Recourse to Force

State Action Against Threats and Armed Attacks

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Use of force by the United Nations

The Charter and uses of force

Chapter 1 has provided a brief synopsis of the origins of a post-war Charter-based system pertaining to the use of force in international affairs. For the first time, international law fully and formally embraced the Lauterpachtian ground-norm: "there shall be no violence." Article 2(4) obliges all member states to "refrain . . . from the threat or use of force": not just to renounce war but all forms of interstate violence.

This dedication to non-violence by states is coupled in the Charter with an extensive commitment to collective measures against violators of the peace of nations. Article 39 authorizes the Security Council "to determine the existence of any threat to the peace, breach of the peace, or act of aggression," and empower it to "make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security." Article 25 requires all members of the United Nations to join in implementing such decisions. Finally, Article 42 authorizes the Council, lesser measures having failed, to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." To that end, Article 43 pledges all members "to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security."

This, then, was to have been the ultimate triumph of the Lauterpachtian ground-norm: there was to be no more violence. States abjured not only the right to make formal war, but all recourse to military force. Failure to adhere to this new law was to be met by decision of the

Security Council acting, first as a jury to determine whether there had been a breach of the peace, by whom, and how serious it was, and then deciding what collective measures might appropriately be taken to put matters right. Although, at the time of the Dumbarton Oaks Conference, it had been agreed by the Big Powers not to attempt to define what would constitute a threat to international peace and security but to leave this question open to the Security Council's case-by-case implementation,[1] all states agreed to abide by such a determination and, if asked by the Council, to participate in implementing the prescribed remedy, using force collectively when necessary.

It was noted in chapter 1 that four new geopolitical developments simultaneously interfered with the implementing of this visionary new scheme. The first was the advent of the Cold War. The second was the growing resort to indirect aggression through states' support of surrogates in the civil wars of other states. The third was the scientific revolution in weaponry that logically supported the claim of "anticipatory self-defence." The fourth was the unexpected momentum, powered by public opinion, of concern for decolonization and human rights: the "justice" factor subordinated at San Francisco in 1945 by security concerns. All four of these developments combined to make unworkable a strictly literal interpretation of the Charter's collective security system. Instead, the member states, in applying the Charter, have interpreted it to accord with changing circumstances and social values.

Collective use of armed force: original intent

In return for states' agreeing to abjure autonomous recourse to violence, the Charter holds out the promise of an effective global gendarmerie to guard the peace. This is set out in Article 42, which authorizes the Security Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." A Council decision to use force is made binding on all members by Article 25, which obliges them "to accept and carry out decisions of the Security Council . . ." These provisions are central to the Charter enterprise. Their drafting history helps illuminate the original intent behind the language.

[1] Memorandum by the Under Secretary of State (Stettinius) to the Secretary of State (Hull), September 1, 1944. 1 Foreign Relations of the United States, 1944, 761, 762.

In an early (1943) memorandum by Secretary of State Cordell Hull to President Roosevelt it was envisaged that "the four major powers will pledge themselves [to] . . . maintain adequate forces and will be willing to use such forces as circumstances require to prevent or suppress all cases of aggression."[2] To this end, the memo said, all members must accept the obligation to "make such contribution to the facilities and means which the Council may require for the enforcement of its decisions or for the prevention or repression of aggression as may be agreed upon in advance *or, in the absence of such agreement, as the Executive Council may deem appropriate*."[3] From this it may be gathered that, in 1943, the US was beginning to think of a Council able to enforce its decisions by military forces that were either placed permanently at its disposal by prior agreements with individual states, or, alternatively, would be provided *ad hoc* for a particular instance of enforcement, in response to a call by the Council.

By 1945, however, the *ad hoc* alternative appears to have been largely set aside in favor of the more direct mode of implementing universal security envisaged by Article 43. This obliges all Members to enter into "special agreements" with the Council making permanently available "on its call . . . armed forces, assistance and facilities . . ." to carry out the mandate "of maintaining international peace and security."

The Dumbarton Oaks proposals (Chapter VIII, Section B, paragraphs 4 and 5) foreshadowed both Articles 42 and 43. Although at San Francisco there were extensive discussions about ancillary matters – whether non-military means should be exhausted before the Council resorted to force, whether the concurrence of the General Assembly should be required, about the non-applicability of the restriction on intervening in a member's domestic affairs, about the role of regional organizations in enforcement, and whether there should be a collective "duty" to deter aggression – the Dumbarton provisions which became Articles 42 and 43 were adopted with relatively little debate. The *ad hoc* approach to enforcing Council decisions, mooted by Hull in 1943, did not surface at San Francisco. This is ironic because, in fifty years of practice, the United Nations has relied for enforcement entirely on *ad hoc* arrangements.

What is especially remarkable is the lack of attention to whether Article 42 and Article 43 were interdependent: that is, whether the

[2] Memorandum by the Secretary of State to President Roosevelt, December 29, 1943. Arrangements for Exploratory Discussions on World Security Organization, 1 Foreign Relations of the United States, 1944, 614 at 615.

[3] Memorandum by the Secretary of State to President, Roosevelt, December 29, 1943 at 620.

Security Council would have the option to employ force even in the absence of the standing contingents that were to be put at its disposal by the members. The lack of disquisition on this issue is in marked contrast to the questioning approach taken by states at San Francisco with respect to many other of the draft provisions. States meticulously combed the text for frailties. They proposed all sorts of solutions to imaginatively anticipated problems. Surprisingly, however, once there was acceptance of the principle that collective military measures should be directed by the Security Council (Article 42), it seemed simply to be assumed that states would provide the means by committing their forces in accordance with Article 43. In the words of the Rapporteur of the Committee that adopted the draft text of Article 42, the "principle of enforcement measures of a military nature being thus established, the Committee proceeded to study the methods of applying these measures."[4] In the ensuing study, however, no "method" was considered other than that of states' entering into agreements with the Security Council to provide specified forces for service when needed. No one questioned whether such agreements would indeed be forthcoming and what to do if they were not.

Were the Charter a static instrument based solely on the expressed intent of the framers, the fact that no Article 43 agreements have ever been made would have put paid to the Charter's vaunted collective military security system. Instead, the adaptive capacity of the Charter has functioned dramatically and controversially to fill the vacuum created by Article 43's non-implementation. This is no small feat. The gradual emancipation of Article 42 as a free-standing authority for deploying collective force, *ad hoc*, has prevented the collapse of the Charter system in the absence of the standby militia envisioned by Article 43. In commending the Charter for Senate advice and consent, Secretary Hull had said: "The whole scheme of the Charter is based on this conception of collective force made available to the Organization for the maintenance of international peace and Security."[5] Had he been right, there would be no United Nations today. Fortunately, however, the practice of the Organization in its first fifty-five years demonstrates the capacity of "the whole scheme of the Charter" to adapt to fulfill the purposes of the

[4] Report of Mr. Paul-Boncour, Rapporteur, on Chapter VIII, Section B, 12 U.N.C.I.O., Doc. 881, III/3/46, June 10, 1945, 502 at 509.

