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Collective Security and UN Reform: Between the Necessary and the Possible

Thomas M. Franck*

I. THE UN'S ORIGINAL MISSION

Article 1(1) of the UN Charter states the primary purpose of the international organization thus: "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace."

Such an ambitious commitment to a new international order raised not only high hopes but also crucial questions regarding its implementation. Who is to determine whether there has been a breach of "international peace and security"? What "collective measures" are to be taken in the event of such a breach, and by whom?

These crucial questions were not overlooked by the nations as they negotiated the post-war order and, in the words of the Charter's preamble, set about preparing the contours of a new institutional process by which "to save succeeding generations from the scourge of war." After forty million deaths caused by the just-ended conflict,¹ states well understood the necessity for collective security and sought to invent a process—replete with parliamentary, executive and judicial institutions²—which, if utilized properly, would ensure against the recurrence of such global catastrophes by timely decisions and effective means.

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¹ See <<http://www.worldwar2database.com/html/frame5.htm>> (visited Oct 5, 2005).

² See United Nations Charter, arts 9–22, 55–60 (setting out the parliamentary structure and powers of the General Assembly, including budgetary authority); United Nations Charter, arts 23–51 (regarding the executive authority of the Security Council, including the use of force); United Nations Charter, arts 97–101 (establishing the Secretariat as the UN's administrative agency); and United Nations Charter, arts 92–96 together with the annexed Statute of the International Court of Justice (establishing the UN's judicial branch).

The Charter does establish norms, procedures and a process for implementing collective security. Article 39 authorizes the Security Council to make the crucial threshold determination as to the existence of a “threat to the peace, breach of the peace, or act of aggression” and to decide which of the measures enumerated in Articles 41 and 42 to invoke in dealing with the problem. These measures are not trivial and range from diplomatic and economic sanctions³ to “action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”⁴ In Article 43, the ratifying parties even agreed to establish and “contribute to” an armed force “available to the Security Council, on its call . . . for the purpose of maintaining international peace and security.”⁵

How well did this plan succeed? The answer to that question appropriately serves as surrogate for another: *how necessary is it, sixty years after it was instituted, to reform the UN system?*

The question is not easily answered in abstract theoretical terms. Some parts of the answer are clear. The promised stand-by force was never created—no states having carried out their obligation to negotiate the necessary agreement with the Security Council.⁶ Peacekeeping-type operations in Namibia,⁷ Cambodia,⁸ Mozambique,⁹ Haiti,¹⁰ Liberia,¹¹ Sierra Leone,¹² the Ivory Coast¹³ and, so far, Kosovo¹⁴ may be accounted qualified successes. Somalia,¹⁵ Rwanda¹⁶ and Bosnia¹⁷ stand out as failures.

³ Id at art 41.

⁴ Id at art 42.

⁵ Id at art 43.

⁶ Thomas M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* 20, 22–23 (Cambridge 2002).

⁷ UNTAG established by Security Council Res No 435, UN Doc S/RES/435 (1978).

⁸ UNTAC established by Security Council Res No 745, UN Doc S/RES/745 (1992).

⁹ ONUMOZ established by Security Council Res No 797, UN Doc S/RES/797 (1992).

¹⁰ UNMIH established by Security Council Res No 867, UN Doc S/RES/867 (1993); UNSMIH established by Security Council Res No 1063, UN Doc S/RES/1063 (1996); UNTMIH established by Security Council Res No 1123, UN Doc S/RES/1123 (1997); MIPONUH established by Security Council Res No 1141, UN Doc S/RES/1141(1997); MINUSTAH established by Security Council Res No 1542, UN Doc S/RES/1542 (2004).

¹¹ UNOMIL established by Security Council Res No 866, UN Doc S/RES/866 (1993).

¹² UNOMSIL established by Security Council Res No 1181, UN Doc S/RES/1181 (1998).

¹³ MINUCI established by Security Council Res No 1479, UN Doc S/RES/1479 (2003); UNOCI established by Security Council Res No 1528, UN Doc S/RES/1528 (2004).

¹⁴ UNMIK established by Security Council Res No 1244, UN Doc S/RES/1244 (1999).

