

# **THE NEW, OLD UNITED NATIONS CHARTER**

## ***Proposal of an Interpretative Model***

**This paper comprises 40 pages *excluding* this cover.**

## I. Introduction

Nations working together can make a difference. Nations upholding the rule of law can advance the cause of a fairer world... Yes, the world is a messy place. But the instruments are there to deal with these problems, and foremost amongst them is the United Nations itself.<sup>1</sup>

On the anniversary of the unilateral strike against Iraq, we are no closer to a definitive understanding of whether the attack is or is not legal. Many critics have, with much eloquence, made arguments for and against preventive self-defense<sup>2</sup> as a normative concept, and others have scrutinized the text of the relevant Security Council resolutions<sup>3</sup> and the United Nation's Charter with much care to ascertain the technical merits of both claims. While both approaches have shed much light on this particular debate, it has done little to place it within its larger context. Iraq (and many conflicts before) should have been an occasion on which to figure out the only relevant question: *how* should the Charter be interpreted? If we accept the premise that the Charter is of constitutional value in international law, then the legality of any act must not be *ultra vires* the Charter. This determination can only be made upon a proper construction of the Charter. While indeterminacy is inevitable, international law could benefit from some *common framework* within which such interpretative choices could be generated and made. It could benefit from a common *methodology* of interpretation that places the immediate controversy within the larger architecture of text, institutional history, practice and – most importantly – the *aspirational values* that the UN stands for. It is only this *cumulative* approach that affords a more holistic standard against which to evaluate individual acts by states. It is also this approach that promises to bridge fundamental gaps in ideology – particularly the dispute over the so-called doctrine of mitigation<sup>4</sup> – and allow us to focus on a way of interpreting the Charter consistent both textually *and* morally.

The aim of this essay is to elucidate just such a methodology. It will first answer three important assumptions. One, whether there is a need for an interpretative model. Two, whether the Charter should continue to be of guiding force in determining the structure of international law. Three, whether there is any logical way that we can divorce technical legality and moral legitimacy. To the extent that the answer is yes in the first instance, yes in the second, and no in the third, we will turn to an explication of how my proposed methodology works. While I will use Iraq as the driving illustration because of the salience of many of the issues it forefronts, this essay is not about Iraq *per se*. It is an

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<sup>1</sup> UN Secretary General, Kofi Annan, at his first press conference of 2003, *available at* <<http://www.un.org/apps/sg/sgstats.asp?nid=228>>

<sup>2</sup> By this I mean the attack of a country in anticipation of a threat but which threat has not yet been fully formed in order to prevent its materializing. *See generally*, Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AJIL (2003) 599

<sup>3</sup> Mainly, S.C. Res 1441 of 8 November 2002, S.C. Res 687 of 3 April 1991, and S.C. Res 678 of 29 November 1990. A sample of the opposing views on this point is found in William H. Taft IV and Todd F. Buchwald, *Preemption, Iraq and International Law*, 97 AJIL (2003) 557; and Thomas Franck, *What Happens Now? The United Nations After Iraq*, 97 AJIL (2003) 8

<sup>4</sup> Thomas Franck, *RECOURSE TO FORCE* (2002), at 190

attempt at sketching a common basis on which international lawyers may approach controversies in the future in a manner that is systematic and likely to yield the most correct answer – or at least options that are consistent with the internal dynamics of the Charter and the UN.

## II. The Need for Interpretation

The practical *necessity* for an interpretative model could not have emerged any clearer than in the aftermath of Al-Qaeda's attack on American soil. The collapse of the World Trade Center on September 11, 2001 threatens to murder the rule of international law. Barely three days after, the Senate and the House of Representatives passed the Joint Resolution Authorizing the Use of Force in which the United States, purporting to assert its right to self defense against what *he* determines necessary to *prevent any future acts* of international terrorism.<sup>5</sup>

This resolution was aimed not only at halting the immediate escalation of an attack by terrorists, but gives *carte blanche* to the President of the United States to determine how, when and whom to target in the name of deterring and preventing acts of international terrorism. This so-called Bush Doctrine,<sup>6</sup> extended to Iraq,<sup>7</sup> reflects a certain realism<sup>8</sup> that the combined desperation of terrorists, the sophistication of their operations and the heightened advances in technology available<sup>9</sup> present a new threat that demands that it be dealt with before they are fully formed.

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<sup>5</sup> Section 2(a) of the Joint Resolution Authorizing the Use of Force (September 14, 2001) *available at* <<http://www.september11news.com/PresidentBush.htm>> (emphasis mine.)

<sup>6</sup> See Michael J Glennon, *Forging a Third Way to Fight: "Bush Doctrine" for Combating Terrorism Straddles Divide Between Crime and War*, LEGAL TIMES, September 24, 2001 at 68. In an Address to the nation on September 7, 2003, President Bush said that the war on terror would be "lengthy and fought on many fronts." (see <http://www.whitehouse.gov/news/releases/2003/09/20030907-1.html>) This was a reiteration of the argument he has made many times since the attacks in 2001 that the US will strike against any "hostile regime" that sought to harbor or support terrorism in any way. "If you feed a terrorist or fund a terrorist, you're a terrorist, and you will be held accountable by the United States and our friends." See, Mike Allen, *From Both Sides, Promises to fight On: Bush Says the Hardest Part is Ahead*, WASHINGTON POST, November 22, 2001 at A2. In a speech in Washington DC at the National Cathedral, on September 14, 2001, President Bush emphasized that the US' retaliation "will end in a way, and at an hour, of our choosing."

<sup>7</sup> Cuba, Syria and Libya are among the three new nations added to North Korea, Iraq and Iran as forming the Axes of Evil. See, <<http://news.bbc.co.uk/1/hi/world/americas/1971852.stm>>

<sup>8</sup> President Bush says it is "common sense." See the NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (September 2002), *available at* <<http://whitehouse.gov/nsc/nss.pdf>> at page v. Hereinafter, the NSS.

<sup>9</sup> This was noted on page v of the NSS (*ibid*). However one may ask if the undoubted tragedy of September 11 has been abused to justify the expanded powers the United States seeks for itself in dealing with countries it deems hostile to it. It should be noted that the actual attacks could hardly be said to have exploited any new-fangled technology in a way that would justify a radical shift in security strategy. The hijacking of planes, while dramatic, is not hitherto unknown. The real worry is that we seem to have suddenly realized that terrorist cells can hide and operate from almost anywhere. This does not call for a departure from the traditional restraints on the unilateral use of force against other territories, but rather resort to other mechanisms such as global frameworks to regulate weapons of mass destructions and

It ought to be immediately apparent that this position strains traditional reading of international law. It is quite clear that the United Nations Charter forbids countries to take it upon themselves to use force to settle disputes unless to resist attack,<sup>10</sup> or where authorized by the United Nations Security Council. That, at least, is the plain reading of Articles 2(4) and 51 read together. The Bush Doctrine, in calling for the use of force both unilaterally and beyond the immediacy of any impending attack, strikes at the core of the scheme of collective security envisaged by the framers of the Charter.<sup>11</sup>

Bending the law out-of-shape will not only legitimate the already vociferous anger that fuels terrorism, it risks alienating potential supporters of the ‘war on terror.’<sup>12</sup> In his 2000 presidential election campaign, then-candidate George W. Bush said, “If we are an arrogant nation, they’ll view us that way, but if we’re a humble nation, they’ll respect us.” Hence, as a *practical* matter, there is little gain from sustaining a power-based, rather than a law-based international order.<sup>13</sup>

This was confirmed by Judge Shahabuddeen who wrote in a separate opinion in *Libyan Arab Jamahiriya v United Kingdom*:

The question now raised...is whether a decision of the Security Council may override the legal rights of the states, and if so, whether there are any limitations on the power of the Council to characterize a situation as one justifying the making of a decision entailing such consequences.<sup>14</sup>

This opinion tells us that the consequences of the Security Council’s decisions have tremendous effect. In maintaining or restoring international peace and security, Art 42 empowers the Council to “take such action as may be necessary.”<sup>15</sup> The paradox lies in

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radioactive sources, toughened inspection regimes and better intelligence. See generally, Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AJIL (2003) 599 at 605-6.

<sup>10</sup> See generally, Franck, *What Happens Now? The United Nations After Iraq*, (2003) 97 AJIL 8, where he argues the strikes by the US against Iraq has submerged the once shiny postwar system, embodied in the UN Charter, based on the assumption of states’ reciprocal respect for law as their sturdy shield against the prospect of mutual assured destruction, in a miasma of so-called realpolitik.

<sup>11</sup> Mexico proposed an amendment at the San Francisco Conference that would have denied states the right to “intervene, directly or indirectly, and whatever be the reason, in the domestic or foreign affairs of another.” 3 UNICO, Restr. Doc. 2, G/7(c), April 23, 1945, at 66. The spirit of this proposal is now captured in Article 2(7) of the Charter forbidding intervention in matters “essentially within the domestic jurisdiction of any state” unless Chapter VII is invoked.

<sup>12</sup> Australia, a strong backer of the Bush Doctrine, once threatened its Asian neighbors that she will preemptively attack any country thought to be harboring terrorists. Prime Minister John Howard was forced to later qualify that statement in the wake of strong outrage by ASEAN. Australian citizens, as we recall, were among the unfortunate targets of a terrorist bombing by Jemiah Islamiah operatives in Bali.

<sup>13</sup> The economic and political objections to a unilateral order are argued in Franck, *What Happens Now? The United Nations After Iraq*, (2003) 97 AJIL 8 at 17-18

<sup>14</sup> ICJ Reports 1992 3, at para 32 (Separate Opinion of Judge Shahabuddeen).

the fact that should countries decide to abandon the restraints of international law, not only does it legitimate rather awesome enforcement measures, it also implicitly undermines the notion that the Council itself is limited in its mandate to enact such measures. The rule of law and restraint works both ways. If there is no international law, then any reign of terror – any status quo – may claim to be ‘legally’ sanctioned.<sup>16</sup>

And yet, admittedly, the Bush Doctrine has an instinctive allure.<sup>17</sup> It is well and good to be philosophical in academic discourse, but in the real world, each use of force must find legitimacy in *its* facts and circumstances.<sup>18</sup> When the *reality* is that you have a rogue nation, known to be hostile towards you and its neighbors, armed with weapons of mass destruction, the fact that they have yet to launch a missile will be of cold comfort if you failed to act – and that country did attack you subsequently. The need to reconcile this tension, then, between the worry of creating a slippery slope and the need to act sensibly in the real world is part of the reason we need an interpretative guide.

But, the deeper challenge we must confront – and resolve – lies in an irresistible tension on *principle*. On the one hand, if the law does not take into account the concerns of the countries it seeks to bind, it is not only a violation of its own inherent purpose – the maintenance of peace and security – it will fail to demand any kind of respect or adherence.<sup>19</sup> At the same time, if the law is merely a reflection of realpolitik, then the law loses its social function, and becomes no more than a non-normative apology, a post hoc justification for any actually effective policy.<sup>20</sup>

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<sup>15</sup> The International Court of Justice’s opinion in *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, 1962 ICJ 163 suggests that this power to authorize action by the UN does not only vest in the Security Council but may be exercised by the General Assembly when the Council is stymied by a veto. This was in the context of peace keeping operations and the court made it clear that such action was legal only “at the request of with the consent of the States concerned.”

<sup>16</sup> Martti Koskenniemi, *The Normative Force of Habit: International Custom and Social Theory*, FINNISH YEARBOOK OF INTERNATIONAL LAW (1990), at 95, summarizing why a purely ‘materialistic conception’ of the law is problematic. It is probably more accurate to suggest that these counterproductive effects of unraveling international law will be more deleterious for less powerful countries that are likely to be subject to the tyranny of more powerful ones. However it may not be in the interest of even powerful countries to have the world in such disorder and unpredictability especially given the interconnectedness of economic and security interests nowadays. See, Franck, *supra*, note 10.

<sup>17</sup> Some have gone as far as to suggest that terrorists should not be afforded the civility of the procedures of international law. See, Bernard Gwertzman, *US Backs Raid, Regrets Death*, NEW YORK TIMES, November 25, 1985 at A1.

