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Platonism, Adaptivism, and Illusion in UN Reform

Michael J. Glennon*

In July 2003, on the heels of the American invasion of Iraq, United Nations Secretary-General Kofi Annan held an extraordinary press conference. At it, he wondered aloud “whether the institutions and methods we are accustomed to are really adequate to deal with all the stresses of the last couple of years.”¹ He warned that we are “living through a crisis of the international system.”² “What are the rules?” he asked.³ Four months later he proceeded to appoint a group, the “High-Level Panel on Threats, Challenges and Change,” to recommend ways of “strengthening the United Nations so it can provide collective security for all in the twenty-first century.”⁴ The High-Level Panel (“Panel”) consisted of former governmental officials and in pursuing its task met at various locations around the world. Hopes ran high that its ideas would breathe new life into an organization that needed, in Annan’s words, “radical change.”⁵ In December 2004 it issued its report,⁶ which has since become the focal point of efforts at UN reform.

For a Burkean pragmatist with any sense of institutional conservation, making the most of the United Nations is a useful project. Massive amounts of capital—financial and otherwise—have been invested in the organization over the past sixty years. To the extent possible, humanity should profit from its

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¹ Felicity Barringer, *Annan Warns of World Crisis*, NY Times A16 (Jul 31, 2003).

² Id.

³ Id.

⁴ 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 vii, ¶ 3 (2004).

⁵ Jonas Hagen, *The United Nations at a Fork in the Road: The 58th General Assembly High-Level Debate*, 4.40 UN Chronicle 5 (Dec 1, 2003).

⁶ United Nations, *A More Secure World* at vii (cited in note 4).

investment.⁷ Even if the objective were merely to advance individual states' national interests, the UN might be a useful tool for doing so. In any event, it is hard to fault an organization that recognizes the need to reform itself, especially one that has borne the hopes of humanity so heavily as has the United Nations.

Sadly, however, the core recommendations of the Panel's report with respect to the use of armed force rest upon wishful thinking rather than empirical evidence. The report evinces a view of a world governed by objective, universal morality rather than by competition for power and shifting national interests. It treats substantive problems as language problems, suggesting that a new vocabulary will eliminate underlying differences. Historical context is either missing or incorrect. The report, in short, exhibits all the familiar shortcomings of old-style Platonic idealism, ignoring the real-world incentives and disincentives to which states actually respond.

The Panel offers no interpretive methodology to support its conclusions concerning the current meaning of the UN Charter. Its findings are offered *ipse dixit*. Commentators have offered a methodology to support those conclusions, however, that might be referred to as radical adaptivism. Under this approach, it is permissible to infer changes in the Charter's limits on use of force that are based upon Security Council practice. This methodology suffers from serious defects, foremost among them being a free-wheeling, outcome-oriented mode of analysis that abandons all fidelity to limitations set out in the text, views interpretation and amendment as interchangeable, and exhibits a lack of commitment to the notion of limited power and the rule of law.

I. USE OF FORCE

The Panel's core recommendation is twofold, addressing when force *may* be used and when force *should* be used. Force may lawfully be used by states, the Panel declares, only in response to an imminent threat or pursuant to Security Council authorization.⁸ Force should be used, by states or by the Security Council, only when its use is legitimate. "[A]nyone . . . involved in these decisions" should be guided by five "criteria of legitimacy" before using force: (1) whether the threat is sufficiently serious, (2) whether the purpose is proper,

⁷ Useful proposals in this regard are set out in the report of a congressional task force headed by former Representative Newt Gingrich and former Senator George Mitchell. See United States Institute of Peace, *American Interests and UN Reform: Report of the Task Force on the United Nations* (2005), available online at <http://www.usip.org/un/report/usip_un_report.pdf> (visited Sept 23, 2005). Notably, the task force declined to endorse the High-Level Panel's use-of-force findings, opining that "there is nothing exclusive about the United Nations as regards American interests. The United Nations is one of the tools that America, our allies, and other democracies use cooperatively on the basis of our shared values." *Id.* at v.

⁸ United Nations, *A More Secure World* at 61 (cited in note 4).

(3) whether every nonmilitary option has been exhausted, (4) whether the military action is proportionate to the threat, and (5) whether there is a reasonable chance of success.⁹

Many problems inhere in this approach, foremost among them that unless the Security Council approves, a state would not be permitted to use force against a serious and likely threat until it becomes imminent. This is not a reasonable limit on state power. The gravity of a threat and the probability of its occurrence are factors far more likely to determine whether a state will use force than whether the threat is imminent.¹⁰ No responsible policymaker, knowing that some rogue state or terrorist group is planning a nuclear strike, would recommend sitting tight until the attack becomes imminent. Indeed, the Panel's own criteria seem to suggest that using defensive force under such circumstances would be legitimate. Even the *New York Times*, not known for its support of unilateralism, editorialized that the suggestion is unrealistic.¹¹

Similarly out of touch is the report's condemnation of humanitarian intervention without Security Council approval. "Genocide anywhere is a threat to the security of all," the report declares, "and should never be tolerated."¹² But the Panel does not really believe that genocide is always intolerable. If the Security Council deadlocks, the Panel implies, genocide must be allowed to continue. France's invasion of the Central African Republic to end the murderous regime of Jean-Bedel Bokassa, Vietnam's invasion of Cambodia to oust the Khmer Rouge, Tanzania's invasion of Uganda that halted Idi Amin's bloodbath, NATO's 1998 air campaign against Yugoslavia to stop ethnic cleansing in Kosovo—all would have been prohibited had the Panel's preferred rules prevailed. Yet here again, under the five criteria espoused by the Panel, each such intervention might have been legitimate.

The Panel suggests that the General Assembly and the Security Council should formally adopt its legitimacy criteria as rules governing the use of force. Doing so, the report insists, "should significantly improve the chances of

⁹ Id at 67.

¹⁰ See, for example, President George W. Bush, *Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction*, Address at West Point, New York (June 1, 2002), in *National Security Strategy of the United States of America* 13, 15 (Sept 2002) ("We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack.").

¹¹ Editorial, *A UN for the 21st Century*, *NY Times* A26 (Dec 7, 2004).

¹² United Nations, *A More Secure World* at 65 (cited in note 4).

reaching international consensus on what have been in recent years deeply divisive issues.”¹³ But there is, alas, little reason to think so.

The criteria of course originate (though the Panel does not acknowledge it) in the doctrine of just war. It might actually be more accurate to say *a* just war doctrine: there is no single one. Various versions have been proffered over the centuries, each with different criteria.¹⁴ The single unifying element in competing versions is their supposed source: natural law.¹⁵ Each posits as its wellspring a single, universal, overarching set of moral precepts that all human beings everywhere are obliged to obey.

The fifth century writings of St. Augustine form the basis of just war arguments. In *The City of God*, Augustine presents a morality that he believes all right-thinking persons must necessarily accept. Good and evil, he writes, are known through “an inward law, that in thy very heart is written.” God’s law is man’s law; “lawfully’ means justly and justly means rightly.” Thus, war must be “undertaken in obedience to God.” When it is, it is a “righteous war.” War, Augustine urges, “might be waged by the good, in order that, by bringing under the yoke the unbridled lusts of men, those vices might be abolished which ought, under a just government, to be either extirpated or suppressed.” The reason that people disagree about what is just is simply that there are “erring and impious men.” If only “one faith existed in all,” we would not be plagued by such disagreements. It is no surprise that Augustine’s next chapter is entitled “Persecution of Heretics”: Sometimes, “he that inflicts [persecution] is in the right.” The “necessary . . . terror inspired” by such laws is merely “a kind of medicinal inconvenience for the cold and wicked hearts of many men.”

The enlightened members of the High-Level Panel would no doubt be horrified by such ideas, or at least by some of them. But the Panel does seem to agree with the core assumption of just war theory: All right-thinking people, everywhere, will somehow identify in unison “sufficiently clear and serious” threats to “State . . . or human security” and can in addition determine as with one mind the “primary purpose” of a given military action.¹⁶ It is important, the report counsels, that decisions be made “for the right reasons, morally as well as legally.”¹⁷ Force should be used only when “good conscience” permits.¹⁸ The

¹³ Id at 61.

¹⁴ One common account sets forth the requirement of noncombatant immunity, which the Panel’s version omits. See, for example, William V. O’Brien, *The Conduct of Just and Limited War* 37, 42 (Praeger 1981).

