

# When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?

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## I. THE CHARTER LAW PERTAINING TO STATES' AUTONOMOUS USE OF FORCE

By Article 2(4) the United Nations' Charter sets out its principal rule. It requires all states to "refrain . . . from the threat or use of force"—not just to renounce war, but all other forms of interstate violence.

This commitment is balanced, however, by the Charter's equally fundamental promise to provide an effective system of collective measures to protect states against violators of the peace. This promise, unfortunately, has not been kept. The scheme setting out the promise is elegant. Article 39 authorizes the Security Council (Council) "to determine the existence of any threat to the peace, breach of the peace, or act of aggression." Article 42 empowers it to "make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security." Article 25 requires all members of the United Nations (UN) "to accept and carry out" those decisions. Article 42 further authorizes the Council, if milder remedies fail, to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." To that end, Article 43 commits all members "to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security." None of these provisions has been implemented in practice.

The noble plan for replacing state self-help with collective

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security failed because it was based on two wrong assumptions: first, that the Security Council could be expected to make speedy and objective decisions as to when collective measures were necessary; and second, that states would enter into the arrangements necessary to give the Council an effective policing capability.

The first of these assumptions simply was taken for granted on the strength of the wartime cooperation among allied powers. The drafters of the Charter—those same allied powers—decided, in their planning for a new global system, not even to try to define what might constitute a “threat to, or breach of the peace” or act of aggression. Instead, they assumed that this could be left safely to future case-by-case interpretations by a willing and able Council.<sup>1</sup>

The second assumption, that states would provide the new organization with a police force, was not so easily made. It was questioned by Secretary Hull in a 1943 memorandum to President Roosevelt raising the possibility that states, at first, might not be willing to pledge forces to UN command. He proposed that “in the absence of such agreement” the Council should be free to make such ad hoc arrangements “as [it] may deem appropriate.”<sup>2</sup>

By the time the Charter was finalized in San Francisco, these doubts had been swept aside, or repressed, as Articles 42 and 43 were adopted with relatively little debate. The drafting committee’s Rapporteur merely observed that there was no contention about these “draft articles.”<sup>3</sup> It simply was assumed that states readily would enter into agreements with the Security Council to commit available specified forces for service when needed.

This may seem Panglossian in retrospect, but as a symptom of the then-prevalent “optimism,” the U.S. Congress enacted a law which authorizes the President:

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1. *Memorandum by the Under Secretary of State (Stettinius), to the Secretary of State* (Sept. 1, 1944), in 1 FOREIGN RELATIONS OF THE UNITED STATES 1944, 761, 762 (1966).

2. *Memorandum by the Secretary of State, to President Roosevelt* (Dec. 29, 1943): *Arrangements for Exploratory Discussions on World Security Organization*, in 1 FOREIGN RELATIONS OF THE UNITED STATES 1944, 614, 620 (1966).

3. *Report of Mr. Paul-Boncour, Rapporteur, on Chapter VIII, Section B*, U.N. Conference on International Organization 3rd Comm., 1st Sess., at 1, U.N. Doc. 881, III/3/46, reprinted in 12 UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, DOCUMENTS 502, 509 (1945).

to negotiate a special agreement with the Security Council . . . providing for the numbers and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance, including rights of passage, to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with article 43 of the Charter.<sup>4</sup>

It all seems so long ago!

No such negotiations, we know, ever took place: not by the United States or by any other nation as the Cold War cooled the impetus for globalist solutions.

What were the consequences for the UN of being built on these two wrong assumptions? Were the Charter a static instrument bound exclusively to the textually expressed intent of its drafters, the profound incapacitation of the Security Council and the absence of a stand-by police force might have put paid to the Charter's collective security system. Instead, the system has adapted, specifically by uncoupling Article 43 from Article 42 and by broadening the authority of states to act in self-defense under Article 51. These adaptations, brought about precedent-by-precedent, are worth noting.