Other evidence of success and failure is more ambiguous. Ultimately, how one assesses the first sixty years of UN collective security will depend not only on one's appraisal of what has happened, but also on what has not happened. Yes, there have been notable instances of aggression which the collective security system has failed to anticipate and suppress.¹⁸ Much more difficult to weigh against the ample instances of non-compliance are the many instances in which the system worked to avert, or end a conflict.¹⁹ Even more difficult to measure is the phenomenon of "the dog that did not bark": instances when states may have been tempted to resort to unlawful force but did not do so, choosing instead to resolve a dispute by peaceful means in deference to the rules and the perceived cost of violating them.²⁰ Then, too, performance must always be balanced against expectations, realistic or optimistic, which are necessarily subjective. On balance, given the failure to establish a standing force and the problems created by the Cold War, the first half-century of the collective security system's operation may have been like Dr. Johnson's dog walking on his

¹⁵ UNOSOM I established by Security Council Res No 751, UN Doc S/RES/751 (1992); UNITAF authorized by Security Council Res No 794, UN Doc S/RES/794 (1992); UNOSOM II established by Security Council Res No 814, UN Doc S/RES/814 (1993).

¹⁶ UNOMUR established by Security Council Res No 846, UN Doc S/RES/846 (1993); UNAMIR established by Security Council Res No 872, UN Doc S/RES/872 (1993).

¹⁷ UNPROFOR established by Security Council Res No 743, UN Doc S/RES/743 (1992).

¹⁸ Franck, *Recourse to Force* at 70–72 (cited in note 6) (discussing Warsaw Pact–Hungary 1956); id at 72–73 (discussing US–Dominican Republic 1965); id at 73 (discussing USSR–Czechoslovakia 1968); and id at 139–143 (discussing India–Bangladesh 1971).

¹⁹ See, for example, UNFICYP Turkey–Cyprus created by Security Council Res No 186, UN Doc S/RES/186 (1964) (pending approval by Government of Cyprus which was later secured); UNTSO established by Security Council Res No 50, UN Doc S/801 (1950) (supervising treaties ending Arab–Israeli wars); UNEF I in the Suez Canal sector and Sinai established by General Assembly Res No 1000, UN Doc A/3354 (1956) and General Assembly Res No 1001, UN Doc A/3354 (1956) (responding to call for an emergency session under Security Council Res No 119, UN Doc S/RES/119 (1956)) (using "emergency special session" powers authorized under General Assembly Res No 377(V), UN Doc A/RES/377(V) (1950)); UNEF II in the Suez Canal sector and Sinai established by Security Council Res No 340, UN Doc S/RES/340 (1973); *Case Concerning the Territorial Dispute (Libya v Chad)* 1994 ICJ 6 (Feb 3, 1994); see note 10; see generally 1991 UNYBUN, 127–130 (discussing UNAVEM/UNAVEM II in Angola respectively established by Security Council Res No 626, UN Doc S/RES/626 (1988) and Security Council Res No 696, UN Doc S/RES/696 (1991)).

²⁰ See, for example, *Case Concerning the Gabčíkovo–Nagymaros Project (Hung v Slovak)*, 1997 ICJ 7 (Sept 25, 1997); *Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indon v Malay)*, 2002 ICJ 625 (Dec 17, 2002); Thomas W. Donovan, *Guyana Invokes Annex VII of the United Nations Convention on Law of the Sea Against Suriname for Disputed Maritime Boundary*, available online at <<http://www.asil.org/insights/insigh131.htm>> (visited Sept 17, 2005).

hind legs, remarkable less for having performed badly than for having performed at all.²¹

Thus, the need for reform cannot convincingly be demonstrated solely, or even primarily, by reference to highly theoretical measures that purport to weigh the incidence of disasters not averted—that is, where the UN may be said to have failed—against those disasters which might have, but did not, occur—that is, where the UN might be thought to have succeeded. Rather, the need for reform is far more convincingly demonstrated by reference to the changing context of events in which the Charter must now operate. It would be very surprising if the new kinds of threats to peace, unanticipated in 1945, could be addressed successfully by a collective security system envisioned in an era when the threats were entirely different.

In 1945, it was rational to assume that threats to peace, as in the past, would probably take the form of one state's armies massed on the borders of another and that aggression would continue to consist of armies marching across state borders.