¹⁵ See, for example, id at 4–5.

¹⁶ United Nations, *A More Secure World* at 106 (cited in note 4).

¹⁷ Id at 66.

¹⁸ Id.

“moral stance” against terrorism must be reinforced.¹⁹ So it is only fair to ask, from what source does the Panel extract its universally “valuable” legitimacy criteria? Right reason? The Bible? The Koran? The Islamic scholar Bassam Tibi has written that “[t]he Western distinction between just and unjust wars linked to specific grounds for war is unknown in Islam. Any war against unbelievers, whatever its immediate ground, is morally justified.”²⁰ Where can we go to find more information on the Panel’s source? Why does its source trump all other potentially conflicting sources?

The question is important because “erring and impious men” continue to differ on when use of force is just—or, rather, *legitimate*. We are not yet all singing from the same hymnal. Prior to the American attack on Iraq, opposing op-eds appeared in the New York Times contending that under just war doctrine an attack was permissible (Senator John McCain)²¹ and impermissible (former President Jimmy Carter).²² Who was erring and impious? Was the Iraqi threat “sufficiently clear and serious”? What was the invasion’s “primary purpose”? What, for that matter, was the primary purpose of, say, Tanzania’s 1978 invasion of Uganda? The Ugandan head of state, Idi Amin, had murdered around three hundred thousand people, many of whom were tortured and killed in his presence.²³ Julius Nyerere, the president of neighboring Tanzania, felt “aversion” to Amin’s “murderous practices.”²⁴ Was Nyerere’s primary purpose to stop them? Or was it to repel aggression, given that the month before the Tanzanian invasion of Uganda, Uganda had invaded Tanzania? Or was it to restore Nyerere’s friend, Milton Obote, to power in Uganda?²⁵ The truth is that in most cases no one can know the principal reason why states behave as they do. Governments, like individuals, act for many reasons, some of which can barely be discerned let alone identified as “primary.”

The “source” question is important because applying the Panel’s legitimacy criteria can easily lead to contradictory results. We need to know where the criteria originate so that we can clarify questions concerning their application. The Panel’s “last resort” criterion, for example, counsels that force be used only when there exist “reasonable grounds for believing that other measures will not

¹⁹ Id at 51.

²⁰ Bassam Tibi, *War and Peace in Islam*, in Terry Nardin, ed, *The Ethics of War and Peace* 131 (Princeton 1996).

²¹ Senator John McCain, *The Right War for the Right Reasons*, NY Times A25 (Mar 12, 2003).

²² President Jimmy Carter, *Just War—or a Just War?*, NY Times § 4 at 13 (Mar 9, 2003).

²³ Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* 163 (Transnational 2d ed 1997).

²⁴ Id at 164.

²⁵ Id.

succeed.”²⁶ Yet in some circumstances where force is not a last resort, its use can still advance the ultimate objective of protecting “human security.” The Panel notes, for example, that the Security Council has stopped imposing comprehensive sanctions because of their “humanitarian impact,” but the imposition of comprehensive sanctions might still succeed in averting a threat.²⁷ Is the use of force therefore “illegitimate” until such sanctions are imposed, even though it could conceivably save more lives? In reading the High-Level Panel’s report, one is reminded of Charles Péguy’s remark to the effect that Kant’s ethics has clean hands, but it has no hands.

In resolving these and other dilemmas posed by its criteria, the Panel offers no guidance, which makes all the more puzzling its claim that its criteria will help eliminate discord. Given that just war principles have, after all, been around in one form or another through every war fought during the past fifteen centuries, what reason is there to believe that their official endorsement in a UN resolution will make a difference? Why would refitting the principles in a spiffed-up vocabulary of “legitimacy” accomplish anything more than shifting the discourse and changing the buzzwords? Indeed, any likely substantive effect would seem the opposite of that intended by the Panel. Rather than bringing humanity together, resurrecting natural law arguments from the Middle Ages could well provide fodder for zealots everywhere who need factitious intellectual ammunition with which to inflame their followers. Osama bin Laden would hardly disagree that war “undertaken in obedience to God” is a “righteous war,” a contention that derives from the same pre-Enlightenment philosophic tradition as the Panel’s proposals for “legitimate war.”

II. LAW AND FORCE

Legitimacy, then, is one metric by which the Panel urges that the propriety of armed force be measured. The other is law. What, precisely, is the law? When can a state use armed force?

On this crucial question the report is contradictory. According to the UN Charter, unless the Security Council approves, a state may use force only in self-defense in response to an armed attack. Article 51 provides 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.”²⁸ Purporting to interpret this provision, the Panel asserts that “according to long established international law,” a state can take military action only if “threatened

²⁶ United Nations, *A More Secure World* at 67, 106 (cited in note 4).

²⁷ *Id.* at 55–56.

²⁸ United Nations Charter, art 51.

attack is imminent.”²⁹ However, the Panel seems to have second thoughts about whether the imminence rule really is “long established” or, for that matter, whether any norm against aggressive war, strong or otherwise, actually exists. Earlier, the Panel acknowledges that states have not in fact honored the imminence requirement as traditionally envisioned and have used force without Security Council authorization:

That all States should seek Security Council authorization to use force is not a time-honoured principle; if this were the case, our faith in it would be much stronger. Our analysis suggests quite the opposite—that what is at stake is a relatively new emerging norm, one that is precious but not yet deep-rooted.³⁰

How can a norm be “long-established international law” if it is a “relatively new emerging norm” that is “not yet deep-rooted”?

The Panel’s confusion about the law derives from two factors. The first is the law’s own incoherence. The second is an unwillingness to locate the law in historical context. Treaties and custom both are sources of international law. In this case the two conflict: The Charter sets forth a rule that requires an actual armed attack as a predicate for the use of force, but subsequent state practice is not consistent with that rule. As the report notes in a footnote, “[f]rom 1945 to 1989, states used military force numerous times in interstate disputes. By one count, force was employed 200 times, and by another count, 680 times.”³¹ Which of the two counts is accurate, the Panel does not venture to guess. But in every one of those instances, at least one state must have used force with no bona fide defensive justification because it is impossible for all parties to a conflict simultaneously to act in self-defense, and in few if any of these incidents have states *either* waited to be attacked before defending themselves or waited until a developing threat became imminent. So it is clear that a significant number of violations have occurred however Article 51 is construed. Giving due weight to this profligate practice, how should Article 51 be interpreted?

The Panel suggests that, historically, Article 51 has always been construed by everyone in a way that somehow reads out of its text the requirement of an actual armed attack as a predicate for using defensive force. A recent article in *Survival* by one Panel member, Gareth Evans, is revealing.³² Evans co-chaired a group assembled by the Canadian government that issued a report on

²⁹ United Nations, *A More Secure World* at 63 (cited in note 4). It elsewhere credits the United Nations with upholding a “strong norm . . . against aggressive war.” *Id.* at 12.

³⁰ *Id.* at 32.

³¹ *Id.* at 140 n 104.

³² Gareth Evans, *When is it Right to Fight?*, 46 *Survival* 59, 65 (Aug 2004).

humanitarian intervention,³³ parts of which are lifted and included verbatim (and without attribution) in the Panel's report. Evans writes that "[i]f an army is mobilizing, its capability to cause damage is clear and its hostile intentions unequivocal, nobody has ever seriously suggested that you have to wait to be fired upon."³⁴

In fact, the "nobodies" who have suggested it include the UN's founders and some of the leading lights in international law. Professor Thomas Franck has summarized the thinking of those who drafted that portion of the Charter: The stringent requirement of an "armed attack" was used at the insistence of the United States. Although the State Department's legal adviser, Green Hackworth, felt that this "greatly qualified the right of self-defense," Governor Harold Stassen, deputy head of the delegation at San Francisco, insisted: "This was intentional and sound. We did not want exercised the right of self-defense before an armed attack had occurred." In response to a challenge regarding US "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 fleet of our own and be ready in case an attack came."³⁵

Professor Louis Henkin has been among the foremost critics of a Charter interpretation that would permit preempting a future attack. The Panel cites Henkin in support of the imminence requirement,³⁶ but here is what Henkin wrote in 1979: "[N]either the failure of the Security Council, nor the Cold War, nor the birth of many new nations, nor the development of terrible weapons, suggests that the Charter should now be read to authorize unilateral force even if an armed attack has not occurred."³⁷ The contrary argument, he wrote, "is unfounded, its reasoning is fallacious, its doctrine pernicious."³⁸ Oxford's Ian Brownlie, writing in 1963, agreed. "[T]he view that Article 51 does not permit anticipatory action is correct," Brownlie wrote, and "arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence."³⁹ Professor and later World Court judge Philip Jessup concurred: "Under the

³³ Gareth Evans and Mohamed Sahnoun, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001), available online at <<http://www.iciss.ca/pdf/Commission-Report.pdf>> (visited Sept 23, 2005).