## II. COLLECTIVE FORCE WITHOUT ARTICLE FORTY-THREE

The Korean War was the first example of the Security Council resisting aggression by ad hoc collective measures, despite the absence of Article 43 forces. The North Koreans launched their attack in the night of June 24-25, 1950. Qualifying the situation as a threat to international peace, the Secretary-General immediately called on the Security Council to determine that the attack was a breach of the peace, demand a cessation of hostilities, and impose an embargo on all "assistance to the North Korean authorities."<sup>5</sup> He proposed that the Council call "upon all Member States to render every assistance" in carrying out this plan of action.<sup>6</sup> The Council

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4. An Act to Amend The United Nations Participation Act of 1945, Pub. L. No. 81-341, 63 Stat. 734 (1949) (codified as amended at 22 U.S.C. §§ 287 et seq (2000)).

5. S.C. Res. 82, U.N. SCOR, 5th Sess., 473rd mtg. at 4-5, U.N. Doc. S/1501 (1950).

6. *Id.* at 4.

adopted this proposal swiftly<sup>7</sup> due to the fortuitous absence of its Soviet member. It determined that there had been a “breach of the peace” and thereby invoked Article 39, the prerequisite for collective measures under Chapter VII of the Charter. By June 25, 1950 with only Yugoslavia opposed, the Council passed a resolution asking “that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.”<sup>8</sup> On July 7, 1950 with the Soviets still absent and abstentions by Egypt, India, and Yugoslavia, the Council recommended that all members providing military assistance make such forces available to a unified military command headed by the United States. The Council authorized the command to use the UN flag and requested the United States to report “as appropriate” to the Security Council.<sup>9</sup>

Since the Charter makes no provision for a UN military response other than with Article 43 forces, the Council was creatively adapting the text by authorizing action in its name by the United States and other national contingents in what became known as a “coalition of the willing.”

Subsequently, authorization of such coalitions of the willing has become an established part of UN practice. In 1990, forty years after the Korean war, the Security Council—still lacking an article 43-based military capability of its own—again authorized a massive coalition of the willing to undertake operation “Desert Storm” after Iraq’s invasion of Kuwait. This began in August when, with all permanent members voting in favor and only Yemen abstaining, the Council found that Iraq’s action constituted a breach of the peace.<sup>10</sup> By November, it invoked Chapter VII and requested member states to “use all necessary means” to reverse Iraqi aggression. This resolution passed with only Cuba and Yemen opposed and with China abstaining.<sup>11</sup>

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7. The proposal was adopted June 25, 1950. *Id.*

8. S.C. Res. 83, U.N. SCOR, 5th Sess., 474th mtg. at 5, U.N. Doc. S/1511 (1950).

9. S.C. Res. 84, U.N. SCOR, 5th Sess., 476th mtg. at 5, U.N. Doc. S/1588 (1950).

10. S.C. Res. 660, U.N. SCOR, 45th Sess., 2932nd mtg. at 19, U.N. Doc. S/RES/660 (1990).

11. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg. at 27-28, U.N. Doc. S/RES/678 (1990).

Somalia was the next instance of the Council exercising its adapted power to deploy military forces. On November 30, 1992 the Secretary-General informed the Council that “the situation in Somalia has deteriorated beyond the point at which it is susceptible to peace-keeping treatment.” Accordingly, he reported, “I am more than ever convinced of the need for international military personnel to be deployed.” He concluded that:

the Security Council now has no alternative but to decide to adopt more forceful measures to secure the humanitarian operations . . . . It would therefore be necessary for the Security Council to make a determination under Article 39 of the Charter that a threat to the peace exists . . . . The Council would also have to determine that non-military measures as referred to in Chapter VII were not capable of giving effect to the Council’s decision.<sup>12</sup>

Promptly, the Security Council, acting under Chapter VII, authorized the United States and any others willing to “use all necessary means” through an ad hoc Unified Task Force (UNITAF) to achieve the objectives specified in the Council resolution.<sup>13</sup> This was adopted unanimously. On March 26, 1993 the Council, again acting under Chapter VII, authorized the replacement of the essentially American force of 37,000 with a multinational coalition of the willing without direct U.S. participation to carry out an expanded peace and security mandate, the expanded United Nations in Somalia (UNOSOM II).<sup>14</sup>

Another example of this genre was the Council’s “exceptional” authorization, in 1994, of a multinational force under “unified command and control” to “use all necessary means to facilitate the departure from Haiti of the military leadership” that had overthrown its democratically elected government.<sup>15</sup> On this occasion, the

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12. *Letter from the Secretary-General, to the President of the Security Council* (Nov. 29, 1992), 47th Sess., U.N. Doc. S/1992/24868.

