TULANE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW

VOLUME 11 SPRING 2003

The Use of Force in International Law

Thomas M. Franck*

I. THE CHARTER AND CHANGE

The U.N. Charter is, at once, a freeze-frame of historically validated principles and the foundation for a dynamic political and administrative institution.

At the center of the freeze frame is what International Court of Justice Judge Sir Hersch Lauterpacht called the guiding norm of the U.N. enterprise: "there shall be no violence." The Security Council, General Assembly, and International Court are the curators of that norm. At the same time, they are also the intendants of a continually dynamic, evolving institution imbued with a spirit of relevance, one in which the emphasis is on practical problem-solving rather than formal doctrinal exegesis.

* Murry and Ida Becker Professor of Law, NYU School of Law; S.J.D. and LL.M., Harvard Law School; LL.D. (honorary) and L.B., University of British Columbia; President of the American Society of International Law (1998-2000); Member of the editorial board and former editor in chief of the *American Journal of International Law*; Member of the *Institute de droit international*; Member of the Council of Foreign Relations, and board member of Africa Watch.

Professor Franck has published prodigiously, with more than two dozen books on international law and relations, comparative law, and constitutional law to his credit. Several of these volumes have been awarded a Certificate of Merit by the American Society of International Law. His most recent work is RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS (Cambridge Univ. Press 2002).

Additionally, Professor Franck has served as legal advisor and counsel to a number of foreign governments. Presently he is a Judge *Ad Hoc* in a case before the International Court of Justice.

This implies that the meaning of the Charter does evolve as it is applied to practical situations. In particular, it suggests that the practices of U.N. organs are a reliable guide to the Organization's future directions. These principal organs deal with, and try to diminish, the incidence and consequences of humankind's seemingly incorrigible proclivity for violence. To this end, they implement the processes and procedures of the Charter and, in doing so, adapt its text to the exigencies of each crisis.

This is not unintended. In 1945, at San Francisco, it was decided by the key drafting committee that

> In the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process . . . will be manifested in the functioning of such a body as the General Assembly, the Security Council, or the International Court of Justice.[1]

It is significant that this statement makes the political bodies co-equal to the Court in construing Charter text. From this, Professor (Judge) Rosalyn Higgins has deduced "that the authority to decide upon disputed questions of the interpretation of the Charter belongs to the organ charged with their application."[2]

Thus, each organ acts as judge of its own competence and *modus operandi*. There is no need to amend the Charter, a formal process of great difficulty. The Charter evolves through the persistent and principled practice of its principal organs.

It need not have been that way. Greece, at San Francisco, proposed that the International Court be designated the sole arbiter of the Charter's meaning.[3] Although the proposal obtained the support of seventeen out of thirty-one votes in committee, this was not the two-thirds majority needed to amend the draft text.[4] Consequently, it may be said, with only mild overstatement, the Charter *is* what the principal organs *do*.

What they do tends to be governed, in part, by their concern for institutional effectiveness and relevance, but, perhaps even more, by the self-interest of the member states. This, then, is not the judicial process, with its formal focus on impartiality and principled consistency.

---

1. *Report of the Rapporteur of Committee IV/2, as Approved by the Committee*, Doc. 933, IV/2/42(2), 13 U.N.C.I.O. Docs. 703, 709 (1945), *reprinted in* THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION: SELECTED DOCUMENTS 875, 879 (U.S. Gov't Printing Office 1946).

2. ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 66 (Oxford Univ. Press 1963).

3. *Id.*

4. *Id.* at 66 n.27.

Neither is it a Symposium. At San Francisco, the Netherlands proposed "an independent body of eminent men . . . known for their integrity . . . who should be available to pronounce [on] a decision of the Security Council . . . solely from the point of view of whether [it] is in keeping with . . . moral principles. . . ."[5] However high-minded, that proposal garnered almost no support.[6] Instead, the process of implementing, and thereby interpreting, the Charter has remained steadfastly political.

This is not to say, however, that the political organs' activities have had no law-making *effect*. On the contrary. How these organs have applied the Charter in actual instances is the best guide to what the text means now, and how it will evolve in the proximate future.