Soon after the Charter came into effect, however, that sort of conventional military action ceased to be the principal mode in which threats to peace tended to arise. The shift to endemic and brutal civil wars, egregious violations of a growing canon of human rights, and clandestine terrorism directed at civilians has threatened with obsolescence those systemic norms meant to address threats to the peace. These new kinds of “threats to the peace” and “acts of aggression” are not those the Charter's drafters had in mind when they formulated the UN's central mission of saving populations from the scourge of war. It is not necessary to insist upon the failure of the first half-century of UN collective measures to demonstrate the original concept's inadequacy with respect to the entirely new challenges of the unanticipated future.

II. THE TRANSFORMED CONTEXT OF COLLECTIVE SECURITY

Today, when we think about collective security we tend to visualize, not the Panzer Divisions rolling across Poland that had traumatized the drafters of the Charter, but, rather, an array of quite different threats: shadowy terrorists without national identifiers planning deadly strikes against civilians at home or abroad, religious or tribal zealots engaging in genocidal civil wars and venal dictators starving segments of their own populace for political purposes. Or we see weapons of mass destruction which, if they were actually used, would leave those attacked with no adequate means of response or survival. We also see

²¹ Samuel Johnson, *The Columbia World of Quotations*, quotation 31293 (Columbia 1996), available online at <<http://www.bartleby.com/66/93/31293.html>> (visited Sept 17, 2005).

unstable dictators pursuing the development of nuclear weapons. These threats are of a kind, or an order of magnitude, entirely different from those envisaged by the Charter's authors.

For one, they are not necessarily, "international" in the traditional sense. The new threats may, indeed, ultimately have cross-boundary impact, but civil wars and genocides generally have not begun as cross-boundary events. They may not be threats by an aggressive state but, rather, by terrorists and factional militias—entities not addressed by a Charter fashioned to deal with state-to-state provocations.

Even that might not have been an insuperable problem for a Security Council seeking to carry out its intended pivotal role in responding to a new array of threats to the peace, had the unexpectedly prolific use of the veto, almost from the very beginning, not so seriously restricted it from acting against almost any kinds of threats.²² This institutionally disastrous by-product of the Cold War undermined a fundamental assumption on which the post-war system had been based. The Charter had spelled out a bargain: states would renounce their freedom to use force unilaterally in return for a reliable systemic guarantee of collective security. Profligate recourse to the veto made that bargain untenable because states could no longer rely on the Security Council to actually authorize the collective measures necessary to protect against new threats to the peace or their legitimate national interests.²³ Rather, when a threat arose, the state causing that circumstance could be expected to be immune to collective measures either because it, itself, had a veto, or because it was sheltered under the protective wing of one of the Council's permanent members.

Another important contextual change occurred when human rights, in the era of decolonization, began to have a major impact on the human conscience, affecting, in many ways, the operations of the UN system. Throughout the world, public opinion increasingly agreed that the most egregious violations of human rights could not be allowed to stand behind a facade of state sovereignty.²⁴ The Charter, however, had not quite anticipated this shift in priorities. Its text precludes intervention "in matters essentially within the domestic jurisdiction of any state"²⁵—an obstacle which seems not to sanction

²² Franck, *Recourse to Force* at 3 (cited in note 6) (pointing out the Security Council's inability to guarantee collective security at the beginning of the Cold War).

²³ See *id.* at 163, 182 (discussing the veto threat as an obstacle to UN authorized collective security measures during the Kosovo crisis of 1999 and the Rwandan genocide of 1994, respectively).

²⁴ See, for example, Security Council Res No 181, UN Doc S/RES/181 (1963); General Assembly Res No 1761, UN Doc A/RES/1761(XVII) (1962) (both expressing condemnation for the Government of South Africa's apartheid policy).

²⁵ United Nations Charter, art 2, ¶ 7.

preventive measures to mitigate civil conflict, genocide, and even the clandestine activities of terrorists operating, technically, within the confines of one state. Yet, these are some of the most baleful activities the UN organization began to face.

Most important among the seismic transformations in the political context surrounding the UN's operation guidelines since 1945, is the exponential development of weapons of mass destruction and the near-instantaneous delivery systems. It is here that the failures of the veto-prone Security Council became most evident.

Although the Charter takes into account the potential failure of the collective security bargain if the Security Council is unable to fulfill its role, the fallback devised by the drafters singularly failed to anticipate the immense developments in weaponry which occurred in the ensuing six decades. Article 51 of the UN Charter stipulates that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations.”

Obviously, with the growing availability of ever more sophisticated nuclear, biological and chemical weapons capable of destroying entire cities, if not nations, and with the development of delivery systems impervious to interception, no nation could seriously be expected to await an actual armed attack before acting to head it off.

