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The United Nations' capacity for adapting to radical changes of circumstance

The legacy of Sir Hersch Lauterpacht

When, in 1933, Judge Lauterpacht wrote *The Function of Law in the International Community*, he reasoned from first principles that the world's legal system must be grounded in an absolute rule: "There shall be no violence" by states. He described this as the "primordial duty of the law."[1]

At the same time, he concluded prophetically that the League of Nations' Covenant would fall far short of establishing that rule in law, let alone in fact. It was full of loopholes for aggressors and their appeasers. Loopholes drew his scorn. "It is impossible," he observed, "in the scheme of things devised to secure the reign of law, to provide machinery calculated to disregard the law . . ."[2]

Loopholes, as we shall see, are the subject of this study, which will argue that they can be bad, but that they also have an important role to play in saving law from itself.

After the Second World War, with Lauterpacht's participation, the Nuremberg tribunal was called upon to draw a much brighter line than hitherto against aggression. So, too, at Dumbarton Oaks and San Francisco, a UN Charter was written that makes absolute the obligation of states not to resort to force against each other and to resist collectively any breach of this prohibition.

New remedies, as we know from medicine, tend to produce unexpected side effects. Article 2(4) of the Charter seemingly cures the Covenant's normative ambiguities regarding states' "threat or use of force" against each other. It plugs the loopholes. But did it intend to

[1] Hersch Lauterpacht, *The Function of Law in the International Community* 64 (1933).
[2] Lauterpacht, *The Function of Law in the International Community* at 372–73.

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prevent a state – one facing imminent and overwhelming attack – from striking first in anticipatory self-defense? Did it intend also to immunize against foreign intervention a state whose government is engaged in genocide against a part of its own population? Are there circumstances in which the prohibition on recourse to force in effect endorses that which itself is wholly unconscionable? Did the Charter try to plug too many loopholes? Has the pursuit of perfect justice unintentionally created conditions of grave injustice?

The use of force under the UN Charter system

On its face, the UN Charter, ratified by virtually every nation, is quite clear-eyed about its intent: to initiate a new global era in which *war* is forbidden as an instrument of state policy, but *collective security* becomes the norm. Collective security is to be achieved by use of international military police forces and lesser but forceful measures such as diplomatic and economic sanctions. Recourse to such measures is to be the exclusive prerogative of the United Nations, acting in concert.

This new way of ensuring peace and security was to be the prescribed cure for the disorders so evident in the first half of the twentieth century: passivity in the face of aggression – Manchuria, Ethiopia, Czechoslovakia – and the egregious pursuit through violence of narrowly perceived national interests.

The Charter text embodies these two radical new concepts: it absolutely prohibits war and prescribes collective action against those who initiate it. We are thereby ushered into the "post-war" era through Charter text: Articles 2(4), 42, and 43.

Article 2(4) essentially prohibits states from using force against one another. Instead, Articles 42 and 43 envisage the collective use of force at the behest of the Security Council upon its determination – Article 39 – that there exist what Article 2(4) forbids, a threat to the peace, breach of the peace, or act of aggression: one that must therefore be met by concerted police action. Article 42 sets the parameters for collective measures, including the deployment of military forces. Under Article 43, such forces are to be committed by member states to the service of the Security Council.

In the idealized world of the Charter, no state would ever again attack another: and if one did, its aggression would be met by a unified and overwhelming response made under the authority and control of the Security Council.

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Even in 1945, however, there were doubts as to whether this idealized world order was as imminent as the post-San Francisco euphoria predicted. Thus, two articles of the Charter provide alternatives, just in case. Article 51 authorizes states to act alone or with their allies in self-defense against any military aggression ("armed attack") that the Security Council might have failed either to prevent or to repel. Article 106 makes further provision for "transitional security arrangements" by the five permanent Council members (Britain, China, France, Russia, and the US). These may "consult with one another" on "joint action," if the Security Council is disabled, "for the purpose of maintaining international peace and security." They are licensed to act in concert until such time as the Council can "begin the exercise of its responsibilities."

In this way, the Charter establishes a two-tiered system.

- The upper tier consists of a normative structure for an ideal world – one in which no state would initiate armed conflict, but in which any acts of aggression that did occur would be met by effective armed force deployed by the United Nations or, for a transitional period, by the Security Council's five permanent members.
- A lower tier is to operate whenever the United Nations is unable to respond collectively against aggression. Subject to certain conditions, states may invoke an older legal principle: the sovereign right of self-defense. Acting alone or with allies, the Charter authorizes members to use force to resist any armed attack by one state on another until UN collective measures come to the victim's rescue. But they may do so only after an actual armed attack.