That the Charter is primarily interpreted by political bodies of state-representatives is also not tantamount to conceding that Charter principles are inseparable from opportunistic application of narrowly defined state interest. The diplomats representing governments at the U.N., although mostly not lawyers, nevertheless are acutely aware that what they do in fact affects the system's normative parameters. There is, thus, an incongruous tendency in the U.N.'s political organs to talk legalese, to justify actions pursued for political ends by elaborately construing what the Charter says, or ought to mean. In this way, lawyer-like diplomats seek to manage the palpable tension between what, in a specific political context, may be the sensible course of action and its potential doctrinal consequences. They realize that each action they take, or do not take, has an afterlife as, that most legal of concepts, a *precedent*.

The Secretary-General has recently addressed this tension between what needs to be done and the normative constraints on doing it. In the aftermath of the genocide in Rwanda, he asked: suppose there had been a coalition of the willing able to act preemptively, but such action had been blocked by the opposition of a permanent member.[7] Would it have been better to sacrifice the Charter rules if it were possible thereby to save a multitude?[8] Or, if there had been a choice, would it in the long run have been better to sacrifice those lives to uphold the letter of the law?[9]

---

5. Suggestions Presented by the Netherlands Government Concerning the Proposals for the Maintenance of Peace and Security Agreed on at the Four Power Conference of Dumbarton Oaks as Published on Oct. 9, 1945, 313.

6. *Id.*

7. *Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 54th Sess., 4th plen. mtg., Agenda Item 10, at 2, U.N. Doc. A/54/PV.4 (1999).

8. *See id.*

9. *See id.*

What would be the costs to the system of allowing the rules to be bent or, in Secretary Annan's words, of "setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances?"[10]

Annan's preference, in this dilemma, is to search for new criteria that would make the rules more responsive to contemporary challenges without altogether abandoning the Charter's normative constraints on the use of force.[11] Although it has lately taken on greater urgency, this is not a new quest. In 1945, at the San Francisco Conference, France proposed an amendment to the draft Charter that would have authorized states to intervene in another nation when "the clear violation of essential liberties and of human rights constitutes in itself a threat capable of compromising peace."[12] This was rejected as too broad and vague an exception to the Lauterpachtian "no violence" principle on which the new Charter was built.[13] As an exception to that rule, it lacked clear criteria and procedures for deciding who might invoke it and in what circumstances.

The dilemma was not resolved at San Francisco and it remains largely unaddressed, although not, thanks to Secretary Annan's efforts, unrecognized.[14] Understandably, because diplomats, politicians, and civil servants are not legal philosophers, governments have been reluctant to broach the subject, recognizing it is potentially a sticky tar-baby. And yet the practical conundrum, whether in any particular crisis to enforce the strict letter of the Charter or make an exception, arises repeatedly in U.N. deliberations and is addressed often, helter-skelter, obliquely, through myriad little decisions and indecisions, actions and inactions, whenever a state asserts a right to use force for justifiable ends without obtaining the prior U.N. authorization required by the Charter.

These crises call out for practical solutions, but solutions also set precedents, especially if an otherwise appropriate action inconveniently is prohibited by the basic rules of the U.N. system. When the then-American ambassador, Dr. Madeleine Albright, defending her country's 1994 invasion of Iraq as a selfless effort to save Kurdish lives, said that: we would prefer to act together with the U.N., but if necessary, we will

---

10. *Id.*
11. *See id.* at 3-4.
12. Doc. 207, III/2/A/3, 12 U.N.C.I.O. Docs. 179, 191 (1945).
13. *See id.*
14. *See, e.g.*, Barbara Crossette, *Canada Tries to Define Line Between Human and National Rights*, N.Y. TIMES, Sept. 14, 2000, at A11, *available at* 2000 WL 26778140.

act without it,[15] she must have been aware that her country was setting an open-ended precedent. That, lacking clear criteria and procedures, can be distorted to permit anything, under any circumstances, by anyone and thereby undermines a Charter system based on reciprocal respect for mutually agreed universally applicable rules.

The answer to the dilemma cannot be found in the simplistic choice between either sacrificing people to preserve insensitive rules, or sacrificing the law to do the right and sensible thing. Put that way, the dilemma is too stark. Rather, nations must engage in a discursive pursuit of new principles and procedures by which the right and sensible thing can be done within an agreed, flexible, but not meaningless legal framework.