<sup>18</sup> William H. Taft IV and Todd F. Buchwald, *Preemption, Iraq and International Law*, 97 AJIL (2003) 557

<sup>19</sup> The question as to why states should ever observe systemic rules, sometimes to the detriment of their own self-interest, is examined in Thomas Franck, *Legitimacy in the International System*, INTERNATIONAL LAW (1992) edited by Martti Koskenniemi.

<sup>20</sup> H. Lauterpacht, INTERNATIONAL LAW, Vol. I, at 341-344. Glennon makes the more extreme argument that the rules of the Charter are irrelevant, especially after repeated violations, significantly by NATO in Kosovo, and then the US in Iraq. He concludes that the US is correct in asserting that it was not illegal for it to have bombed Iraq. See, Michael J Glennon, *How War Left the Law Behind*, NEW YORK TIMES, November 21, 2002 at A37.

An interpretative model should force us to adopt a sense of humility in avoiding the exhortation of one principle at the expense of the other, and to strike a *balance* between the two competing aims. The fact that we can understand why the law needs to be able to vindicate our moral intuitions<sup>21</sup> must not be a license to either ignore it at the slightest instance that it does not, or to advocate a reading of the Charter that merely describes rather than prescribes.<sup>22</sup> If so, the Security Council is no longer enforcer and protector of international law so much as it is a platform for political bargaining.<sup>23</sup>

It is this exact sentiment that was expressed in a Security Council meeting on the UN's role in ensuring the rule of law and promoting justice: "The restoration of the rule of law is the *sine qua non* for the sustainable resolution of conflict and the rebuilding of secure, humane and orderly societies."<sup>24</sup>

The study of law is almost always the study of where the limits are drawn.<sup>25</sup> Iraq demonstrates that with crystal clarity. How far can we go in attacking a regime we believe to possess or is about to possess weapons that will threaten us but which have yet to actually attack us? Does *fear* of attack put us within the rubric of Art 2(4)? Such questions prompt the need for a systematic interpretative guide, one that reconciles our knee-jerk intuitions with sensible pragmatism, political reality with normative aspirations.

### **III. The UN Charter: The Starting Point**

While this essay's proposal of an interpretative model rests primarily on a given assumption that the *Charter* is our starting point, the US' almost-unilateral action in Iraq has made it clear that this assumption does not rest easy. It has highlighted the question of whether the UN Charter is of any relevance at all, and hence by extension, whether it

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<sup>21</sup> See generally, 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.'

<sup>22</sup> See below, Part VI, where I argue that one of the framing philosophies of the Charter is to act as a side-constraint on the wanton exercise of power by states.

<sup>23</sup> This is the argument of Glennon who sees international legalist institutions as "largely epiphenomenal, that is, reflections of underlying causes. They are not autonomous, independent determinants of state behavior but are effects of larger forces that shape that behavior." See, *Why the Security Council Failed*, 82 FOREIGN AFFAIRS (2003) 16 at 30

<sup>24</sup> Mr Jean-Marie Guehenno, Under-Secretary for Peacekeeping Operations, at the Security Council Meeting, S/PV.4835 on "Justice and Rule of Law: The Role of the United Nations," (September 30, 2003).

<sup>25</sup> Miriam Sapiro, *Advising the United States Government on International Law*, 27 N.Y.U.J INT'L L. & POL. 619 (1994-1995) at 621 says that the central task for today's international lawyer is to "never say no when you could say yes; and never say yes when you must say no."

should continue to be the basis for regulating international behavior.<sup>26</sup> There are two main interrelated answers.

The first is simply a matter of authority. The United Nations and its attendant organs derive their power from the Charter itself. This was confirmed by the Appeals Chamber of the ICTY as such:

The Security Council is an organ of the international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law.)<sup>27</sup>

The Charter therefore simultaneously provides for the powers of the Council and the limits to those powers as well.<sup>28</sup> The ICJ has held:

The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers and criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, *reference must be made to the terms of the constitution.*<sup>29</sup>

Given that the US and UK will almost never contemplate forgoing their seats in the Security Council, and that the Council's powers derive from the Charter itself, it would be highly problematic even for them to assert that the Charter is irrelevant.

Further, a constitution is contractual in the sense that it encapsulates an agreement between the various parties *inter se*. Given that the international system of law rests on an essentially voluntary system, it is important to construe what member states consented to, and what they did not. The Charter is a *record* of the agreement of the balance between rights and responsibilities. The corollary of a contract is that every party to it has a veto: unless she agrees, no contract is formed.<sup>30</sup> Therefore, if, on a proper construction of the Charter, an act was not consented to by the signatories, no one is bound by it.

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<sup>26</sup> The irony, of course, is that in violating the Charter, the US and its allies risk losing the only institutional chain it has over other countries.

<sup>27</sup> Appeals Chamber Decision of the Tadic Jurisdictional Motion, *Prosecutor v Dusko Tadic a/k/a "Dule"*, Case No. IT-94-1-AR72, 2 October 1995, para 28. Article 7 "establishes", *inter alia*, the General Assembly, the Security Council and the International Court of Justice.

<sup>28</sup> This is "more or less uncontroversial." *See*, David Schweigman, *THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UNITED NATIONS CHARTER* (2001), at 166

<sup>29</sup> *Conditions of Admission of a State to Membership in the United Nations*, Advisory Opinion, ICJ Reports (1948), at 64. (emphasis mine.)

<sup>30</sup> Ronald Dworkin, *Justice and Rights*, *TAKING RIGHTS SERIOUSLY* (1977) at 168-9. The Vienna Convention on the Law of Treaties (1980) speaks of the "free consent" of parties in entering into treaties.

For those who believe in an international order based on law, there is little disagreement that the Charter is of constitutional status.<sup>31</sup> The fact that almost every country seeks to explain itself by reference to the Charter is not without significance. Most explicitly, it continues to be argued the strike on Iraq is consistent with the law despite its being conducted outside Security Council approval.<sup>32</sup> The Charter is the fountain of legitimacy; it allocates powers and rights; it carries both denotative as well as connotative implications. Of course acknowledging that the Charter is our *starting point* does not absolve us from the question of how best to interpret it, and it is a question to which we will turn shortly.

#### **IV: The UN Charter: Is it Legal or Legitimate?**

Article 1 of the United Nations Charter stipulates that one of the purposes of the United Nations is to bring about the settlement of international disputes by peaceful means and in conformity with the principles of justice *and* international law. After 58 years, this purpose is still a very important one for this Organization.<sup>33</sup>

That we can speak of justice *and* international law surely suggests an uncomfortable dichotomy between our sense of morality and the law. My proposed interpretative model advances the dialogue by refusing to draw an arbitrary line between legal and legitimate. Lest we dismiss this as academic indulgence, it is useful to point to two particular examples where this issue was implied or raised.

Before the strikes in Yugoslavia, several resolutions had been taken condemning the “appalling atrocities” that were being committed.<sup>34</sup> More than half of Kosovo’s population was displaced.<sup>35</sup> It was clearly a violation of international humanitarian law;

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<sup>31</sup> I use the metaphors of contract and constitution interchangeably because they essentially convey the ideas I wish to make. It is a contract in the sense that it captures the terms that state parties consent to; and it is a constitution in the sense that its terms are somewhat elastic and shades differently according to changes in circumstances in a unique constitutive process – rather than an abandonment and remaking of a new contract. The idea of the Charter as a constitution seems to be implicitly or explicitly recognized by many, and appears to be uncontroversial. See, generally, Franck, *Is the UN Charter a Constitution?* VERHANDELN FÜR DEN FRIEDEN (2003), edited by Frowein, Scharioth, Winkelmann and Wolfrum. This was also judicially accepted in *Prosecutor v Dusko Tadic a/k/a “Dule”*: see, supra, note 27

<sup>32</sup> Particularly S.C. Res 1441 of 8 November 2002, where the Security Council declared Iraq in material breach of its obligations and afforded it a ‘final opportunity’ to comply with various other resolutions on weapons inspection. See, Lord Goldsmith, Attorney-General Clarifies Legal Basis for Use of Force Against Iraq (March 18, 2003), available at <[www.fco.gov.uk](http://www.fco.gov.uk)> (statement in response to a parliamentary question.)

<sup>33</sup> Mr. Haraguchi, Representative for Japan, at the Security Council Meeting, S/PV.4835 on “Justice and Rule of Law: The Role of the United Nations,” (September 30, 2003). (Emphasis mine.)

<sup>34</sup> S/1998/912, 3 October 1998, R/RES1160 of 21 March 1998, S/RES/1199 of 23 September 1998, R/RES/1203 of 24 October 1998, S/PRST/1999/2, 19 January 1999.

<sup>35</sup> See, S/1999/99, of 30 January 1999, Annex II, Table 1 for a documentation of the various atrocities committed.

the Security Council “emphasizing the need to ensure that all the rights of the citizens of Kosovo are respected.”<sup>36</sup> The moral prerogative was not in doubt. What was doubtful, was whether NATO’s action, outside of any prior authorization by the Security Council, was legal.<sup>37</sup> Russia, convening the 3988<sup>th</sup> Meeting of the Security Council, expressed her “profound outrage” at NATO’s attacks. She argued that

...attempts to justify the NATO strikes with arguments about preventing a humanitarian catastrophe in Kosovo are completely untenable. Not only are these attempts in no way based on the Charter or other generally recognized rules of international law, but the unilateral use of force will lead precisely to a situation with truly devastating consequences.<sup>38</sup>

Equally adamant, were those *in favor* of the strikes. The United Kingdom, argued:

In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable. The force now proposed is directed exclusively to averting a humanitarian catastrophe, and is the minimum judged necessary for that purpose.

It should be noted that while countries supporting the strikes took pains to justify their actions as a necessary last resort to halt what was an undeniably gross humanitarian violation, those against the strikes equally took much effort to stress that they were not blind to the atrocities. Russia, for instance, said, “We certainly do not seek to defend violations of international humanitarian law by any party.”<sup>39</sup> This is particularly instructive because it demonstrates very clearly the division between those who separate the law from morality, and those who believe that, in some circumstances, if violating a law vindicates a moral wrong, it is acceptable.

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<sup>36</sup> S/RES/1199 of 23 September 1998

<sup>37</sup> NATO’s actions were not the first time a regional organization acted outside or prior authorization. ECOWAS, in Liberia and Sierra Leone, also intervened in humanitarian disasters. In 1991, five months after the ceasefire in Liberia, the Security Council issued a Presidential Statement commending the efforts made by ECOWAS to ‘promote peace and normalcy.’ (S/22133 of 22 January 1991) The same refusal to condemn ECOWAS in Sierra Leone, and in fact, the commendation of its “positive role” (S/RES/1181 of 13 June 1998), again showed the UN’s willingness to recognize the necessity of allowing regional organizations to take the lead in dealing with humanitarian disasters when it cannot. (We will return to the point of trusteeship later on.) The difference between NATO’s and EOCWAS’ actions though was that Liberia and Sierra Leone were members of ECOWAS and hence were subject to the latter’s jurisdiction under Art 52(1) of the UN Charter. Yugoslavia was not a member of NATO and therefore falls under the general terms of the prohibition on the use of force under the Charter. *See* further, Franck, *RECOURSE TO FORCE* (2002) at 155-163.

<sup>38</sup> S.C.O.R. (LIV), 3988<sup>th</sup> Meeting, 24 March 1999, at 2-3

<sup>39</sup> *Ibid*, at 3

In 2003, Saddam was accused of repressing his own people, aiding terrorism, and blocking inspections aimed at disarming it of weapons of mass destruction.<sup>40</sup> Australia, one of the supporters of the war, declared as such:

[A]n Iraq with weapons of mass destruction represents a grave threat to our security and to international security. Our participation in the coalition is in complete accordance with international law.<sup>41</sup>

Malaysia responded:

[U]nilateral military action undertaken without the support and authorization of the Security Council violates international law and the United Nations Charter. Furthermore, the doctrine of pre-emptive strikes has no foundation in international law.<sup>42</sup>

Again, we find ourselves in a situation where some countries speak as if the moral case *is* the law, and others speak as if the law is *divorced* from the moral case. My predictable answer is that neither position is correct. Law and morality are neither mutually distinct nor can one substitute the other as a guide of what a country is ‘allowed’ to do. Rather, it is a constitutive process. Morality informs the law, as much as the law provides stability and formal consistency to what may otherwise be random assertions of what is ‘just.’