13. S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg. at 63, 64, U.N. Doc. S/RES/497 (1992).

14. S.C. Res. 814, U.N. SCOR, 48th Sess., 3188th mtg. at 1, U.N. Doc. S/RES/814 (1993).

15. S.C. Res. 940, U.N. SCOR, 49th Sess., 3413rd mtg. at 1, U.N. Doc. S/RES/940 (1994).

resolution was passed by a vote of 13-0, with Brazil and China abstaining.

Yet another instance of this adapted power was the mandate given by the Security Council to another ad hoc “coalition of the willing,” the United Nations Protection Force (UNPROFOR),<sup>16</sup> in the former Yugoslavia. Its mandate was gradually extended to include the defense of Bosnian “safe areas.”<sup>17</sup> When those safe areas and the UN personnel in them came under attack, air strikes by NATO were deployed against Serb heavy weapons. This cooperation between UNPROFOR forces deployed in Yugoslavia, under the direction of the Secretary-General, and NATO’s air and naval command was authorized by the Security Council<sup>18</sup> in a resolution of June 4, 1992 which called for close coordination between the Secretary-General and NATO air power<sup>19</sup>—the “double key” approach. This approach was later extended to operations in Croatia.<sup>20</sup> In 1997 the Security Council, with only the abstention of China, authorized a “protection force” to restore order in Albania.<sup>21</sup>

In both the Haitian and Yugoslav instances, the respective Security Council resolutions were adopted unanimously, validating the conclusion that creative adaption of the Charter effectively had introduced a new form of collective security based on ad hoc “coalitions of the willing,” including the authorization by the Council of regional force. The Security Council confirmed this conclusion while stretching the precedents a bit further in 1997, by retroactively authorizing the armed forces (ECOMOG) of the Economic Community of West African States (ECOWAS) to take military measures to end the carnage of the Liberian Civil War.<sup>22</sup> The term

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16. S.C. Res. 743, U.N. SCOR, 48th Sess., 3055th mtg. at 8, U.N. Doc. S/RES/743 (1992).

17. S.C. Res. 836, U.N. SCOR, 48th Sess., 3228th mtg. at 1, U.N. Doc. S/RES/836 (1993).

18. *Id.*

19. *Id.*

20. S.C. Res. 958, U.N. SCOR, 49th Sess., 3461st mtg. at 1, U.N. Doc. S/RES/958 (1994).

21. S.C. Res. 1101, U.N. SCOR, 52nd Sess., 3758th mtg. at 1, U.N. Doc. S/RES/1101 (1997); S.C. Res. 1114, U.N. SCOR, 52nd Sess., 3791st mtg. at 1, U.N. Doc. S/RES/1114 (1997).

22. S.C. Res. 1116, U.N. SCOR, 52nd Sess., 3793rd mtg. at 1, U.N. Doc. S/RES/1116 (1997). This resolution establishes a UN observer presence in Liberia alongside ECOMOG

“retroactively” is used to highlight an important further development: that the Council ratified unauthorized regional use of force after it had already begun to operate.

### III. THE VIABILITY OF ARTICLE FIFTY-ONE

The failure to realize the aims of Article 43 caused the Charter system to invent an alternative: the “coalition of the willing” authorized by the Council to use force collectively.

An additional important adaption of the Charter was dictated by changes in the way aggression came to be committed in the post-World War Two era. By the terms of Article 51, the Charter envisaged that states, individually or through treaty-based regional or mutual-defense systems, would defend themselves against an armed attack until such time as the UN, acting under Chapter VII of the Charter, could deploy Article 43 forces to combat the aggression. Not only were Article 43 forces not forthcoming, but neither were the sorts of conventional armed attacks visualized by Article 51. Thus the right of self-defense, just as it had become more important due to the system’s failure to provide its promised collective security, also became more problematic as it was limited, textually, to responses to traditional armed attacks.

Three developments threatened to make this part of the Charter system unworkable. One was the virtual tactical replacement of military aggression with surrogate warfare, waged indirectly by subversion and covert foreign intervention in civil wars. This was not the kind of traditional “armed attack” against which the “inherent right of individual or collective self-defense” was designed to provide protection.