The search for agreement on such a flexible yet principled normative framework may be furthered by paying close attention to the experiential wisdom gained in fifty-five years of the practice of the principal U.N. organs. As these have interpreted and applied their jurisdiction in practice, the Charter's black-letter text has become more tensile, evolving in accordance with functional criteria and procedures in response to new and unforeseen circumstances. Out of the tangle of institutional practice has emerged some flexible yet coherent interpretation of the Charter's foundational principles.

II. INTERPRETING INTERPRETATION

The practice of principal U.N. organs has generated new criteria and procedures regarding the use of force in some circumstances not envisaged by the Charter.

(1) When faced with aggression, the Charter system has authorized "coalitions of the willing" to act in place of collective force envisaged, but never established, under article 43;

-examples include Korea (1950),[16] Kuwait (1990),[17] Somalia (1992 and 1993),[18] and Haiti (1994).[19]

---

15. Barbara Crossette, *U.S. Is Demanding a Quick U.N. Vote on Iraqi Pullback*, N.Y. TIMES, Oct. 15, 1994, at A1.

16. *See, e.g.*, John M. Goshko, *Beleaguered U.N. Struggles to Maintain Peacekeeping Role*, WASH. POST, Oct. 22, 1995, at A24, *available at* 1995 WL 9268378.

17. *See, e.g.*, Thomas W. Lippman & Barton Gellman, *Cheney Ends Gulf Tour on Fiery Note; 'Days Drawing Closer' for Military Solution*, WASH. POST, Dec. 24, 1990, at A01, *available at* 1990 WL 2091049.

18. *See, e.g.*, Kathy Sawyer, *U.S. Officials Estimate Cost, Length of Somalia Mission; Humanitarian Operation Seen Taking 2 to 3 Months*, WASH. POST, Dec. 7, 1992, at A27, *available at* 1992 WL 2152730.

19. *See, e.g.*, Thomas W. Lippman, *White House Seeks Talks on War Powers; Clinton Aide Calls for End of Fight Between Branches*, WASH. POST, Oct. 25, 1994, at A12, *available at* 1994 WL 2447333.

(2) When peacekeeping action has been blocked by a veto in the Security Council, the General Assembly has sometimes assumed coordinate jurisdiction to authorize similar collective measures;

-an example is the UNEF operation in Sinai (1956).[20]

(3) In some circumstances, the Charter system has condoned retaliatory action by a state against terrorists or insurgents operating from a neighboring or other state;

-examples include the Israeli action in Sinai (1956),[21] Turkey's in Iraq (1995),[22] and the action of the U.S. against Afghanistan in 2001.[23]

(4) In some circumstances, the Charter system has condoned a state's use of force to rescue its endangered citizens abroad;

-examples include Israel's Entebbe raid (1976)[24] and U.S. action against the Achille Lauro hijackers (1985).[25]

(5) In some circumstances, the Charter system has condoned a state's recourse to force to preempt an imminent attack on it;

-an example is the Israeli war against Egypt (1967).[26]

(6) In some circumstances, the Charter system has condoned a state's use of force to redress a long-standing, egregious wrong committed against itself;

-examples include the Israeli kidnapping of Adolf Eichmann (1960),[27] the Indian invasion of Goa (1961)[28] and Turkey's invasion of Cyprus (1974).[29]

---

20. *See, e.g.*, C.V. Narasimhan, Editorial, *The Problem of Palestine*, HINDU, Dec. 18, 2000, *available at* 2000 WL 30164799.

21. *See, e.g.*, Dan Burton, Commentary, *Crucial Role for the U.S.*, WASH. TIMES, Oct. 28, 1991, at E1, *available at* 1991 WL 6701165.

22. *See, e.g.*, Nicole Watts, *Panned Abroad, Turkey's Iraq Incursion Is a Hit at Home/Drive Against Kurd Rebels Winds Down*, S.F. CHRON., Apr. 26, 1995, at A8, *available at* 1995 WL 5279176.

23. *See, e.g.*, Editorial, *Long and Difficult*, WASH. POST, Oct. 28, 2001, at B06, *available at* 2001 WL 29758014.

24. *See, e.g.*, Michael Byers, *Unleashing Force*, WORLD TODAY, Dec. 1, 2001, *available at* 2001 WL 13346555.

25. *See, e.g.*, Fred Hiatt & Dale Russakoff, *Four Bunglers Shake the Global Community*, WASH. POST, Oct. 13, 1985, at A01, *available at* 1985 WL 2090440.

