities which might be deemed a breach of or threat to peace, including serious human rights violations and other ostensibly domestic actions.¹³³ For purposes of analysis, I call this school of thought the "substantivist" school. This school of thought appears to be emerging as the dominant school, both in inquiry by scholars and in action by the Security Council. Without a proper legal framework for this school, however, the world is left with a basic indeterminate as to the role of the Security Council.

This competing school of thought, in its basic conception, contends that a framework for international law, based solely on a set of rules, is impracticable; international law should serve conceptions of community-based policy, particularly because of rapid change in the international community.¹³⁴ Substantivists seek a basis for authority on a supranational basis which transcends the nation-state. Sovereignty, in this conception, is held by the people of a country and not by the ruling elites who have been able to use sovereignty as a shield against scrutiny of repression and corruption.¹³⁵ Within this framework, sovereignty has as its base a conception that results in rules or principles to determine who is entitled to assert it on behalf of a state.

The Charter could be read to be consistent with this approach, too. The Charter's Preamble and its statement of Purposes in Article 1 "clearly recognized the intimate interdependence, if not identity, of peace and human rights and made the protection of human rights

130. Glennon, *supra* note 115, at 72.

131. *Id.* at 74.

132. U.N. CHARTER art. 2 ¶ 4.

133. See McDougal, *supra* note 2; W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984); Reisman, *supra* note 52; Turner, *supra* note 18.

134. McDougal, *supra* note 2, at 4.

135. Reisman, *supra* note 53, at 795.

coordinate with the maintenance of peace.¹³⁶ The drafters of Article 2(7) of the Charter, however, intended to preclude the Charter's human rights provisions from being construed to provide the United Nations with the authority to intervene in states' domestic affairs.¹³⁷

Notwithstanding the original intent for Article 2(7), subsequent developments allow for new interpretations of the Charter while maintaining the rule of law. International law evolves as a matter of custom and state practice.¹³⁸ The Charter should be interpreted in accordance with this evolving nature of international law. International law has changed dramatically since 1945. Subjecting the Charter to some type of "framers' intent" analysis could be deleterious to the evolution of international law and could render the Charter of limited significance or even meaningless. Further, freezing the Charter in time would seriously distort the purposes of the Charter and hamper efforts to allow the collective security system envisioned by the framers to respond to change in the international legal and political order. This does not mean that the Charter should be interpreted in an undisciplined, result-oriented manner, but looking to the framers' intent as the sole or primary focus would prove pedantic. The world is undergoing transformation in the post Cold War era; some countries are able to agree on political provisions in international agreements and for international institutions, the content of which they could never agree upon during the Cold War.¹³⁹ Any sound interpretation of the Charter must reflect developments in international law; such an interpretation would enhance, not injure, the concept of world order through law.

Indeed, this evolving approach to Charter interpretation is the only approach which would seem to be consistent with the doctrine of *jus cogens*. Certain international law principles are so fundamental so as to be non-derogable. These principles must be respected regardless of the Charter provisions; these principles supersede treaties.¹⁴⁰ Since *jus cogens* can evolve over time, the Charter also must evolve, or it will become an unworkable instrument.

The substantivist approach to interpreting the Charter is consistent with the manner in which the United States Constitution has been interpreted throughout most of United States history. It is a method of interpretation that acknowledges the difficulties of seman-

136. McDougal, *supra* note 2, at 13.

137. 10 U.N.C.I.O. Docs. 83 (1945), *quoted in* MOORE ET AL., *supra* note 20, at 677.

138. See International Court of Justice Statute art. 38; Restatement of the Law of Foreign Relations §102.

139. See John W. Head, *Supranational Law: How the Move Toward Multilateral Solutions is Changing the Character of "International" Law*, 42 U. KAN. L. REV. 605 (1994).