The second development featured the transformation of weaponry to instruments of overwhelming and instant destruction. These brought into question the conditionality of Article 51, which limits states’ exercise of the right of self-defense to the aftermath of an

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forces and “[n]ote[s] with appreciation the active efforts of ECOWAS to restore peace, security, and stability to Liberia, and commend[s] those African states have and continue to contribute to ECOMOG . . .” For a similar endorsement of ECOMOG deployment in Sierra Leone, see S.C. Res. 1162, U.N. SCOR, 53rd Sess., 3872nd mtg. at 1, U.N. Doc. S/RES/1162 (1998).

armed attack. Inevitably, first strike capabilities begat a doctrine of “anticipatory self-defense,” for which the literal text of the Charter made no provision.

The third new development is the most difficult to assess. Undoubtedly, however, a new ethos had begun to develop that challenged traditional Westphalian notions of sovereignty. Article 2(7)’s promise that the UN will not intervene in matters “essentially within the domestic jurisdiction of any state” began to be tested against changing perceptions of sovereignty and new concepts of human rights. A doctrine of “humanitarian intervention” began to emerge in practice, for which the Charter provides no literal textual support.

These unanticipated circumstances have led the Charter system to confront new and controversial “interpretations” of the right of states to use armed force in the absence of Security Council authorization.

#### IV. SELF-DEFENSE AGAINST ANTICIPATED AND INDIRECT AGGRESSION

Of particular difficulty in light of subsequent developments is the requirement in Article 51 that the “inherent right of self defense” can only be exercised “if an armed attack occurs against a member state.” It was the United States that had insisted on inserting this phrase. Green Hackworth, the State Department’s legal adviser, was alarmed that this language “greatly qualified the right of self-defense,” but Governor Harold Stassen, deputy head of delegation at San Francisco, refused to yield, insisting “that this was intentional and sound. We did not want exercised the right of self-defense before an armed attack had occurred.”<sup>23</sup> When another member of the U.S. delegation, Mr. Gates, “posed a question as to our freedom under this provision in case a fleet had started from abroad against an American republic, but had not yet attacked,” Governor Stassen replied that “we could not under this provision attack the fleet but we could send a

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23. *Minutes of the Forty-Eighth Meeting (Executive Session) of the United States Delegation, Held at San Francisco, Sunday, May 20, 1945, 12 Noon, in 1 FOREIGN RELATIONS OF THE UNITED STATES 1945, 813, 818 (1967).*



fleet of our own and be ready in case an attack came.”<sup>24</sup>

The exchange illustrates how little the contemporary advances in the technology of war had informed the thinking of the Charter’s drafters, making it necessary for the Charter to respond in practice to these challenging transformations. In San Francisco, the founders deliberately closed the door to any claim of “anticipatory self-defense,” but that posture was soon challenged by the exigencies of a new age of nuclear warheads and long-range rocketry.

It has been asserted that the emergence of “new age” weaponry makes it illogical to require states to sit still until an “armed attack” against them has occurred. Where the state is small and the potential attacker powerful or equipped with a “first strike capability,” there is verisimilitude to the claim that Article 51 should be interpreted to allow anticipatory self-defense. This may even have been acknowledged tacitly by the UN when, after Israel’s “preventive” attack on Egypt in 1956, it did not criticize this action but rather authorized the stationing of UN peacekeepers along a line that left Israel temporarily in occupation of much of the Sinai. Israel again made reference to anticipatory self-defense in 1967. And again, the UN “in its debates in the summer of 1967, apportioned no blame for the outbreak of fighting and specifically refused to condemn the exercise of self-defense by Israel.”<sup>25</sup> This time, Israel remained in occupation of most of the Sinai until a peace treaty with Egypt was negotiated.

Similar claims to use force in anticipatory self-defense were made by the United States in 1962 when it imposed a naval quarantine on Cuba to compel the removal of Soviet missiles said to pose an immediate threat to American security,<sup>26</sup> and again in 1986 when U.S. aircraft attacked bases in Libya allegedly used for terrorist attacks on its citizens abroad.<sup>27</sup> Indeed, even the International Court

24. *Minutes of the Thirty-Eighth Meeting of the United States Delegation, Held at San Francisco, Monday, May 14, 1945, 9:05 a.m.*, in 1 FOREIGN RELATIONS OF THE UNITED STATES 1945, 707, 709 (1967).