26. *See, e.g.*, *Key Events in Recent Palestinian History*, WASH. POST, Sept. 10, 1993, at A28, *available at* 1993 WL 2099942.

27. *See, e.g.*, Lee Hockstader, *A Holocaust Postscript; Israel to Release Eichmann's Handwritten Defense Argument*, WASH. POST, Aug. 11, 1999, at A14, *available at* 1999 WL 23297575.

28. *See, e.g.*, *The Long Road to Freedom*, TIMES (India), Dec. 17, 2001, *available at* 2001 WL 31420166.

(7) In some circumstances, the Charter system has condoned a state, or states, use of force to alleviate massive wrongs being inflicted by a government on its own people.

-examples include India's liberation of Bangladesh (1971);[30] Tanzania's ouster of Idi Amin (1978);[31] France's ouster of Emperor Bokassa of the Central African Empire (1979);[32] the British, French, and U.S. rescue of Iraqi Kurds (1991);[33] ECOMOG interventions in Liberia and Sierra Leone (1989-99);[34] and NATO action regarding Kosovo (1999).[35]

These are the seven categories of use of force in which the actual practice of the U.N. system has seemed to develop a margin of flexibility in circumstances not envisaged by the Charter. Recognition of such a margin of flexibility, however, must be cautious. The effect of U.N. practice on the law of the Charter has been gradual and is not always readily ascertained. What does emerge, however, is less a new rule than the flexible application of existing rules, in accordance with pragmatic, contextual exigencies and with narrow exceptions for situations of extreme necessity. It is also apparent from the practice of U.N. organs that a state seeking to justify its actions by reference to extreme necessity must be able credibly to demonstrate the circumstances of that necessity, the *bona fides* of its motives, the proportionality of its means, and the reasonablenesses of its objectives. This is why it made sense for the United States, in 2002, to get the Security Council unanimously to reintroduce a tough weapons-inspection regime into Iraq as a necessary exhaustion of available remedies before any resort to force.[36]

We[37] have examined seven categories of justifications offered by states for recourse to force in modalities not strictly in accordance with

---

29. *See, e.g.*, *World in Brief: Top Greek Diplomat Welcomed in Turkey*, WASH. POST, Oct. 4, 1999, at A18, *available at* 1999 WL 23307196.

30. *See, e.g.*, *Bangladesh: Heavens Above*, ECONOMIST, July 7, 1999, at 38, *available at* 1999 WL 7363895.

31. *See, e.g.*, Michael Kilian, *After the Fall Out-of-Work Despots Don't Always Leave a Forwarding Address when They Go into Forced Retirement*, CHI. TRIB., Sept. 30, 1994, at 1, *available at* 1994 WL 6467719.

32. *See, e.g.*, *id.*

33. *See, e.g.*, Clyde Haberman, *U.S. Military Takes Over Relief for Kurdish Refugees in Iraq*, N.Y. TIMES, Apr. 13, 1991, at A6, *available at* 1991 WL 2096357.

34. *See, e.g.*, Editorial, *A New Approach to Peacekeeping*, CHI. TRIB., July 23, 2000, at 16, *available at* 2000 WL 3688149.

35. *See, e.g.*, *id.*

36. Weapons Inspection Assessment, H.R. Res. 55, 108th Cong. (2003); United Nations Weapons Inspectors, S. Res. 28, 108th Cong. (2003).

37. The author refers to himself in the first person plural throughout this Article, however, all views expressed in this Article are the author's alone.

the Charter. In response to extreme necessity, the Charter evolves as it is applied by the principal U.N. organs. What today may be seen to be the modalities for use of force depends upon how the past is interpreted and the future apprehended.

III. THE "JURYING" FUNCTION

What can be said with some certainty is that the system, to the extent it can summon its political will to action, in future as in the past will still oppose, and raise stakes and costs of, military action taken by states that have not themselves been attacked if they do not first obtain Security Council authorization. Nevertheless, the practice of U.N. organs indicates a significant margin of flexibility in applying that general prohibition to extraordinary facts creating circumstances of extreme necessity. In many instances, the prohibition has been waived in reliance on credible evidence adduced in support of such facts, on the perceived legitimacy of the motives of those resorting to force, on the immediacy and gravity of the crisis an intervention seeks to avert, and on the proportionality and appropriateness of the measures taken.