The examples demonstrate the danger of either polarity. Where rules of law are not based on moral commonsense, they will be observed more in the breach. Simultaneously, we can understand the reluctance to allow our moral intuitions to trump established rules:<sup>43</sup>

Those who are involved in this unilateral use of force against the sovereign Federal Republic of Yugoslavia — carried out in violation of the Charter of the United Nations and without the authorization of the Security Council — must realize the heavy responsibility they bear for subverting the Charter and other norms of international law and for attempting to establish in the world, *de facto*, the primacy of force and unilateral diktat.<sup>44</sup>

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<sup>40</sup> S/RES 1441 of 8 November 2002

<sup>41</sup> S.C.O.R. (LIV), 4726<sup>th</sup> Meeting, 26 March 2003, at 27

<sup>42</sup> *Ibid*, at 8

<sup>43</sup> At San Francisco, there was concern that peace would be sought at the cost of justice. In fact Netherlands thought that while they “do not claim to have found the ultimate solution, they have asked themselves whether a reference to those feelings of right and wrong, those moral principles which live in every human heart would not be enough.” (Proposals for the Maintenance of Peace and Security Agreed at the Four Powers Conference at Dumbarton Oaks at 313). In 1945, Ecuador proposed that the supremacy of moral law [be] the guiding motive which governs relations between states.” (3 UNICO General, Doc 2, G/7(p), May 1, 1945 at 398. *See also*, Franck, RECOURSE TO FORCE (2002), at 14-19.

<sup>44</sup> S.C.O.R. (LIV), 3988<sup>th</sup> Meeting, 24 March 1999, at 2

The harms of such polarity are obvious. As a practical matter, this creates political rifts between the two camps. This is untenable. In calling for a “unity of purpose,” UN Secretary-General Kofi Annan exhorted the Security Council as such:

Let me conclude by saying that we are living through a moment of deep divisions, which, if not healed, can have grave consequences for the international system and relations between States. I appeal to all of you to reunite around a new resolve to uphold the principles of the Charter. This is essential if the Security Council is to recover its rightful role, entrusted to it by the Charter, as the body with primary responsibility for the maintenance of international peace and security.<sup>45</sup>

This was echoed by South Africa who reminded us that “the Security Council is the primary institution that gives legality *and* legitimacy to our collective efforts to secure peace and security in the world.”<sup>46</sup> As much as it is reasonable to assert that an automatic equation between law and morality “threatens to degenerate into a pretence for the use of power by those who have the means,”<sup>47</sup> there is no doubt that a continued persistence on maintaining a distinction between morality and law, common sense and rules, is, if anything, only going to put a wider wedge between nations on difficulty issues in the future by giving them an excuse to hide political animus behind the veil of legal dispute.

But apart from the practical ramifications of not drawing a common ground between legality and moral justice, there are two interrelated problems on principle. The first is that this creates a *hydraulic effect*, where because we are not allowed to refer to our moral senses in interpreting the Charter, we are forced to read it in a very artificial manner in order to keep up the pretense. For instance, the UN’s sending in of troops to Congo<sup>48</sup> in order to drive out Katanga separatists. This, despite the presence of Articles 2(4) and 2(7), which, read together, prohibits intervention in matters “essentially domestic.” It is clear that any assertion that civil wars are not internal is mere sophistry. In 1992, the Security Council again intervened in the Somali civil war<sup>49</sup> in what it called a “unique situation.” Of course, such action was anything but exceptional. The UN has intervened in Yemen, Iraq, the former Yugoslavia, Haiti<sup>50</sup> and Sierra Leone. In fact, in 1992 itself, UN Secretary General Boutros Boutros-Ghali called for a more interventionist approach

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<sup>45</sup> S.C.O.R. (LIV), 4726<sup>th</sup> Meeting, 26 March 2003, at 4

<sup>46</sup> *Ibid*, at 20.

<sup>47</sup> Martti Koskenniemi, ‘*The Lady Doth Protest Too Much*’ – *Kosovo, and the Turn to Ethics in International Law*, (2002) 65 MLR 159, at 167

<sup>48</sup> S/RES 143 of 13/14 July 1960

<sup>49</sup> S/RES 794 of 3 December 1992

<sup>50</sup> S/RES 940 of 31 July 1994. Uruguay also opposed the resolution, saying that, “We do not believe that the internal political situation in Haiti projects externally in such a way as to represent a threat to international peace and security.” See generally, S/PV.3413, S.C.O.R. (LIV), 3413<sup>th</sup> Meeting, at 5-6. Both were observers at the meeting, and the resolution (940) was adopted with 2 abstentions (China and Brazil.)

in *An Agenda for Peace*,<sup>51</sup> where he argued for what he calls “peace-making”, with clear references to UN involvement towards peace-building in countries torn by civil strife.

It is no doubt admirable that the Council tries to build a future “more secure, more free and more prosperous.”<sup>52</sup> But to justify its actions with reference to a lazy reading of the Charter only opens the way towards a dangerous path where more countries are tempted to do so, and is simply wrong in principle. The authority that the Security Council has derives from the mandate given to it by the Charter. If the Charter can be read in such a loose and artificial fashion, then it becomes perfunctory. This would violate the principle of “maximum effectiveness” expressed in the rule *ut res magis valeat quam pereat* – it is better for a thing to have effect than to be made void. Every provision is included for a reason and it should not be made redundant.<sup>53</sup>

Another problem has been the proposal of what is called the doctrine of mitigation. This doctrine would allow exceptions to the norms of Charter where there is an extenuating circumstance. It “does not create law and is recognized as purely circumstantial and discretionary. [Such] unanticipated factors and extreme necessity may exceptionally mitigate the consequences of acting ‘off the Charter’ while still leaving the Charter’s norms in tact.”<sup>54</sup> Two bases are put forward. The first is judicial precedence. Here, we are pointed to the *Corfu Channel Case*<sup>55</sup> where – it is argued – the court recognized certain extenuating circumstances. However, a closer reading may suggest otherwise:

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.*<sup>56</sup>

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<sup>51</sup> A/47/277 - S/24111 of 17 June 1992, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992

<sup>52</sup> Madeline Albright, speaking for the US, after the vote was taken on Resolution 940. *Supra*, note 50.

<sup>53</sup> G. Fitzmaurice, *THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE* (1986), at 49. *See also*, generally, David Schweigman, *THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER* (2001), at 10

<sup>54</sup> Franck, *RECOURSE TO FORCE* (2002), at 190. *See also*, Oscar Schachter, *INTERNATIONAL LAW IN THEORY AND PRACTICE* (1991) at 126. He believes that despite the absence of prior authorization, where “the necessity is evident and the humanitarian intention is clear,” humanitarian interventions can be “pardoned.” *INTERNATIONAL LAW IN THEORY AND PRACTICE* (1991) at 126

<sup>55</sup> *Corfu Channel Case (United Kingdom v Albania)*, *Judgment of 9<sup>th</sup> 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.

<sup>56</sup> *Ibid*, at 35 (emphasis mine.) Professor Franck argues that the *Teheran Hostages Case* is another example supporting this doctrine. (*Supra*, note 54, at 185). But the reason the court did not pronounce on the illegality of the US’ action was because it had no bearing on the legality of Iran’s action. I fail to see how the fact that the ultimate decision, despite America acting while the case was still before the court, can be

It is thus not at all clear that judicial opinion agrees that mitigation is a valid defense. In this case, the ICJ held that the United Kingdom was in breach of Albania's sovereignty *despite* acknowledging the so-called extenuating circumstances.

The second basis of the doctrine derives from an analogy with domestic law that allows defenses in order "to bridge the gap between what is requisite and what is generally regarded as just and moral."<sup>57</sup> There are at least two difficulties with such an analogy. The first is that this resort to what is "just and moral" is, in contrast with domestic law, nowhere supported by the text of the Charter. This is crucial because even if we make allowances for the evolution of international law, they must be supported by reference to the Charter, which remains the only universally accepted legal basis for the use of force.<sup>58</sup>

My second objection lies in the difficulty in deciding *when* this should apply. It is one thing to say that any exception is open to abuse, but quite a different thing when there is not even a system by which we can even determine, in any *principled* manner, when these exceptions apply. In domestic laws, excuses such as diminished capacity are held to articulated standards and requirements of proof.<sup>59</sup> Morality, on the other hand, is an extremely broad concept. If morality is to trump in every such situation, then the processes of the international system will be rendered superfluous.

One might accuse my approach as conflating excuses with justifications. Defenses in domestic law operate on two-tiers: those that exculpate, or absolutely negate any illegality (justification); and others that merely excuse the crime without denying the underlying guilt. It is argued that the doctrine of mitigation does not suggest that the acts are legal. They are claimed to be excuses. In fact, it is argued that making this distinction preserves the norm and therefore stops, rather than creates, a slippery slope. My answer to this is simple. In domestic law, the issue of mitigation applies in reducing the *sentence* for an illegal act. In international law, there is no such parallel. If NATO argues that Kosovo was legitimate, they don't mean to accept *some* punitive sanction; 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: "NATO's actions are completely

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construed as support for the doctrine of mitigation. 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.)

<sup>57</sup> Franck, *RECOURSE TO FORCE* (2002), at 180

<sup>58</sup> UN Secretary General, Kofi Annan, 54 GAOR, 4<sup>th</sup> Plenary Meeting, September 20, 1999, A/54/PV.4, at 2 (para 66)

<sup>59</sup> For instance, section 4.02(1) of the American Law Institute's Model Penal Code is as follows: "Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense."

justified. They are necessary to stop the violence and to prevent a further deterioration of peace and stability in the region.”<sup>60</sup>

It is not clear whether the US representative, Mr Burleigh, used the word “justified” in the technical sense in which lawyers distinguish between excuse and justification. If he did, then it shows clearly that he thought the moral necessity of the situation *negates* the illegality. But even if he did not mean to make that distinction, it is clear that they see that the *practical* effect of mitigation is absolution.<sup>61</sup> Therefore, practically speaking, unlike in domestic law, there is no distinction between excuse and justification.

No one suggests that basic notions of morality and justice are unimportant. Indeed, one of the important controversies at San Francisco was precisely over the unease that many delegates felt in a system that seemed to prize peace over all else. Australia, while emphasizing the priority of principles of non-aggression and state sovereignty, said, “At the same time, we recognize that in the course of time, adjustments in the existing order may become necessary, not so much for the preservation of peace as for the attainment of international justice.”<sup>62</sup> But respect for the international system will also diminish if we attempt to secure justice by undermining the very foundation we seek to support. The point is this: if we are to uphold moral values, we must find the means *within* the structure and words of the Charter, and not outside it. It is wishful thinking that such broad exceptions can still leave the Charter norms in tact.

## V. A Proposal of an Interpretative Model

The US’ strike against Iraq opened our eyes to the very real practical and philosophical issues that continue to plague our system of international law. It revealed the failure of nations to seek common ground and exposed the sharp division between them. There is a need to balance pragmatism with idealism, and to vindicate the purposes of the Charter without setting a dangerous precedent. A failure to approach the interpretation of the Charter with sensitivity to these issues, and falling into the trap of divorcing the twin concepts of legality and legitimacy, can only spell even more angst and division. An interpretative model, then, must reject extremes. While paying attention to the text, it must be cognizant of its relationship to the real world; and while attempting to secure our

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<sup>60</sup> S.C.O.R. (LIV), 3989<sup>th</sup> Meeting, 26 March 1999, at 5. Speaking before action on the text, the representative of the Russian Federation said that attempts to justify the military action under the pretext of preventing a humanitarian catastrophe bordered on blackmail, and those who would vote against the text would place themselves in a situation of lawlessness. Indeed, the aggressive military action unleashed by the North Atlantic Treaty Organization (NATO) against a sovereign State was a real threat to international peace and security, and grossly violated the key provisions of the United Nations Charter.

<sup>61</sup> In another case, where Israel kidnapped war criminal Adolf Eichmann in Argentina, the Security Council passed a resolution that reiterated the need to respect national sovereignty (S/RES 138 of 23 June 1960) but at the same time imposed no punitive measures on Israel. It is arguable in this case that the Security Council recognized the illegality of the action. But this also illustrates that the practical consequence is hardly any different from nullifying the illegality of the act. It seems to merely pay lip service to the fact of illegality.