[5] Report of the President on the Results of the San Francisco Conference, June 26, 1945, US Congress, Senate Committee Hearings, 79th Cong., vol. 767, 1945, 34 at 55. (Hereafter: Report of the President.)

Organization by other means in the face of unexpected obstacles and unanticipated challenges.

The practice: uncoupling Article 42 from Article 43

Faced with its failure to establish a police militia under Article 43, the Security Council has adapted by using, or authorizing states to use, *ad hoc* forces put together for the purpose of responding to a specific crisis, rather as Hull had proposed in 1943. Far from being paralyzed by the failure to realize the potential of Article 43, the system, in actual practice, has developed new ways to deploy force to secure peace and resist aggression.

The Korean War is the first example of the Security Council's authorizing *ad hoc* collective measures in the absence of Article 43 forces. On June 25, 1950, Secretary-General Trygve Lie reported the previous night's attack by North Korea on the South. Qualifying the situation as a threat to international peace, he called on the Security Council as the "competent organ" to act at once[6] by determining that the attack was a breach of the peace, calling for a cessation of hostilities, embargoing all "assistance to the North Korean authorities," and calling "upon all Members to render every assistance to the United Nations in the execution of this resolution."[7] This was precisely the response voted by the Council. Its resolution determined that there had been a "breach of the peace" and thereby invoked Article 39, the prerequisite for collective measures under the Charter's Chapter VII.[8]

Collective military measures – at least in the sense envisaged by Article 43 – being unavailable, Resolution 83 of June 27 (passed with only Yugoslavia opposed and with the Soviet Union absent) recommended instead "that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area."[9] On July 7, with the Soviets still absent and three abstentions (Egypt, India, and Yugoslavia), the Council recommended that all members providing military assistance make such forces available to a unified military command headed by the US, authorized that command to use the United Nations

[6] S.C.O.R., 5th Sess., 473rd Meeting at 3. U.N. Doc. S/PV.473 (1950), 25 June 1950.
[7] S.C.O.R., 5th Sess., 473rd Meeting at 3. U.N. Doc. S/PV.473 (1950), 25 June 1950.
[8] S.C. Res. 82 (1950) of 25 June 1950. [9] S.C. Res. 83 (1950) of 27 June 1950.

flag, and requested the US to report "as appropriate" to the Security Council.[10]

Since the Charter makes no provision for a UN military response except with Article 43 forces, the Council's authorization of action in its name by *ad hoc* national contingents – what has since become known as a "coalition of the willing" – represented a creative adaption of the text. The practice of Security Council authorization of action by such coalitions of the willing subsequently became a firmly established part of the UN collective security system. In this first experience, the UN force was constituted by ground forces volunteered by ten states, naval units from eight nations, and air units from five.[11]

While the Soviet boycott of the Council had facilitated this innovation, so had the presence in Seoul of the field representatives of the United Nations Commission on Korea. It was they who were able to report the facts immediately and credibly to the Secretary-General, enabling him, in turn, to communicate authoritatively that it was North Korea that had instigated the conflict.[12] They thereby refuted North Korean and Soviet-satellites' pretence that the North had responded only in self-defense against aggression by the South.[13]

In 1960, the Security Council authorized another coalition of the willing to respond to an appeal by the Government of the Republic of the Congo to restore order and facilitate the removal of Belgian troops from that newly-independent state (see below).[14] Six years later, the Council authorized the British navy to enforce UN sanctions against the break-away white-supremacist regime of Ian Smith in the self-governing Crown Colony of Rhodesia.[15]

Forty years after the Korean episode, the Security Council – still lacking an Article 43-based military capability of its own – once again authorized a massive coalition of the willing: this time to undertake operation "Desert Storm" after Iraq's invasion of Kuwait. As in the earlier instances, the Council, in accordance with Charter Article 39, began by determining that Iraq's actions constituted a breach of the peace[16] to which a collective military response was warranted.[17] That finding was made by a vote of 14–0 with only Yemen abstaining. The resolution as a whole, invoking Chapter VII and requesting member states to "use all necessary means" to reverse Iraqi aggression, passed with only Cuba

[10] S.C. Res. 84 (1950) of 7 July 1950. [11] 1950 U.N.Y.B. 8. [12] 1950 U.N.Y.B. 251.
[13] S.C.O.R., 473rd Meeting, n. 6 above, at 3. [14] S.C. Res. 143 of 13 July 1960.
[15] S.C. Res. 221 of 9 April 1966. See further S. Res. 232 of 16 December 1966.
[16] S/RES 660 of 2 August 1990. [17] S/RES 678 of 29 November 1990.

and Yemen opposed and with China abstaining but not claiming to have cast a veto.[18]

The drafters of the Charter, as we have seen, did not envisage such Council-mandated use of force in the absence of an Article 43-based military capability. There is no reason, however, why the Council's responses to aggression cannot be understood as a creative use of Article 42, severed from, and unencumbered by, the failed Article 43.[19] Although the negotiators at Dumbarton Oaks and San Francisco undoubtedly had inferred that Article 42 would operate only in reliance on forces pledged by members under Article 43, the Charter does not make this interdependence explicit. On the contrary, Article 42 fully authorizes the Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations." Textually, Article 42 can stand on its own feet and it now may be said to do so as a result of Council practice. This practice, moreover, while not anticipated by the drafters, does no violence to their architecture. Article 39 states:

[18] As noted in Chapter 1 above, this is a prime example of the Charter's adaption through consistent practice by the relevant political organ of the United Nations. Article 27(3) of the Charter, interpreted literally and in accordance with the intent of the drafters, provides that an abstention *does* constitute a veto, since a decision on substantive matters requires "the concurring votes of the permanent members."