25. MALCOLM N. SHAW, INTERNATIONAL LAW 429 (1977).

26. Pres. John Fitzgerald Kennedy, *Proclamation 3504: Interdiction of the Delivery of Offensive Weapons to Cuba*, 57 AM. J. INT’L L. 512 (1963).

27. Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 80 AM. J. INT’L L. 612, 632 (1986).

has been ambiguous about the use of force in situations of supreme provocation. In its 1996 *Advisory Opinion on the Legality of the Use of Nuclear Weapons in Armed Conflict*, it was unable to decide definitively whether an otherwise unlawful act—recourse to nuclear weapons in anticipatory self-defense—would be lawful if the very existence of the state were threatened.

These instances pose an intractable dilemma. On the one hand, it is evident that any adaption of the Charter's absolute prohibitions on the unilateral or initiatory use of armed force would be nullified if each state were free to determine for itself whether a perceived danger of attack warrants anticipatory action. On the other hand, law that seeks to prohibit a state from protecting its very survival until the threat to it has eventuated is irrational and ineffectual.

This dilemma cannot be resolved in the abstract. Formulating an applicable principle may be easy, but the devil is in its application: how to make—credibly and impartially—the key determination that, in a particular instance, extreme necessity does or does not exist, so as to justify a military action? Who shall decide and on what facts?

Even traditional deference to U.S. Secretary of State Daniel Webster's opinion in the arbitration arising out of the 1837 *Caroline* incident<sup>28</sup> does not go far to resolve the problem of its application to an infinite variety of factual situations in the absence of mandatory recourse to an impartial judge or jury. In seeking a resolution of this hiatus, it is less important to fine-tune the legal formula than to agree on institutions and procedures for getting the facts speedily and correctly, on which to base a sensible systemic response to the claim to have acted in "anticipatory self-defense."

Even more troublesome is the question whether force in self-defense may be used against indirect aggression by one state or its surrogates. Indirect aggression includes the fomenting of civil war by one state in another state, or supporting the export of insurgency, subversion, and terrorism. It includes acts perhaps analogous to, but

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28. Webster considered that there had to be a "necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation," and that the act should involve "nothing unreasonable or excessive, since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it." See ROBERT JENNINGS & ARTHUR WATTS, 1 OPPENHEIM'S INTERNATIONAL LAW 420-27 (9th ed. 1992).

not factually the same as, the conventional armed attack envisaged by the self-defense provision of the Charter.

With the beginning of the Cold War—inhibited by a nuclear balance of terror but otherwise unconstrained in zealotry—some states saw “surrogate warfare” as the best means to spread their influence and ideology. With the end of the Cold War, other states have felt freer to emulate this tactic.

Increasingly, states claiming to be the victim of indirect or surrogate aggression have sought recourse under the right of self-defense in Article 51. This sometimes has taken the form of an armed response against the state from which the indirect or surrogate attack is said to originate. In its controversial and deeply divided decision in *Nicaragua v. U.S.A.*, the International Court of Justice appeared to uphold the right of a state subject to indirect aggression to receive military support in collective self-defense, but not its right to intervene militarily against the state from which the surrogate aggression was launched or supported.<sup>29</sup> The case also underscored the importance of basing any principled decision in any particular case on a credible assessment of the facts—something the UN system is not always well-equipped to provide.

Despite the court’s *Nicaragua* ruling, the practice of intervening militarily in a country from which interventions emanate becomes increasingly tolerated practice. Turkey has occupied base areas in Iraq used by Turkish Kurds to fight for their independence. Russia has threatened to attack Afghanistani bases that support Chechen rebels. These events have passed with little or no comment at the UN, a sharp break with the vigorous condemnation that had earlier met Israeli occupation of PLO base areas in Lebanon.