<sup>62</sup> 1 UNICO, Plenary, Doc 20, P/6, April 28, 1945, at 174, cited in Franck, *RECOURSE TO FORCE* (2002), at 17

moral intuitions, it must avoid reducing the Charter to an instrument of post-hoc rationalization. The interpretative model that I propose involves a series of steps that forces the decision-maker to confront the multidimensional nature of a truly thorough inquiry that will address the concerns of the foregoing analysis.

### A. Text, and Changing Circumstances

If there is one lesson that Iraq taught us, it may well be that we are fighting new battles with old rules. While the attack on Iraq was itself justified on narrow technical readings of various resolutions by the Security Council, Iraq did represent a new moral paradigm. That paradigm was this: short of an actual armed attack (which would justify retaliation under Art 51), how long must a country wait for a threat to materialize before preemptive measures may be taken against it?<sup>63</sup> The Bush Administration's initial answer was contained in the NSS as follows: 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.<sup>64</sup>

This, of course, is hardly what the words of Art 51 allow on its face. The question for us is the extent to which we believe that our interpretation of the text should be flexible enough to allow the Charter its proper role as a living constitution. As Kofi Annan reported, the demands we face also reflect a growing consensus that collective security can no longer be narrowly defined as the absence of armed conflict.<sup>65</sup>

A constitution assumes that the parties have contracted with reference to the possibility of change, and the role of construction is to ask what might have the parties agreed had they known that this would happen.<sup>66</sup> So in determining whether evidence of an impending attack would justify a state taking unilateral pre-emptive action, we need to put ourselves in the shoes of the framers of the Charter and see if this would have been their intention. This is sometimes known as the doctrine of original intent, strict constitutionalism or fidelity to the framer's intent:

The whole aim of construction is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted the Constitution. The necessities which gave rise to the provision, the controversies which preceded, as well as the conflicts of opinion which

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<sup>63</sup> William H Taft IV, Legal Advisor, Department of State, *The Legal Basis for Preemption*, Nov 18, 2002, available at <<http://www.cfr.org/publication.php?id=5250>> (memorandum to American Society of International Law-Council on Foreign Relations Roundtable on Old Rules, New Threats)

<sup>64</sup> NSS, *supra* note 8, at 15

<sup>65</sup> Report of the Secretary-General on the Work of the Organization, 55<sup>th</sup> GAOR, 5<sup>th</sup> Plen. Meeting, August 30, 2000, A/55/1, at 4

<sup>66</sup> Dworkin makes the distinction between actual interest and antecedent interest in explaining why it may be fair to impose certain conditions on people even though they may not have agreed to it explicitly. In essence it says it is fair to do so where it is determinable that the person would have agreed to the condition had he been asked earlier because, all things considered, it would still have been in his interest to agree. *See*, Ronald Dworkin, *TAKING RIGHTS SERIOUSLY* (1977), at 150-3.

were settled by its adoption, are matters to be considered to enable us to arrive at a correct result. The history of the times, the state of things existing when the provision was framed and adopted, should be looked to in order to ascertain the mischief and the remedy. As nearly as possible we should place ourselves in the condition of those who framed and adopted it.<sup>67</sup>

At the same time:<sup>68</sup>

Legislation, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are designed to approach immortality as nearly as human institutions can approach it.

The ICJ has also commented as such:

In the interpretation of a multilateral convention...which sets before itself certain sociological or humanitarian goals, the task of interpretation should be guided by the object and purpose which the Convention sets before itself. A literal interpretation, using strict methods of anchoring interpretation to the letter, rather than to the spirit of the convention, would be inappropriate.<sup>69</sup>

The fact that the Charter contains no provision for a state to withdraw (unlike its predecessor, the League of Nations Covenant) suggests that the provisions should be read in order to make sense for perpetuity.<sup>70</sup> Indeed, whatever one's conviction may be in this area, it is undoubted that the practice of the member states has leaned towards the latter.<sup>71</sup>

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<sup>67</sup> *Home Building & Loan Association v Blaisdell*, 290 US 398 (1934) per Justice Sutherland (in dissent)

<sup>68</sup> *Weems v United States* 217 US 349 (1910) per Justice McKenna

<sup>69</sup> *Legality Of The Use By A State Of Nuclear Weapons In Armed Conflict*, Adv. Op., Judge Weeramantry, ICJ Rep (1996), at 148 (Dissenting Opinion.)

<sup>70</sup> The Charter only provides for the expulsion of members pursuant to Article 6 if there has been a persistent violation of the Principles. So far, no nation has been expelled. Franck observes that in practice, the UN has “studiously avoided validating a right of exit” by pointing to Indonesia who had, in 1965, purported to leave because of its failure to win support for its claim to North Borneo and Sarawak, but then changed its mind, and was seated in the General Assembly as if the withdrawal was null and void. Franck, *supra* note 31, at 2.

<sup>71</sup> See, *The United Nations and Iraq: Irrelevant, Illegitimate or Indispensable?*, THE ECONOMIST, February 20, 2003, available at <[http://economist.com/displaystory.cfm?story\\_id=1592138](http://economist.com/displaystory.cfm?story_id=1592138)> Interestingly, in 1955, the Security Council adopted a resolution that expressed its concurrence in an earlier General Assembly Resolution 922 (X) that would convene a conference at an appropriate time to review the

Take, for instance, Article 27(3) which provides that all non-procedural matters “shall be made by an affirmative vote of nine members including the *concurring* votes of the permanent members.” A plain reading of Article 2(7) should be enough to realize that abstentions from the permanent members should, unless one stretches the imagination, mean that the resolution is “vetoed.” Yet, the Council has adopted some 319 resolutions<sup>72</sup> where there has been an abstention. The ICJ has endorsed this practice in the *Namibia* Advisory Opinion.<sup>73</sup> Other examples of the Charter evolving include the starting, and then the expansion, of the concept of peace-keeping which is nowhere mentioned in the Charter. But under the mandate of a fictive “Chapter 6½” of the charter, invented to mop up after the Suez expedition in 1956, countless peacekeeping operations have been undertaken, and their scope has been steadily widened.<sup>74</sup>

The underlying premise of such evolution is that there is very little reason why we should be held ransom to the writers of any given treaty, precisely because it is undoubtedly the case that the balance those writers struck would have been because of the immediacy of the circumstances they faced, and wanted to cure. The overwhelming emphasis on non-violence was primarily the result of the treaty being negotiated not quite yet at the end of the Second World War and there were threats of another round of conflict.<sup>75</sup>

Given the tension between the need to ensure against running against the express intentions of the parties to the Charter, and the need to evolve, how do we decide which terms are pliable are which are not? The US Supreme Court has said:

When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented...But where constitutional grants and limitations of power are

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Charter. In doing so, it reminded itself of Art 109, which provided for a General Conference of the Members of the United Nations to review the Charter before the General Assembly’s 10<sup>th</sup> annual session, and if such a conference was not held, then it will be if there is a majority vote in the General Assembly and any seven votes in the Security Council. (S/RES 110 of December 16, 1955) This would seem to indicate that the founders of UN thought it was important that succeeding generations would be able to have a second look of the Charter, presumably with a view towards altering it if necessary. The logical conclusion appears to be that they certainly did not believe the Charter as it was written in 1945 would forever be unchanged, and probably felt unsure that the Charter had achieved the right balance.

<sup>72</sup> Franck, *RECOURSE TO FORCE* (2002), at 8

<sup>73</sup> *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 22, para 22.

<sup>74</sup> The first deployment by the UN dates back to 1948, where, under resolutions S/773 of 22 May 1948 and S/801 of 29 May 1948, 600 military observers were sent to monitor the Arab-Israeli ceasefire. To demonstrate its rapid expansion: most recently, on October 14, 2003, the UN Council unanimously voted to expand the 55,000 NATO-led peacekeeping operations in Afghanistan beyond Kabul.

<sup>75</sup> See generally, Stephen Schlesinger, *AN ACT OF CREATION, THE FOUNDING OF THE UNITED NATIONS: A STORY OF SUPER POWERS, SECRET AGENTS, WARTIME ALLIES & ENEMIES AND THEIR QUEST FOR A PEACEFUL WORLD* (2003)

set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details.<sup>76</sup>

This method of interpretation makes a lot of sense. If the framers wanted to insulate certain provisions against change, they would have made it so specific that there was only one way to read it. But where words like “peace” and “aggression” are used, it is not inconceivable that it was their intention that future generations be able to interpret these according to the changing contexts. It would be fair to impose such an interpretation on the signatories to the Charter because even though they may not have known what the exact interpretation would end up being, it would still, on balance, have been in their interest to agree to this flexibility.

## B. INTERPRETING AMBIGUITY

Most controversies arise precisely because the provisions in the Charter are worded broadly, and are thus likely to be capable of being understood different from when it was formulated. For example, in the context of Iraq - and the general issue of preventive self-defense that it raises – much argument has been made in favor of a more flexible doctrine that acknowledges the reality that threats posed to nations no longer take the form of visible troops marching in the horizon but in the form of potentially lightning-quick strikes, involving weapons of mass destruction. The impracticality of waiting for a first-strike before retaliating is an oft-quoted justification for a more expansive reading of Art 51, which otherwise offers a relatively limited right to self-defense.

The starting point in interpreting how to proceed when it is not clear that the framers intended only *a* specific meaning is to distinguish between *institutional* rules (that provide a justification for a decision by some particular and specified institution) and *background* rules (that provide a justification for decisions in the abstract).<sup>77</sup> The distinction may be illustrated as follows.<sup>78</sup>

*Institutional rules* are fixed by constitutive and regulative rules that belong distinctly to that institution. No one can claim an institutional right by reference to some general sense of morality. If we recall the discussion on the doctrine of mitigation, we can now see why I objected to it. It is for the simple reason that institutional rules would be rendered superfluous if every time there was a decision to be made on an issue, institutional rules will defer to some general and nebulous idea of what is right and wrong. But the theory of institutional rules goes further. It says that they can only be recognized by constructing the character of the institution by asking a series of questions that looks at its history and established norms. A decision in a hard case must be brought within a general theory of why, in the case of this institution, the rules create or destroy those particular rights in question. The situation is somewhat more subtle especially in an Organization as complex as the UN. There is not only one institutional rule; there are many. And in

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<sup>76</sup> *Home Building & Loan Association v Blaisdell*, 290 US 398 (1934) per Chief Justice Hughes

<sup>77</sup> See generally, Dworkin, *Hard Cases*, TAKING RIGHTS SERIOUSLY (1977) at 81-130

<sup>78</sup> *Ibid*, at 93

making a decision as to whether an act is legal, one would have to consider these various (sometimes seemingly contradictory) rules together – and decide where one rule ends and another starts.

However, apart from a horizontal association between institutional rules, there needs to be a vertical association between institutional and background rules. Institutional rules may need to be trimmed, aligned and positioned in order to “fit” within the larger moral canvass that the particular institution supports. This constitutive interaction is necessary if we believe in an ethically-drenched interpretative model, one where law and morality ought to be – to some extent – one and the same. A constitutional theory is therefore formulated by referring alternately between background theory and institutional detail.<sup>79</sup>

Let me illustrate this by reference to one justification that was proffered for the invasion of Iraq: the human rights situation. Given the general prohibition on the use of force unless to restore “international peace and order,” would the UN have had the authority to intervene solely on the basis of human rights violations?<sup>80</sup> Well, it is not clear. This is a situation in which the rules are not so particularized as to deny any reinterpretation. An analysis of institutional rules reveals that exceptions to the prohibition against force are drafted narrowly. Once we start automatically equating human rights abuses with “international peace and security” it blows apart any meaningful right to sovereignty and puts the Security Council in the unenviable position of having to sit in judgment of all domestic arrangements. And, neither the text nor the history explicitly recognizes a right to act in cases of human rights abuse. On the other hand, there is an instinctive sense that in *some* circumstances – surely – the lives of humankind must be valued more than sovereignty concerns. Thus the question becomes whether we can fit our institutional rules within some background theory. In other words, if we are going to be able to deal with such abuses, we have to find a way *within* the Charter itself

Here, the Charter clearly states as one of its purposes respect for human rights and fundamental freedoms: We, the peoples of the United Nations, determined to...reaffirm faith in fundamental human rights...*and for these ends*...to maintain international peace and security. It is certainly arguable therefore that the notion of “peace and security” is not purely military, and may in fact have been regarded as having an *instrumental* value in ultimately protecting the rights of the individual.<sup>81</sup>

This process of going back and forth in determining the interpretation of a troublesome provision is much more difficult in reality. Even within the background theories or within

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<sup>79</sup> Ibid, at 107

<sup>80</sup> This analysis does not deal with the question of individual nations intervening without UN authority. That issue will be addressed later.