[19] It has been argued that the Council's Resolution 678, authorizing "States co-operating with the Government of Kuwait" to use force to uphold the Security Council's demands for Iraqi withdrawal "and to restore international peace and security" was no more than an acknowledgment of Kuwait's right, under Article 51, to implement its "inherent right of individual or collective self-defence" against "an armed attack." This legal analysis, however, is wrong. For Kuwait to exercise its right of self-defense under Article 51, the Charter neither envisages nor requires authorization by the Security Council. Furthermore, the right of states to join with Kuwait in its collective defense had already been acknowledged by the Council Resolution 661 of 6 August 1990, which had affirmed "the inherent right of individual or collective self-defence, in response to the armed attack of Iraq against Kuwait in accordance with Article 51 of the Charter." Resolution 678, coming almost four months later, did something radically different: it *decided*, under Chapter VII's mandatory authority, "to allow Iraq one final opportunity, as a pause of goodwill," to get out of Kuwait, S/RES/678 of 29 November 1990, para. 1. It *authorized* the coalition of willing states to use force "*if Iraq failed to comply by January 15, 1991*" S/RES/678 of 29 November 1990, para. 2 (emphasis added). With its passage, the Council, without abrogating Kuwait's right of self-defense, superimposed upon it a collective measure involving the use of military force that was now authorized under Chapter VII and subject to the Council's parameters regarding objectives, means, and date of initiation.

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain international peace and security.

Article 39 thus empowers the Council to "take measures" under Article 42 without reference to Article 43, thereby creating room for the Council to order – or, more probably, to call for – states' participation in collective security measures whether or not they have entered into special agreements with the Council under Article 43.

If the Council were to *order* states to use force, Article 25 would require all members to "agree and carry out" that decision. To date, however, all the resolutions authorizing *ad hoc* military forces have merely "called on" or "authorized" states to use force.[20] While participation in military action has thus been voluntary, the authority and objectives of *ad hoc* forces have usually been formulated in mandatory terms. For example, in resolution 678, the Security Council speaks of Iraq's "obligation" to "comply" with its demands to restore Kuwaiti sovereignty and authorizes the use of force "to implement" those demands.[21] Moreover, the war was concluded not by a treaty between the participants but by Security Council decision establishing the mandatory terms on which member states would "bring their military presence in Iraq to an end . . ."[22] These, obviously, are exercises of the Council's power to make binding decisions under Chapter VII, even if they are enforced by voluntary "coalitions of the willing."

There have been several subsequent occasions on which the Security Council has authorized the use of force by states in coalitions of the willing: national military contingents assembled *ad hoc* for a particular task. The Council has also authorized a single state or a regional organization to lead a specified military operation. Whatever their composition, however, these operations increasingly have filled the void created by the lapse of Article 43. Thus, on November 30, 1992, the Secretary-General informed the Council that "the situation in Somalia has deteriorated beyond the point at which it is susceptible to peace-keeping treatment."

[20] For example, S/RES/678 of 29 November 1990, para. 3, and S/RES/794 of 3 December 1992. Note, however, that when economic sanctions have been imposed by the Council, compliance has been mandatory for all Members. See, for example, S.C. Res. 232 of 16 December 1966 mandating trade sanctions against Southern Rhodesia and S.C. Res. 418 of 4 November 1977 imposing an arms embargo on South Africa.

[21] S/RES/678 of 29 November 1990, preamble and para. 1.

[22] S/RES/687 of 3 April 1991, para. 6.

Accordingly, he reported, "I am more than ever convinced of the need for *international military personnel* to be deployed in Somalia" (emphasis added). He concluded that "the Security Council now has no alternative but to decide to adopt more forceful measures to secure the humanitarian operations . . . It would therefore be necessary for the Security Council to make a determination under Article 39 of the Charter that a threat to the peace exists . . . The Council would also have to determine that non-military measures as referred to in Chapter VII were not capable of giving effect to the Council's decision."[23] Promptly, the Security Council made the requisite finding under Chapter VII and authorized the US, and any others "willing," to "use all necessary means" through an *ad hoc* Unified Task Force (UNITAF) to achieve the specified objectives.[24] This was decided unanimously, demonstrating the assent of all members to the principle of Council-authorized coalitions of the willing.

It is notable that the Council, in authorizing military intervention in Somalia, followed precisely the requisites of Article 42. It first determined that measures short of the use of armed force (Article 41) had failed to achieve the objective of restoring order and removing a threat to the peace (Article 39). This made the operation, although conducted by the designated member state, subject to terms of reference set out in the authorizing resolution.

These were not trivial operations. UNITAF engaged 37,000 (primarily American) forces. Its multinational successor, UNOSOM II, deploying 30,000 military personnel, was placed by the Council under the control of the UN Secretary-General and charged with enforcement powers and the task of creating peace, democracy and unity in that riven land.[25] All the more significant is it to note that both operations – engaging the United Nations in an essentially humanitarian intervention with *ad hoc* forces and doing so even in the absence either of a clearly *international* crisis or the consent of Somalia – should have received the unopposed consent of the members of the Security Council. Although few members of the Council thought it prudent to spell out general principles of Charter-interpretation underpinning this use of collective force – and, indeed, in Resolution 794 states took care to note the "unique character" of the crisis to which they were responding – the actions of the Council cannot but be seen as precedent-setting.

[23] Letter dated 29 November 1992, S/24868. [24] S/RES/794 of 3 December 1992.
[25] S/RES/814 of 26 March 1993, para. 6. The transfer from UNITAF to UNOSOM II was set for May 1, 1993.

Another example of the expansion of the practice of deploying coalitions of the willing is the Council's – again, expressly "exceptional" – authorization, in 1994, of a multinational force under "unified command and control" to "use all necessary means" to facilitate the ouster from Haiti of the military leadership that had overthrown its democratically elected government.[26] On this occasion the resolution was passed by 13–0 with Brazil and China abstaining. (China's abstention once again was not seen as a veto.) Yet another instance is the mandate given by the Security Council to another *ad hoc* force, UNPROFOR,[27] in the former Yugoslavia and the gradual extension of that military mandate to include the defense of Bosnian "safe areas."[28] When those safe areas and the UN personnel in them came under attack, the Security Council authorized air strikes by NATO against Serb heavy weapons.[29] This UN cooperation with NATO, the "double key" approach to air strikes, was later extended by the Council to UNPROFOR operations in Croatia.[30] These resolutions, too, were adopted with the unanimous assent of Council members and widespread approval from states outside the Council.[31] Despite *pro forma* protest from the Russian Federation,[32] the ensuing "bombs of August"[33] constituted the first effective military partnership between a regional military organization and the United Nations' own *ad hoc* multinational force,[34] one that ultimately led to the defeat of Serb forces and, in turn, to the Dayton peace negotiations.

Reflecting on the air and land campaign from the perspective of Washington, Richard Holbrooke, then Assistant Secretary of State with special responsibility for the Yugoslav situation, has written of both the

[26] S/RES/940 of 31 July 1994. [27] S/RES/743 of 21 February 1992.

[28] S/RES/836 of 4 June 1993, paras. 5 and 9.

[29] S/RES/836 of 4 June 1993, para. 10: "Member States, acting nationally or through regional organizations or arrangements, may take, *under the authority of the Security Council* and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures, through the use of air power, in and around the safe areas in the Republic of Bosnia and Herzegovina, to support UNPROFOR in the performance of its mandate . . ." (emphasis added).