140. Shihata, *supra* note 54, at 35.

tics and linguistics, and how abstractions in language can fail to allow for definitive resolutions in a consistent manner in each case.¹⁴¹ As explained by Karl Llewellyn, postulated in the context of the United States Constitution, the Charter should be viewed as an institution rather than as a document.¹⁴²

Under the substantivist approach, the scope of Article 2(7) shrinks considerably.¹⁴³ Security Council actions to enforce democracy and rule of law do not implicate Article 2(4) because there is no violation of "political independence" or "territorial integrity."¹⁴⁴ "Threats to the peace" or "breaches of the peace" under Article 39 could conceivably encompass a wide range of peace-building initiatives. Security Council actions consistent with this approach have already occurred in Haiti, Somalia, and Rwanda.¹⁴⁵

The substantivist approach provides the United Nations with considerable flexibility. Of course, this method of interpretation must be principled. As explained by Professor Reisman:

there is a limit to 'institutional elasticity,' i.e., the extent to which institutions created and still used for other purposes can be 'stretched' in order to get them to perform human rights functions, especially when these functions are accomplished at the expense of their manifest functions. Institutions simply cannot do everything we think they are capable of, if this requires them to move too far from their manifest mandate.¹⁴⁶

Even if one concludes that the Security Council does have the authority to engage in peace-building, that conclusion does not answer the question of the specific measures available to the Security Council. The implications for Security Council involvement are radical in nature. Could the Security Council use or approve military force by its members to overthrow a non-democratic government? One can see the need for such action in certain contexts. But repressive regimes often commit other destabilizing actions, such as genocide and armed attacks of neighboring countries, so that reliance by the Security Council on the lack of democracy alone may prove unnecessary.¹⁴⁷

141. See K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934); ELY, *supra* note 116, at 1-41. Cf. McDougal and Feliciano, *Goal Clarification by Configurative Analysis: An Alternative Conception* 154-55, in *LAW AND MINIMUM WORLD PUBLIC ORDER* (1961), quoted in MOORE ET AL., *supra* note 20, at 94.

142. Llewellyn, *supra* note 141.

143. See MOORE ET AL., *supra* note 20, at 678.

144. Turner, *supra* note 18, at 24-25.

145. Hutchinson, *supra* note 126; Turner, *supra* note 18.

146. W. Michael Reisman, *Through or Despite Governments: Differentiated Responsibilities in Human Rights Programs*, 72 IOWA L. REV. 391, 395 (1987).

147. *New Global Order*, *supra* note 24, at 640.

In some cases, a coercive force would be unnecessary or imprudent for peace-building.¹⁴⁸ Election monitoring, non-violent pressure, and proactive development assistance may prove sufficient in some situations. The Security Council, however, may not be the appropriate body to undertake such actions.

The extent of United Nations involvement in peace-building hinges to a great degree on whether the United Nations relies upon Chapter VI or Chapter VII of the Charter. Although effectively used in the past, Chapter VI may prove ineffective in post Cold War peace-building. It is intended primarily to facilitate the process of decolonization and the achievement of independence of former colonies.¹⁴⁹ An examination of the peace-building efforts of the United Nations to date reveals that these efforts have been limited in scope and that they have been, with a few notable exceptions, Chapter VI actions.¹⁵⁰

Chapters VI and VII of the Charter provide awkward and difficult authority for United Nations peace-building. Reliance on the Security Council seems to be unsatisfactory for effective peace-building.

2. If Not the Security Council, Then What Other Body?

Looking elsewhere for peace-building authority, outside of the jurisdiction of the Security Council, leaves one pessimistic. The Economic and Social Council would seem at first blush to be either an alternative or a complement to the Security Council, depending on the situation. The Charter provides that the Economic and Social Council "may furnish information to the Security Council and shall assist the Security Council upon its request."¹⁵¹

The Economic and Social Council has proven to be ineffective. Its ineffectiveness is largely due to the fact that it is a body of inquiry and not of action, subservient to the General Assembly and the Security Council. It essentially functions as an organization to study problems. Given the problems of that plague many bureaucracies, it is doubtful whether the Economic and Social Council could be remade, even if the applicable Charter provisions were rewritten.