<sup>81</sup> Drastic human rights violations tend to have spillover effects on neighboring countries, especially in the form of refugee movement so that they often do have a practical international dimension, in addition to the moral one. Inherent in this discussion is, of course, the recognition of competing background theories. Whether and when human rights abuses *per se* are sufficient to justify trumping the domestic jurisdiction exception contained in Art 2(7) is investigated in Part VI.

the institutional rules, there will be many, all of which need to be referred to in order to generate an answer for such hard cases, and to ensure that the part is consistent with the whole. So the process is not simply bouncing between one background rule and one institutional rule, but quite probably, between several. This complexity is probably what UN Secretary-General Kofi Annan had in mind when he said:

The sovereign States that drafted the Charter over a half century ago were dedicated to peace, but experienced in war. They knew the terror of conflict, but knew equally that there are times when the use of force may be legitimate in pursuit of peace. That is why the Charter's own words declare that "armed force shall not be used, save in the common interest". But what is the common interest? Who shall define it? Who will defend it — under whose authority and with what means of intervention? These are the monumental questions facing us as we enter the new century.<sup>82</sup>

One might object that if we end up with the same conclusion, why bother going through this process. The point in doing so is because it forces the reader to look first and foremost to the words of the Charter. If we accept the contractarian analysis above, the only way we can impose conditions on member states is if we are able to point out that, on a proper construction of the Charter, this is what they signed on to. Therefore the analysis begins not from some general conception of what is good and bad, but a careful consideration of what the institutional rules are. We look at the words of the Charter, and ask ourselves if it admits of any ambiguity. If there is none, then that must be the end of the inquiry. If there is doubt, or if it is in fact obvious that certain *conceptions* are meant to change with time, then we must first construct the institutional rules by reference to history, norms and text. Sometimes, this may be sufficient to yield a clear and sensible result. Other times, where the result appears awkward or counterintuitive, we see if we can fit these institutional rules within some background theory. The UN is framed by such underpinning philosophies, and answers should be sought within these confines.

There is another reason for this constitutive process of referring back and forth.<sup>83</sup> An alternative for reading the relationship between, say individual rights and national sovereignty, might be to suggest that the sovereign state is a device that protects *preexisting* rights.<sup>84</sup> What the method I propose does is to argue that a person is constituted as a rights holder of a certain sort only *within* the context of a specific social relationship. If we elevate this to the international system, what it means is that countries maintain rights only insofar as the matrix of institutional rules and background theories allow. If a state asserts a right to use force, that country has to justify it with reference to that matrix, and not by resort to any autonomous or free-standing right.<sup>85</sup>

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<sup>82</sup> 54 GAOR, 4<sup>th</sup> Plen Meeting, September 20, 1999, A/54/PV.4 at 3

<sup>83</sup> See generally, Mervyn Frost, *ETHICS IN INTERNATIONAL RELATIONS: A CONSTITUTIVE THEORY* (1996)

<sup>84</sup> *Ibid.*, at 138-9

<sup>85</sup> This debate is perhaps best illustrated by the controversy surrounding Art 51 that suggests countries have an "inherent" right to self-defense. See, Oscar Schachter, *Self Defense and the Rule of Law* (1989) 83 AJIL 259. We will be examining this.

We now turn to ask: how do we use this method of interpretation to decide if the strike on Iraq is legal? Iraq poses two interesting questions. One, is whether the US was acting properly when it took it upon itself to enforce what it believed were Security Council resolutions authorizing such action. Two, is whether, in a larger sense, notwithstanding those resolutions, did the US have a right to attack Iraq on the grounds of either preventing the possible threat of Saddam acquiring and using weapons of mass destruction against her, or on humanitarian grounds. I will first begin by elucidating those institutional rules pertinent to answering those questions; and then move on to see if the result we yield fits within the general background theories that underlie the UN. Predictably, the text of Charter – as expected – does not give us an explicit answer either way, and that is why we need to embark on this interpretative mission.

## **VI. Institutional Rules**

Our attention thus turns to what institutional rules govern the use of force, particularly in situations like Iraq's. In this case, we focus on three: the general prohibition on the use of force and its exceptions, the procedural and substantive requirements in the exercise of force, and finally whether there is any truth to the idea that a 'coalition of the willing' may use force on its own prerogative on what I call the trusteeship argument. The definitions and limits of these rules are constructed by looking at the words of the Charter, and examining whether and how institutional practice, norms and history shed light on the text.

### **A. Prohibition on the Use of Force**

The focus of any serious discussion on the *use* of force begins with understanding how wide the *prohibition* on the use of force is. This is captured in Art 2(4). The words are clearly aimed at precluding almost any unilateral recourse to force.<sup>86</sup> The provision uses the word "force" rather than "war", making a deliberate departure from the League of Nations Covenant and the Kellogg-Briand Pact of 1928. "Force" presumably would take care of aggression short of an actual declaration of war. By way of further elaboration, the Declaration on the Principles of International Law Friendly Relations and Co-operation among States adopted in 1970,<sup>87</sup> which is clearly aimed at fleshing out the terms of the UN Charter, purports to "recall the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State."<sup>88</sup> The language is strikingly similar to Art 2(4). I would suggest that "force" therefore includes

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<sup>86</sup> Articles 39, 40, 41, 42 and 51 suggest that this prohibition does not apply to action taken collectively by the UN or authorized by the Security Council. Article 42 in particular empowers the Security Council to take any action it deems necessary to restore international peace and security, without the qualification that it cannot be used against the territorial integrity or political independence of any state.

<sup>87</sup> Adopted at the 1883rd Plenary Meeting, 24 October 1970. (hereinafter, Friendly Relations Declaration)

<sup>88</sup> Preamble, para 9

not only military force, but other coercive acts.<sup>89</sup> Indeed it would be very strange to prohibit only military force but allow other forms of coercion. If the underlying principle is to protect the integrity of the nations, there is really no reason to suppose that there should be any distinction between military and non-military aggression. So, at the most general level, the prohibition on force captures a wide range of situations.

Of more concern however is whether a state violates the Charter where it does not use force but allows other non-state actors to. This is the Taliban situation – where a country may allow itself to be the breeding ground of terrorists or sponsor terror networks. This was also one of the many justifications proffered by the US when it linked Saddam Hussein with Al-Qaeda operations. While the Charter is not clear on this point, we can look to other treaties as indicative of what the international community has accepted as *practice* and *norm* in order to inform our interpretation of the Charter. For instance, Article 1 of the Friendly Relations Declaration says:

Every State has the duty to refrain from organizing, *instigating*, *assisting* or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force. (emphasis mine.)

This would strongly suggest an interpretation that something short of a direct participation in unlawful aggression is nonetheless violative of the Charter. One may try to squeeze this into the meaning of “use of force” against the sovereignty of another state, or more realistically, as one of the unenumerated prohibitions under the “or in any other manner inconsistent” clause of Art 2(4). If we take this as evidence of institutional norms, then it can be confidently stated that even indirect aggression constitutes a violation of Art 2(4) of the Charter.<sup>90</sup> Therefore, assuming it is true that Saddam was selling weapons or aiding in other ways the operation of Al-Qaeda, notwithstanding Security Council resolutions, Iraq would have been in violation of the Charter. But this does not end our inquiry because even if Iraq violated the Charter, it still remains to be seen if the *United States* was proper in acting the way they did.

The strike itself – of course – was a “use of force” and so falls easily within the rubric of Art 2(4) and 51. But what about the explicit threats of a military response before the strikes? An often ignored term is what is meant by the “threat of force.” It is a well

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<sup>89</sup> An interesting question for the future will no doubt be whether the use of computers to send viruses or overload information such as to cripple or jam another country’s computer systems will constitute the use of force. Presumably it would, since its effects could be as, if not more, devastating than a military strike given that many governments use computer systems to control such important facilities as their military defenses.

<sup>90</sup> The ICJ however said the following in the *Corfu Channel Case*, 1949, ICJ at 15: “It is true that a State on whose territory an act contrary to international law has occurred, may be called upon to give an explanation...But it cannot be concluded from the mere fact of control exercised over its territory that it knew, or ought to have known, of the unlawful act perpetrated therein; nor yet that it knew, or should have known, the authors.”

accepted fact that threats of force are made every day particularly by militarily stronger countries. Negotiations with Afghanistan and Iraq were accompanied by threats of force;<sup>91</sup> and it is at least arguable that the threat of force may sometimes be used as a bargaining chip which in fact preempts an escalation of military aggression. However, given that the scheme of the UN is *collective security vested* in the organs of the UN, there is no reason why first recourse should not be had the Security Council<sup>92</sup> and therefore why individual nations should see fit to either speak on behalf of, or in place of, the Security Council. It is thus submitted that if *unilateral* threats of force are intended to elicit political gain, it should be illegal.<sup>93</sup>

What about the actual strikes? To illustrate how difficult it is to assert the right to use force, the *Corfu Channel Case* of 1949 is instructive. The United Kingdom had violated Albanian waters in order to remove mines after an incident which killed fifty four British sailors. In rejecting the defense of self-help, the ICJ held, in no uncertain terms:

The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to the most serious abuses and as such cannot, whatever may be the defects in international organization, find a place in international law.<sup>94</sup>

This almost absolutist stand denies the right of countries to use force even to secure its legal rights. In 1976, commenting on Israel's rescue action in Entebbe, Uganda, the US Representative in the UN Security Council suggested that a "temporary breach of territorial integrity" would "normally be impermissible under the Charter of the United Nations."<sup>95</sup> The *Corfu Channel Case* may also be useful in interpreting the qualifying words of Art 2(4), which appear to accept the legality of force where it does not in fact impinge on the territorial integrity of a country or political independence of a state, or is consistent with the purposes of the Charter. Does this mean that surgical strikes made at another country, say in order to incapacitate terrorist training camps, are legal?<sup>96</sup> What

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<sup>91</sup> This does not apply to UN resolutions promising the threat of force. On March 2, 1998, US Ambassador to the UN Bill Richardson said that the UN Security Resolution adopted that day promising "severest consequences" if Iraq failed to comply with weapons inspection was an example of then-President Clinton's doctrine of diplomacy backed by force. The transcript of the interview is available at <<http://www.usa.or.th/news/press/1998/nrot053.htm>>. At a Hearing of the Senate Armed Services Committee on the US Policy Toward Iraq, on September 23, 2002, General (Retired) Wesley K Clark had this to say: I think the president's strong statement and the statements of members of the administration have provided the leverage on which we should be able to build a coalition and possibly even achieve a new resolution in the United Nations. I think we're proceeding in a path of diplomacy backed by force. I think it is the appropriate path.

<sup>92</sup> S/RES 1154 of 2 March 1998 and S/RES 1441 of 8 November 2002

<sup>93</sup> See Oscar Schachter, *The Right to Use Armed Force* (1983) 82 MICH. L. REV 1620 at 1625. Obviously, some flexibility should be admitted just because differences in military strength and spending are inevitable and should not be *per se* construed as implicit threats of force.

<sup>94</sup> *The Corfu Channel Case, (UK v Albania)*, 1949, ICJ 4 (Judgment of April 9) at 35

<sup>95</sup> *1976 Digest of US Practice in International Law*, at 150-51 (per Governor Scranton)

about military action taken to vindicate the purposes of the Charter, such as may be the case in humanitarian interventions?<sup>97</sup> If there are such exceptions, do they conform to any procedural or substantive limitations? The answer is unclear. While it has the potential to be a powerful legal basis to halt atrocities, it should also be limited. This is because Art 2(4) should be read together with Art 51 which talks of the right to self-defense only in cases of an armed attack, and only up until the Security Council takes action. Given that Art 51 is generally accepted as the only explicit exception to the prohibition on the unilateral use of force, and is itself extremely limited, it may be suggested that the Charter, as a whole, should not be interpreted in a manner that would allow an open-ended right to unilateral action. Furthermore, it makes little sense to draft such an ostensibly narrow exception in Art 51, only be rendered otiose by Art 2(4). Art 2(4) was an explication of what is *not* allowed, rather than what is.