[30] S/RES/958 (1994) of 19 November 1994. [31] 1994 U.N.Y.B., vol. 84, 514.

[32] Statement of the Russian Federation, S/1994/443 of 11 April 1994.

[33] The term is borrowed from the section on NATO's 1994 bombing campaign in Richard Holbrooke, *To End a War* 101–05 (1998).

[34] According to Holbrooke: "When it was all over and we could assess who had been most helpful, my Washington colleagues usually singled out Kofi Annan at the United Nations, and Willy Claes and General Joulwan at NATO." Holbrooke, *To End a War* at 103.

cumbersome and historic qualities of this cooperative effort[35] between the US, NATO, and the United Nations. Cumbersome or not, it marked yet another instance in the adaption of the Charter to give the United Nations a flexible role in situations demanding a military response to threats to the peace and acts of aggression, albeit one quite possibly constituted in a manner – and with an operational mandate – not envisaged by the drafters at San Francisco half a century earlier.

There are other, even more recent examples of coalitions of the willing or individual states being authorized by the Security Council to use force as necessary, usually but not always under Chapter VII. Thus, the Security Council in 1994 authorized France to use "all necessary means" for security and humanitarian ends during the civil turmoil in Rwanda[36] and in 1997 authorized Italy, with others, to deploy forces to prevent civil war in Albania[37] and created INTERFET under Australian leadership to establish security in East Timor.[38] In an effort to contain the civil war in Sierra Leone the Council, in 1999, created UNAMSIL, a force of 11,000 with authority, under Chapter VII, to use force "to afford protection to civilians under imminent threat of physical violence" as well as to "assist . . . the Sierra Leone law enforcement authorities in the discharge of their responsibilities."[39]

It may thus be concluded that the failure to implement Article 43 has not seriously hampered the United Nations in carrying out its mission to provide collective security. On the contrary, *ad hoc* coalitions of the willing, in various logistical configurations, or designated surrogates, have not merely filled the gap left by states' reluctance to make long-term standby troop commitments but have been deployed with mandates, including interventions in essentially domestic conflicts for primarily humanitarian purposes, that were never contemplated and probably would not have been approved at San Francisco. This does not, however, mean that the Organization has become a "rogue cop," operating without license. It was the intention of the founders at San Francisco to create a living institution, equipped with dynamic political, administrative, and

[35] "To attack Option Three targets, a much broader group that included Serb troop concentrations and equipment throughout Bosnia, we would need to return to both the NATO Council and the U.N. Security Council for permission." Holbrooke, *To End a War* at 146.

[36] Operation Turquoise, authorized by S/RES/929 of 22 June 1994.

[37] Operation Alba, authorized by S/RES/1101 of 28 March 1997 and S/RES/1114 of 19 June 1997.

[38] S/RES/1246 of 11 June 1999.

[39] S.C. Res. 1270 of 22 October 1999 and S/RES/1289 of 7 February 2000.

juridical organs, competent to interpret their own powers under a flexible constituent instrument in response to new challenges. The United Nations has fulfilled that mandate.

The role of the General Assembly: original intent

Another issue left largely uncontemplated and wholly unresolved at Dumbarton Oaks and at San Francisco was this: what would happen if a palpable threat to the peace were to arise but the Security Council (either for lack of a majority or by exercise of the veto) were unable to act? From before the Dumbarton Oaks conference to the time of national ratifications of the Charter, little systematic thought was devoted to the potential for stasis in the Council. Yet this soon became the principal challenge to the effectiveness of the Charter system.

At Dumbarton Oaks some consideration had been given to allotting a secondary role to the General Assembly for the maintenance of international peace and security, but this was rejected. The Big Powers agreed that any member state "may bring to the attention of the General Assembly any condition, situation, or dispute the continuation of which is likely to impair the security or general welfare of itself or of any other member of the organization, or lead to a breach of the peace." The Assembly was to defer to the Security Council, however, in any situation "which it deems of sufficient gravity to require immediate consideration" of "measures."[40] Briefly, thought was given to a plan to allow the Assembly "to consider questions relating to the maintenance of international peace and security" subject only to the caveat that it could not "on its own initiative . . . deal with any such matter which is being dealt with by the Council."[41] This, too, did not make the final draft. At San Francisco, New Zealand made a last-ditch effort to insert a provision requiring joint action by the Security Council and General Assembly in implementing enforcement measures, except in "extremely urgent cases."[42] That also failed. A few other attempts to strengthen the

[40] Plan for the Establishment of an International Organization for the Maintenance of International Peace and Security. Memorandum by the Secretary of State (Hull) to President Roosevelt, December 29, 1943, 1 Foreign Relations of the United States, 1944, 614 at 619.

[41] Memorandum by the Under Secretary of State (Stettinius) to the Secretary of State, August 31, 1944, 1 Foreign Relations of the United States, 1944, 755.

[42] San Francisco, May 10, 1945, 1 Foreign Relations of the United States, 1945, 657 at 662.

Assembly's role were unfavorably noted in Secretary of State Hull's report to Congress, which spoke of strenuous efforts on the part of smaller nations "to give the General Assembly an equal share with the Security Council in the maintenance of peace and security." If some participants had had their way, he observed, "the Security Council would have been limited by the constant supervision of the General Assembly in the consideration of methods and measures to maintain peace and security."[43] These ill-advised initiatives, Hull was glad to say, had been successfully resisted.

Summarizing the intended relationship between the two bodies, Hull told Congress:

> Unlike the functions of the Security Council, which are primarily political and in case of need may be repressive in character, the functions of the General Assembly will be concerned with the promotion of constructive solutions of international problems in the widest range of human relationships, economic, social, cultural and humanitarian.[44]

This prognosis would seem to exclude the Assembly from all security issues. Nevertheless, its power, set out in Article 11(2) of the Charter, does permit the Assembly to make recommendations as to "questions relating to the maintenance of international peace and security" as long as it refrains from doing so while "the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the… Charter."[45] This can be (and indeed has been) interpreted to grant it wider jurisdiction than is indicated by Hull's report to Congress. Nevertheless, the intent of the Big Powers in drafting the Charter seems closer to Hull's view, or to those expressed by China at Dumbarton Oaks:

> Any question on which action is necessary should be referred to the Security Council by the General Assembly either before or after discussion. The General Assembly should not on its own initiative make recommendations on any matter relating to the maintenance of international peace and security which is being dealt with by the Security Council.[46]

This makes all the more remarkable the evolutionary growth of Assembly jurisdiction in matters requiring collective action, including the deployment of military forces. This adaption has occurred through

[43] *Report of the President,* n. 5 above, at 69.
[44] *Report of the President* at 71.
[45] UN Charter, Article 12(1).
[46] Proposals of China for the Establishment of a General International Organization, 1 Foreign Relations of the United States, 1944, 890 at 892.

two developments: the adoption of the "Uniting for Peace Resolution" and the invention of "Chapter 6 1/2."