³⁴ Evans, 46 *Survival* at 65 (cited in note 32).

³⁵ Thomas M. Franck, *The UN and the Protection of Human Rights: When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?* 5 *Wash U J L & Poly* 58–59 (2001).

³⁶ United Nations, *A More Secure World* at 63, 140 n 106 (cited in note 4).

³⁷ Louis Henkin, *How Nations Behave: Law and Foreign Policy* 141 (Columbia 2d ed 1979).

³⁸ *Id.*

³⁹ Ian Brownlie, *International Law and the Use of Force by States* 278 (Oxford 1963).

Charter,” Jessup wrote in 1948, “alarming military preparations by a neighboring state would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened.”⁴⁰ It is therefore hard to see where the Panel gets the idea that an imminence requirement is “long established.” It is not.⁴¹ What is clear is simply that Article 51 did at one time require states to await an actual armed attack before defending themselves, but that provision has been violated so many times by so many states that used force before threats became even imminent that its edge has been blunted by history. Subsequent state practice has overtaken both the imminence requirement and the armed attack requirement.⁴²

Yet the proverbial Martian would get nary a clue from this report as to why Article 51 reads the way it does or why it didn’t work. In fact, the reason for its wording lies in the finely wrought design of the UN Charter—a plan that has long been shattered by the weight of reality: The Security Council was originally intended to exercise a monopoly on the use of force. The Founders’ notion in 1945 was that a state, if attacked, would report to the Security Council and that the Council, drawing upon standing or standby forces provided by member states and directed by its own Military Staff Committee, would itself respond to the breach of the peace. Defensive force would be used by the victim state only during the brief interim between its report to the Security Council and the Council’s armed response. All know, of course, that it did not work out that way. The Council, deadlocked by the Cold War, never negotiated the special agreements contemplated in the Charter under which military units would be provided, and Churchill’s vision of a “constabulary power before which barbaric and atavistic forces will stand in awe”⁴³ was never realized. The rest is not, as the report implies, mystery, but history.

But the Panel’s history is not simply incomplete. It is wrong. The Founders of the UN, the Panel asserts, intended to create “a system in which States join together and pledge that aggression against one is aggression against all, and

⁴⁰ Philip C. Jessup, *A Modern Law of Nations: An Introduction* 166 (Macmillan 1948).

⁴¹ The Panel might have reached further back into history for support in former US Secretary of State Daniel Webster’s famed “Caroline Doctrine.” Under it, “exceptions growing out of the great law of self-defence . . . should be confined to cases in which the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.” The hortatory tone bespeaks the fact that states regularly flouted this rule. See David Rivkin, Lee Casey, and Mark Wendell DeLaquil, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Preemption and Law in the Twenty-First Century*, 5 *Chi J Intl L* 467, 469 (2005) (internal citations omitted).

⁴² See Michael J. Glennon, *How International Rules Die*, 93 *Georgetown L J* 939 (2005).

⁴³ Winston Churchill, Chancellor’s Address at The University of Bristol, July 2, 1938, in Robert Rhodes James, ed, 6 *Winston S. Churchill: His Complete Speeches, 1897–1963* at 5991 (Chelsea House 1974), available online at <<http://www.bartleby.com/73/1861.html>> (visited Oct 29, 2005).

commit themselves in that event to react collectively.”⁴⁴ But the Founders had no such intent. The notion that an attack on one is an attack on all is a premise that underpins mutual security treaties such as NATO and the Rio Pact, but not the United Nations Charter. The use of force by member states to enforce Charter provisions or Security Council resolutions has always been regarded as optional.⁴⁵ That is why the Charter provides, in Article 43, for the negotiation of special agreements with member states so as to require states and the Security Council to work out the conditions, if any, under which states would provide naval, air, and land forces to the Council.⁴⁶ Absent such an agreement, no obligation obtains on the part of any member state to use armed force when another state is attacked.

Dispute over this same issue—whether the treaty obliges states to use force—first arose in 1919 in connection with Article 10 of the Covenant of the League of Nations. Concern was expressed about the constitutionality of excluding the House of Representatives from the decision to go to war by locating the commitment to use force in a treaty approved only by the Senate. That dispute was largely responsible for sinking the League Covenant in the Senate. Senator Henry Cabot Lodge and the “small group of willful men” who were his allies insisted that it be made clear that the United States undertook no obligation to use military force under the Covenant. Wilson refused to accept clarifying reservations to this effect and as a result could never get the two-thirds vote needed to join.

Memories of all this were fresh in the minds of those who met in San Francisco in 1945, and they were not about to see the UN Charter go down the same drain. The Founders therefore made clear that that Charter contained no obligation on the part of any state to use force. Rather, they incorporated into the Charter what was in effect an agreement to agree: Upon the initiation of the Security Council, states would have the opportunity, if they wished, to contribute military units for use by the Council in the event a member state was attacked. But member states did not, as the Panel insists they did, “commit themselves in that event to react.”⁴⁷ Indeed, in the halcyon days of 1945, the suggestion that states would themselves be using armed force individually to

⁴⁴ United Nations, *A More Secure World* at 1 (cited in note 4).

⁴⁵ Although neither the NATO nor the Rio treaties parties promised to use armed force to aid in the defense of a co-party, the agreements create a powerful political commitment. See Michael Glennon, *Constitutional Diplomacy*, 207–10 (Princeton 1990). The same cannot be said for obligations under the Charter. See generally Michael J. Glennon, *The Constitution and Chapter VII of the UN Charter*, 85 *Am J Intl L* 74 (1991).

⁴⁶ United Nations Charter, art 43, ¶ 1.

⁴⁷ United Nations, *A More Secure World* at 9 (cited in note 4).

enforce the Charter or Security Council resolutions would have been taken as strange. It was not until the collapse of the Charter's grand design during the Cold War and the shattering of the Security Council's monopoly that the Council began to "franchise out" to individual states the right to use armed force. Even then, such use has always been regarded as a right, never an obligation. It is, indeed, doubtful that the Security Council can lawfully order a member state to use force absent a special agreement with the Council in which the state explicitly undertakes to do so.

Because the Panel gets the past wrong, it gets the present wrong. "Today, more than ever before," its report repeats, "threats are interrelated and a threat to one is a threat to all."⁴⁸ But that is not the way that modern states assess threats. The reason that Rwanda, Darfur, Kosovo and other human tragedies generate mainly yawns within the United Nations is not that states fail to respond to genuine threats to their own security. The reason that states often do not respond to such humanitarian catastrophes is that they do not believe that such events really *are* threats to their own security. Yet the report prattles on in this vein in the seeming belief that the power of positive thinking can overcome that reality. "There is a growing recognition," the report asserts, "that the issue is not the 'right to intervene' of any State, but the 'responsibility to protect' of every State when it comes to people suffering from avoidable catastrophe."⁴⁹ The report here borrows, once again, from Evans's Canadian group, which had initially come up with the idea of rhetorical relabeling as the solution to international divisions over humanitarian intervention. This Panel resists confronting those underlying divisions, however, let alone the historic and geopolitical reasons that states of the South and East have opposed Western suggestions that sovereignty ought not be permitted to shield intrastate genocide or mass atrocity. Michael Ignatieff, a member of the Canadian group, got it right. Referring to the Panel's report, Ignatieff told the Financial Times:

On intervention, the conclusion I draw is that there is no consensus in the system for any change. The great majority of states are against it, come what may. . . . I remember talking to Jeremy Greenstock (the departing British UN Ambassador . . .) and saying "we've got to get into a situation where the UN can intervene over ethnic massacres and occasions like that." And he said "if you think that's a starter you don't know what planet you're living on."⁵⁰

In response to such objections, the Panel declares repeatedly that a new global consensus should somehow come into being, as though creating one is

⁴⁸ Id at 14.

⁴⁹ Id at 65.