These are but some of the most salient examples of a shadow of obsolescence under which the global security system has increasingly had to operate during the past half-century. It had been designed for other times and very different circumstances than those that increasingly came to prevail. There may be valid arguments as to whether the world should even try to have a global system of collective security, as opposed to other alternatives such as reliance on the protective imperium of a benevolent global superpower with very deep pockets.²⁶ Surely beyond rational argumentation, however, is that—if we are to continue to participate in, and rely on, the UN—then there must be a general overhaul of the way it sets about saving future generations from the scourge of war. Ways must be found to make it much more responsive to future dangers, rather than primarily to those which, long ago, had been anticipated by the founders.

²⁶ For a general discussion, see Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo* (Palgrave 2001); Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford 2005).

Fortunately, although formal amendment of the Charter is extremely difficult,²⁷ the system of collective security has proven itself quite tractable in practice. When there is a willingness to make the Charter work in new circumstances, the dead hand of literal text has not, in the past, always barred the way to transformative change. It need not preclude even more radical and urgent reform of the system today.

III. CHARTER ADAPTION AND TRANSFORMATION

As we know from the experience of national constitutions, foundational instruments tend to be “living trees”²⁸—texts capable of expanding and flourishing in the sunlight of common usage and common sense. Creative reinterpretation of constitutional text is everywhere recognized as a necessary alternative to withering societal stasis or revolution.

During the drafting of the UN Charter, states engaged in a vigorous debate about where to place this crucial authority to interpret, and thus adjust, its mandates. Some states thought that, in line with their own constitutional experience, power of review should be vested in the judiciary, that is, the International Court of Justice, which had been designated “the principal judicial organ” of the new global system.²⁹ Others preferred to leave each UN political organ free to interpret its own sphere of authority. In these deliberations, it was decided that both the Court and the principal political organs would be competent to interpret the Charter and, thus, to participate in the process of its pragmatic adaption.³⁰ In practice, this has produced a few important judicial decisions, but also many more innovations achieved by the political organs in construing their own powers. A few instances of both may serve to illustrate the system’s potential for such renovation.

²⁷ See United Nations Charter, art 108 (requiring amendments to the UN Charter to be “adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council”).

²⁸ The phrase was coined by the Judicial Committee of the Imperial Privy Council in construing a provision of the Canadian constitution. *Edwards v AG Canada*, 1930 AC 124, 136 (PC 1930); see also Thomas M. Franck, *Is the UN Charter a Constitution?*, in Jochen Abr. Frowein, et al, eds, *Negotiating for Peace* 95, 102–03 (Springer 2003) (analogizing the UN Charter to a living organism).

²⁹ Statute of the International Court of Justice (1946) art 1, 59 STAT 1055.

³⁰ For an account of this compromise see Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* 63, 66 n 27 (Oxford 1963) (discussing claims made by signatory countries against the jurisdiction of the UN as well as a Greek effort to give sole interpretative jurisdiction to the ICJ, which narrowly missed adoption).

It is the advisory opinions³¹ of the ICJ which have established that, to protect its independence and integrity, the UN must be assumed to have been endowed with legal rights separate from, and even maintainable against, member states,³² that the abstention of a permanent member in a Security Council vote does not constitute a veto,³³ and that, when the Security Council is blocked by a veto, the General Assembly might invoke an implied “secondary” authority to take action to preserve peace and security.³⁴ Each of these watershed opinions may be seen as deduced by the judges not so much from expressed text as from what was creatively thought to be “implicit” in the “purposes” of the Charter and the institutional objectives it delineates.

The actual practice of the political organs has been even more creative. The Security Council, by its actions, has made it apparent that extreme racial discrimination as practiced in South Africa during the apartheid regime,³⁵ egregious violations of human rights as practiced by the military junta in Haiti,³⁶ disastrous civil conflict as in Somalia,³⁷ Bosnia³⁸ and the Sudan,³⁹ as well as a

31 United Nations Charter, art 96 (granting the “General Assembly or the Security Council [the power to] request the International Court of Justice to give an advisory opinion on any legal question”).

32 Advisory Opinion, *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 ICJ 174 (Apr 11, 1949) (finding the UN has the authority to bring action against an at fault member or non-member state for injuries suffered by a UN agent in the course of their duty); Advisory Opinion, *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 1988 ICJ 12 (Apr 26, 1988) (finding that the United States of America is under an obligation, under section 21 of the United Nations Headquarters Agreement, to enter into arbitration to settle a dispute with the United Nations).