Adapting General Assembly powers: "Uniting for Peace"

After being absent from the Security Council in June 1950 at the inception of North Korea's aggression, the Soviet Union resumed its participation in August. This presaged renewed deadlock in that organ. Accordingly, in October, at the beginning of the General Assembly's annual meeting, the US introduced an agenda item entitled "United Action for Peace."[47] It was debated in Committee from October 9–21 and in Plenary from November 1–3.

Secretary of State Dean Acheson proposed that the Assembly "organize itself to discharge its responsibility [for collective security] promptly and decisively if the Security Council is prevented from acting." Declaring that the Council's firm response to the Korean invasion in June had "marked a turning point in history for it showed the way to an enforceable rule of law among nations," Acheson urged that when the Council is "obstructed" by the veto this ought not to "leave the United Nations impotent…" because Charter Articles 10, 11, and 14 also gave the Assembly "authority and responsibility for matters affecting international peace."[48] Responding to those who thought the proposal distorted the drafters' allocation of functions, US Ambassador Benjamin Cohen reasoned that the Charter should be interpreted flexibly to allow new responses to unanticipated changes of circumstance. He cited US constitutional practice in allowing the making of "executive agreements" supplementing the formal treaty power, and the recognition of "implied powers" of Congress by the Supreme Court's decision in *McCulloch* v. *Maryland*.[49] Cohen touted these American constitutional precedents as creative examples for the United Nations to emulate in construing its own constitutive instrument.[50]

Whatever Assembly delegates may have made of these references to US constitutional practice, they endorsed the "Uniting for Peace"

[47] G.A.O.R., 5th Sess., Annexes, vol. 2, Item 68, U.N. Doc. A/1377 (1950).

[48] 23 Department of State Bull. 524–25 (1950). See also Dean Acheson, *Present at the Creation* 450 and 2 Foreign Relations of the United States, 1950, 335–37.

[49] 4 Wheat. 316 (1819).

[50] Benjamin V. Cohen, The United Nations, *Constitutional Developments, Growths, Possibilities* 18–19 (1961).

resolution by a resounding vote of 52–5 with only the Soviet bloc in opposition, and 2 abstentions (India and Argentina).[51] The resolution:

1. *Resolves* that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members or by a majority of the Members of the United Nations.

Soviet Ambassador Andrei Vyshinsky angrily opposed the new initiative. "Do you not propose therein," he asked, "that armed forces should be transferred to the control of the General Assembly? . . . do you not disregard Chapter VII of the Charter, where, beginning with Article 43, it is expressly stated that only the Military Staff Committee shall be responsible under the Security Council for the direction of armed forces, and that they may be used only by decision of the Security Council and not of the General Assembly . . .?" He concluded that "when the measures envisaged call for action in the sense of enforcement action, particularly by means of armed forces, the General Assembly can do nothing, since the Charter does not give it the right to act."[52] Turning to another US representative, he asked of him: "Is John Foster Dulles really so ignorant a person that he does not know all this?"[53]

In a better-tempered reply, Canadian Secretary of State for External Affairs, Lester B. Pearson conceded that "some honest doubts have been expressed about [the resolution's] constitutionality and . . . the sponsors . . . respect them. Nevertheless . . . [w]e believe that the General Assembly has the power to make recommendations on the subjects dealt with [in the Charter], although it would not have the power to make decisions which would automatically impose commitments or enforce obligations on the Members of the United Nations."[54]

[51] G.A. Res. 377(V). G.A.O.R., 5th Sess., 302nd Plen. Meeting, 3 November 1950, A/PV.302, 341 at 347.
[52] G.A.O.R., 5th Sess., 301st Plen. Meeting, 2 November 1950, A/PV.301 at 334.
[53] G.A.O.R., 5th Sess., 301st Plen. Meeting, 2 November 1950 at 328.
[54] G.A.O.R., 5th Sess., 302nd Plen. Meeting, 3 November 1950, A/PV.302 at 342.

Left unexamined in this explanation, however, is the difference between the effect of a General Assembly resolution on the entire membership – which could only be recommendatory – and its potential effect on parties affected by the recommended action, which might well be dispositive. For example, under "Uniting for Peace" may the Assembly be convened to resist an act of aggression or even to stop a government committing genocide against a minority of its population? Could the Assembly recommend that states deploy force against an aggressor or a genocidal government? Even if such a resolution by the Assembly were cast in purely recommendatory language – "calling upon" states asked to commit armed force – its purport would be more than a recommendation to those against whom force was to be deployed. While this was scarcely touched upon during the debate, both advocates and opponents of "Uniting for Peace" understood that its effect, in some unspecified instances, would be to empower the Assembly to deploy military force.[55]

The resolution had its first full-scale test in 1956,[56] during the Suez crisis. Israel having invaded the Sinai, and with Britain and France bombing Suez Canal cities in anticipation of an expeditionary landing, the US, on October 30, convened the Security Council demanding that it determine that there had been a breach of the peace and order Israeli forces back to the armistice lines established by the Council's cease-fire order of 11 August 1949.

With the UN Truce Supervisory Organization (UNTSO) already deployed in the area, the Secretary-General, as in the previous instance of North Korea's attack on the South, was in a position to report the facts. He rejected Israel's claim to be acting in self-defense against an Egyptian attack. The US then introduced a draft resolution[57] calling for withdrawal of Israeli forces and insisting that Britain and France not intervene. It received 7 votes in favor, with 2 opposed and 2 abstentions. The two negative votes having been cast by Britain and France, the resolution was vetoed.

Immediately, Yugoslavia, which had vigorously opposed "Uniting for Peace" in 1950, offered a resolution which, "taking into account" that

[55] UN Charter, article 18(2).

[56] A few states argued before the General Assembly in November 1950, after Chinese armed forces had entered the Korean conflict, that Assembly action in response to this event should be taken under the newly adopted "Uniting for Peace" procedures. 1950 U.N.Y.B. 245. This, however, did not become the basis for further Assembly initiatives on this item.

[57] U.N. Doc. S/3710 (1956).

the Council had been prevented "from exercising its primary responsibility for the maintenance of international peace and security" called for an emergency session of the General Assembly.[58] China, Cuba, Iran, Peru, the USSR and the US joined Yugoslavia in supporting this invocation of "Uniting for Peace," while France and the U.K. voted against, and Australia with Belgium abstained.[59] As the Yugoslav resolution was procedural, it was not subject to the veto. With that, the matter passed into the hands of the first emergency session of the General Assembly, which convened the next day and met from November 1–10.