These are contextual, textured, not absolute or simple, standards. The onus of demonstrating their applicability is on a state seeking to legitimate recourse to force by reference to them. The facts adduced must justify any relaxation of an important general principle. Thus, a state invoking anticipatory self-defense must be able to demonstrate that it faced an imminent and overwhelming attack which would have crippled its capacity to defend itself. A state claiming the right to use force to prevent an imminent human catastrophe in a neighboring state must be able to demonstrate that it has clean hands and no ulterior motives.

These modalities are essentially evidentiary rules. When absolute principles are relaxed to permit nuanced exceptions, it is evidence of the specific contextual facts that becomes crucial. Evidence for and against making an exception is usually adduced by the fact-gathering agencies of national governments and presented by their foreign ministries. The media with global reach also contribute to this important process. A significant contribution can be made by the Secretary-General and other on-the-ground U.N. agencies.[38]

---

38. There are several examples of the Secretary-General engaging in fact-finding on the basis of the office's independent powers under Charter article 99, or by agreement of the parties to a dispute. In 1983, in the midst of the war between Iran and Iraq, Iran alleged that Iraq had resorted to use of chemical weapons. *Iraq the Dossier—Part 3 Iraq Under Saddam Hussein*, INDEPENDENT (London), Sept. 25, 2002, at P12, *available at* 2002 WL 100759304. In his role as

These agencies' capacity to discharge the crucial fact-finding function has recently been thoroughly examined in the U.N.-sponsored "Brahimi Report,"[39] which emphasized the urgent need for "more effective collection and assessment of information at United Nations Headquarters"[40] and called for "more frequent use of fact-finding missions to areas of tension" under the auspices of the Secretary-General.[41] The problem of inadequate fact-finding, the Report concludes, goes "to the heart of the question" of peacekeeping[42] and, it may be added, of the other uses of force. The U.N. and International Atomic Energy Agency inspectors in Iraq are another example of such fact-finding.[43]

Adducing evidence is different from the process of assessing its weight and credibility: the "jurying" function. In the international system, where is the "jury of peers"?

There are essentially four forums in which such jurying occurs. One is the International Court of Justice. A second is the international political forums, the Security Council and General Assembly.

A third forum for assessing the facts is the court of public opinion, informed and guided by global television, radio and the new force of the internet. A fourth forum is the conference of states in key regional institutions. Although the Court and the media play a powerful role both in gathering and weighing evidence, it is in the collective interstatal decision-making fora of international and regional institutions that representatives of foreign ministries of states have ultimate responsibility for deciding what to make of evidence of varying credibility, probity, and significance. This is the principal locale of the jurying function. It is up to states, collectively, deliberating in agreed processes, to decide whether a case has been made for an exception to the rules intended to control

---

finder of fact and acting on his own authority, the Secretary-General dispatched several missions to the front and was able to confirm that, despite Iraqi denials, such weapons had been used. *Id.* In 1986, New Zealand and France asked the Secretary-General to render a binding opinion on the acrimonious *Rainbow Warrior* dispute. *See Ruling Pertaining to the Differences Between France and New Zealand Arising from the Rainbow Warrior Affair*, 81 AM. J. INT'L L. 325 (Jan. 1987).

39. *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects*, U.N. SCOR, 55th Sess., Item 87 of the Provisional Agenda, U.N. Doc. A/55/305-S/2000/809 (2000). This report is also known as the 'Brahimi Report' after the United Nations Peace Operations Chairman, Lakhdar Brahimi. *Id.* at iv. The entire report is currently available at the United Nation's Web page http://www.un.org.

40. *Id.* at 1, ¶ 6(d).

41. *Id.* at 54, Annex III, ¶ 1(b).

42. *Id.* at 6, ¶ 32

43. *See, e.g.*, Nadim Ladki & Irwin Arieff, *UN Tightens Vise on Iraqi Economy: Baghdad Warns of Suffering as U.S. Winds Bid to Extend Sanctions to Drugs, Boats, Trucks*, NAT'L POST, Dec. 31, 2002, at A01, *available at* 2002 WL 104088192.

and inhibit states' recourse to force. The visible manifestations of that inescapable common responsibility is now habitually exercised in large part through the U.N.'s political forums.

