

Who Holds the Real Veto: Use of Force and the Trusteeship Analogy

It is a well-known fact that except when a country is defending herself from an armed attack, all recourse to force must be authorized by the Security Council.¹ In early 2003, when President Bush became frustrated at the reluctance of the UN Security Council to authorize the use of force against Iraq for stalling on the weapons inspections regime, he told the world in no uncertain terms that America would attack Iraq alone if necessary.² This, of course, is not the first time a country has claimed that the impotence of the Security Council should not stand in the way of what is otherwise practically just and even morally legitimate. Indeed, five years earlier, in Kosovo, NATO acted without prior Security Council authorization as well. What I want to explore in this article is the question of whether countries retain a residual right to act outside of such authorization on the basis of what I call the trusteeship analogy.

A. Justifying The Trusteeship Analogy

In short, what the trusteeship analogy argues is that the Charter is not only a contract between member states inter se, or a constitution, but is in fact also an instrument of trust,

¹ This is undoubtedly the combined effect of Articles 2(4) and 51 of the UN Charter.

² In his State of the Union Address (January 28, 2003), President Bush had this to say:

America's purpose is more than to follow a process -- it is to achieve a result: the end of terrible threats to the civilized world. All free nations have a stake in preventing sudden and catastrophic attacks. And we're asking them to join us, and many are doing so. *Yet the course of this nation does not depend on the decisions of others.* Whatever action is required, whenever action is necessary, I will defend the freedom and security of the American people. (emphasis mine.)

where nations vest the responsibility of collective security in the hands of the Security Council, giving up a hitherto core element of foreign policy (the ability to use force for political gain).³ Where this trust is not exercised in good faith, member states, as beneficiaries of that trust, retain a residual power to revoke the trust, thereby denying that the Council holds power anymore, or they are entitled to enforce it by themselves. Three reasons may be forwarded in support of this proposition: the Charter itself, institutional practice, and sheer commonsense.

Article 2(2) states that all members shall fulfill in good faith the obligations assumed by them in accordance with the Charter. There is no reason why this does not apply to Security Council members. The reference to “good faith” is, of course, language familiar to trust lawyers. It describes a relationship of exclusive loyalty between the fiduciary (the Security Council) and the principals (the member states). The concept of loyalty in a fiduciary relationship extends beyond our everyday understanding of what loyalty means; instead, it conveys a very specific obligation to carry out the purposes expressed in the trust instrument (the Charter) without personal profit, or as we say in international law speak, vested interest. This means that the Security Council is obligated to make decisions that are in the best interests of those who empowered it in the first place. Where the trust is breached, there is no more relationship that holds the scheme of collective security together, and the power to use force results back to the member states.

³ There was concern at San Francisco that the obligation to give up the use of force was not reciprocated by a mandatory legal obligation to aid future victims. New Zealand, for instance, proposed that all members of the UN should “collectively resist every act of aggression against any member.” 6 U.N.I.C.O., General, Commission I, Doc. 810, I/1/30, June 6, 1945, 342. *See*, THOMAS M. FRANCK, *RECOURSE TO FORCE* 45-51 (2002) While this proposal was not adopted, it clearly demonstrates that the intention was for there to be a mutuality in the obligation of states to deny themselves the ability to use force, and the obligation of the Security Council to ensure international peace and security.

Article 24 then goes on to explicate the relationship between Security Council members and UN member states as such:

In order to ensure prompt and effective action by the United Nations, its members *confer* on the Security Council *primary responsibility* for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility, the Security Council *acts on their behalf*.