The Assembly quickly adopted a resolution that "urged" a cease-fire.[60] As fighting continued, Canada submitted a resolution, adopted in the early morning of November 4, urgently requesting the Secretary-General to propose a plan for an international emergency force (UNEF) to secure and supervise a cease-fire.[61] Such a proposal, presented to the Assembly the same day[62] and taken up the next morning,[63] was adopted by 57–0 with 19 abstentions. It appointed a Chief of Staff – the Canadian Commander of the UNTSO mission, Major-General E.L.M. Burns[64] – and authorized recruitment of a military force "from member states other than the permanent members of the Security Council."[65] The same day the Secretary-General received Israel's unconditional agreement to a cease-fire, followed one day later by French and British acquiescence.

In his second and final report to the Assembly on the establishment of the new force, the Secretary-General emphasized that it had been authorized by, and would operate under, the "Uniting for Peace" resolution. He noted that it was being deployed with the consent of the countries concerned and would be stationed on Egyptian territory with that country's agreement[66] as "required under generally recognized international law."[67] He further noted that "there was an obvious difference between establishing the Force in order to secure the cessation of hostilities, with a withdrawal of forces, and establishing such a Force with a view to enforcing a withdrawal of forces." Asked by a member of the Assembly what would happen if Israel failed to comply with the resolution requiring

[58] S.C. Res. 119, S/3721 of 31 October 1956.
[59] 1956 U.N.Y.B. 34.
[60] G.A. Res. 997 (ES-I) of 2 November 1956.
[61] G.A. Res. 998 (ES-I) of 4 November 1956.
[62] U.N. Doc. A/3289, 4 November 1956. First report of the Secretary-General on plan for emergency international United Nations force.
[63] G.A. Res. 1000 (ES-I) of 5 November 1956.
[64] G.A. Res. 1000 (ES-I) of 5 November 1956, para. 2.
[65] G.A. Res. 1000 (ES-I) of 5 November 1956, para. 3.
[66] 1956 U.N. Yearbook 32.
[67] U.N. Doc. A/3302 and Add. 1–30 and Add. 4/Rev.1.

its withdrawal to the pre-existing armistice line, the Secretary-General replied that, "were that unfortunate situation to arise, he would consider it his duty to bring it at once to the attention of the General Assembly or the Security Council."[68]

This reply suggests that, while the Secretary-General did not consider UNEF to have been authorized to engage in military enforcement, he thought it potentially within the Assembly's power to strengthen that mandate. In the event, this proved unnecessary. On November 7, the Emergency Session approved "guiding principles" for UNEF by a persuasive vote of 64–0 with 12 abstentions.[69] Even the Soviet representative, although reporting that his Government still believed that the Assembly was creating a military force in violation of the Charter,[70] did not cast a negative vote. The moment, clearly, had been seized. The Organization, adapting to the circumstances of Cold War stasis in the Security Council, had found a new way to authorize, recruit, and deploy the military force necessary to allow it to fulfill its mission.[71]

Less than four years later, the Assembly once again stepped forward to authorize UN military action in the face of Security Council deadlock. The force deployed in the Congo (ONUC) by the Security Council in July 1960[72] had become mired in a dispute between the West and the Soviet Union. By September, Moscow began to demand the operation's termination. On September 17, the US invoked "Uniting for Peace" to convene another emergency session of the General Assembly,[73] which, by a large majority, voted new instructions for the Secretary-General to "assist the Central Government of the Congo in the restoration and maintenance of law and order throughout the territory of the Republic of the Congo and to safeguard its unity, territorial integrity and political

[68] G.A.O.R., 567th Plen. Meeting, 1st Emergency Special Session, 7 November 1956, 115, para. 134.

[69] G.A. Res. 1001 (ES-I) of 7 November 1956.

[70] G.A.O.R., 567th Plen. Meeting, 1st Emergency Special Session, 7 November 1956, 127, para. 292.

[71] Little observed during this episode, which focused on the General Assembly, was the legal implication of a move by the Soviets to have the Security Council, acting under Article 42, authorize states to defend Egypt against Britain, France, and Israel. Moscow, by this time, had apparently become reconciled to the use of such *ad hoc* forces by decision of the Council, unimpeded by the non-implementation of Article 43. U.N. Doc. S/3736, reproduced in S.C.O.R., 11th Sess., 755th Meeting, S/PV.755 (1956), at 42.

[72] S.C. Res. 143 of 13 July 1960.

[73] S.C. Res. 157 of 17 September 1960. The resolution passed by 8–2 (Poland and USSR), with France abstaining.

independence in the interests of international peace and security."[74] This became an important extension of ONUC's mandate, leading to military operations against the secessionist regime of Katanga province.[75] Only a year later was the Council again able to assume operational control over ONUC.[76]

Large expenses were incurred by the United Nations to maintain ONUC's 25,000 military and support personnel. France and Russia, however, refused to pay their share, arguing that ONUC operations authorized by the Assembly were *ultra vires* the Charter. To test the legality of that proposition, the Assembly asked the International Court for an advisory opinion[77] as to whether these expenditures constituted "expenses of the organization" that, under Article 17(2) of the Charter, must "be borne by the Members as apportioned . . ." Since Paris and Moscow were also refusing to pay their share of the cost of UNEF's Sinai operation, the Court was also asked to consider the legality of that earlier Assembly-authorized deployment.

In responding, the Court had to decide on the legality of the General Assembly's role in military operations – UNEF and ONUC – under "Uniting for Peace." The judges, by a majority of 9 to 5, confirmed the *vires* of both.

Article 24 of the Charter states:

> 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 . . .

The Court reasoned that, while the text was clear in giving the Council "primary" responsibility, that term itself implied a "secondary" responsibility which the Assembly could exercise when the Council was stymied by a veto. In the majority's view, the Assembly has the right "by means of recommendations . . . [to] organize peace-keeping operations" although only "at the request or with the consent, of the States concerned."[78]

In this opinion, the International Court both endorsed and shaped the "Uniting for Peace" Resolution, deeming it a lawful means by which the

[74] G.A. Res. 1474 (ES-IV) (1960). Adopted by 70–0 with 11 abstentions.
[75] U.N. Doc. S/5038; 9 UN Rev. 5 (February 1962).
[76] Res. S/5002 of 24 November 1961. Adopted by 9–0 with 2 abstentions (France and UK).
[77] G.A. Res. 1731 (XVI) of 20 December 1961.
[78] Certain Expenses of the United Nations, Advisory Opinion of 20 July 1962, 1962 I.C.J. 163 at 164.