So we know that the general prohibition on force is wide and almost absolute. Do the US' actions against Iraq, then, fall within the articulated exception of Art 51, which allows unilateral action when a country is being attacked, *and* where the Security Council has not acted on the situation? The starting point is the interpretation of what an "armed attack" means.<sup>98</sup> An appreciation of what "necessity" means<sup>99</sup> can only be had in relation to what the words "armed attack" intended to convey. In *Nicaragua*, the Court said:

In the view of the Court, this is to be understood as meaning not merely action by regular armed forces across an international border, but also the sending by a State of armed bands on to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack had it been carried out by regular armed forces...The Court does not believe that the concept of "armed attack"

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<sup>96</sup> This argument was not made by Israel in an emergency meeting called by Syria after Israel made a strike against what it believed was a terrorist training camp in Syria (which Syria claimed was a civilian settlement) in retaliation against a suicide bombing in Haifa that killed 19 Israelis. Instead, Israel resorted to a general argument about Syria having supported terrorist cells in its territory and the claim of self-defense. The UK found the strike by Israel "unacceptable." See S.C.O.R. (LIV), 4836<sup>th</sup> Meeting, S/PV.4836, 5 October 2003

<sup>97</sup> As far as my research has taken me, the argument of humanitarian intervention has not been invoked in relation to the qualifying words of Art 2(4).

<sup>98</sup> While some scholars continue to believe that self-defense is a matter of domestic politics rather than objective evaluation, it is clear from the Charter that evidence has to be submitted to the Security Council. There is no reason for this requirement other than the fact that it is to ascertain whether self-defense was indeed justifiable. For example, in 1981, when Israel struck at certain nuclear facilities in Iraq, the Security Council was quick to condemn this action. It did not buy the argument that there was a right to self-defense here because the requirement of necessity (or eminence of threat) was met. In fact it seemed to make the finding that Iraq could be using the nuclear facilities for developing their economies and industries for peaceful purposes. (S/RES 487 of 19 June 1981) Also, in the 1986 case between the US and Nicaragua, the Judge Schwebel accepted that claims of self-defense were justiciable. (*Military and Paramilitary Activities In and Against Nicaragua*, ICJ Rep 259 at 285)

<sup>99</sup> The Court held in *Nicaragua* (ibid): "in holding that whether the response to an attack is lawful depends on the observance of the criteria of the necessity and the proportionality of the measures taken in self-defense."

includes assistance to rebels in the form of the provision of weapons or logistical or other support.<sup>100</sup>

Thus, while provision of such support constitutes a violation of the Charter, it would not justify a unilateral strike. This is an extremely high standard. In order to act in self-defense, that state has to actually initiate and coordinate an attack. Therefore it seems that countries that sponsor terrorism (like Iraq) cannot be subject to unilateral strikes.<sup>101</sup> More importantly, the reference to an “armed attack” would be an unnecessary double emphasis except if it was meant to underline the need for an attack of appreciable scale and effect. This reading would bring us closer to the standards of the *Caroline* case which is often cited as the limits to anticipatory self-defense, requiring that the situation has to be “instant, overwhelming, leaving no choice of means and no moment for deliberation.” The question that interests us is whether these standards admit of any possibility of change.<sup>102</sup> Our first duty is to the words of the Charter and institutional norms. I cannot see how the words are ambiguous. If a country is directly actively complicit in the attack of another country through terror networks that it supports, then there is no question that the victim may defend herself upon an attack until such time the Security Council takes over.<sup>103</sup> But where this is not the case, then recourse should be had to the Security Council. The almost absolute general ban on the use of force discussed above also emphasizes a limited reading of the exception.

We should look at Resolution 1368 in relation to Afghanistan, which purported to authorize the US’ right to self-defense. In doing so, it achieved two remarkable feats. The first is that it extended its jurisdiction to non-state actors, showing its commitment to deal with terrorism.<sup>104</sup> The second – and most important – is that by doing so, the implication is that the US would otherwise *not* have had legal authority to attack Afghanistan based on the *Nicaragua* holding (ie a regime such as the Taliban, which did no more than provide assistance to Al-Qeada, is not guilty of an armed attack.) This resolution was not an affirmation of any inherent right of the US to attack, but an *authorizatiorto* act. Thus,

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<sup>100</sup> *Military and Paramilitary Activities In and Against Nicaragua*, ICJ Rep 259 at 285

<sup>101</sup> See generally, Michael J Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, (2001) 25 HARV. J.L. & PUB. POL’Y 539 at 542

<sup>102</sup> In an era of heightened terrorist activity, two arguments may be put forward to justify changing our interpretation. First, the devastating effect of such attacks; and second, that many of these groups can move quickly and often rely on states for funding and other forms of assistance. The problem with this argument is that even attacks by conventional armies can have this effect. America itself was stunned out of isolation by a surprise attack from the Japanese army on Pearl Harbor during WWII. Is there a qualitative difference between terrorism and other forms of warfare that would justify overriding the clear words of the Charter? I would suggest not.

<sup>103</sup> The requirement of proportionality seems to suggest that the more likely target for any unilateral strike would be against the terror targets or the host country, rather than other countries who may be assisting financially.

<sup>104</sup> S/RES 1368 of 12 September 2001. The resolution equated the attacks to a threat of international peace and security.

institutional norms confirm that while support for terrorism constitutes a violation of international law it cannot be enforced unilaterally.<sup>105</sup> If that were so, it would render the clear intention to put the Security Council as the centerpiece of the collective security scheme of the UN redundant.<sup>106</sup>

There may be a very small and limited right to strike back in cases of terrorist attacks in order to halt the *continuation* of further attacks. This was Israel's argument in an emergency meeting called for by Syria after the former retaliated for a suicide bombing:

Israel's measured defensive response to the horrific suicide bombings against a terrorist training facility in Syria is a clear act of self-defence in accordance with Article 51 of the Charter... And it is designed to prevent further armed attacks against Israeli civilians in which Syria is complicit.<sup>107</sup>

The Security Council did not pass a resolution condemning Israel's action, but did the pragmatic thing by asking both Israel and Syria to practice restraint. This may be a recognition of the right of countries to protect themselves when under an actual attack, even against non-state actors. This makes sense.<sup>108</sup> But it should not be taken to mean that there is a *general* right to launch a sustained military campaign against another's territory by the mere fact of its harboring terrorists.

From the discussion above, it appears that the right to self-defense is really a concession to practicality. If a country is under heavy attack, it should – of course – be able to defend itself. If it comes from a non-state actor, the requirement of proportionately means that it should only aim to incapacitate a particular facility and not 'take out' the whole country. Outside of these exceptions, the real recourse is to the Security Council. If there is no imminent threat, and where recourse to diplomacy is possible, the Israel-Iraq example in 1981<sup>109</sup> - Iraq was at least four years away from an operationally-ready nuclear facility when Israel attacked it – the words of the Charter and institutional norms clearly preclude any expanded notion of self-defense. As such, the US was wrong in attacking Iraq for any supposed complicity with Al-Qaeda.

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<sup>105</sup> In *Nicaragua*, the Court said, "While an armed attack would give rise to an entitlement to collective self-defense, a use of force of a lesser gravity cannot produce an entitlement to collective self-defense." *Supra*, note 100

<sup>106</sup> Glennon argues, correctly in my opinion, that a general and sustained military campaign on a country that hosts terrorists is also unproportionate per se. *Supra*, note 101, at 545. Therefore it needs to be authorized by the UN Security Council.

<sup>107</sup> S.C.O.R. (LIV), 4836<sup>th</sup> Meeting, S/PV.4836, 5 October 2003, at 7

<sup>108</sup> Even so, there were several countries which expressed regret at Israel's actions. Notably the United Kingdom, while saying that Israel's actions would undermine the peace process, stopped short of calling it a violation of international law. The French did however characterize it as "an unacceptable violation of international law and the rules of sovereignty." (*Ibid*, at 10)

<sup>109</sup> Franck, *RECOURSE TO FORCE* (2002) at 49

But the US' justification goes further in suggesting that it had a right to *preventive* self-defense against Iraq because of its aggressive history and its alleged possession and manufacture of weapons of mass destruction. In arguing for a general concept of self-defense that involves taking action even when removed from the immediacy of any attack, much emphasis is placed on what it means that states have an "inherent" right to self-defense. One view is that the right to self-defense derives from natural law and cannot be limited by positive law. Closely associated with this view is the idea that the law is necessarily subordinate to power. These schools of thought are wrong. Firstly, as Sir Hersch Lauterpacht wrote, "such a claim is self-contradictory inasmuch as it purports to be based on a legal right and at the same time, it disassociates itself from regulation and evaluation of the law."<sup>110</sup> Secondly, if "inherent" imports natural law or customary law (which envisages a relatively broad right to self-defense), it is quite clearly inconsistent with the part of Art 51 that purports to terminate the right of self-defense once the Security Council has taken measures to stem the crisis and requires any use of force is to be reported immediately to the Council. Clearly, the right is subordinate to positive law and is very limited. I would also suggest that institutional practice affirms this. In 1990, Resolution 678 authorized member states to use "all necessary means" to drive out Iraq from Kuwait. At the same time, it also "reaffirmed" Resolution 661,<sup>111</sup> confirming Kuwait's authority to engage in individual and collective self-defense. More than just evidence that it is possible for UN action and self-defense to be taken concurrently,<sup>112</sup> it is submitted that this reaffirms the fact that Kuwait may not otherwise have this "right" once the Council acted. In Resolution 1368, adopted after the September 11 tragedy, the Council – once again – authorized self-defense.<sup>113</sup> Some believe this is a contraction in terms, the argument being that since the right is inherent in the victim, the Council should not be able to authorize this.<sup>114</sup> I suggest there is no contradiction. Instead, I would argue that these two examples demonstrate that the word "inherent" has a much more limited meaning than one might expect. If this is the case, then clearly all that the "inherent" right entails is a right to defend oneself from destruction out of the sheer necessity at that moment in time when it is under attack. Rights of nations are not prior to the Charter, but instead derives from the unique legal and political arrangement that the Charter dictates. The ICJ said as much in *Namibia*:

It first recalls that the entry into force of the United Nations Charter established a relationship between all Members of the United Nations on the one side, and each mandatory Power on the other, and that one of the fundamental principles governing that relationship is that the party which

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<sup>110</sup> H Lauterpacht, *The Function of Law in the International Community* (1933) at 179-80

<sup>111</sup> S/RES/661 of 6 August 1990

<sup>112</sup> Franck, *RECOURSE TO FORCE* (2002) at 49

<sup>113</sup> S/RES 1368 of 12 September 2001

<sup>114</sup> Franck, *Terrorism and the Right of Self-Defense*, (2001) 95 AJIL 839 at 840

disowns or does not fulfill its obligations cannot be recognized as retaining the *rights which it claims to derive from the relationship*.<sup>115</sup>

We should be careful of admitting recourse to notions of natural justice unless there is a very good reason to. In the case of self-defense, there is a perfectly reasonable way to interpret the word “inherent” without doing violence to the express words of Art 51, and the general scheme of the Charter which places the Security Council at the center of international peacekeeping. Thus, it is submitted that the general principle of preventive self-defense is not legal, and cannot be used to support the unilateral strike against Iraq.

## **B. The Requirement for Standards**

In assessing the legality of any unilateral action in self-defense, and particularly in Iraq’s case, two questions are raised. Is the unilateral response by that country justiciable and if so, how do we determine if the response was “necessary.”

It is not always uncontroversial that it is part of the institutional process that state actions even in self-defense should be accounted for. If one holds the belief that the right to self-defense for instance is “inherent” it is possible for one to hold the belief that the exercise of such a right is non-justiciable.<sup>116</sup> Professor Franck comes very close to this conclusion. He says that the inherent right being preserved in Article 51 is clearly that of a victim state and its allies, “exercising their own, sole judgment in determining whether an attack has occurred and where it originated.” However, he goes on to qualify this by saying that evidence does play a role, but only after the right of self-defense is exercised, and not before. I certainly agree that it is absurd to require a state that is facing an attack to exercise its right to self-defense only after its representative has made a presentation of facts to the UN Security Council, and to obtain its prior authorization, but that does not seem a particularly illuminating point to make. If the right to self-defense is a concession to practical necessity – the inability to wait before resorting to force as a last measure to preserve its territorial integrity – then obviously the right is exercisable immediately upon attack. But does this mean the obligation to provide proof *arises* only after the response is complete? And if this obligation arises only after, does this mean that the Security Council or the International Court of Justice can never intervene in the middle of a purported exercise of self-defense?