The facial words of the Article appear to be unambiguous support for my proposition. Firstly, the act of conferring responsibility suggests that a concomitant right resided in the person vesting that power. You cannot delegate an authority without having it in the first place. Therefore, Art 24 recognizes that individual nations had a pre-existing right to use force, which has now been delegated to the Security Council. Secondly, what is authorized is not exclusive responsibility for ensuring prompt and effective action in the maintenance of peace and security, but only “primary responsibility.”⁴ Where the Security Council acts, and is able to act, it has exclusive jurisdiction over the matter.⁵ However, where it fails to act, or unable to act, a secondary responsibility opens up to those who can or are willing, be it the General Assembly or individual nations themselves. Thirdly, Art 24 makes it clear that in the exercise of its responsibility, the

⁴ *Certain Expenses Case, infra*, note 10

⁵ Article 12 of the UN Charter says that the General Assembly is precluded from making any recommendation with respect to any dispute or issue currently being dealt with by the Security Council.

Security Council acts, at all times, on behalf of – and therefore for the benefit of – member states. The metaphorical analogy to a trust is therefore complete. There is a vesting of a power in a trustee, which exercises that power in accordance with certain standards enumerated in the trust instrument. The trustee remains, at all times, accountable to the principals, who reserve an authority to act where the trustee does not.

There is strong evidence that this was the intention behind the idea of collective security. In fact, at San Francisco, France proposed that “should the Council not succeed in reaching a decision, the members of the organization reserve to themselves the right to act as they may consider necessary in the interest of peace, right and justice.”⁶ While this may not have been adopted in the final draft of the Charter, Articles 2(2) and 24 do carry an implicit understanding that the Security Council was not a power unto itself, but derived it from member nations, for the benefit of them. The very idea of collective security was, after all, to get countries to forfeit the use of force in exchange for more powerful countries to police the murky waters of international peace and security. In 1999, in his report to the General Assembly, UN Secretary-General Kofi Annan, somewhat surprisingly, warned that:

The Charter requires the Council to be the defender of the common interest, and unless it is seen to be so in an era of human rights,

⁶ Minutes of the Thirty-Seventh Meeting of the United States Declaration, San Francisco, May 12, 1945, 1 Foreign Relations of the United States, 1945, 674 at 679-80.

interdependence and globalization, there is a danger that others could seek to take its place.⁷

What Kofi Annan meant by “others” taking the place of the Council is unclear, but I think it does allude to the fact that the Council is beholden to the international community, rather than – as it may be thought – the other way around.⁸

Institutional practice has also recognized this principle. In 1950, America, frustrated by the deadlock in the Security Council over deployment of troops in Korea because of the Soviet Union, went to the General Assembly, arguing that it was crucial not to leave the United Nations impotent. The General Assembly voted 52-5 and adopted what is now referred to as the “Uniting for Peace” resolution,⁹ which authorizes the General Assembly to call an emergency special session to recommend collective measures where the Security Council is paralyzed, as long as seven Council members, or a majority of UN members, request such a session. The Uniting for Peace resolution has now been used during the Suez crisis, and the deployment of UN military action in Congo. In the *Certain Expenses Case*, the International Court of Justice, in an advisory opinion, confirmed the legality of the resolution by reasoning that the implication in giving the Council “primary

⁷ 54 G.A.O.R., 4th Plen. Meeting, September 20, 1999, A/54/PV.4, at 3

⁸ In fact, the veto was given to the Permanent Members in return for the contribution of their political and economic powers, which were seen as important ingredients for collective security. This never quite happened. The UN has no standing army, and the largest UN contributor, Japan, is not a permanent member of the Council. Therefore, in a sense, there has already been a betrayal of trust by the permanent members.

⁹ G.A. Res. 377(V). G.A.O.R., 5th Sess., 302nd Plen. Meeting, 3 November 1950, A/PV.302, 341 at 347

responsibility” was that the General Assembly retained “secondary” responsibility that could be exercised when the former was stymied.¹⁰

Understandably, such practice never went as far as acknowledging that individual countries also retained this secondary right. I have two responses. Firstly, by suggesting that the General Assembly could act where the Security Council could not, it recognized that the latter’s authority and mandate derives from the democratic will of the Assembly. Therefore it is not much of a leap to argue that ultimate power comes from the individual states themselves (albeit acting collectively in the Assembly). Secondly, where there is still recourse to diplomatic channels like the General Assembly, this is, of course, the preferred route. But in the world of politics, the General Assembly is not itself immune from the possibility of a deadlock, or a situation where the requisite majority cannot be reached.¹¹ In such cases, as I have argued above, individual nations retain a right to act unilaterally.