33 Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 ICJ 16, 22 (June 21, 1971) (noting that an abstention does not constitute a veto in the UN Security Council).

34 United Nations Charter, art 24, bestows upon the Security Council “primary responsibility” for action to maintain peace and security. From this, the judges deduced that a “secondary responsibility” must have been vested in the General Assembly. Advisory Opinion, *Certain Expenses of the United Nations*, 1962 ICJ 151, 163 (July 20, 1962).

35 For examples of resolutions condemning the apartheid regime see Security Council Res No 134, UN Doc S/RES/134 (1960) and Security Council Res No 930, UN Doc S/RES/930 (1994).

36 See Security Council Res No 841, UN Doc S/RES/841 (1993) (imposing an arms and oil embargo on Haiti); Security Council Res No 933, UN Doc S/RES/933 (1994); Security Council Res No 940, UN Doc S/RES/940 (1994) (authorizing a multinational force to restore Haiti’s democratically elected President); Security Council Res No 944, UN Doc S/RES/944 (1994); and Security Council Res No 948, UN Doc S/RES/948 (1994) (welcoming the restoration of the democratically elected President, the departure of the military junta, and the lifting of sanctions).

37 See Security Council Res No 733, UN Doc S/RES/733 (1992) (establishing an arms embargo against Somalia); Security Council Res No 746, UN Doc S/RES/746 (1992); Security Council Res No 751, UN Doc S/RES/751 (1992) (establishing UNOSOM I); Security Council Res No 767, UN Doc S/RES/767 (1992); Security Council Res No 775, UN Doc S/RES/775 (1992); Security Council Res No 794, UN Doc S/RES/794 (1992) (authorizing UNITAF); Security Council Res

rogue regime's proven aggressive intentions when coupled with a capacity to act thereon⁴⁰ can all constitute grounds for collective measures including the introduction of observers or peacekeepers, economic sanctions, and outright military intervention. It is arguable that none of these sorts of actions were within the contemplation of the Charter's drafters in 1943–45, when, in Chapter VII, they established the outlines of the postwar system of collective security. Today, however, the text has been augmented by extensive practice. In the words of the High-Level Panel reporting to the Secretary-General on reform: "the principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing, which can properly be considered a threat to international security and as such provoke action by the Security Council."⁴¹ Notably, the Panel included senior past and present government officials from a broadly representative array of states, including each of the permanent members.

Adaption in practice has also affected the interpretation of Article 51, with its provision granting states the right to use force in self-defense, but only against "an armed attack." The text appears to prohibit the taking of military measures against any state that has not actually attacked another. In practice, the Security Council has deliberately not enforced this provision when force was used to forestall an evidently imminent attack—as in the instance of the Arab-

No 814, UN Doc S/RES/814 (1993) (establishing UNOSOM II); Security Council Res No 837, UN Doc S/RES/837 (1993); Security Council Res No 954, UN Doc S/RES/954 (1994) (calling for an end of UN operations in Somalia by March 1995 due to lack of progress in the peace process).

³⁸ See Security Council Res No 713, UN Doc S/RES/713 (1991) (establishing an arms embargo on the Socialist Federal Republic of Yugoslavia); Security Council Res No 721, UN Doc S/RES/721 (1991); Security Council Res No 724, UN Doc S/RES/724 (1991) (establishing a Security Council Committee concerning the Socialist Federal Republic of Yugoslavia); Security Council Res No 727, UN Doc S/RES/727 (1992) (strengthening the arms embargo); Security Council Res No 740, UN Doc S/RES/740 (1992); Security Council Res No 743, UN Doc S/RES/743 (1992) (establishing a UN Protection Force which terminated in December 1995).

³⁹ See Security Council Res No 1547, UN Doc S/RES/1547 (2004) (establishing UN Advance Mission in Sudan) and Security Council Res No 1593, UN Doc S/RES/1593 (2005) (referring the situation in Darfur to the International Criminal Court).

⁴⁰ See Security Council Res No 1441, UN Doc S/RES/1441 (2002) (recognizing "the threat Iraq's noncompliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles poses to international peace and security") and Security Council Res No 1511, UN Doc S/RES/1511 (2003) (authorizing a multinational force to take all necessary measures to secure and stabilize Iraq).