I suggest not. A careful reading of the Charter demonstrates otherwise. For one, the Security Council is charged with the right and obligation to make determinations of threats to peace or unlawful aggression. There is nothing to suggest that this determination should take place only after an attack has occurred. Furthermore, Article 51 makes it explicit that:

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<sup>115</sup> *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.)

<sup>116</sup> See Franck, *Terrorism and the Right of Self-Defense*, (2001) 95 AJIL 839 at 840, at 842

...measures taken by Members in the exercise of self-defense shall be *immediately reported* to the Security Council and *shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take such action as it deems necessary in order to maintain or restore international peace and security.* (emphasis mine.)

The requirement to present evidence clearly arises from the moment of the exercise of the right of self-defense. The fact that the Charter recognizes the possibility of Council's actions terminating the right to self-defense implies that the legal obligation to make such information available so as to enable the Council to make a determination of the situation arises immediately. As the ICJ said in *Nicaragua*, it is often the victim that is most aware of the facts, and likely to want to draw attention to its plight anyway. To allow otherwise is to permit such countries to act in their own discretion, with no recourse until the attack is over. By that time, the infrastructure of the other country may have been illegally destroyed, or the innocent party would have struck back in *its* claim to self-defense, thereby escalating the violence. Either situation is clearly unpalatable. Therefore assuming that the US can invoke the self-defense exception, it is still open to scrutiny.

The next question in relation to any assertion of self-defense, and particularly with Iraq, is the necessity of the attack, which then turns on what we mean by "imminent." The words of the Charter are silent. Hence, we need to look at the institutional norms and practices. In the original formulation of the classic *Caroline* test, there needed to be "a necessity of self-defense, instance, overwhelming, leaving no choice of means, and no moment for deliberation."<sup>117</sup> The emphasis is, of course, on the fact that there needs to be "no moment for deliberation," which suggests that the attack should not only be imminent but also *immediate*. William Taft's interpretation that this merely indicates "urgency rather than just the timing of the response"<sup>118</sup> severely underestimates the stringency of the *Caroline* test. The strong condemnation of Israel's attack on the Iraqi nuclear reactor in 1981 clearly indicates that even though it may have been 'urgent' for Israel to preempt Iraq's nuclear-weapons capability, it was not an *immediate* concern and hence failed the test of necessity.<sup>119</sup> Therefore even assuming that the US' assessment of Iraq's possession of weapons of mass destruction was accurate, it made no effort at showing that some sort of attack was going to be immediate. What is labeled "preventive self-defense" would definitely fall outside the threshold since, by definition, it is not a response to an immediately impending attack. This certainly accords with the general tenor of the Charter in ensuring as limited a right to use force as possible unilaterally, and is consistent with the idea that decisions on the use of force are vested *primarily* in the Security Council, especially where time permits a diplomatic route.

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<sup>117</sup> Letter from Daniel Webster to Lord Ashburton (Aug 6, 1842), quoted in 2 JOHN VASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906)

<sup>118</sup> *Supra*, note 63

<sup>119</sup> S/RES 487 of 19 June 1981. The resolution clearly condemned Israel's actions as being violative of Article 2 of the Charter and labeled it a threat to international peace and security, hence implying it failed to meet the standards of self-defense.

Standards, both procedural (justiciability) and substantive (test of necessity), are crucial if we want to prevent a slippery slope and an ever-expanding concept of self-defense. The US' failure to present 'overwhelming evidence'<sup>120</sup> of the necessity to use force against Iraq because of any imminent *and* immediate attack meant that the strike against Iraq fell far short of the those standards that have evolved out of institutional practice and norm.

### C. Trusteeship and Good Faith

The question that I want to confront is the extent to which it can be said that institutional rules allow individual countries to retain a residual, secondary ability to act in the event that the Security Council is stymied and unable to make a decision. This is particularly important in light of the William Taft's open-ended assertion that "the president may, of course, always use force under international law in self-defense."<sup>121</sup> I suggest that they may be such a right but it a very limited one which does not apply in the case of Iraq. This is what I call the trusteeship analogy.<sup>122</sup> 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, 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).<sup>123</sup> 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

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<sup>120</sup> Ibid

<sup>121</sup> William H Taft IV, Remarks Before National Association of Attorney General (March 20, 2003), excerpted at <<http://usinfo.state.gov/regional/nea/iraq/text2003/032129taft.htm>> 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.)

Available at <<http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>>

<sup>122</sup> See generally, Schlesinger, *supra* note 84, where he argues that this was one of the original designs of the United Nations.

<sup>123</sup> 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.

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.

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.”<sup>124</sup> Where the Security Council acts, and is able to act, it has exclusive jurisdiction over the matter.<sup>125</sup> 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 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.”<sup>126</sup> 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

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<sup>124</sup> *Certain Expenses Case, infra*, note 130

<sup>125</sup> 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.

<sup>126</sup> 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.

derived it from member nations, for the benefit of them. The very idea of collective security is to get countries to forfeit the use of force in exchange for more powerful countries to police 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, interdependence and globalization, there is a danger that others could seek to take its place.<sup>127</sup>

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.<sup>128</sup>

Institutional practice has also recognizes 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,<sup>129</sup> 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 responsibility” was that the General Assembly retained “secondary” responsibility that could be exercised when the former was stymied.<sup>130</sup>

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<sup>127</sup> 54 G.A.O.R., 4<sup>th</sup> Plen. Meeting, September 20, 1999, A/54/PV.4, at 3

<sup>128</sup> 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.

<sup>129</sup> G.A. Res. 377(V). G.A.O.R., 5<sup>th</sup> Sess., 302nd Plen. Meeting, 3 November 1950, A/PV.302, 341 at 347

<sup>130</sup> *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.)

Understandably, such practice never went as far as acknowledging that individual countries also retained this secondary right. However, 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. It is not much of a leap to argue that ultimate power comes from the individual states themselves (albeit acting collectively in the Assembly). Also, 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.<sup>131</sup> In such cases, 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 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.<sup>132</sup>

Slovenia is factually correct.<sup>133</sup> 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:

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<sup>131</sup> 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.

<sup>132</sup> S.C.O.R. (LIV), 3988<sup>th</sup> Meeting, 24 March 1999, at 6-7

<sup>133</sup> 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.

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?<sup>134</sup>

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. 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 essay to examine the specific circumstances under which the trusteeship analogy can be invoked,<sup>135</sup> but I do want to point out that apart from institutional safeguards, 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,<sup>136</sup> 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.<sup>137</sup> This political counterbalance is important

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<sup>134</sup> 54 G.A.O.R., 4<sup>th</sup> Plen. Meeting, September 20, 1999, A/54/PV.4, at 2

<sup>135</sup> 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 failure to carry out its primary responsibilities. As always, the use of force should be necessary, proportional and a last resort.

<sup>136</sup> 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>>

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.<sup>138</sup>

Iraq seems a simple case to decide on this point. The strike came at a time when the UN and the International Atomic Energy Agency inspectors were engaged in on-site searches for weapons of mass destruction. Given this, it cannot be said that UN was completely inadequate in carrying out its primary duty. The Security Council can, of course, delegate this discretion if it so wishes by explicit terms. This, however, was not the case in Iraq. The US and the UK have consistently argued that the mandate to use force under 678, revived by 1441<sup>139</sup> were vested in individual members because 1441 made no mention of a need for a further resolution before force could be used, and that all that was required was “discussion.” The ambiguous wording of the resolution was no doubt a political compromise, which if anything, was designed to *defer* or *stop*, and not to authorize the invasion of Iraq. Furthermore the Council did explicitly reserve judgment by remaining “seized of the matter” and also clearly stated that it would convene to “consider the situation” after a report had been submitted by the inspectors. Saying that it would consider the situation means exactly that: that *it* would decide what to do *next*. To suggest that “consider” meant there was no obligation to seek authorization is a twisted way of interpreting strikingly plain words and runs against the grain of our discussion above. The entire architecture of the UN was one of collective security and collective decision-making. While concessions to practicality are necessary, they must be allowed only in very discrete and limited exceptions.<sup>140</sup>

## VII. Background Theories

We now know that the institutional rules – gathered from text, history, practice and norm – do not provide a basis for the attack on Iraq. Our next step is to ask if those rules could possibly have developed in way that is out-of-step with the UN’s founding principles. If so, we will need to trim, shear and align those rules so as to be consistent with these larger moral aspirational values. In this section, we will test those institutional rules against the three major premises of the UN: its role in checking abuses of power, its role in protecting the sovereignty of nations, and its role in alleviating humanitarian crises.

### A. Law as a Side-Constraint on Power

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<sup>137</sup> 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>>

<sup>138</sup> 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.

<sup>139</sup> *Supra*, note 32

<sup>140</sup> See, Franck, *What Happens Now? The United Nations After Iraq* (2003) AJIL 8, at 11-15, where he also discusses why resolutions 687 and 678 themselves only authorized force specific to the Kuwaiti invasion by Iraq, and was not a general authorization of use of force for other purposes.

The award of the centennial Nobel Peace Prize to the United Nations was a fitting recognition of its role as an instrument for making and maintaining peace. As the Nobel Committee put it, .the only negotiable route to global peace goes by way of the United Nations.<sup>141</sup>

The United Nations, if anything, remains a potent symbol of a nation's place in a community of nations.<sup>142</sup> Its Charter is almost universally accepted. That countries such as India – who could probably do without the UN – and others such as Syria, Libya and Sudan – well-known violators of international law – all seek to justify their actions in relation to the Charter seems particularly significant. The fact is that countries to a large extent do believe there are limits to the exercise of their power, and that the law as embodied by the Charter (however malleable or uncertain) is a guide to that. The rationale behind this is summarized as such:

It is tempting to pick and choose which international rules the United States wants to uphold. But forsaking the rules of the road can backfire for us to invoke them against others.<sup>143</sup>

It is therefore the uncertainty of what the future may hold that provides the greatest incentive for countries to abide the law. But what happens when there's a country like the United States, who is not only a superpower, but what some might call, a hyperpower? Can they bend the rules? Should they? It may serve us well to remember that the United Nations was, really, an American creation. And it was created in 1945, after the war, when America was the only Allied Power to remain relatively unscathed. Its economy was half the world's total, its army the strongest, and in many senses, one may argue that its global dominance was much greater then than it is now. Yet its leaders thought it fit that they should construct a multilateral institution as the primary mechanism for ensuring America's and the world's security. In the words of President Truman, "We all have to recognize—no matter how great our strength—that we must deny ourselves the license to do always as we please."<sup>144</sup> The UN envisages a system of collective security, and the laws expressed should be consistent with that vision, and insofar as it is possible, not to make exceptions for powerful countries, or allow loopholes that can be exploited in the unilateral discretion of countries. That international law generally abhors the use of force is well stated here:

Malaysia fully subscribes to the fundamental principle of the paramount need to preserve the sanctity of the Charter of the United Nations. Malaysia underlined clearly that any conflict should be resolved through dialogue and political negotiations and not by the use of force. Force, if at

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<sup>141</sup> UN Secretary General, Kofi Annan, 57 GAOR, 4<sup>th</sup> Plenary Meeting, September 20, 1999, A/57/1, at 1

<sup>142</sup> Ibid

<sup>143</sup> Miriam Sapiro, *War to Prevent War*, LEGAL TIMES, April 7, 2003 where she argues that the strikes on Iraq represented a radical departure from current norms governing pre-emption.

<sup>144</sup> *Supra*, note 75

all necessary, should be a recourse of last resort and it should be sanctioned by the Security Council.<sup>145</sup>

It is therefore evident that the United Nations, as imperfect as some may criticize it to be, continues to play an important role in defining or at least lending legality and legitimacy to state action; and that however we interpret the Charter, it should be consistent with this value. One of the biggest worries about the invasion of Iraq is that while we may instinctively agree that it is good to get rid of an evil dictator with a large arsenal of weapons, this may come at the price of dismantling a system of international law that – on balance – has worked to preserve stability and predictability particularly as a result of keeping in check abuses of power by larger, more militarily advanced nations. The institutional rules – requiring procedural and substantive standards, together with a strict prohibition on the use of force with few exceptions – as a means of achieving the end of constraining abuse of power, are thus consistent.