⁵⁰ John Lloyd, *Between Iraq and a Hard Place: Writer Michael Ignatieff Tells John Lloyd that Intervention Was the Lesser of Two Evils*, Fin Times, Weekend Mag 30 (Aug 30, 2003).

just one more item to be added to some to-do list. The Panel never asks *why* the current consensus is what it is, how attitudinal patterns such as these develop, or why they change. It has no curiosity as to why the United States has shifted, over the last 60 years, from a concern that the United Nations would *require* it to use force when it did not want to use force, to a concern that the United Nations would *prevent* it from using force when it wants to do so. The Panel does not care what interests states view as countervailing or what incentives might need to be put in place to overcome them. States are simply at fault for having “a lack of political will to react firmly against genocide”⁵¹; why they lack that will is a question that the Panel neither asks nor answers. What planet we’re living on is beyond the scope of its inquiry.

III. CORRELATION OR CAUSATION?

The extent of the Panel’s wishful thinking and distaste for empiricism is most apparent in its assessment of the contemporary international system. Panglossian assertions that there exists a “growing recognition” that humanitarian intervention by the Security Council is permissible, that there has emerged a “recent expectation that the Security Council should be the arbiter of the use of force,”⁵² that “the world has now changed and expectations about legal compliance [with the Charter] are very much higher,”⁵³ that the United Nations has upheld “a strong norm . . . against aggressive war,”⁵⁴ and that “collective security institutions have made critical contributions to the maintenance of international peace and security”⁵⁵ are all presented with neither evidence nor argument to back them up. Kosovo, Iraq, and the 200 to 680 instances in which force was used by states in violation of the Charter are not even explained away; they are ignored. Not mentioned is the General Assembly debate of 1999, in which few members supported the Secretary-General’s endorsement of humanitarian intervention.⁵⁶ Not mentioned is the inability of the parties to the International Criminal Court to define the term “aggression.”⁵⁷ Not mentioned are numerous state-by-state public opinion polls, such as those

⁵¹ United Nations, *A More Secure World* at 134 n 34 (cited in note 4).

⁵² *Id.* at 32.

⁵³ *Id.* at 64.

⁵⁴ *Id.* at 12.

⁵⁵ *Id.* at 17.

⁵⁶ Barbara Crossette, *China and Others Reject Pleas That U.N. Intervene in Civil Wars*, NY Times A5 (Sept 23, 1999). See generally Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo* (Palgrave 2001).

⁵⁷ Rome Statute of the International Criminal Court, art 5, ¶ 1(d), ¶ 2, UN Doc A/CONF.183/9 (1998).

conducted by the German Marshall Fund, that demonstrate deep and abiding divisions among the citizens of different states on fundamental issues of international peace and justice.⁵⁸

Instead of sound empirical research, the Panel relies upon a specious methodology that equates correlation with causation. Readers are assured, for example, that “without the United Nations the post-1945 world would very probably have been a bloodier place.”⁵⁹ How does the Panel know this? Because “[t]here were fewer inter-State wars in the last half of the twentieth century than in the first half.”⁶⁰ It seems not to have occurred to the Panel that the decline in interstate conflict might have been the result of something else, such as growing economic integration, stronger alliances, military deterrence, more influential nongovernmental organizations, the reportage of mass media, increased international tourism, or merely a broader transnational sense of horror over the barbarism of war.

Readers are assured, further, that in “the last 15 years, more civil wars were ended through negotiation than in the previous two centuries in large part because the United Nations provided leadership, opportunities for negotiation, strategic coordination, and the resources needed for implementation.”⁶¹ But between 1945 and 1990, the report also reveals, the number of ongoing civil wars *increased* by over 400 percent.⁶² Of course more civil wars could end through negotiation: There were more civil wars. Based upon the report’s mode of reasoning, a reader might ask whether the increase in the number of civil wars was caused by the United Nations. That possibility, of course, is unworthy of the Panel’s attention, but curious inferences might nonetheless be drawn if the Panel’s methodology were applied consistently. If correlation equates with causation in the way the Panel implies that it does, then comparatively speaking, the legalist collective security institutions of the twentieth century have been a tragic failure. During the nineteenth century, peace in Europe depended upon balance of power dynamics, not legalist institutions. As Eric Hobsbawm pointed out in *The Age of Extremes*, no world war was fought between 1815 and 1914; during that period, “no major power fought another outside its immediate region.”⁶³ The greatest (post-Napoleonic) interstate conflict of the nineteenth century, the Franco-Prussian War of 1870–71, killed perhaps one hundred fifty

⁵⁸ See *Transatlantic Trends, Key Findings 2004*, available online at <http://www.transatlantictrends.org/doc/2004_english_key.pdf> (visited Oct 27, 2005).

⁵⁹ United Nations, *A More Secure World* at 12 (cited in note 4).

⁶⁰ *Id.*

⁶¹ *Id.* at 33–34.

⁶² *Id.* at 11.

⁶³ Eric Hobsbawm, *The Age of Extremes: A History of the World, 1914–1991* 23 (Pantheon 1994).

thousand—about the same number killed during the Chaco War of 1932–35 between Paraguay and Bolivia.⁶⁴ During the twentieth century, however, the number of war-related deaths—after the legalist model was put in place following World War I—exceeded one hundred fifty million.⁶⁵ But these numbers do not appear in the Panel’s report. Could they be the consequence of an ill-advised reliance upon legalist institutions to control armed conflict? Might there be some alternative—an alliance of democracies, strengthened regional organizations, coalitions of the willing that are less ad hoc, or some other possibility—that would maintain peace and security more effectively than has the Security Council? To the Panel, this is not an issue; the Panel’s task is “not to find alternatives to the Security Council as a source of authority but to make it work better than it has.”⁶⁶ The question whether other options for managing the use of force might work better than the Security Council is simply not on the table.

Nonetheless, the Panel does hazard to assess the Security Council’s effectiveness, apparently believing that effectiveness can be measured without reference to possible alternatives. The “flood of Foreign Ministers into the Security Council chambers during the debates” on Iraq “demonstrated not just the relevance but the centrality of the Charter.”⁶⁷ One wonders whether the Panel counted the number of diplomats who flooded Geneva in 1936 to attend the League of Nations debate following Italy’s invasion of Abyssinia. Presumably the relevance and centrality of the League were also demonstrated by such homage. The Panel proudly reports that the Security Council is now effective in dealing with global crises: “With the end of the cold war, the Security Council became increasingly active in addressing international threats. The average annual number of resolutions it passed increased from 15 to 60, or from one resolution a month to one a week.”⁶⁸ What better way to address international threats than by passing resolutions? Nowhere is the Security Council’s record in conflict prevention measured against the standard set out in the first great words of the Charter: “to save succeeding generations from the scourge of war.”⁶⁹

⁶⁴ Id at 24.

⁶⁵ This number is derived from subtracting the number estimated killed in the First World War (20 million), Henry Kissinger, *Diplomacy* 217 (Simon & Schuster 1994), from the estimate of the total killed in the twentieth century (175 million), Glennon, *Limits of Law* at 1 (cited in note 56).

⁶⁶ United Nations, *A More Secure World* at 3 (cited in note 4).

⁶⁷ Id at 33.

⁶⁸ Id at 31.

⁶⁹ United Nations Charter, preamble.

If shoddy empirics were merely peripheral to its conclusions, the Panel might be excused. But they are not. The Panel's impressionistic sketches of how the world works form the basis of its ideas about the solidity of the global order, and it is concern about the "risk to the global order"⁷⁰ that causes it to oppose humanitarian intervention and preemptive defensive force. Consequently, it is crucial to know how great the costs will be if these disfavored options are to be discarded. Just how stable *is* the global order? How effective have the current rules really been? Who is right—has it been 200 or 680 times that the Charter has been violated? How great would the sacrifice to stability really be if preemption and humanitarian intervention were permitted? The reader can only guess. To the Panel, the unilateral option is intrinsically wrong, and that's that. Weighing costs against benefits is not an acceptable approach. To reduce state miscreance it is necessary to reduce state power; countervailing concerns such as humanitarianism and state security are simply irrelevant.

This, then, is what Secretary-General Annan has commended as the Panel's "sweeping" cure for the crisis in the international system: Resurrection of the medieval just war doctrine, a new vocabulary for describing it, and a flat-out prohibition against the use of force by states—unless the Security Council approves—even in the face of intrastate genocide, and even in the face of a threat to a state that is momentous and nearly certain but not yet imminent.