Perhaps this growing tolerance is as it should be. Why should a state under attack from abroad by terrorists or insurgents supported by a foreign state grant those forces immunity in a so-called “safe haven”? When, after hundreds of persons were killed in the bombing of the United States embassies in Nairobi and Dar-es-Salaam, the United States launched retaliatory strikes against Osama bin-Laden’s base in Afghanistan and a factory near Khartoum, there was scarcely

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29. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, at ¶¶ 232, 249 (June 27).

any criticism and no recourse to the UN. On the other hand, while there may be support for the principle behind such actions, again the devil is in its contextual application. If admitted, how is the principle to be kept from becoming a license for every state taking the law into its own hands—no matter how flimsy its evidence of wrongdoing?

It is not merely new agreed upon principles that appear to be needed, but rather an effective, credible process for their implementation: a way to distinguish those instances where a state's recourse to force is factually and contextually justified and those where it is not. A white-knuckled insistence on the letter of the law embodied in Article 51 will lead to ever-greater disrespect for an obsolete principle. On the other hand, relaxation of Article 51's absolutism would be very dangerous to world peace unless new principles are not only agreed upon, but a process is instituted for these principles to be applied credibly. We shall return to this matter after examining the third recent development challenging strict construction of Article 51.

#### V. THE HUMANITARIAN INTERVENTION ISSUE

The UN system has not been oblivious to the fact that not all violations of Article 51—that is, resorts to armed force that were neither provoked by a direct armed attack nor authorized by the Security Council—are precisely the same. This is evidenced by the significant variation from case to case of the international system's reaction—the degree of approbation or disapprobation—when states have claimed to be acting in a reconfigured version of self-defense. In practice, the reactions of the system have varied across a broad spectrum. Benign silence greeted Tanzania's ouster of Idi Amin's brutal regime in Uganda, France's intervention against the mad Emperor Bokassa of the Central African "Empire," and America's air strike against the Sudan and Afghanistan after the destruction of U.S. embassies in Dar-es-Salaam and Nairobi by the forces of Osama bin-Laden. The UN system appears tacitly to have accepted the need for allied intervention in northern Iraq in 1991-92 to save the Kurdish population, even though textually required authorization by the

Security Council was not then forthcoming.<sup>30</sup> Instead the UN, in effect, stepped in after the unauthorized allied military intervention had compelled Iraq to agree to the positioning of 500 UN guards to protect the local population's access to humanitarian efforts on their behalf.<sup>31</sup> Mild formal reprimand greeted Israel's incursions into Uganda to rescue hijacked passengers at Entebbe and into Argentina to seize the war criminal, Eichmann. India's intervention in Bangladesh got off with a light reprimand.

On the other hand, there was fulsome condemnation of the Soviets' invasion of Hungary, and U.S. occupation of Grenada. For years the UN steadfastly refused to recognize the results of the use of force by Vietnam in Cambodia, and still will not legitimate the military presence of Turkey in Cyprus. The UN system clearly refused to legitimate the use of force by Indonesia in East Timor or by Morocco in the Western Sahara.

Thus, it can be argued that the UN system, far from literally and mechanically applying Article 51 to each of these cases, has made a carefully nuanced analysis of each. Perhaps the system unselfconsciously has been reworking the Charter text to conform to a less rigid principle and is seeking to apply this adapted version of the applicable principle on a case-by-case basis, informed by the context and the facts as much as by an abstract normative concept.

Where would a more contextually sensitive adaption of Article 51 lead? That question arises most starkly in the context of humanitarian intervention.

Secretary-General Kofi Annan has captured the essence of this tension between an intolerably inflexible principle and the equally intolerable *carte blanche* that might result were the inflexible rule simply abandoned without any new checks and balances in place. The issue arises unavoidably out of NATO's action in Kosovo. Annan remarked on this profound dilemma:

To those for whom the greatest threat to the future of the

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30. See S.C. Res. 688, U.N. SCOR, 46th Sess., 2982nd mtg. at 31, U.N. Doc. S/RES/688 (1991). The resolution, passed April 5, 1991, while condemning Iraqi repression of the Kurds, does not authorize the military action by allied powers.

31. Carl-August Fleischhauer, Remarks at the Proceedings of the American Society of International Law (April 4, 1992) (on file with author).

international order is the use of force in the absence of a Security Council mandate, one might ask, not in the context of Kosovo but in the context of Rwanda, if, in those dark days and hours leading up to the genocide, a coalition of states had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?