## **B. Law as Protecting Sovereignty**

It is quite possible, of course, to envisage a system of collective security not based on a premise of non-intervention; the United Nations would be some kind of a supra-national organization that would organize the affairs of member states, from the political to economics. But the Charter clearly spells out this was not the intention. Art 2(1) says the Organization is based on the principle of sovereign equality of all its Members, and the real heart of this is captured in Art 2(7) suggesting that the United Nations is not authorized to intervene in matters within the domestic jurisdiction of any state. To put this in perspective, this is about the only provision in the Charter that explicitly limits the mandate of the Security Council. It must be readily apparent that, if anything, the law embodied in the Charter is meant to protect this right to sovereignty. Sovereign equality is at the heart of the UN system, with an essentially democratic General Assembly. While, as with any large organization, there must be leadership (in the form of the Security Council), the General Assembly is not without its powers, and in fact has made important recommendations including the innovation of Chapter 6½, which has become one of the core operations on the UN Agenda today. In essence, the principle of sovereign equality is sometimes called the ‘minimum content’<sup>146</sup> of international law.

There are possibly three reasons why the concept of sovereign equality is particularly revered in international law. The first derives from the idea that international law should only control aspects of governance that has a direct effect on others. Political decisions made for, and directly affecting one’s citizens, should not be subject to an overriding jurisdiction. It would render national governments practically powerless. But perhaps more than that, it seems particularly perverse that an unelected Council should sit in judgment of decisions made by individual states that are often context specific. The second reason is simply instrumental. It is “an essential political and legal prerequisite for

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<sup>145</sup> S.C.O.R. (LIV), 3988<sup>th</sup> Meeting, 24 March 1999, at 8

<sup>146</sup> H.L.A Hart, *THE CONCEPT OF LAW* (1961) at 189-95, although he uses it in the context of natural law, which as we have discussed should not apply to the Charter. Countries gain rights and obligations from the relationship it has within the Charter, and not outside it.

the maintenance of international peace and stability in international law and international political, economic, social, humanitarian and cultural relations.”<sup>147</sup> Territorial boundaries are important because it is a means to order international society. The third reason is that it confirms and protects the formal status of weak nations, giving them an equal standing in the eyes of international law, and granting advantages in multilateral decision making processes they would otherwise not have.<sup>148</sup>

As much as equal sovereignty is a crucial concept in international law, it is not absolute. Art 2(7) makes it clear that the domestic jurisdiction exception is itself not to prejudice the enforcement powers under Chapter VII. Therefore, when an act, purported to be within a country’s domestic jurisdiction, rises to the level of a breach of international peace or aggression, the Charter allows action to be taken against such a country. So if a country amasses weapons of mass destruction, it cannot hope to escape international censure simply by invoking the domestic jurisdiction exception. This was expressly recognized in the *Corfu Channel Case*:

We can no longer accept sovereignty as an absolute and individual right of every State, as used to be the old law under the individualist regime, according to which States were bound only by rules they accepted. Today, owing to social interdependence and to the predominance of the general interest, the States are bound by many rules that are not ordered by their will. The sovereignty of States have now become an institution, an international social function of a psychological character, which has to be exercised in accordance with international law.<sup>149</sup>

While this statement goes a bit too far in suggesting that we can impose obligations without the consent of states, it certainly carries the argument that sovereignty is not absolute very lucidly. To investigate what the boundaries of these obligations are, is beyond the scope of this essay<sup>150</sup> (although we will investigate one such obligation in the next section, namely, human rights) but it is sufficient for our purposes to realize that equal sovereignty is both vital yet not absolute. While on first glance, this underlying value may appear to be a basis on which the Iraqi strike can be justified, an important part in keeping this balance between the right to sovereignty and the need to intervene to prevent abuse of sovereignty is that the decision to intervene is, wherever possible,

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<sup>147</sup> A. Magaresevic, *The Sovereign Equality of States*, PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION (1972), edited by Milan Sahovic, at 188-9

<sup>148</sup> Colin Warbrick, *The Principle of Sovereign Equality*, THE UNITED NATIONS AND THE PRINCIPLES OF INTERNATIONAL LAW: ESSAYS IN MEMORY OF MICHAEL AKEHURTST (1994), edited by Lowe and Warbrick

<sup>149</sup> *Supra*, note 55, at 43

<sup>150</sup> The judgment goes on to explain that there are three categories of conduct for which states may be responsible: international delinquency (acts contrary to the sentiments of humanity), prejudicial acts (acts that prejudice a state or its citizens) and unlawful acts (acts that violate treaties or agreements). The use of force or threat of its use is classified by Judge Alvarez as falling in the “unlawful acts” category. *Ibid*, at 47

carried made by the *Security Council* and not unilaterally. If *one* country could decide the sovereignty of another, that would destroy any meaningful existence of this concept. Thus, the Bush Doctrine, which underlines the attack on Iraq, threatens the basic fabric of state sovereignty by proclaiming the United States as the sole arbiter of the fate of other nations. Furthermore, the idea of sovereignty operates on the principle of reciprocity. A state may only interfere in another's if the latter has violated some norm which creates a practical necessity for the retaliation. This is why the self-defense exception is consistent with sovereignty. This is also precisely the reason why this exception is as limited as it is, and an open-ended right to prevent future threats opens the door too wide. Hence the conclusion arrived at in Part VI is consistent with the UN's role to police the sovereign integrity of all countries.

### C. Law as Protecting Human Rights

What have been the reasons for which have prompted the changes in the matter of subjects of international law, with regard both to international rights and to international duties? These causes have been numerous and manifold. They have included, with reference to the recognition of the individual as a subject of international rights, the acknowledgement of the worth of human personality as the ultimate unit of all law; the realization of the dangers besetting international peace as the result of denial of fundamental human rights...<sup>151</sup>

Article 1 of the Charter states, as one of the purposes of the UN, the respect for human rights and fundamental freedoms. The principle is easy enough to understand, but the substantive content of that means is highly controversial. Indeed, the Charter does not purport to suggest where this right derives, whether from natural law or political philosophy, or somewhere else. It is simply there, and has become one of the most formidable challenges confronting international lawyers today. The question is not so much whether human rights (whatever its content) should be upheld, but the extent to which force may be used to stop the abuse of human rights. It is a particularly thorny issue because countries often claim that human rights are not universal and their status should therefore be left to the determination of national governments. Yet, Art 2(7) does contemplate that the Security Council can trump the domestic jurisdiction exception if such abuses can properly be said to fall within the categories of a breach of peace, threat to peace, or act of aggression.<sup>152</sup> UN Secretary-General Kofi Annan spelt out the dilemma as such:

Recognition that many States have serious and legitimate concerns about intervention does not answer the question I posed in my report, namely, if

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<sup>151</sup> H Lauterpacht, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1950), at 61

<sup>152</sup> There is some suggestion that Kosovo could be defended as an issue of collective self-defense; with the definition of 'self' being broadened to include the 'self' of Europe. While ingenious, I would argue that this seems to be a rather strained reading of the Charter. Furthermore, it obscures the real intentions of NATO when they acted. They were acting on a internal humanitarian crisis, and not to prevent an external aggression.

humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica — to gross and systematic violations of human rights that offend every precept of our common humanity?<sup>153</sup>

While the definitions of threat to peace, breach of peace and act of aggression are not clear – indeed one seldom makes a distinction between them – it is, I think, obvious, that the extent of the human rights situation must be such as to rise to a level where sovereignty should no longer be able to interpose itself as an impenetrable barrier between the individual and the greater society of all humanity.<sup>154</sup> In other words, there must not only be a quantitatively significant humanitarian situation, but there should be something *qualitatively* different. A mere denial of certain human rights for instance should not be enough to override the domestic jurisdiction exception. If it was sufficient, it would render that exception practically toothless since every domestic political decision always has the potential to be of international concern. The absence of a national welfare system may seem to many Europeans as a violation of fundamental human rights. Yet surely this alone cannot justify a military campaign against a country that does not have welfare. If we look back on the cases where humanitarian intervention was endorsed, explicitly or impliedly, there has always been the presence of something else. For example, in South Africa, the regime was being aggressive to its neighbors.<sup>155</sup> And in Kosovo, it is at least arguable that not only was the humanitarian disaster spreading to other countries, but Milosevic had violated a right to self-determination of the Kosovars by dissolving the province's autonomous status and later on, its government.<sup>156</sup> In contrast, despite the wide abuses by the Pol Pot regime in Cambodia, the regime continued to be recognized by the General Assembly until 1998. The abuse of women's rights by the Taliban in Afghanistan was of no import until it was clear they were also harboring terrorists.

Most of the time, a genocide or humanitarian disaster will be accompanied by other factors, but where it is not, it should not be presumed that there is legal basis for action. Thus, the “purely humanitarian” intervention is a myth. In truth, while the Charter does call on member states to respect human rights, it does not authorize the violation of sovereignty unless it qualitatively rises to a level where the national/international distinction can no longer be maintained. This analysis answers the latest justification offered by the White House in defense of its attack on Iraq (having failed to evince any evidence of Saddam's weapons stockpile.) *Alone*, human rights abuses do not justify an invasion, and certainly do not justify a *unilateral* attack. While this may seem unusually harsh, it does provide a necessary and manageable line at which to say that if we go

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<sup>153</sup> Report of the Secretary-General on the Work of the Organization, 55<sup>th</sup> GAOR, 5<sup>th</sup> Plen. Meeting, August 30, 2000, A/55/1, at 5

<sup>154</sup> *Supra*, note 151

<sup>155</sup> S. Res. 418 of 4 November 1977; S. Res 417 of 31 October 1977

<sup>156</sup> In October 1998, the Council called for Kosovo to be given “a substantially greater degree of autonomy and meaningful self-determination.” S/RES/1203 of 24 October 1998, preamble and para 1

further, there is no *principled* way in which we can *not* go even further down the slippery slope.

## VII. Conclusion

The case study of Iraq presents the classic problems in reconciling the previously glaring tensions between adhering to the words of the Charter (“the law”) and our moral persuasions (“legitimacy”). It questions if there is a way to balance the need to insure against an artificial and over-expansive reading of the Charter with the necessity of interpreting it in light of modern situations. The interpretative model that is elucidated above does exactly that. We first ask if the words are so particularized as to prevent further inquiry. If they are, then the framers of the Charter may be presumed to have intended that provision to be solely *denotative*. Conversely, where there is ambiguity, or where it is clear that the words require further interpretation, we can assume the framers intended that provision to be *connotative*. Our interpretation then begins by constructing institutional rules by examining how history, norms and practice have interpreted the text. The answers generated are then tested against more general background theories that provide form the normative values underlying the Charter.

In the case of Iraq, our institutional rules suggest that the US’ actions are illegal. They flatly undermine the general prohibition on the use of force, and fail to fall within the exception in Art 51 (self-defense) because it does not clear the justiciable, substantive requirement of necessity by demonstrating the imminence and immediacy of an attack. It also does not meet the exception contemplated in Art 24 (the trusteeship principle) since the facts show that the UN was not neglecting its primary obligation, and none of the UN’s resolutions on Iraq indicate that the responsibility for any military action was delegated to individual members. These institutional rules are uncontradicted by any of the background theories. They are consistent insofar as they promote the aims of the UN, which are to prevent abuse of power and protect sovereignty. While the UN is also designed to deal with humanitarian crises, we have come to understand that the crisis in question must be qualitatively different from a mere abuse of human rights within the four walls of a given country.

This fit between institutional rules and background theories extinguishes the need to think in terms of binary dichotomies of law and legitimacy. By understanding that interpretation is a *cumulative* exercise in *constitutive association* between the text, norms, history, institutional rules and background theories, we are able to confront these difficult situations in a more holistic fashion that pays attention to the textual constraints of the law but recognizes the need to accommodate the more flexible demands of our moral instincts.<sup>157</sup>

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<sup>157</sup> For those who still believe that this balance struck is too harsh, an abandonment or amendment of the Charter may be a better solution than trying to interpret the Charter willy-nilly, thus making a mockery of it.