IV. RADICAL ADAPTIVISM

The Panel offers no interpretive methodology to identify the origins of this supposed rule. Readers are invited to accept its conclusions *ipse dixit*—not on the basis of legal analysis, or even on the basis of some reference to legal analysis done by others, but simply on the basis that the Panel has said so. Apparently, perhaps pleased by its conclusions but troubled by their lack of support, others have proffered a rationale for adaptivism—or, more accurately, for radical adaptivism.

Adaptivism itself is uncontroversial. Most legal instruments—from contracts and wills to statutes and treaties—have some play at the joints that permits the consideration of subsequent practice of the parties as a means of ascertaining their intent. This is the traditional justification for permitting reference to extra-textual sources of authority: In the face of ambiguity, the reader needs to understand more fully the intent of the parties in consenting to a text.⁷¹ Radical adaptivism, on the other hand, is distinctive in its disregard of the

⁷⁰ United Nations, *A More Secure World* at 63 (cited in note 4).

⁷¹ Even post-modernists apparently share this commitment. See, for example, Stanley Fish, *Intentional Neglect*, NY Times A21 (July 19, 2005).

intent of the parties and its willingness to substitute for that intent the preferences of the interpreter, viewing interpretation and amendment as, in effect, interchangeable operations. In a number of respects radical adaptivism is consequently arbitrary and outcome-oriented.

Radical adaptivism is arbitrary in that it finds no support in a fixed philosophical or legal firmament. Radical adaptivism is outcome-oriented in selecting the data upon which its supposed inferences are based. In the effort to shore up preexisting policy preferences, radical adaptivists overvalue evidence that confirms a putative rule's viability and undervalue evidence that disconfirms it. Article 2(4) is a case in point.⁷² Evidence confirming the rule's effectiveness, they insist, lies in many instances in which the rule supposedly worked to avert or end a conflict, instances in which "the dog didn't bark."

The difficulty with this claim is twofold. First, as discussed earlier, the dog may not have barked for any number of reasons.⁷³ Given the wide range of factors that influence policymakers' decisions, behavior that is consistent with a rule cannot by itself be taken as compliance. Disconfirming evidence, on the other hand, falsifies a prohibitory rule such as Article 2(4); we know to a certainty that the rule has not caused specific state behavior in situations in which it was intended to cause that behavior. The conceit that international rules cause behavior that happens to conform with a preferred rule is central to the method of radical adaptivism.⁷⁴ Second, the claim is at bottom a rejection of the traditional methodology of customary international law formation, which has it that a rule gives way when disconfirming evidence—evidence of violation—reaches a tipping point. At that point, the balance shifts; at that point, the rule changes; at that point, the obligation alters. Whether the issue is a rule's birth, death, or modification, the process is the same. The only difference is that when a rule falls into desuetude, rather than being superseded by accreted precedents that reify into a different rule, the original rule is superseded by precedents that comprise a null set.⁷⁵

Data selection is outcome-oriented in a second respect: Because it seems at first blush less harmful to their preferred conclusions (as discussed below, in fact is not⁷⁶), radical adaptivists rely upon the words of the Security Council rather than the actions of states. The reason is understandable. As the data noted

⁷² "All 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." United Nations Charter, art 2, ¶ 4.

⁷³ See Glennon, 93 *Georgetown L J* 939 (cited in note 42) and text accompanying note 60.

⁷⁴ For elaboration, see Glennon, 93 *Georgetown L J* 939 (cited in note 42).

⁷⁵ *Id.*

⁷⁶ See text accompanying notes 80–84.

by Professor John Yoo reveal, interstate conflict has continued under the Charter.⁷⁷ Indeed, Professor Thomas Franck has himself elsewhere acknowledged the juridical force of such data. In 1987 he wrote as follows:

Traditionally, a normative principle has been thought to enter into customary law only after being confirmed by practice, that is, after it is demonstrably adhered to by the actual conduct of the large preponderance of international actors capable of violating it. The customary norms cited by the Court [in *Nicaragua v US*⁷⁸] are adhered to, at best, only by some states, in some instances, and have been ignored, alas, with impunity in at least two hundred instances of military conflict since the end of World War II.⁷⁹

In 1970 Professor Franck had forcefully announced the “demise of Article 2(4)”: “The practice of these states has so severely shattered [mutual confidence in] . . . the precepts of Article 2(4) that . . . only the words remain.”⁸⁰ “In the twenty-five years since the San Francisco Conference, there have been some one hundred separate outbreaks of hostilities between states.”⁸¹ “What killed Article 2(4) was the wide disparity between the norms it sought to establish and the practical goals [that] nations are pursuing in defense of their national interest.”⁸² Twenty years later Article 2(4) remained dead: “[T]he extensive body of international ‘law’ . . . which forbids direct or indirect intervention by one state in the domestic affairs of another [and] precludes the aggressive use of force by one state against another . . . simply, if sadly, is not predictive of the ways of the world.”⁸³ In 2003, following the US invasion of Iraq, Professor Franck concluded that Article 2(4) “has died again, and, this time, perhaps for good.”⁸⁴

Thus the data upon which Professor Franck based these conclusions was, appropriately, state practice—not what states have said, and surely not what the Security Council has said, but what states have actually done. The narrow issue, it must be remembered, is whether a putative rule—an “imminence” requirement that is at odds with the Charter’s own words—musters the level of state support that is required to make the rule binding in the consent-based system that is the international legal order. Reference to state practice makes

⁷⁷ John C. Yoo, *Force Rules: UN Reform and Intervention*, 6 *Chi J Intl L* 641, 644–45 (2006).

⁷⁸ *Military and Paramilitary Activities (Nicar v US)*, 1986 ICJ 14, 18–19 (June 27, 1986).

⁷⁹ Thomas M. Franck, *Some Observations on the ICJ’s Procedural and Substantive Innovations*, 81 *Am J Intl L* 116, 119 (1987).

⁸⁰ Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 *Am J Intl L* 809, 809 (1970).

⁸¹ *Id.* at 810–11.

⁸² *Id.* at 837.

⁸³ Thomas M. Franck, *The Power of Legitimacy Among Nations* 32 (Oxford 1990).

⁸⁴ Thomas M. Franck, *What Happens Now? The United Nations after Iraq*, 97 *Am J Intl L* 607, 610 (2003).

sense in seeking an answer to that question. In arguing now for a rule that would require an imminent threat of attack before permitting the use of armed force (and thus prohibit counter-genocidal intervention), however, Professor Franck's shift to reliance upon the Council's words and his willingness to ignore states' deeds is puzzling.⁸⁵ Is state practice no longer evidence of state consent? If the Security Council is empowered to change the Charter, why can states, acting together to establish customary norms, not do the same? And if states can change a prohibition, why can they not, as Professor Franck earlier argued they could, eliminate it altogether?

Moreover, the new evidence upon which Professor Franck now relies is unconvincing. Neither the Council's words nor its actions in fact indicate an intent on the part of the Council to substitute an imminence requirement for the plain requirement of an actual "armed attack" set out in Article 51.⁸⁶ It says nothing that the Council stood silently by in the face of the numerous instances in which states used force when faced with no imminent threat, such as occurred in 1978 in Uganda or in 1967 in the Arab-Israeli War. There are, again, many reasons why a political organ such as the Security Council chooses to act or not to act; for the reasons discussed earlier, conduct consistent with a putative rule, without more, cannot be taken as corroborating the rule's existence. If Security Council inaction is to be given any effect it would seem equally logical to infer from it, in light of the number of violations, that the Council concurs with the opinion that Professor Franck has expressed elsewhere—that Article 2(4) is a dead letter.

Most important, the Council has never claimed power to exempt states from the explicit limitations and prohibitions imposed upon them by the Charter (such as the armed attack requirement of Article 51), and it has not done so for good reason: The Security Council has no power to expunge provisions in the Charter text that member states have agreed upon as limitations on their power. The Council is a creature of states. It exercises delegated power. Delegates do not define the scope of their power; they derive their powers from the entities within the system that created them. This principle of limited power is fundamental to the rule of law. "We the peoples" begins the Charter, calling to mind the preamble of the United States Constitution—"We the people." Both

⁸⁵ Thomas M. Franck, *Collective Security and UN Reform*, 6 Chi J Intl Law 597, 604–05 (2006).