To those for whom the Kosovo action heralded a new era when States and groups of States can take military action outside the established mechanisms for enforcing international law, one might ask: Is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances?<sup>32</sup>

## VI. IS THERE LIGHT AT THE END OF THIS DILEMMA?

One possible answer based on the actual practice of UN organs is that the UN system already tolerates, ultimately cooperates with, and may even commend military action by states when such action is taken to avert a demonstrable catastrophe. The kind of catastrophe is relatively easily answered in principle; the principle being derived from the actual responses of the UN system to such uses of unauthorized force.

The system has responded benevolently when anticipatory force has been used solely to prevent a demonstrably imminent and potentially overwhelming threat to a state's security. It has also responded benevolently when unauthorized force is used solely to contain or end a state's instigation of, or tolerance for, indirect aggression. Finally, the system has responded benevolently to the use of unauthorized force solely for the purpose of preventing a major humanitarian catastrophe.

"The system responded benevolently" means either specific

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32. U.N. GAOR, 54th Sess., 4th plen. mtg. at 2, U.N. Doc. A/54/PV.4 (1999).

consent or silent acquiescence. The Security Council or General Assembly have approved *ex post facto* the previously unauthorized use of force (as in the instance of ECOMOG's intervention in Liberia). The Council has defeated resoundingly a vote of censure of NATO's intervention in Kosovo.<sup>33</sup> Both the Council and Assembly have avoided censure of the unauthorized use of force by Israel in its preemptive strike against Egypt in 1967, of the Turkish invasion of Cyprus in 1974, of Tanzania's invasion of Uganda in 1979, and of the U.S. bombing of Osama bin-Laden's training camps in Afghanistan in 1998. These instances of benevolent response contrast eloquently with the systemic condemnation of uses of force that were not considered warranted by the facts and circumstances. Examples include the UN system's unrelenting opposition to the Israeli invasion of Lebanon, to Morocco's taking of the Western Sahara, and to Indonesia's seizure of East Timor.

It also may be argued that the system has responded benevolently to a use of force if the UN participates positively in its consequences: for example, by agreeing to provide the transitional regime for Kosovo, or by policing the Green Line created by Turkish intervention between ethnic Turks and Greeks in the Cyprus civil war. Was the admission of Bangladesh to the UN after Indian troops had won its independence not a form of absolution?

The UN organs have not always acted wisely, of course. It is difficult to defend as principled the General Assembly's ten-year-long rejection of the credentials of the Government of Cambodia. True, that government had been installed by invading forces from Vietnam; but it was surely an improvement, in humanitarian terms, over the Khmer Rouge. That Vietnam's use of force violated the Charter text is beyond question, but, in the absence of some collective remedy under UN auspices, can one really say that the world has an interest in defending Cambodian sovereignty even if it means the methodical murder of a large part of the Cambodian people? What kind of principle is that? Must the system always give preference to its rule against recourse to force over the emergent rules of humanitarian law and human rights? Juries sometimes get it

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33. U.N. SCOR, 54th Sess., 3989th mtg. at 6, U.N. Doc. S/PV.3989 (1999).

wrong, especially in close cases where the facts are inadequately represented. Of note in Vietnam's defense of its action before UN organs is its government's reticence in presenting evidence of Khmer Rouge atrocities, perhaps because its invasion was even then installing a former Khmer Rouge commander as Cambodia's new ruler.

If a sort of consensus is emerging around the principles applicable to defense against egregious instances of several kinds of aggression not adequately covered by Article 51's concept of an "armed attack," who should apply these principles? Is it acceptable to leave their case-by-case application to the "jury" that is the Security Council or the General Assembly? It is clear that they already have the authority under the Charter to perform this jurying function. In the words of Professor Rosalyn Higgins: "[I]t has come to be accepted almost as a matter of principle that the authority to decide upon disputed questions of the interpretation of the Charter belongs to the organ charged with their application."<sup>34</sup> Thus, it is "significant that at the San Francisco Conference the proposal to confer the point of preliminary determination [of jurisdiction] upon the International Court of Justice was rejected."<sup>35</sup>

Instead, two key questions were left to be solved primarily by the political organs: whether a matter is beyond the UN's jurisdiction because it is "essentially within the domestic jurisdiction" of states and whether, consequently, the UN is barred from taking a proposed action because to do so would violate the requirement not to "intervene" in such matters. "[S]uffice it to say," Higgins concludes, "that the political organs of the United Nations have clearly regarded themselves entitled to determine their own competence."<sup>36</sup> Moreover, she adds, these interpretations of the Charter are made by the political organ not through a formal decision but as a merged, or even submerged, part of its "decisions on the matter at issue, and often . . .