Indeed, while there has never been an explicit endorsement of my theory in institutional practice, there have been occasions that seem to suggest, implicitly, that the failure of the

¹⁰ *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, 1962 ICJ 163 at 164. In another ICJ decision, the Court also used the language of trusteeship:

All States should bear in mind that the entity injured by the illegal presence of South Africa in Namibia is *a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted.*

Legal Consequences for States of the Continuing Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, [1971] ICJ Rep 16 at para 87-116 (emphasis mine.)

¹¹ There is an added complication in that while the Security Council can *authorize* force, the General Assembly may only make *recommendations*. Therefore a resolution by the Assembly, say, that countries stop a genocide in a particular country is not legally binding on a non-consenting country.

Security Council to promptly authorize action in what are intuitively compelling circumstances lends legitimacy to what may otherwise be a technical violation of the law. For example, in a Security Council debate on NATO's actions, Slovenia appears to have justified NATO's actions by pinning the blame on the failure of the Council to act in concert in what was undeniably a massive humanitarian crisis. In other words, she argued that the inability of the Council to fulfill its role nullified the apparent illegality of NATO's action:

We regret the fact that not all permanent members were willing to act in accordance with their special responsibility for the maintenance of international peace and security under the United Nations Charter. Their apparent absence of support has prevented the Council from using its powers to the full extent and from authorizing the action which is necessary to put an end to the violations of its resolutions.¹²

When the Security Council convened two days later to vote on Russia's draft resolution condemning the illegality of the attacks,¹³ Slovenia commented:

Furthermore, the draft resolution completely fails to reflect the practice of the Security Council, which has several times, including on recent occasions, chosen to remain silent at a time of military action by a regional

¹² S.C.O.R. (LIV), 3988th Meeting, 24 March 1999, at 6-7

¹³ Draft Resolution, S/1999/328, 26 March 1999. The draft resolution was voted down 3-12.

organization aimed at the removal of a regional threat to peace and security.¹⁴

Slovenia is factually correct.¹⁵ But what is more significant is the recognition that individual countries, or coalitions, can act outside of Council authorization without reprisal where there is an expectation or knowledge that the Council will not, or is unable, to authorize the action despite the practical necessity of the situation.

The last basis on which I propose this trusteeship analogy is commonsense. Kofi Annan put it in stark terms, when he asked:

To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask, not in the context of Kosovo but in the context of Rwanda, if, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defense of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?¹⁶

¹⁴ S.C.O.R. (LIV), 3989th Meeting, 26 March 1999, at 3

¹⁵ For instance, between 1989 and 1999, the Economic Community of West African States (ECOWAS) was involved in two peace-keeping missions in Liberia and Sierra Leone outside of Security Council authorization which is required under Article 53. Yet there was virtually no criticism of their actions, and in Sierra Leone, the Council commended ECOWAS for its role in the resolution of the conflict. Press Release, Presidential Statement, SC/6481, 26 February 1998. These have been characterized as “ex post facto approval” of ECOWAS’ actions. *See*, FRANCK, *supra*, note 3, at 155-162.

¹⁶ 54 G.A.O.R., 4th Plen. Meeting, September 20, 1999, A/54/PV.4, at 2

The instinctive answer must be a resounding no. Sometimes, countries may refuse to act for reasons wholly unconnected with the ground situation. Domestic politics may play a role; international alliances may influence; or occasionally a country may face a unique threat that no other country can appreciate. America, for instance, will always remain more vulnerable to terrorist attacks than, say, France will ever be, and as a result, may feel more justified in preempting the threat Iraq could pose in the future than France would. In such circumstances, it may well be necessary to understand that countries can, and should, have a residual right to act where there is a compelling reason to, and where there is paralysis in the system.