⁸⁶ This has, if anything, been recently reaffirmed by the International Court of Justice. See *Oil Platforms (Iran v US)*, 2003 ICJ 90 (Nov 6, 2003). The ICJ placed the burden on the United States to show that attacks on its vessels "were of such a nature as to be . . . 'armed attacks' within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force." *Id.* at ¶ 51. The Court thus appeared to assume without analysis that Article 51 and customary international law concerning the requirement of an armed attack are identical.

instruments remind us, in their first words, where the organs created therein get their power. They do not get it from themselves.⁸⁷ In a consent-based system, deviant practice by the *creators* of an organ such as the Security Council goes to the question of whether those creators—states—continue to consent to the limits the system imposes. But deviant practice by an organ—*ultra vires* acts of the creature—can be given no such effect. To do so would be unsafe. As Inis Claude wrote, “We cannot dismiss as fantastic the anxiety that international organization might prove itself a new variety of tyranny, global in scope; in the long historical view, any tendency of international agencies to exhibit contempt for constitutional limitations is a bad augury.”⁸⁸

Security Council practice therefore cannot, as radical adaptivism contends, present a back door for circumventing domestic constitutional requirements of legislative approval. The constitutions of some states, such as the United States, require legislative consent to treaties. Amendments to treaties, at least in the United States, also require such approval.⁸⁹ If modification effected by formal amendment to a treaty requires Senate approval, back-door modification effected by Security Council practice (to say nothing of the sort of back-room “gentlemen’s agreement” to be effected with a wink and a nod by the five permanent members as recommended by Professor Franck) cannot be exempt from the requirement of Senate approval. The problem would be compounded were the amendment process one that could operate even without the participation of the United States, as would be true if the Security Council could change the Charter without honoring the amendment process that the Charter spells out. The United States of course has a veto in the Council, but the United States representative might not necessarily be present on every occasion on which it might wish to cast a veto. In such a situation, the obligations incurred by the United States under the UN Charter would effectively be altered without *presidential* consent, let alone Senate consent. Those obligations could, under such circumstances, be altered by the treaty-created entity—the Security Council—whose practice would have been initiated or reinforced with no participation by the state incurring those obligations.

⁸⁷ These principles trace ultimately to John Locke’s “justification for the overthrow of the Stuarts in the 1688 Revolution, which remains basically the theory of constitutional government and of popular sovereignty among the anglo-saxon peoples.” Luzius Wildhaber, *Wechselspiel Zwischen Innen und Aussen* 27 (Helbing & Lichtenhahn 1996). Wildhaber notes that, “[a]ccording to Locke, man surrenders his natural rights to the political community, not absolutely, but to the extent necessary for the common good.” Id.

⁸⁸ Inis L. Claude, Jr., *Swords into Plowshares: The Problems and Progress of International Organization* 169 (Random House 4th ed 1984).

⁸⁹ In the United States, the Constitution requires Senate advice and consent. US Const, art II, § 2, cl 2.

Other states may have no problem with such an arrangement. But the United States could never constitutionally become a party to a treaty that permitted its rights and obligations under the treaty to be altered without its consent. This possibility was considered early on by the Senate Foreign Relations Committee. In a 1955 report, it rejected the suggestion that the President could “alter drastically the nature of our commitments in the United Nations”:

In the United States there is little doubt that our Government would follow the regular treaty procedure outlined in the Constitution and secure the advice and consent of the Senate before ratifying a proposed amendment since any other course would be a subversion of the treaty-making process. Certainly it would be illogical if the President, after securing a two-thirds vote of the Senate approving the ratification of the original charter, could then proceed to alter drastically the nature of our commitments in the United Nations by accepting amendments without referring them to the Senate for approval.⁹⁰

In the 1980s the Senate insisted upon the principle that a treaty means what it said when the Senate gave its approval.⁹¹ The Senate resisted the efforts of the Reagan Administration to “reinterpret” the ABM Treaty so as to permit what was seen by the Senate as being prohibited—deployment of the Strategic Defense Initiative—at the time of its 1972 ratification. This same principle precludes interpreting the UN Charter as today permitting what it was seen by all to prohibit—intervention—at the time of its 1945 ratification. As the Senate Foreign Relations Committee elaborated in 1955: “[C]harter growth through interpretation can only proceed within well-defined constitutional limits. The United Nations is not a superstate. It . . . must function within the specific limitations laid down in the Charter.”⁹²

Hence it was with good reason that Judge Sir Percy Spender observed that the “nature of the authority granted by the Charter to each of its organs does not change with time.”⁹³ Judge Spender wrote in the *Certain Expenses* case that while the subsequent conduct of individual state parties to a bilateral treaty may reveal their intent with respect to the meaning of ambiguous terms, “an element of artificiality” attaches when the meaning of a multilateral treaty such as the UN Charter is inferred from the actions of groups of states that are parties to that

⁹⁰ Review of the United Nations Charter, Compilation of Staff Studies Prepared for the Use of the Subcommittee on the United Nations Charter of the Committee on Foreign Relations, S Doc No 164, 83d Cong, 2d Sess 40 (1955).

⁹¹ “A general rule is that words used in a treaty should be read as having the meaning they bore [] when it came into existence.” *Certain Expenses of the United Nations*, 1962 ICJ 151, 186 (July 20, 1962) (Spender separate opinion).

⁹² S Doc No 164 at 54 (cited in note 90).

⁹³ *Certain Expenses*, 1962 ICJ at 187 (Spender separate opinion) (cited in note 91).

treaty.⁹⁴ Judge Spender noted that the “essential fact” is that the Charter is a multilateral treaty.⁹⁵ He continued:

It cannot be altered at the will of the majority of the Member States, no matter how often that will is expressed or asserted against a protesting minority and no matter how large be the majority of Member States which assert its will in this manner or how small the minority. . . . The majority has no power to extend, alter, or disregard the Charter.⁹⁶

These same principles apply to the Security Council and other organs of the United Nations.⁹⁷ The Security Council is ordered in plain terms to act in accordance with the Charter. Article 24(4) provides that “[i]n discharging [its] duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.”⁹⁸ One cannot, therefore, assume that simply because the Security Council has carried out an act, even more than once, that repetition is perforce lawful. The Security Council and other UN organs are not empowered, as the radical adaptivists would prefer, to “interpret their own authority.”⁹⁹ That the Charter imposes no meaningful checks on *ultra vires* action by one or more of its organs does not mean that that organ has unlimited power to redefine the scope of its own power—a distortion of principles of governance shared by constitutions everywhere. It is unpersuasive to maintain, therefore, that the Security Council can itself have rewritten the basic limits agreed upon by states when they ratified Articles 2(4) and 51.

Confronted by such obstacles, radical adaptivism relies upon the familiar fallbacks, such as the argument that fidelity to textual limits empowers “the dead hand.”¹⁰⁰ In every legal system, however, consent is inferred to rules made by others, sometimes even dead others; without such an inference, the rule of law would be impossible to administer and no time-honored text would have any continuing authority. Constitutions, statutes, and treaties all oblige action or prohibit inaction by actors that played no role—and often did not even exist—at the time of their making.

Radical adaptivists next argue that the general “purposes” of the Charter support their preferred outcomes, oblivious to the malleability of abstract

⁹⁴ Id at 189.

⁹⁵ Id at 196.

⁹⁶ Id at 196–97.

⁹⁷ Americans who are, because of the veto, sanguine about radical adaptivism by the Security Council might reflect that there is no reason why the same adaptivism ought not prevail in other UN agencies in which the United States exercises no veto.

⁹⁸ United Nations Charter, art 24, ¶ 2.

⁹⁹ Thomas M. Franck and Faiza Patel, *UN Police Action in Lieu of War: “The Old Order Changeth,”* 85 Am J Intl L 63, 67 (1991).