When the U.N. political organs are called upon to jury a claim to exemption from the general rules in reliance on a plea of extreme necessity, it can no longer be argued convincingly that the literal letter of the Charter text always controls the verdict. But conversely, it also cannot be argued, on the evidence of state behavior, that the Lauterpachtian "no violence" principle prohibiting state recourse to violence has been repealed in practice and that we are now in an institutional mode of "anything goes." States do not accept that any unilateral, unauthorized use of force in the national interest is acceptable. They do not operate in the belief that there are no rules. They do not agree that facts cannot be distinguished from lies, or humane altruism from greedy self-interest.

For a state seeking to invoke the margin of flexibility, there are hard tests, requiring sophisticated pleading backed by relevant and highly probative evidence: the sort of evidence, for example, the United States could not adduce for its claim to be rescuing its citizens from real danger in Grenada when we invaded in 1983.[44] Harder still is a state's task in marshalling this evidence effectively before the appropriate interstatal organ or organs, the "jury": the sort of thing Secretary of State Colin Powell undertook to do in the Security Council at the beginning of February 2003, in connection with Iraqi arms of mass destruction.[45]

What is evolving is a "jury" of states to decide when an instance of extreme necessity has arisen that justifies recourse to force, by a state or coalition of the willing. The great debate currently underway in this nation pits those willing to submit to such jurying against those insisting on unfettered U.S. discretion to act solely on self-perceived self-interest.

Why would the United States submit to a jury of peers? If we are, indeed, the world's only superpower then it follows that we have no peers and, thus, no reason to submit to peer review our government's judgment as to what constitutes extreme necessity warranting a waiver of the rules against recourse to force.

But are we truly the world's only superpower? Has our government not just acknowledged that, while we may be able to disarm Iraq all by

---

44. *See, e.g.*, Ed Magnuson, *D-Day in Grenada; The U.S. and Friends Take Over a Troubled Caribbean Isle*, TIME, Nov. 7, 1983, at 22, *available at* 1983 WL 2002316.

45. *See, e.g.*, David S. Cloud & Marc Champion, *Powell Uses Spy Photos, Tapes to Argue Iraq Is Deceiving U.N.*, WALL ST. J., Feb. 6, 2003, at A1, *available at* 2003 WL-WSJ 3958656.

ourselves, we cannot act alone to disarm North Korea?[46] What does that make the government in Pyongyang? The superpower's superpower? Is it not clear that Washington cannot prevail, alone, in almost all of those matters that matter most? It cannot alone achieve nonproliferation. Not in India, not in Pakistan, not in Israel, not in Brazil, not in North Korea. It cannot alone open societies, not even in Myanmar, let alone in China, that resist democratization. It cannot alone prevent climate change. It cannot alone control population growth. It cannot alone contain proliferating diseases. It cannot alone fight terrorism. With others, perhaps. Alone, impossible.

If these and other ends can only be pursued multilaterally, then mechanisms for multilateral action, the "jury," need to be nourished and the jurors assiduously reasoned with, not continually reminded of their power-deficit. Multilateralism is a process of doing for others the kinds of favors you want them to do for you, not reminding them, over and over, that superpowers demand favors, but do not have to bestow them. Thus, when we decide to destroy an international treaty-regime everyone else wants, be it that of a Kyoto round of environmental reforms, or the Rome Treaty establishing an International Criminal Court, we should be aware that such actions may prevail, but that they also have costs in the reciprocal withholding of support by others for initiatives that matter most to us.[47]

The call to submit to jurying our claims to use force in the face of "extreme necessity" thus is a call to modulate, to self-restrain, the so-called "only superpower's" exercise of its option to use force. But even being the only superpower does not mean never having to explain, to justify, to others.

On the contrary. The power of the monopoly superpower depends as much on the voluntary assent of other states as on its military preeminence. Preeminence, in reality, is evanescent and illusory, for our greater ability to inflict pain may be outweighed by others' greater ability to withstand it. Our Vietnam debacle should surely have taught us that. Moreover, Americans will surely sacrifice for a just cause, but that justice is hard to demonstrate to Americans if we utterly fail to demonstrate it to other nations, the "jury of peers."

---

46. *See, e.g.*, *U.S. Calls on Pyonyang to Eliminate Its Nuclear Weapons*, IR. TIMES, Dec. 28, 2002, at P11, *available at* 2002 WL 104539531.