Thus did the Charter visualize this bifurcated regime, one that postulates a common, absolute global response to aggression, but which also makes realistic allowance for state action during the potentially prolonged transition from contemporary realpolitik to an ideal future of UN-orchestrated collective security.

Both tiers, almost immediately, were seen to fail to address adequately four seismic developments that, even as the Charter was being signed, were beginning to transform the world.

One was the advent of the Cold War, which, because of the veto, froze the Security Council's ability to guarantee collective security under Articles 42 and 43 of the Charter and precluded operation of Article 106's interim Big Power protectorate.

Another was the ingenuity with which states effectively and dangerously substituted indirect aggression – the export of insurgency and

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covert meddling in civil wars – for the sort of traditional frontal military aggression the Charter system was designed to prohibit by Article 2(4) and to repress by Article 42.

The third development was the technological transformation of weaponry (nuclear, chemical, and biological) and of delivery systems (rocketry). These "improvements" tended to make obsolete the Charter's Article 51 provision for states' "inherent" right of self-defense. In an effort to prevent the right of self-defense being used, in Lauterpacht's words, "to provide machinery calculated to disregard the law in a manner binding on the party which is willing to abide by the law,"[3] Article 51 limits "self-defence" to situations where an "armed attack" has occurred. However, the acceleration and escalation of means for launching an attack soon confounded the bright line drawn by the law, effecting a *reductio ad absurdum* that, literally, seems to require a state to await an actual attack on itself before instituting countermeasures. Inevitably, states responded to the new dangers by claiming a right of "anticipatory self-defence." That claim, however, is not supported by the Charter's literal text. And "anticipatory self-defence," too, is vulnerable to *reductio ad absurdum*. If every state were free to determine for itself when to initiate the use of force in "anticipation" of an attack, there would be nothing left of Articles 2(4) and 51, or of Lauterpacht's "primordial duty" to eschew violence.

The fourth development was a rising global public consciousness of the importance of human freedom and the link between the repression of human rights and threats to the peace. This link should have been apparent from the history of Hitler's rise from domestic tyrant to global menace. But the text of the Charter puts human rights rather at its periphery while focusing on the prevention of aggression. That deliberate drafting choice reflected the concerns of some states that the cause of human rights might be used to justify intervention in their sovereign affairs. The drafters, of course, did not anticipate the imminent end of colonialism and communism, the rise of a democratic entitlement, and a tectonic shift in public values during the 1990s, each of which altered perceptions of sovereignty and its limits.

All four of these developments might have been (and to some extent were) foreseen, but the Charter's text is not facially responsive to the challenge of change. It, like other grand instruments written for the long term, has had to meet the threat of obsolescence with adaption.

[3] *Ibid*.

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Clark and Sohn, already in 1958, presented an elegant blueprint for top-to-bottom overhaul.[4] Such radical revision, however, by dint of the Charter's Chapter XVIII, could have been accomplished only by an unachievable agreement among the deeply divided permanent members of the Security Council.

Nevertheless, change there has been: far more extensive and profound than is generally acknowledged. It has come about not by the formal process of amendment but by the practice of the United Nations' principal organs.

Adaptability of the Charter as a quasi-constitutional instrument

The UN Charter is a treaty, one to which almost every state adheres. This universality, alone, distinguishes it from the general run of international agreements. That the drafters of the Charter recognized its special quality is evidenced by Article 103, which purports to establish an unusual principle of treaty law:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

This legal primacy of the Charter over subsequent agreements can only be construed as a "quasi-constitutional" feature. Clearly, it illustrates that the drafters intended to create a special treaty different from all others.[5] This difference becomes relevant when we consider the instrument's capacity for adaption through the interpretative practice of its organs and members.

There were spirited debates at San Francisco in 1945 about the process by which the Charter would be interpreted. Some states argued that this ought to be the exclusive prerogative of the Organization's judiciary, the International Court of Justice (ICJ). Others preferred to leave each political organ free to interpret its own sphere of authority. In the event, the Charter was framed so as to allow for interpretation both by the political and the judicial organs.

[4] Granville Clark and Louis B. Sohn, *World Peace Through World Law* (1958).
[5] *See* Articles 58, 59 Vienna Convention on the Law of Treaties, May 23, 1969, 1152 U.N.T.S. 331 (1969); 8 I.L.M. 679 (1969). Entered into force 27 January 1980.