The anachronistic character of the Charter is further illustrated by a review of Chapter XII, which established the trusteeship system for territories that are not yet states, and Chapter XIII, which established the Trusteeship Council. If any section of the Charter shows the Charter's emphasis on decolonization, it is these sections. Today, these

148. *Id.* at 628.

149. DEPARTMENT OF PUBLIC INFORMATION, UNITED NATIONS, EVERYONE'S UNITED NATIONS: A HANDBOOK ON THE WORK OF THE UNITED NATIONS 98-99 (10th ed. 1986).

150. See generally Han, *supra* note 15.

151. U.N. CHARTER art. 65.

sections take up an inordinate amount of space in the Charter, although they once dealt with pressing issues. Most trust territories have made the transition to statehood; therefore, the Trusteeship Council has very little to do. In fact, current members of the United Nations are exempt from the trusteeship system.¹⁵² It would be offensive to place a country into such a system; it could appear to be a reversion to colonial rule. Trust administration has a very small role in the post Cold War world. The Trusteeship Council is on the extreme margins of the pressing problems of the world.

There have been other organizations established under the auspices of the United Nations, in response to problems of the day, which are not specified in the Charter. For example, the United Nations Conference on Trade and Development was established as an alternative to the General Agreement on Tariffs and Trade to provide developing countries with stronger representation in international trade matters.¹⁵³ The Human Rights Commission, another example, was established to promote human rights.¹⁵⁴ These organizations are not well funded, are *ad hoc* in nature, and spend most of their time in the inquiry stages. In their present structure, these organizations would not be effective in implementing peace-building.

B. *The "Economic" Institutions*

In 1944, during the same time period in which the United Nations Charter was being formulated at Dumbarton Oaks and later in San Francisco, the Monetary and Financial Conference was held in Bretton Woods, New Hampshire.¹⁵⁵ The IMF and the World Bank were formed as a result of the Bretton Woods Conference.¹⁵⁶

The IMF was created to promote and to maintain relative exchange rate stability, to alleviate short-run balance of payments problems, and to establish an orderly method for countries' exchange rate payments.¹⁵⁷ Although not created with any special emphasis on developing countries, since, at the time of its creation, many countries were only at the beginning of their decolonization, the IMF role has evolved and the IMF has been involved in the efforts of developing countries to promote structural adjustment.¹⁵⁸ The IMF will make loans and stand-by arrangements with countries only on the basis of

152. U.N. CHARTER art. 78.

153. Brown, *supra* note 82, at 360.

154. *New Global Order*, *supra* note 24, at 619.

155. Brown, *supra* note 82, at 352.

156. *Id.*

157. See DAVID D. DRISCOLL, *THE IMF AND THE WORLD BANK: HOW DO THEY DIFFER?* 2-3 (1994).

158. Brown, *supra* note 82, at 352-53.

strict conditionality.¹⁵⁹ The lenders must adhere to rigorous macro-economic policies in order to draw down IMF facilities. This conditionality also helps to establish the creditworthiness of borrower countries for loans from other sources.¹⁶⁰

The World Bank was initially established in order to finance the reconstruction of countries ravaged by World War II and to finance the development of developing countries.¹⁶¹ The Bank's focus today is on the elimination of poverty. It has evolved considerably over the years and is now the primary development banker in the world. The World Bank makes project-based as well as policy-based loans, structural adjustment.¹⁶² There exist also regional development banks, such as the Inter-American Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development (EBRD) and the African Development Bank; however, their portfolios are far smaller than the World Bank's portfolio.

Although these institutions can do a great deal to promote development throughout the world, they are far from the ideal institutions for peace-building. As a threshold matter, all of these institutions, with the exception of the EBRD, are expressly prohibited from taking political considerations into account.¹⁶³ With the exception of the EBRD,¹⁶⁴ these are institutions of the Cold War. Moreover, these institutions require a fairly stable environment in which to work. They lend and otherwise deal with money. As lenders, they must protect the

159. *Id.* at 352; STEPHAN III ET AL., *supra* note 89, at 244-46.