⁴¹ United Nations, *A More Secure World: Our Shared Responsibility*, Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, UN Doc A/59/565 at 65, ¶ 200 (2004).

Israeli war of 1967⁴²—or to prevent a humanitarian catastrophe—as in the instance of Tanzania’s ouster of Idi Amin in 1978—or to end a disastrous civil war—as in the Economic Community of West African States (ECOWAS) interventions in Liberia and Sierra Leone.⁴³ The UN Secretary-General, himself, has spoken of the shameful failure of states to intervene to rescue the eight hundred thousand Tutsis before they were murdered in Rwanda.⁴⁴ Clearly, the practice of the Council has allowed some sensible exceptions to the “armed attack” requirement, thereby making the concept of “self-defence” more consonant with modern realities.

This further evidence of the evolutionary nature of the UN Charter has been acknowledged by the Report of the High-Level Panel⁴⁵ which was able to agree that Article 51, despite what may be gleaned from a strict constructionist reading of the text, in practice now permits “a threatened State” to “take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate.”⁴⁶ This interpretation of the Charter, a view formally confirmed by the Secretary-General,⁴⁷ unequivocally recognizes a right to anticipatory self-defense in limited circumstances and effectively removes one of the most serious normative hurdles on the way to keeping the collective security system relevant to contemporary threats.

IV. WHERE ADAPTION HAS NOT YET WORKED

Article 51 is unique, within the Charter, in that it is self-executing. It permits states to use force in self-defense at their own discretion, without having to go to the Security Council for approval. This makes sense, since convincing facts pertaining to an armed attack—“who attacked whom?”—are readily adduced and falsified claims, in instances where a state falsely reports being

⁴² See Security Council Res No 233, UN Doc S/RES/233 (1967); Security Council Res No 234, UN Doc S/RES/234 (1967); Security Council Res No 235, UN Doc S/RES/235 (1967); Security Council Res No 236, UN Doc S/RES/236 (1967); Security Council Res No 237, UN Doc S/RES/237 (1967) (all calling for adherence by all parties to the cease-fire ordered by the Security Council and for cooperation by all parties with UNTSO).

⁴³ See Security Council Res No 866, (addressing Liberia) (cited in note 11); Security Council Res No 1181 (addressing Sierra Leone) (cited in note 12).

⁴⁴ See Report of the Secretary-General, UN GAOR, 54th Sess, 4th mtg at 2–3, UN Doc A/54/PV.4 (1999).

⁴⁵ United Nations, *A More Secure World* (cited in note 41).

⁴⁶ *Id.* at 63, ¶ 188.

⁴⁷ See United Nations, *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General, UN Doc A/59/2005 at 33, ¶ 124 (2005) (“Imminent threats are fully covered by Article 51.”).

attacked as a cover for its own aggressive aims, can usually be exposed.⁴⁸ That this provision allows states to act at their own initiative when attacked, or when an attack is imminent, is therefore subject to the discipline of quick fact-checking by the rest of the world.

The same cannot be said of a state's claim that it may *eventually* be the victim of a *potential* aggressor. Here, the element of extreme, self-evident peril is not present. Such a claim is extraordinarily difficult to disprove and so, if it could validly be made under the aegis of Article 51, every state making it would be free to resort to force.

The High-Level Panel has sought to address this conundrum by distinguishing between *preemptive* measures against *imminent* attack, which could be taken by a state under Article 51—that is, without the prior authorization of the Council—and *preventive* measures taken against a *non-imminent* or *non-proximate* threat.⁴⁹ The latter, the Panel said, might still constitute a bona fide “threat to the peace.” Nevertheless, that fact, in each instance, would still have to be demonstrated to the satisfaction of the Council before coercive action could be taken to avert it.

That distinction seems sensible. To permit every state to determine for itself whether, and when, to resort to the “preventive” use of force against a long-range potential threat would render meaningless the Charter's central purpose, which prohibits states’ “threat or use of force against the territorial integrity or political independence of any state” under Article 2(4). Yet the Panel's Report does not rule out preventive use of force in some situations where there is good evidence of extreme danger and the postponement of remedial action poses an unacceptable risk. If “there are good arguments for preventive military action,” the Panel said, “with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to.”⁵⁰

Although quite Solomonian at first impression, the Panel's solution to the problem of preventive action is less so upon closer scrutiny. States with the capacity to defend their own national interests are not easily convinced, based on the evidence of sixty years of UN political log-rolling, that, in the eventuality envisaged by the Panel, the Council would actually vote on the evidence, rather than on the basis of interests and alliances irrelevant to the facts. That the Panel

⁴⁸ This was the case when, in 1950, North Korea launched its attack on the South on the pretense, readily exposed by the presence of a UN Commission in the region, that it had, itself, been attacked. See Security Council Res No 82, UN Doc S/RES/82 (1950) and the attending discussion of evidence in UN SCOR 5th Sess, 473d mtg at 3 (1950).