¹⁰⁰ Franck, 6 Chi J Intl Law at 603 (cited in note 85).

arguments from purpose and the ease with which different (or even the same) “implicit” purposes can be enlisted to support the very rules they condemn, such as rules that would permit preventive war or counter-genocidal intervention.¹⁰¹

Nor does it do to assert that radical adaptivism is justified because the United Nations Charter is a “living constitution.”¹⁰² The Charter is of course not a constitution; the United States of America, for one, already has a Constitution, and there is no indication in the Charter’s legislative history in the United States Senate that in 1945 senators believed that the United States needed a new constitution or an additional one. In some respects, the Charter is *sui generis*: It sets up institutions that, through the parties’ consent, exercise limited authority over them. But the extent to which it is “living” is precisely the question; there is no reason to view that characteristic, or the fact that the Charter creates a unitary administrative scheme, as somehow distinguishing the Charter from all other treaties in its relation to subsequent custom.¹⁰³ It is perfectly plausible that the international system could function efficiently if these normative provisions of the Charter were on the same interpretive footing as all other treaties. Portions of the Charter, important though they are, do not necessarily partake in a supposed constitutional character. The provisions concerning use-of-force and human rights, for example, are not essential to the UN organization’s core functions; similar provisions have in fact been included in other treaties relating to both subjects. The 1949 Geneva Conventions are a prominent example. Why should Articles 2(4) and 51 of the Charter be subject to different interpretive rules than the Conventions, or than, say, the Kellogg-Briand Peace Pact, which existed apart from the “constitutive” League of Nations Covenant?¹⁰⁴

Radical adaptivists’ claim that they are defending the Charter is therefore illusory. They are in fact defending not the Charter but the authority of the Security Council to *traduce* that Charter. They are defending not a norm that has been accepted by states, but rather their *own* dogma that they believe *ought to be* accepted by states. In this mission, they reveal themselves to share the project of

¹⁰¹ See *id.* at 6.

¹⁰² See *id.* at 5.

¹⁰³ As Hinsley put it, modern men seem not to “suspect that a single administrative and technological framework for political action would not necessarily produce a single political system: a successful international organisation or a world state.” F.H. Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States* 7 (Cambridge 1963).

¹⁰⁴ The infamous Kellogg-Briand Peace Pact of 1928 purported to outlaw war. Its parties declared “that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.” Treaty Providing for the Renunciation of War as an Instrument of National Policy (1928), art 1, 46 Stat 2343, 2345–46 (1929). Among its parties were (actually, *are*; the Pact is still in effect, and states continue to ratify it) the United States, the United Kingdom, Germany, France, Italy, and virtually all other belligerents in World War II.

the Platonists: They have devised a rule that they believe is preferable to the one posited by states through repeated practice, and it matters not whether the world is ready for their new rule. In fact, it is not; their catechism, like the Platonists', works only if one is willing to assume a world different from the one that actually exists.

Let there be no doubt that their world is different. In what world is it "wholly unconscionable and politically unpalatable" to deny Nigeria a Security Council veto?¹⁰⁵ In what world would sensible policymakers conceivably delegate the propriety of using force to, in effect, an unreviewable fact-finding determination by the UN Secretary-General (as Professor Franck recommends)? In what world is it "all but certain" that there will be at least six new members of the Security Council—given that a veto will sink the proposal, and given that the United States and China have both announced their opposition?¹⁰⁶ Hours after President Bush said that he could not rule out the use of force as a last resort to press the government of Iran to give up its nuclear program, German Chancellor Gerhard Schröder rejected the threat of force. "[L]et's take the military option off the table," he said. "We have seen it doesn't work."¹⁰⁷ In what world would the United States be all but certain to acquiesce in Germany's efforts to secure a seat on the Council when differences this profound concerning the use of force so obviously persist?¹⁰⁸

It is easy to see why, positing this imaginary world, a Platonist could suppose that the central question is "Who decides?"¹⁰⁹ But the issue is vastly

¹⁰⁵ See Franck, 6 Chi J Intl Law at 610 (cited in note 85). In the real world, two hundred deaths occurred in Nigeria in November 2002 in riots sparked by a dispute whether the prophet Muhammad, given the opportunity, would have married a Miss World contestant. Marc Lacey, *Fiery Zealotry Leaves Nigeria in Ashes Again*, NY Times A3 (Nov 29, 2002). In the real world, the World Health Organization had planned to eradicate the polio virus completely by 2005; in August 2003, however, Nigerian officials stopped polio vaccinations for religious and political reasons—and within months, genetically-linked polio outbreaks occurred in nine countries that had previously been polio-free. Lawrence K. Altman, *Polio Reported In Botswana, Its First Case Since 1991*, NY Times A16 (Apr 15, 2004). Would it really be unconscionable to permit American rather than Nigerian officials to decide whether the United States should use force to defend itself from a threat from al Qaeda, or to stop genocide in Kosovo, or Rwanda, or Darfur?

¹⁰⁶ See Franck, 6 Chi J Intl L at 610 (cited in note 85). See also *US Opposes Vote Now On UN Security Council Expansion*, States News Serv (July 12, 2005). See also Edith M. Lederer, *World Still Split over UN Council Reform*, Lancaster Online (Sept 16, 2005), available online at <http://ap.lancasteronline.com/4/un_reform> (visited Oct 30, 2005).

¹⁰⁷ *Schröder Rejects Military Force to Stop Iran's Nuclear Work*, NY Times A8 (Aug 14, 2005).

¹⁰⁸ For recent polling data confirming the extent of continuing transatlantic divisions over use of force see *After the U.S. Election: A Survey of Public Opinion in France, Germany and the United States*, The German Marshall Fund of the United States (Feb 7, 2005), available online at <<http://www.gmfus.org/doc/postelectionsurvey.pdf>> (visited Sept 17, 2005).

¹⁰⁹ See Franck, 6 Chi J Intl Law at 608 (cited in note 85).

broader than the mere identity of the decision-maker. The issue is whether the international community is willing to make a decision-maker's judgment stick *by causing the costs of violation to exceed the benefits*. Doing so requires more than the oracular announcement of some grand decision. Doing so requires specific rules that command broad assent—and the willingness of states to honor those rules; it requires a widely-respected judicial entity capable of adjudicating disputes—and the willingness of states to honor its decisions; it requires executive powers capable of meeting out penalties that bite—and the willingness of states to bear the burden of enforcement. It requires, in short, not only a process, but a truly *international* process, one that is near-universal in its reach and that is swift and certain in making violation too costly to contemplate. Unless states are willing to establish such a process, “who decides” will continue to be meaningless, and the rules applied in such a decision will continue to be paper rules.

In the real world, the international community is not ready to impose such costs, for the simple reason that the abuse of *centralized* power is seen by states as a greater risk than the abuse of *decentralized* power; states thus continue to believe that the risk to their security from having penalties imposed arbitrarily upon them is greater than the risk of having no penalties at all.¹¹⁰ That fear of arbitrariness flows from the all-too-accurate realization that basic values on fundamental issues continue to be dramatically different from one nation to the next.¹¹¹ And that fear of arbitrariness is hardly assuaged by the willingness of radical adaptivists to let centralized Security Council power run roughshod over all limits on that power.

¹¹⁰ Professor Franck himself has thus urged that the United States reject UN rules governing use of force, counseling that the United States retain “the freedom to protect freedom” by preventing the International Court of Justice from deciding use-of-force cases in which the United States might be a party:

To make sure the United States retains sovereign discretion to defend itself and its allies, any new American acceptance of the Court's compulsory jurisdiction should emulate the good sense of others like India and Kenya by excluding disputes involving armed conflict. America—acting alone or with its allies—still needs the freedom to protect freedom. The finger on the trigger cannot be that of the global judiciary.

Thomas M. Franck, *A Way to Rejoin the World Court*, NY Times A23 (July 17, 1986).

¹¹¹ On the day before the New York Times reported Nigerian riots over whether Miss Universe could have become Mrs. Muhammad, it reported that “[a] bag containing \$50,000 in cash from a credit union fell from a security truck on Interstate 94 in St. Paul, [Minnesota,] scattering bills across the highway and bringing traffic to a halt. Motorists scrambled to grab the money, but . . . they handed it over to troopers. All the money was believed to have been recovered.” *National Briefing: Midwest: Minnesota: Recovering \$50,000 Blown Away*, NY Times A33 (Nov 28, 2002). Would this have happened in Nigeria? For a survey of differing state positions on the propriety of humanitarian intervention see Glennon, *Limits of Law* at 133–35, 159–60 (cited in note 56).