160. Brown, *supra* note 82, at 352.

161. Brown, *supra* note 82, at 353; DRISCOLL, *supra* note 157, at 5-7.

162. For a general description of the World Bank's activities, see STEPHAN III ET AL., *supra* note 89.

163. Article 1 of the World Bank's Articles of Agreement provides as follows:

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.

Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 60 Stat. 1440, *amended by* Dec. 16, 1965, 16 U.S.T. 1942. A similar provision appears in Article 1 of the Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401 (1947); *amended by* July 28, 1969, 20 U.S.T. 2775 and Apr. 1, 1978, 29 U.S.T. 2203. See Cahn, *supra* note 39, at 163 (arguing that the World Bank violates the above provision); Margaret Conklin & Daphne Davidson, *The I.M.F. and Economic and Social Human Rights: A Case Study of Argentina, 1958-1985*, in INTERNATIONAL BORROWING: NEGOTIATING AND STRUCTURING INTERNATIONAL DEBT TRANSACTIONS 209 (Roberto G. MacLean et al eds., 1994).

164. "The EBRD, a post Cold War institution created in May 1990, is overtly political in character and has the ability to exercise political conditionality over its loans. It finances projects in Central and Eastern Europe, in the Newly Independent States, and in the Russian Federation." Linarelli, *supra* note 41, at 361-65.

assets of their shareholders and creditors and must avoid transactions in which there is an undue amount of political risk.¹⁶⁵ The World Bank must consider political risk just as any other lender.¹⁶⁶ Although a development bank, such as the World Bank, can take risks which are greater than a commercial bank, there still must be an acceptable minimum level of political stability and security in a country or loan proceeds would be wasted. Good governance in the borrowing country is an important precedent to development lending.¹⁶⁷

The Bretton Woods institutions can do little to assist those countries at the early stages of peace-building. They can become involved only at a point of time in which a country is substantially on the road to political stability. Thus, there is a void between United Nations functions in peace-building and that of the Bretton Woods institutions. Situations can conceivably arise in a country in which there is no live conflict or dispute which the United Nations can seek to resolve but in which the Bretton Woods Institutions can have no or marginal involvement.

C. *Regional and Non-governmental Organizations*

Chapter VIII of the United Nations Charter addresses "Regional Arrangements."¹⁶⁸ Article 52 of Chapter VIII provides as follows:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.¹⁶⁹

Regional organizations have played roles mainly in the pacific settlement of disputes under Chapter VI and not in coercive actions under Chapter VII.¹⁷⁰ But, certain non-governmental organizations, such as the International Committee for the Red Cross, can play significant roles in Chapter VII operations.¹⁷¹

The roles of regional organizations and non-governmental organizations in peace-building are limited. Many of these organizations suffer from even more financial and bureaucratic constraints than those from which the United Nations suffers.¹⁷² They are further con-

165. See IBRAHIM F.I. SHIHATA, *THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS* 62-78 (Franziska Tschofen & Antonio R. Para eds., 1991).

166. *Id.*

167. *Id.*

168. U.N. CHARTER Ch. VIII.

169. U.N. CHARTER art. 52.

170. SHARP, *supra* note 4, at 69.

171. *Id.* at 70-72.

172. This point was suggested by Professor Gary S. Sharp, Sr., in the course,

strained by their limited mandates and the often lukewarm support of their membership. Non-governmental organizations can be granted consultative status with the Economic and Social Council.¹⁷³ Thus, they can have only a restricted role in an organization that at present itself has only limited role in peace-building.¹⁷⁴ These organizations do not present an effective supranational ability to implement peace-building. At most, in their present state, they can perform complementary or subsidiary functions.