⁴⁹ United Nations, *A More Secure World* at 63, ¶ 189 (cited in note 41).

⁵⁰ *Id* at 63, ¶ 190.

was aware of this is demonstrated by its own way of squaring the circle. If the Council does not choose to authorize a valid preventive measure despite the evidence warranting action, the Report suggests, "there will be . . . time to pursue other strategies, including persuasion, negotiation, deterrence and containment—and to visit again the military option."⁵¹

But will there?

The phrase "to visit again the military option" may be brilliantly conceived for the purpose of getting a unanimous report, but it leaves unresolved the central issue—in *extremis*, *who decides?*

And this *is* the central issue.

And it may not be resolvable. Not, in any event, by law.

V. WHAT CAN BE DONE?

The law is not always good at resolving the ultimate moral dilemmas that arise when a good and necessary general rule encounters its *reductio ad absurdum*: that is, when strict adherence to the law would engender a result significantly worse than that which the law seeks to prevent. This is a problem well known in domestic legal systems.⁵² What happens when a car carrying a gravely ill person to the hospital meets a red traffic signal? Or when starving passengers on a life-raft begin to contemplate cannibalism of one to save the many?⁵³ Or when timely action to prevent an evil state or group from deploying weapons of mass destruction is blocked by the veto of a permanent member of the Security Council?

The answer to these sorts of questions can be sought in detailed provisions that exhaustively set out the exceptions to general rules pertaining to traffic lights, cannibalism, and the use of force by states. The objection to such cataloging of the circumstances in which the general rules do not apply is that it creates loopholes not only for bona fide emergencies, but also for malefactors seeking to escape the law's prohibition and seeking an excuse to engage in the very conduct the general rules were intended to prohibit. This problem of the abuse of exceptions is particularly evident in a system like that established by the UN Charter, where there is no automatic recourse to a judiciary with authority to determine authoritatively whether, in the circumstances, an exception has been validly invoked.

⁵¹ *Id.*

⁵² For a general discussion, see Franck, *Recourse to Force* at 174–91 (cited in note 6).

⁵³ See *Regina v Dudley and Stephens*, 14 QB 273 (1884) (A late nineteenth century British case wherein two men are tried for the murder of a boy with whom they were stranded in a life-raft at sea, and the two defendants claimed a right to survival as a form of self-defense.).

An alternative to writing new rules is to seek agreement on new processes. That approach, in respect of Charter practice, would shift attention away from efforts to change the rules governing the use of force by states and focuses, instead, on the process by which the Security Council determines, case by case, whether to authorize collective measures in borderline cases. That process hinges on the veto. Problems arise when the Security Council, because of an unjustified veto, or threat of a veto, cannot deal with a threat that is widely perceived by most members, as in the instances of Rwanda⁵⁴ and Kosovo⁵⁵—but the opposition of a permanent member prevents the organ from exercising its responsibility to protect threatened states, or endangered people. In such circumstances, the problem can be revisualized: *not as one of rules but of process*, the process by which the Council is prevented from taking or authorizing the action deemed necessary by most of its members.

Any reexamination of the veto is always a fraught matter. It cannot be abolished by amending the Charter without the prior consent of the states currently entitled to exercise it. There is no possibility of such consent in the foreseeable future. Neither would it necessarily be desirable, from the perspective of effective world order, that the Council's majority be free to take action against the will of its most powerful members.

The trouble is that the veto has been used far too often, and not always to protect the permanent members' most important self-interests. These states have clients and friends who sometimes act as if they were shareholders in their protectors' veto power, demanding that it be used on their behalf even in circumstances in which the core national interests of the permanent member are not at stake. A way should be found to divest the veto-holder from this spurious duty to protect clients in situations where a majority of the Council perceives a clear necessity for timely and decisive collective action.