Assembly could exercise at least some of the Organization's responsibility for maintaining international peace and security when the Security Council was unable to do so. What the opinion leaves undefined is the circumference of the category of "states concerned" whose consent must be obtained. Logically, if there appears a likelihood of conflict between states *A* and *B*, the Assembly, following upon consent by state *B*, could position a peacekeeping force on its territory even without the consent of state *A* as it would have no lawful cause to be "concerned" with that peaceable deployment.

Inventing "Chapter 6 1/2"

"Uniting for Peace" established a new procedure expanding General Assembly jurisdiction over peacekeeping operations. Concurrently, the United Nations began also to expand the kinds of such operations and their missions. Thus, the large UNEF military deployment in 1956 was a new venture both in scale and kind. "Blue helmets," lightly armed but in persuasive numbers, were deployed to observe a truce and to interpose themselves between hostile parties. They were not to engage in combat but, if attacked or hindered, were authorized to defend themselves and their mission. Thirty-eight peacekeeping operations[79] based on this innovative precedent were deployed during the United Nations' first fifty years.[80]

Most of these operations, unlike UNEF, have been authorized by the Security Council,[81] but the resolutions creating them usually do

[79] Yearbook of the United Nations, Special Edition, UN Fiftieth Anniversary, 1945–1995, at 32, figure 1.

[80] The first, the UN Truce Supervisory Organization (UNTSO) actually preceded UNEF. It was established in 1948 but was of a much smaller scale.

[81] In 1948, six years before UNEF, the Council authorized deployment of almost 600 UNTSO military observers to monitor the Arab–Israeli cease-fire. Resolutions S/773 of 22 May 1948 and S/801 of 29 May 1948. Their operations were placed under the supervision of an office of mediator created by the General Assembly. UNTSO thus was a "hybrid peacekeeping operation." Henry Wiseman, "The United Nations and International Peacekeeping: a Comparative Analysis," in *The United Nations and the Maintenance of International Peace and Security* 263 at 270, UNITAR, 1987. UNEF, however, as we have seen, was authorized solely by the General Assembly. G.A. Res. 1000 (ES-1) of 5 November 1956. The 1960 ONUC operation in the Congo was authorized by the Security Council (S.C. Res. 143 (1960)). The resolution was adopted by 8–0 (China, France, and Britain abstained), although, for a time in late 1960–61, jurisdiction passed to the General Assembly. G.A. Res. 1474 (ES-IV) of 20 September 1960; G.A. Res. 1599(XV) of 15 April 1961; G.A. Res. 1600(XV) of 15 April 1961; G.A. Res. 1601(XV) of 15 April 1961.

not invoke the Council's unique Chapter VII enforcement powers. Yet, neither do they quite fit the parameters of Chapter VI, which deals only with "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements . . ." (Article 33). Hence, the blue helmets are commonly said to be authorized by "Chapter 6 1/2." This is yet another illustration of the Charter's adaption in practice.

These UN peacekeeping operations have involved more than 700,000 military personnel and cost approximately 12 billion dollars.[82] The space occupied by the fictive Chapter 6 1/2 is fluid, being defined by practice rather than Charter text. A Chapter 6 1/2 operation may begin by the parties' acquiescence in deployment of a peacekeeping force. Over time, however, the operation may incur the hostility of one or several of the parties, requiring either its withdrawal (as in the instance of UNEF in the Sinai) or its difficult and risky transformation into a peace enforcement operation (as with ONUC in the Congo and UNPROFOR in the former Yugoslavia). This phenomenon of "mission-creep," most dramatically evident again during the work of UNPROFOR in Bosnia-Herzegovina during 1993–95, illustrates the ambiguity which may arise in conducting UN "blue helmet" military operations which, although initially not authorized or armed to engage in Chapter VII-based enforcement actions, are assigned new tasks that may involve them in combat operations.[83] Nevertheless, the concept has proven to be of immense utility, filling the wide lacuna between the use of collective force to resist aggression, on the one hand, and, on the other, recourse to pacific measures of persuasion such as hortatory resolutions or mediation.

Expanding the concept of threats to the peace, breaches of the peace, and acts of aggression

Of particular significance is the gradual expansion of UN military intervention to meet threats to peace arising not out of aggression by one state against another but from events occurring within one nation.

The US legal justification for the deployment of ONUC military force to vanquish the Katanga separatists in the Congo was explained in

[82] Estimate based on United Nations Peace-Keeping Operations, PS/DPI/Rev. 7, July 1994.

[83] Report of the Secretary-General pursuant to General Assembly resolution 53/35, the fall of Srebrenica A/54/549, 14 November 1999.

February 1963, by then Deputy Assistant Secretary of State Richard N. Gardner, as follows:

> First, the Government of the Congo asked the United Nations to come in.
>
> Second, the Security Council authorized the U.N. to go in with a mandate to maintain law and order – a mandate which was subsequently expanded into a mandate to prevent civil war, protect the Congo's territorial integrity, and remove the foreign mercenaries.
>
> Third, the military actions of the U.N. Force were taken in pursuit of these mandates and in self-defense.

He added that "this was not an internal matter – there was a clear threat to international peace and security because of the actual involvement or potential involvement of outside powers."[84]

Despite this explanation, it is clear from the drafting history of the Charter's Articles 39, 42, 43, and 51 that the representatives at San Francisco had not intended to authorize a role for the United Nations in civil wars. Rather, Charter Articles 2(4) and 2(7) appear to forbid such intervention. In practice, however, the Congo was but the first of several UN military involvements in precisely those sorts of conflict: in Yemen, Iraq, the former Yugoslavia, Somalia, Haiti, and Sierra Leone. It is worth emphasizing in this connection that the Charter's prohibition on UN intervention in matters "essentially . . . domestic" is not, textually, suspended even when a government asks for help in suppressing a domestic insurgency. Indeed, a literal reading of Article 2(7) precludes a positive response to such a request. The practice, however, has been much more flexible, treating an "invitation" from the government of a state as suspending the obligation not to intervene: or, alternatively, construing civil conflict, at least when it exceeds certain levels of virulence, as no longer "primarily . . . domestic."