I do not mean to suggest that every veto can be circumvented in this way. This would render the system of checks-and-balances within the UN structure nugatory. After all, the Charter does envisage the possibility that not every country will get its way all the time. In fact, that is the whole point of a multilateral collective security design. There will need to be evidence of bad faith, or at least a reckless disregard for their duties in ensuring prompt and effective action, in order to employ the trusteeship argument. It is beyond the scope of this article to examine the specific circumstances under which the trusteeship analogy can be invoked,¹⁷ but I do want to point out that apart from institutional safeguards,

¹⁷ Such instances will probably have to be decided on a case-by-case basis, although I would suggest that the test of good faith may include, possibly among others, the idea that the Security Council should be able to demonstrate a substrata of fact to which the decision is reasonably linked. Even in the law of trusts, there is no definitive elucidation of what good faith is, apart from the fact that it forms the core of a fiduciary's duty, and appears to be a matter of matter of inference from the surrounding facts. Where the Council is apathetic when there is an overwhelming practical or moral prerogative to act, such as in Liberia, Sierra Leone and Kosovo, this should be sufficient to establish either a lack of good faith, or at least a reckless

member states are also particularly vulnerable to domestic and international criticism by the international media, which has also been an extremely powerful weapon against reckless leaders bent on ignoring the general prohibition against unilateral use of force based on spurious grounds. What the BBC did to British Prime Minister Tony Blair's domestic popularity,¹⁸ and the inquiry he now faces over charges of deceiving Parliament should not be forgotten in a hurry. Even President Bush's popularity has dipped significantly after the Iraqi war.¹⁹ This political counterbalance is important because my argument, admittedly, places the initial power to decide when there has been bad faith in the hands of the very countries who want to use force unilaterally.²⁰ However, political credibility, domestic and international, should also put it in their interest not to abuse the argument.

B. Legal or Political Question?

My argument assumes that such exceptions to the general requirement for Security Council approval in the use of force outside of self-defense should be a *legal* one, rather

failure to carry out its primary responsibilities. As always, the use of force should be necessary, proportional and a last resort.

¹⁸ 61% of voters are said to be unhappy with Tony Blair's performance in office, and his rating for trustworthiness has also fallen. See, Alan Travis and Patrick Wintour, "Blair's Popularity Ratings Nosedive In Wake of Hutton Inquiry Revelations," *The Guardian*, September 25, 2003, available at <<http://politics.guardian.co.uk/polls/story/0,11030,1049272,00.html>>

¹⁹ Only 53% of the American public support Bush's handling of Iraq, 45% believe the White House mishandled the analysis of Iraq's threat, and 38% said Bush had purposely misled the public. See "Bush's Popularity Falls," July 13, 2003, available at <<http://au.news.yahoo.com/030711/2/kt3e.html>>

²⁰ Of course, victims of illegal incursions may seek redress at the International Court of Justice. My point is that the political counterbalance will be an important consideration when nations first decide whether to use force unilaterally, as it almost always is even now.

than a *political* one.²¹ More crucial, it is a legal exception found within the structure of the Charter itself, rather than from outside. In the aftermath of Kosovo, nervous international lawyers, wanting to preserve ‘the law’ and yet recognizing the moral urgency of the situation, sought to characterize NATO’s action as “illegal yet legitimate.”²² It might have been hoped that by maintaining that such behavior was illegal, it would make countries tempted to act in similar fashion to think twice since it would continue to attract the stain of illegality. That, however, seems to be mere sophistry. If an act is illegal, it is illegal. Saying it is illegal yet legitimate is akin to saying murder is unlawful, but if you can prove you murdered someone who was evil, then we will let you off the hook. It is nothing more than a glorified euphemism for vigilante justice based on flimsy and subjective notions of morality, more likely to advance the unilateral diktat²³ of powerful countries than the rule of international law. I want to put forward three observations.

Firstly, the judicial response from the International Court of Justice, is, I submit, unfavorable to an argument that political or moral exigencies can justify breaking the law. In the *Corfu Channel Case*,²⁴ the Court said:

²¹ This would mean that countries would huddle with each other and agree not to oppose certain unilateral action even though it is illegal. Kosovo is a recent example of this, where a great majority of countries did not raise any objections to NATO’s use of force without Security Council authorization.