47. *See* Glenn Kessler, *Efforts to Build Iraq Support Are Stymied by Global Resentment*, WALL ST. J. EUR., Feb. 17, 2003, at A2, *available at* 2003 WL-WSJE 3871050; Junn Sung-chull, *Feared but Not Respected*, KOREA HERALD, Apr. 8, 2003, *available at* 2003 WL 5416400.

In other words, the case for jurying is not an appeal to one-world illusion but to national self-interest. The U.N. is not our enemy. The Charter is not an obstacle to doing what needs to be done. The law is not an impediment to necessary action. Together, these are impediments only to the arrogance of power and it is that which is truly our enemy. As Emily Dickinson said, "thyself may be Thine enemy,"[48] or, in *Pogo*'s reconfiguration of Admiral Perry, "We has met the enemy, and it is us."[49] It is the illusion of omniscience, the deadly temptation of those who believe they have preeminent power that, constituting hubris, leads to self-inflicted disaster.

In the community of states, as in any civilized society, there is need both for the capacity to act decisively and for institutional checks and balances that compel consideration and reconsideration of a decision to act. The international system is struggling with the need to develop both. It is in the self-interest of the United States to assist, and, surely, not to hinder, that endeavor to balance power with reason.

Adlai Stevenson may have been the one, in the early sixties, to produce the "smoking gun" that convinced the Security Council of the reasons for Washington's power-struggle with Moscow over the enforcement of nuclear missiles in Cuba.[50] But he was also the American, in another context, who cautioned his country: "Don't just do something, sit there!"[51]

The Charter system, as it has evolved, does not paralyze power. Through its system of collective security, it visualizes the deployment of great power for great causes, such as Operation Desert Storm in which many states joined to drive Iraq out of Kuwait in 1990-1991.[52] Now President Bush has said that what the *U.N.* does about Iraq will make or break the Organization. Permit me to rephrase that. What the *United States* does about Iraq, whether it acts with or without the U.N., will determine the future of the system of collective security so carefully crafted after World War II.

The U.N. Charter is not inflexible. It does not paralyze resort to force in situations of extreme necessity. But it cannot accommodate an interpretation of its constitution, the Charter, that leaves it entirely to the

---

48. Emily Dickinson, *No Rack Can Torture Me*, poem no. 384, stanza 4, *reprinted in* THE COMPLETE POEMS OF EMILY DICKINSON 198-99 (Little, Brown & Co., 1930).

49. Walt Kelly, *Pogo* (comic strip).

50. *See* KENNETH S. DAVIS, THE POLITICS OF HONOR: A BIOGRAPHY OF ADLAI STEVENSON 483-85 (G.P. Putnam's Sons 1967).

51. *See* THE WIT AND WISDOM OF ADLAI STEVENSON 38 (Hawthorn Books, Inc., 1965).

52. *See, e.g.*, Tim Reid & Clem Cecil, *Gulf War General Tells Bush: Don't Go It Alone*, TIMES (London), Aug. 19, 2002, at 14, *available at* 2002 WL 4235162.

discretion of one powerful state to determine whether an extreme necessity exists.

In a world of new and deadly dangers emanating from new kinds of mortal enemies, it is folly to think that America can preempt every potential threat to itself. Its military and moral preeminence can rally the nations in a system of collective security, but only if it shares the responsibility for deciding when necessity calls for action. Or we can act alone, accompanied by, at most, a few "special relationships." What we *cannot* do is *both*: both to use collective security when it suits our purposes, as in the post-conflict regimes in Afghanistan,[53] and be free to deploy unilateral force in other instances. For our repeated recourse to unilateral force would destroy the impetus for others to join in collective measures.

About this we must be clear. If we act to destroy the U.N. system because we have decided that its faults outweigh it merits, what else will take its place except lonely American imperium? There are those who do not fear that trade-off, but I am not among them.

---

53. *See* Samuel R. Berger, Editorial, *Building Blocks to Iraq*, WASH. POST, Aug. 1, 2002, at A27, *available at* 2002 WL 24824739; Bob Woodward, *A Struggle for the President's Heart and Mind; Powell Journeyed from Isolation to Winning the Argument on Iraq*, WASH. POST, Nov. 17, 2002, at A01, *available at* 2002 WL 102572714.