This might be accomplished through negotiations among the veto-wielding nations, with a view to writing a sidebar agreement between them that would enumerate a few crucial situations in which the veto would not be used to block initiatives supported by a voting majority of the Council. For example, it could be agreed that the veto would not be used to stop a resolution authorizing the use of force necessary to alleviate a humanitarian crisis caused by the failure of a government to carry out the measures previously ordered by a Chapter VII mandatory resolution, upon formal certification by the Secretary-General that there had been substantial non-compliance with the essential requisites of the prior resolution.

⁵⁴ See note 23.

⁵⁵ Id.

There is precedent for such a sidebar agreement among veto-wielding states in the San Francisco Four Power Agreement regarding a procedure that came to be called the "double veto."⁵⁶ Such a sidebar agreement is not an amendment to the Charter. It is a reciprocal commitment by some states, binding only *inter se*, not to exercise an inherent power under defined circumstances.

Such a procedural approach has the advantage of focusing the attention of the permanent members on the circumstances in which they might agree not to block action by the Council in bona fide circumstances that require timely and decisive collective measures. Such a discourse is not guaranteed success, of course, but it would manifest the serious intent of those with the most onerous responsibility for salvaging the collective security system.

Why would any permanent member be willing to enter into such a self-limiting discourse?

First, there might well be a perception by each party that they have more to gain than to lose from enhancing the capacity of an endangered collective security system. If the sixty year experiment with collective security has been less than a resounding success, so surely, has the recent experiment with unilateralism.

Second, global public opinion might make it difficult for any permanent member to insist upon the right to block the implementation of the Charter's promise of collective security, no matter how urgent the circumstances, how persuasive the evidence of crisis, and how willing other states are to help.

Third, this is a moment when it is all but certain that there will be at least six new permanent members of the Council. That means that matters will either get better or much worse. It is very much in the interest of the five who currently dispose of the veto to insist that the newcomers are not also accorded the power to block all action. But, it would be difficult to withhold the veto power from India, Japan, South Africa, Nigeria or Brazil if they become permanent members, while retaining it for the Permanent Five.⁵⁷ That sort of discrimination between new and original permanent members would be wholly unconscionable and politically unpalatable, given the strong claim of most of the new candidates, *unless it is instituted in tandem with a commitment on the part of the original veto-holders to negotiate appropriate limits on their own discretion in the most urgent exigencies.*

⁵⁶ The Five-Powers San Francisco Declaration on the veto power, San Francisco, June 8, 1945, UNCIO Doc 852, III/1/37(1), United Nations Conference on International Organization, Vol II, 711-14.

⁵⁷ Britain, China, France, Russia, and the United States.

When one looks at the system of collective security set out in the 1945 Charter, it is possible to conclude that there is not much wrong with it that could not be fixed by creative reinterpretation of obsolete norms. Indeed, there have been important steps in that direction, all along, taken both by the International Court of Justice and by the UN's political organs. What now needs to be done is to restrain and redirect the accumulated bad practices of peremptory recourse to the veto in circumstances not anticipated by the drafters and inimical to the tasks assumed by the organization. Yes, retention of the veto may still be both inevitable and even desirable, but rationally indefensible recourse to it has undermined states' willingness to entrust the protection of their national security to the collective system. If that system is to be rescued, the problem of the veto—not the veto as set out in Article 27(3) of the Charter, but as it has erroneously and mendaciously evolved in practice⁵⁸—needs to be redressed.

There is a way out of the conundrum posed when good rules inconveniently confront stark new practical necessities. This is the time for politics to do its work: achieving a synthesis between the necessary and the possible.

⁵⁸ It is worth noting that there are two limitations on the veto in Article 27 of the UN Charter. The first is that it applies only to non-procedural matters. This has never been defined. More important is the last sentence of Article 27(3) which states "a party to a dispute shall abstain from voting." This provision has never been used to compel a permanent member not to veto an action proposed by a majority of the members. An example is the inability of the Security Council to give effect to the International Court of Justice's decision in *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar v US)*, 1986 ICJ 14 (June 27, 1986) because of the threat of a United States veto. See 40 UN Handbook 186 (1986): "The Security Council considered the [ICJ] Judgment at the end of July and again in mid-October. Draft resolutions calling for compliance with the Judgment were not adopted on either occasion owing to the negative vote of a permanent Council member." That member was the United States, a party to the litigation.