²² See, FRANCK, *supra*, note 3, at 174-191, arguing for a doctrine of mitigation; and MARTTI KOSKENNIEMI, “ ‘The Lady Doth Protest Too Much’ – Kosovo, and the Turn to Ethics in International Law,” (2002) 65 MLR 159 where he argues a need to balance formalism (recognizing the need for objective limits) with ethics (recognizing the emotional immediacy of the particular situation) in what he calls ‘situational ethics.’

²³ S.C.O.R. (LIV), 3988th Meeting, 24 March 1999, at 2

Certainly, the Court recognizes the Albanian Government's complete failure to carry out its duties after the explosions and the dilatory nature of its diplomatic notes as extenuating circumstances for the action of the United Kingdom. *But, to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.*²⁵

Here, the ICJ held that the United Kingdom was in breach of Albania's sovereignty *despite* acknowledging the so-called extenuating circumstances; therefore seemingly rejecting the notion that international law permits pleas of mitigation.

Secondly, I would suggest that the analogy to domestic law, sometimes used to demonstrate the need to bridge legality and morality by allowing a set of defenses, is not complete. This resort to what is "just and moral"²⁶ is nowhere supported by the text of the Charter. This is very different from domestic law where such defenses are governed and explicitly recognized on the statutes. This is crucial because as much as we can make allowances for the evolution of international law, they must be supported by reference to

²⁴ *Corfu Channel Case (United Kingdom v Albania)*, Judgment of 9th April, 1949, ICJ Reports, 1949, 4. This case involved a situation where the Royal Navy decided to sweep Albanian waters after a stray mine had hit a British vessel.

²⁵ *Ibid*, at 35 (emphasis mine.) Professor Franck argues that the *Teheran Hostages Case* is another example supporting the doctrine that extenuating circumstances can mitigate an illegality. *See*, FRANCK, *supra*, note 3, at 184-5. In that case, the Court did not pronounce on the illegality of the United States' action. But, this was because it had no bearing on the legality of Iran's action and not because it absolved the US from its actions. If anything, an earlier part of the judgment found that the accusation that the US was conducting illegal activities in Iran did not justify or mitigate Iran's own wrongdoing. (*United States v Iran*, Judgment of 24 May 1980, ICJ Reports, 1980, 3 at 17-18, para 32; and 39 at para 80-89.)

²⁶ *See*, FRANCK, *supra*, note 3, at 180

the Charter, which is the only universally accepted legal basis for the use of force.²⁷ The reason why this is so critical is not the subject of this article but suffice it to say that the Charter, being an expression of agreement between member states, must be the reference point in deciding what nations can do to one another. Furthermore, in domestic law, clear standards of adjudication are set down as to what circumstances can rise to the level of a valid defense. Putting exceptions to the use of force without authorization outside the legal framework means that we are held ransom to whatever definition whatever country wishes to put on justice and morality. Placing such exceptions firmly within the framework of international law, with reference to the Charter, at least allows victims of such unilateral use of force a legal basis on which to take their case to the ICJ, or allows the Security Council to ask for an advisory opinion of the Court, where the latter can set about formulating proper legal standards.²⁸

Thirdly, as a practical matter, there is no distinction between legality and legitimacy in the conduct of international affairs. In domestic law, that distinction – maintained by the concept of mitigation – is important because it has a practical role in reducing the severity of the offense and hence in the sentence imposed on the offender. In international law, when a country says that its acts are legitimate or justified, it does not

²⁷ UN Secretary General, Kofi Annan, 54 GAOR, 4th Plenary Meeting, September 20, 1999, A/54/PV.4, at 2 (para 66)