The Charter also makes no provision for UN intervention in cases of gross violations of human rights, destruction of democracy, the disintegration of effective governance, or mass starvation and environmental degradation. The literal Charter text would appear to preclude any international action unless such "domestic" crises begin to threaten international peace. That threshold, however, has been gradually lowered in the practice of the United Nations' principal organs. In 1999, UN Secretary-General Kofi Annan stated that gross violations of human

[84] Department of State Press Release No. 99, February 22, 1963; 48 Department of State Bull. 477 at 478–79 (1963).

rights and denials of democratic fundamentals can no longer be regarded as purely "domestic" matters. He boldly called on the United Nations to "forge unity behind the principle that massive and systematic violations of human rights – wherever they may take place – should not be allowed to stand" and that the "sovereign state, in its most basic sense, is being redefined by the forces of globalization and international cooperation."[85]

The Secretary-General's observation, far from being outré, is based solidly on practice. Both the General Assembly and the Security Council have invoked Chapter VII measures, in 1966 against the white minority regime in Rhodesia and in 1977 against its equivalent in South Africa, in an effort to end those governments' gross racism.[86] Chapter VII was also invoked in 1994 and military enforcement measures were authorized to reverse the military coup against the democratically elected government of Haiti.[87] In 1998, Chapter VII was again used to threaten the Federal Republic of Yugoslavia with collective measures if it continued to repress its Kosovar minority.[88] On September 28, 2001, the Security Council invoked Chapter VII to impose mandatory sanctions on terrorist groups, thereby extending the Council's enforcement powers to reach non-state actors.[89]

It is increasingly apparent that, in practice, both the Security Council and the General Assembly now regard themselves as entitled to act against oppressive and racist regimes, and, in situations of anarchy, to restore civil society, order, and legitimate governance where these have unraveled.[90] In some instances the United Nations has deployed military force (Congo, Somalia, Haiti, East Timor) or police (Namibia, Cambodia, Mozambique, Haiti) to neutralize or disarm factions or reintegrate them into a cohesive national army and otherwise to help recreate a civil society and establish democratic governance. In its decision in the *Tadic* appeal, the International Criminal Tribunal for the Former Yugoslavia, referring to evidence that "the practice of the Security

[85] Report of the Secretary-General on the Work of the Organization, G.A.O.R., 54th Sess., 4th Plen. Meeting, A/54/1, 20 September 1999.

[86] S. Res. 232 (1966) of 16 December 1966 (Rhodesia); S. Res. 418 of 4 November 1977 (South Africa).

[87] S/RES/940 (1994) of 31 July 1994.

[88] S/RES/1160 (1998) of 31 March 1998; S/RES/1199 (1998) of 23 September 1998; S/RES/1203 (1998) of 24 October 1998; S/RES/1244 (1999) of 10 June 1999.

[89] S/RES/1373 of 28 September 2001.

[90] S/RES 794 (1992) of 3 December 1992; S/RES 814 (1993) of 26 March 1993; S/RES 954 (1994) of 4 November 1994.

Council is rich with cases of civil war or internal strife which it classified as a 'threat to the peace' and dealt with under Chapter VII" concluded "that the 'threat to the peace' of Article 39 may include, as one of its species, internal armed conflicts."[91] This marks recognition of the role of practice in interpreting the Charter, sometimes in radical departure from original intent.

The gradual attrition, in UN practice, of states' monopoly over matters of "domestic jurisdiction" has occurred in tandem with an expansion of activities and conditions seen to constitute "threats to the peace." Aggravated instances of racism, colonial repression, massive violations of human rights, tactical starvation, genocide, the overthrow by military juntas of democratically elected governments, and the "harbouring of terrorists"[92] have all begun to be regarded as potentially constituting "threats to the peace" even if they are not instances of "aggression" in the traditional international legal sense.

This expansion of global jurisdiction has not happened at once and, like much legal reform, tends to occur in the guise of "legal fictions." We have noted Richard Gardner, on behalf of the US Government, defending ONUC's use of force to subdue Katanga secessionists in the Congolese civil war, by reference to the "potential involvement of outside powers" which threatened to turn "an internal matter" into "a clear threat to international peace and security."[93] In 1977, the Security Council, invoking Chapter VII, found that the racist policies of the Government of South Africa "are fraught with danger to international peace and security,"[94] thereby opening the way for its first exercise of enforcement powers against a member.[95] Later, the Secretary-General persuaded the Security Council to find a threat to the peace in the Somali civil war because of its "repercussions… on the entire region."[96] In agreeing to intervene with military force under Chapter VII, the Council carefully noted "the unique" and "extraordinary character" of that conflict without further defining it.[97] In determining in 1994 that the rule of the Haitian military junta constituted a threat to peace and security in the

[91] *Prosecutor* v. *Tadic*, IT-94-1-AR 72 (October 1995) para. 30.
[92] S/RES/1368 of 12 September 2001. [93] See n. 84 above.
[94] S. Res. 418 of 4 November 1977.
[95] See Statement of the Secretary-General, S.C.O.R. (XXXII), 2046th Meeting, 4 November 1977.
[96] Letter dated 29 November 1992 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/24868 of 30 November 1992.
[97] S/RES/794 of 3 December 1992.

region and authorizing military intervention by a coalition of the willing, the Council referred to "the desperate plight of Haitian refugees" as evidence of a threat to the peace.[98] This has rightly been called "unprecedented in authorizing the use of force to remove one regime and install another."[99] In 1998, the "flow of refugees into northern Albania, Bosnia and Herzegovina and other European countries" was cited by the Council as a justification for invoking Chapter VII in respect of the Kosovo crisis.[100] In reaction to the destruction of the New York World Trade Center, "international terrorism" was classified by the Council "as a threat to international peace and security"[101] and subjected to Chapter VII mandatory sanctions.[102]

These somewhat artificial "international" dimensions of what, in 1945, would have been seen as lamentable but primarily domestic tragedies or criminal matters subject to domestic police enforcement have not been advanced fraudulently or cynically. Rather, the meaning of "threat to the peace, breach of the peace and act of aggression" is gradually being redefined experientially and situationally. For the present, those doing this redefining understandably seek to contain it within familiar, or at least non-threatening, parameters. For example, an intervention to respond to the "inducing of massive flows of refugees" is as yet more acceptable to many governments than intervention to stop a government's slaughter of its own ethnic or political minorities, its subordination of women, or its failure to control calamitous domestic starvation and civil war.

Of course, unlike some governments, most *persons* might accept that the killing or dying of a population or its gross oppression in place deserves at least as much response as does large-scale population displacement across international borders. They might consider quite odd the recourse to anomalous fictions to obscure the gradual attrition of distinctions between what is "domestic" and "international." Nevertheless, the more remarkable fact is that the global system is responding, tentatively and flexibly, through *ad hoc* actions rather than by systematic implementation, to new facts and threats that are redefining the threshold of what is seen to constitute a threat to peace, requiring a powerful collective response.

[98] S/RES/940 of 31 July 1994.
[99] Simon Chesterman, *Just War or Just Peace* 151 (2001).
[100] S/RES/1199 of 23 September 1998.
[101] S/RES/1368 of 12 September 2001.
[102] S/RES/1373 of 28 September 2001.