D. *Unilateral Actions*

An alternative to collective action in the peace-building area is unilateral action by single states. This approach may work in limited circumstances. As a general method of peace-building, unilateral action is imprudent for a number of reasons.

No one state could be able to take on such a daunting task. Indeed, no one state could afford to take on such a role from a financial point of view. Multilateral actions are prudent because they allow a "leveraging" of principles as well as resources.¹⁷⁵

Unilateral action may violate international law principles of non-intervention. Some have suggested that unilateral intervention to support new democracies would be appropriate.¹⁷⁶ Such an approach could serve to avoid the problem of instability in new democracies.¹⁷⁷ The concept of non-intervention or non-interference in the internal affairs of a state are sometimes used to prop up oppressive elites within a country.

The problem of determining when and in what circumstances action to support a democracy would be appropriate provides strong justification for the collective security system which forms the basis for the United Nations Charter based order. Peace-building should be implemented within a collective structure to avoid problems of credibility and charges of neocolonialism and selective and unjust enforcement. As explained by Professor Franck in the context of the emerging right to democratic entitlement, "[t]hat a new rule might au-

United Nations Peace Operations, offered at the Georgetown University Law Center, Summer 1995.

173. U.N. CHARTER art. 71; see SHARP, *supra* note 4, at 70.

174. See *supra* part III.A.

175. See James A. Leach, *A Republican Looks at Foreign Policy*, 71 FOREIGN AFF. 17, 22 (Summer 1992). "[I]n addition to leveraging dollars, these [multilateral financial] institutions allow the West to leverage principles. Few governments are prone to bow to pressure for market-oriented reform coming from a single country. Many, however, will institute politically difficult reforms as prerequisites for IMF and World Bank support." *Id.*

176. W. Michael Reisman, *supra* note 53.

177. See *supra* part II.A.

thorize actions to enforce democracy still conjures up just such chilling images to weaker states, which see themselves as the potential objects of enforcement of dubious democratic norms under circumstances of doubtful probity.¹⁷⁸ The challenge of peace-building remains in the possibilities of implementing effective collective action, outside of military action, under Chapter VII of the Charter. That the collective security system has failed in some cases to provide relief to new democracies does not justify its abandonment. Rather, it would seem that a strengthening of the collective system would prevent egregious situations from "falling through the cracks."

IV. CONCLUSION

A significant evolution of international law principles relevant to peace-building appears to be taking place. Changing principles of sovereignty and non-intervention are causing a shrinking *domaine reserve* for states and expanded views on the appropriateness of humanitarian intervention.¹⁷⁹ The veil of sovereignty is being pierced by the evolution of human rights principles. Traditional principles governing state succession are giving way to concepts of popular sovereignty and legitimization of governments through proper elections.¹⁸⁰ Some scholars have asserted an emerging norm of democratic entitlement.¹⁸¹ Expanded views of the principle of self determination, beyond the view that it is merely a concept applicable to decolonization, are emerging.¹⁸²

Whether these principles are aspirational ideas of scholars or positivist conceptions of international law has yet to be definitively determined. Peace-building can provide the framework for that determination. From a pragmatic standpoint, however, it is doubtful that the United Nations, or any other institution, can provide a comprehensive institutional base for peace-building. Coordination among institutions should help but will not result in an effective institutional structure. Structural inadequacies in the current state of affairs create a chasm between the United Nations and other institutions.¹⁸³ Some countries and regions in dire need of peace-building will go unserved, with the result being continued conflict and need for traditional United Nations peace operations. In this article, I have attempted to lay the groundwork for some new thinking about peace-building and world peace through law.

178. *Democratic Governance*, *supra* note 24, at 84.

179. See *supra* part III.A.

180. See *supra* parts II.A, III.A.

181. See *supra* part II.A.

182. See Christian Tomuschat, *Self-Determination in a Post-Colonial World*, in *MODERN LAW OF SELF DETERMINATION 1* (Christian Tomuschat ed., 1993).

183. See *supra* part III.