²⁸ It goes without saying that the Security Council's decisions are not subject to the judicial review of the ICJ. However, the ICJ continues to be the standard bearer of international law. In its 2002 Report to the General Assembly, 57 GAOR, 6 September 2002, A/57/4, it noted that 189 countries were parties to the Statutes of the Court, and 63 had submitted a declaration submitting themselves to the compulsory jurisdiction of the Court. It also observed more multilateral treaties were including the ICJ as having jurisdiction over disputes arising from them. This shows the sustained respect of countries to the role of law and legal standards in the conduct of their affairs.

seek to accept some legal sanction or responsibility. Instead, it seeks to argue quite the opposite. They mean to say: this is something we should not have to accept *any* legal sanction or responsibility for whatsoever. In a debate on a draft resolution tabled by Russia condemning the Kosovo attacks as being outside the law, the US said:

The draft resolution before us today alleges that NATO is acting in violation of the United Nations Charter. This turns the truth on its head. The United Nations Charter does not sanction armed assaults upon ethnic groups, or imply that the international community should turn a blind eye to a growing humanitarian disaster.

NATO's actions are *completely justified*. They are necessary to stop the violence and to prevent a further deterioration of peace and stability in the region.²⁹

Again, in 2003, Australia, one of the supporters of the war on Iraq, declared as such:

Australia is a part of the coalition to disarm Iraq because we believe an Iraq with weapons of mass destruction represents a grave threat to our security and to international security. Australia hopes that Iraq can be disarmed soon with a minimum of harm to civilians and to coalition

²⁹ S.C.O.R. (LIV), 3989th Meeting, 26 March 1999, at 5 (emphasis mine.)

forces. Our participation in the coalition is *in complete accordance with international law*.³⁰

In neither instance did proponents of the use of force outside Security Council accept that what they were doing were illegal. Australia made it quite clear that the extenuating situation in Iraq nullified – not mitigated – the illegality of their act. I would submit therefore, that as a practical matter, no one but academics make that fine distinction between legality and legitimacy. All that distinction does, really, is to perpetuate the idea that law can exist without legitimacy, and that legitimacy can exist without law, when, in truth, “the Security Council is the primary institution that gives legality *and* legitimacy to our collective efforts to secure peace and security in the world.”³¹

Therefore, to suggest that exceptions to the use of force should be governed by the realpolitik of the situation is both dangerous and intellectually sloppy. If there is an exception, it should be found within the Charter and the legal norms it has created, rather than from some amorphous conception of what is legitimate. Placing exceptions within a legal framework does not, of course, absolve us from examining the ground realities on a case-by-case basis; but it does provide a means by which we can develop a coherent principle that is consistent, rather than antagonistic, with the rest of the Charter.

C. Conclusion

³⁰ S.C.O.R. (LIV), 4726th Meeting, 26 March 2003, at 27 (emphasis mine.)

³¹ S.C.O.R. (LIV), 4726th Meeting, 26 March 2003, at 20.

Without doubt, the general prohibition on the use of force outside of self-defense or Security Council authorization is extremely desirable. But if experience is the life of the law, then history tells us that we will inevitably face situations where the general proposition cannot be accommodated, and must give way. The hard question of what recourse an individual country has when the Security Council or the General Assembly is unwilling or unable to act in compelling circumstances, is, I hope answered by my justification of a general principle that says that the Security Council is a trustee of individual nations' right to use force, and where it fails to exercise this trust for the benefit of those nations, the latter have a right to use force without authorization. The real veto, it would seem, lies in the hands of "equally sovereign" states.³²

PAUL TAN*

³² It is sometimes argued that the Security Council stands in the way of a UN system that is supposedly based on the notion of sovereign equality as laid down in Art 2(1) of the Charter. This analysis should restore some faith in that notion by recognizing that the ultimate power of the Security Council derives from the free will of the individual member states.

* Paul Tan is currently on exchange at the New York University School of Law. He is pursuing a Bachelor of Law degree at the National University of Singapore.

** I am thankful to Miriam Sapiro for her kind comments and advice on this piece. Miriam teaches a course on recourse to force in international law at the New York University School of Law as an adjunct. All faults and errors, however, remain mine.