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34. ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 66 (1963).

35. *Id.* at 66 n.27 (discussing the failure of a Greek proposal to give sole *competenz-competenz* which secured 14-17 support, but not the necessary two-thirds majority needed to amend the draft); *see also* Leich, *supra* note 27.

36. HIGGINS, *supra* note 34, at 66-67.



by implication.”<sup>37</sup> While under Article 96 of the Charter the International Court may be asked to render an advisory opinion, Higgins stresses that judicial “consultation is not obligatory”<sup>38</sup> and resort to it has been infrequent.

More often than not, the political organs of the UN have interpreted the Charter sensibly but, in the words of the Privy Council, as if it were “a living tree,”<sup>39</sup> capable of adapting to changing circumstances.

Another thing that may be said about the record of the Council and Assembly in applying the Charter to unauthorized uses of force is that decisions are affected profoundly, if not always decisively, by the quality of the information available to those bodies. The Council’s firm response to North Korea’s invasion of the South was facilitated by a report of the Secretary-General<sup>40</sup> based on first-hand reporting by a UN team present in Seoul. By way of contrast, the reporting on conditions in Kosovo leading up to the NATO strike was less satisfactory, the UN-sponsored OECD mission to Kosovo having been withdrawn.<sup>41</sup>

It may be that Russia or China would have vetoed collective military action against Yugoslavia even had the Secretary-General been in a position to present a credible, timely assessment of the humanitarian crisis. But the costs of casting such a veto would have been very high. Moreover, in such an event, the NATO states might have been better positioned to take their case to the General Assembly under the “Uniting for Peace” procedure.<sup>42</sup>

37. HIGGINS, *supra* note 34, at 66-67.

38. HIGGINS, *supra* note 34, at 67.

39. *Edwards v. A.G. Canada*, [1930] A.C. 124 at 136 (P.C.).

40. U.N. SCOR, 5th Sess., 473rd Mtg. at 3, U.N. Doc. S/1496 (1950).

41. S.C. Res. 1160, U.N. SCOR, 53rd Sess., 3868th mtg. at 1, U.N. Doc. S/RES/1160 (1998); S.C. Res. 1203, U.N. SCOR, 53rd Sess., 3937th mtg. at 1, U.N. Doc. S/RES/1203 (1998); *Letter from the Secretary-General, to the President of the Security Council* (Mar. 25, 1999), U.N. Doc. S/1999/338 (1999) (notifying withdrawal of Kosovo Verification Mission).

42. G.A. Res. 377(V), U.N. GAOR, 5th Sess., Supp. No. 20, at 10, U.N. Doc. A/1775 (1950).

## VII. CONCLUSION

The Charter system has proven resilient in the face of changing fundamental circumstances to which it has learned to adapt. It is the practice of the principal organs—the Security Council, the General Assembly, and the Secretary-General, sometimes aided by the Court—that has helped it adapt.

Reading the practice of these organs, it is possible to conclude that the use of force by a state or regional or mutual-defense system is likely to be tolerated if there is credible evidence that such first-use was justified by the severe impact of another state's indirect aggression or by clear evidence of an impending, planned, and decisive attack by a state or by an egregious and potentially calamitous violation of humanitarian law by a government against its own population or a part of it.

Even if there appears to be a high level of agreement as to these emerging general principles, the more difficult challenge is to apply them, case-by-case, to the specifics of each crisis. There is no realistic alternative to the Council and Assembly as the global juries. True, the jurors are not all disinterested, unbiased citizens of the world community. But neither are they, or most of them, blind to credible evidence—evidence of states party to a crisis on their own behalf and evidence adduced by an augmented system of fact-finding reporting to the political organs through the Secretary-General. Most governments do respond to clear and unimpeachable evidence of the facts and of their sociopolitical context.