V. "UNSHARED IDEALISM"

Richard Rorty has written about self-marginalization, describing how the failure of idealists to connect with the real-life concerns of a community can cause their commentary to be dismissed.¹¹² With the report of the High-Level Panel, the United Nations moved toward that self-marginalization. It is not that ideals have no place in international discourse; far from it. States, like individuals, are driven by preferences that they often call ideals. The point here is twofold: That there is no transcendent reason why those ideals are necessarily shared by every other state or individual on the planet; and that, whatever their origin, global ideals cannot be advanced unless idealists confront the practical navigational problems that stand in the way of their realization. Getting from point "A" to point "B" requires studying the world as it is, appreciating what works and what does not, knowing which incentives states respond to and which they do not. Navigational success requires determining whether others share one's ideals, and if not, why not. Proceeding under the illusion that one's ideals are and must be everyone else's is a formula for disaster. "[T]here is grave danger," Henry Cabot Lodge said, "in an unshared idealism."¹¹³ With empirical data, on the other hand, and a realistic assessment of what is feasible, it is possible to identify shared ideals and to forge compromises that last. Humanity needs to know as a practical matter what is possible to achieve and what is not. That is what was called for in this report, and that is what it fails to deliver.

The alternative is not to reject idealism, properly conceived. There is nothing "unidealistic" in seeking a better world pragmatically—with hard-headed analytic rigor that recognizes the influence of power, history and culture in shaping behavioral norms. Idealism need not be sentimentality. The alternative to the Panel's approach lies in recognizing that, whatever its appeal in domestic political polemics, there in fact exists no universal, absolute standard by which to assess the propriety of state conduct, at least none that has penetrated the consciousness of policymakers in pertinent state actors. The alternative lies not in another acontextual effort to resuscitate dying international institutions but in the recognition that a greater foundation of political integration is required before those institutions can operate as envisioned.

This means getting beyond the usual happy talk of the UN's more starry-eyed apologists. We are often told, for example, that the UN's deficiencies in managing the use of force are not the fault of the UN but rather are the fault of

¹¹² Richard Rorty, *Postmodernist Bourgeois Liberalism*, in Louis Menand, ed, *Pragmatism: A Reader* 329 (Vintage 1997).

¹¹³ Senator Henry Cabot Lodge, Address in Washington DC (Aug 12, 1919), available online at <http://www.firstworldwar.com/source/lodge_leagueofnations.htm> (visited Sept 18, 2005).

member states, for the UN can be no more than member states want it to be. Insofar as this is true, however, the obverse must also be true: that the UN's achievements are not the triumphs of the UN but rather are the successes of member states, which are no less responsible for an institution's failures than for its accomplishments. (The argument represents, on reflection, a surprising acceptance of epiphenomenalism on the part of those who often insist that institutions are autonomous actors.) Utopians, moreover, mindlessly repeat the refrain that if the UN did not exist, it would be necessary to invent it. But who seriously can believe that the Security Council as currently structured would ever be invented today? In composition alone, the Security Council is the product of another era, an era that will not return.

The harsh reality is that the old order of the United Nations cannot be resurrected—not because of any particular design flaw but because the conditions needed to make its use-of-force regime work are not present in the world today and likely will not be present any time soon.¹¹⁴ States have new interests that differ from those they had in 1945. They have, indeed, new interests that on occasion cause them to clash with states that earlier were allies. “The clash of interests is real and inevitable,” E.H. Carr wrote, “and the whole nature of the problem is distorted by an attempt to disguise it.”¹¹⁵ The failure of Platonists' to appreciate the fundamentality of the challenge posed by counter-integrative forces has been the greatest impediment to achieving the objectives of force management at which the United Nations was aimed.

What, then, is the alternative to the United Nations? To raise the question is not to suggest that the United Nations should be abolished or that the United States should withdraw from it. Quite the contrary: The diplomatic transaction costs alone would likely outweigh any benefit to be derived from continued participation. That the organization has proven feckless as a manager of violence does not counsel its destruction. The Security Council performs, after a fashion, other useful functions, ranging from attacking the sources of terrorist financing to inhibiting the transfer of fissile materials. Formally terminating participation could prejudice the establishment of future institutional mechanisms that might address such challenges more effectively.

Still, prudence counsels hardheadedness in assessing the possibility of devising workable institutional limits on use of force. Within the legalist paradigm, the probability is high that, at this point in history, there *is* no solution for curbing the profligate use of force, interstate or intrastate: The current institutions do not work, and no practicable alternative can likely work. Other

¹¹⁴ For elaboration see Glennon, 93 *Georgetown L J* at 986 (cited in note 42).

¹¹⁵ E.H. Carr, *The Twenty Years' Crisis: 1919-1939: An Introduction to the Study of International Relations* 57 (Palgrave 2001).

institutional alternatives would almost surely be subject to the same insidious forces that have hollowed out the Security Council. Some have suggested, for example, that a new caucus or alliance of democracies should be established to confront common security challenges. Let us remember, however, that it was primarily a group of democracies, led by France, that split the Security Council on Iraq.¹¹⁶ Power disparities would persist in such an organization, as would the rivalries that those disparities engender. Philosophical differences would likely continue as to when force should be used. So too would free rider distortions. There are too many security consumers in the world today and too few security producers. Why would participants in such an alliance have any greater incentive to share the security burden in the future than they now do in the UN or NATO? There is therefore little reason to believe that creative statesmanship can today forge new, more workable international institutions. The tiresome insistence that realists provide some legalist alternative to the UN brings to mind the story related by Carr. Following the great Lisbon earthquake of 1755, Carr recounts, a man went about the city hawking “earthquake pills”; when someone pointed out that the pills could not possibly be effective in preventing earthquakes, the hawker replied, “But what would you put in their place?”¹¹⁷ The Security Council cannot prevent unwanted uses of force, and nothing useful can be put in its place.

We have of course found something to put in the place of the Council when the Council is *on specific occasions* unavailable: *ad hoc* coalitions of the willing. NATO in 1998 provided an effective substitute for a Security Council that would have been sidelined by a veto had a proposal to intervene in Kosovo then been tabled. As noted above,¹¹⁸ an earlier coalition of the willing—the Council of Europe—in fact proved far more effective at keeping the peace in nineteenth century Europe than did the rickety legalist institutions of the twentieth century. No believer in the rule of law can be satisfied with “mere” political answers as a long-term solution to the problem of interstate violence. But they are better than perennially paralyzed legalist institutions.

Throughout the Cold War, the UN’s defenders took solace in the belief that its paralysis stemmed from a kind of fifty-year rain delay that had somehow prevented the game from proceeding. But the clouds cleared in the 1990s and the system still did not work. In fact, the idea had not worked in its earlier incarnation either: The United Nations was largely a reconstruction, rearranged and rebuilt with the burnt timbers of the League of Nations.¹¹⁹ President

¹¹⁶ See Michael J. Glennon, *Why the Security Council Failed*, 82 *Foreign Aff* 16 (May/June 2003).

¹¹⁷ Carr, *The Twenty Years' Crisis* at 8 n 12 (cited in note 115).

¹¹⁸ See Hobsbawm, *The Age of Extremes* at 23 (cited in note 63).

¹¹⁹ See generally Glennon, *Limits of Law* (cited in note 56).

Woodrow Wilson's press secretary reported that Wilson was asked, while en route to the Paris Peace Conference at which the League was founded, whether the plan would work. Wilson responded, "If it won't work, it must be made to work."¹²⁰ For the better part of the twentieth century, humanity tried to make something work that won't work.

Analysis of why it has not worked has missed the mark because the wrong questions have been asked. The question is not what use of force is moral or immoral. The question is not whether we can muster the resoluteness or courage or "political will" to make some transcendently compelling rule work. A seeming weakness in political will is simply a reflection of the force of legitimate countervailing interests. The real issues are practical, empirical, and comparative: What geopolitical conditions are required for the effective management of force by an international institution? Do those conditions currently prevail? If not, can they be created? What tradeoffs are required to create them? How long will it take? If those tradeoffs are not now practicable, what interim arrangements can nonetheless be achieved in their absence? The answers to these questions are not set in the stars. They are to be found—if at all—in painstaking research by social sciences that are now in their relative infancy, guided by policymakers and diplomats who know the difference between wishful thinking and realworld possibility.

"No answer," Alexander Bickel wrote, "is what the wrong question begets."¹²¹ Until we start asking the right questions about why gratuitous use of force occurs, what systemic disincentives can be established to curb it, and whether states are willing to bear—and share—the costs of maintaining and applying those disincentives, we will continue to get the answer given by the High-Level Panel to international relations' most intractable issue: No answer.

¹²⁰ Ray Stannard Baker, 1 *Woodrow Wilson and World Settlement: Written from his Unpublished and Personal Material* 93 (Doubleday 1922).

¹²¹ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 103 (Yale 2d ed 1986).