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But it is the political organs that have done most of this interpretative work, especially but not solely with respect to the fraught boundary between the United Nations' jurisdiction and the jealously guarded sovereignty of its members. In the words of Professor, now Judge, Rosalyn Higgins: it "is . . . significant that at the San Francisco Conference the proposal to confer the point of preliminary determination [of jurisdiction] upon the International Court of Justice was rejected."[6] For example, two key questions regarding the interpretation of the Charter's important Article 2(7) – whether a matter is beyond the United Nations' jurisdiction because it is "essentially within the domestic jurisdiction" of states and whether, consequently, the United Nations is barred from taking a proposed action because to do so would violate the requirement not to "intervene" in such matters – usually are decided by the political organ in the course of dealing with a crisis. "[S]uffice it to say," Higgins has concluded, "that the political organs of the United Nations have clearly regarded themselves entitled to determine their own competence."[7] Moreover, these interpretations of the Charter are made in the relevant political organ not by a formal vote but as a merged, or even submerged, part of its "decisions on the matter at issue, and often . . . by implication."[8] While, under Article 96 of the Charter, the International Court *may* be asked to render an advisory opinion, Higgins stressed, judicial "consultation is not obligatory"[9] and resort to it has been infrequent, although not without significance.

What emerges from the vast legacy of recorded debates and decisions of the principal political organs is that they tend to treat the Charter not as a static formula, but as a constitutive instrument capable of organic growth. Borrowing a phrase coined by the Imperial Privy Council speaking of the Canadian constitution, the Charter is "a living tree."[10]

Ordinary treaties are not "living trees" but international contracts to be construed in strict accord with the black-letter text. Not so the Charter. The Charter also differs from most treaties not only in

[6] Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* 66 (1963) and n. 27, discussing the failure of a Greek proposal to give sole *kompetenz-kompetenz* which secured 14–17 support, but not the necessary two-thirds majority needed to amend the draft.

[7] Higgins, *The Development of International Law Through the Political Organs of the United Nations* at 66–67.

[8] *Ibid*.

[9] Higgins, *The Development of International Law Through the Political Organs of the United Nations* at 67 and n. 34.

[10] *Edwards* v. *A.G. Canada* [1930] A.C. 124 at 136 (P.C.).

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enumerating rights and duties but also in elaborating institutions to carry them into effect. Two political organs (the General Assembly and the Security Council) were given Charter-implementing powers: Chapters IV and V, respectively. An independent civil service, the Secretariat, headed by a Secretary-General, enjoys autonomous, Charter-based power to construe and apply the Charter and decisions of the political organs.[11] Although the International Court is authorized to interpret the Charter in adversarial proceedings between states or at the request of the principal political organs,[12] the extent to which the Charter establishes political and executory machinery for implementing its purposes, principles and norms distinguishes it from ordinary treaties and invests it with a potential for adaption through organic practice. In this, it is both unusual and quasi-constitutional.

Further, the Charter makes allowance for its interpretation through state practice. It reserves an ample sphere of autonomy for member states by giving each an equal vote in the General Assembly while guaranteeing members' "sovereign equality,"[13] prohibiting the United Nations from intervening "in matters which are essentially within the domestic jurisdiction of any state" (subject to one exception),[14] and preserving each state's "inherent right of individual or collective self-defence if an armed attack occurs…"[15] Taken together, these provisions ensure that the Charter will be subjected to continuous interpretation and adaption through the member states' individual and collective practice: their actions, voting, and rhetoric.

Each principal organ and the members thus continuously interpret the Charter and do so in accordance with the requisites of ever-changing circumstances. This necessarily means that the Charter text is always evolving. One important example pertains to Article 27(3), which contains the key "veto power." It provides:

> Decisions of the Security Council on all [non-procedural] matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members…

In practice, for many years, each President of the Security Council (the post rotates monthly among Council members) has interpreted this provision to mean that an abstention by a permanent member is not counted as a veto. A strict-constructionist reading of Article 27(3)

[11] UN Charter, Articles 97–101. [12] UN Charter, Chapter XIV.
[13] UN Charter, Article 18 and Article 2(1), respectively.
[14] UN Charter, Article 2(7). [15] UN Charter, Article 51.

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might have predicted otherwise. Still, in 319 instances,[16] very important decisions have been made in the face of – and without objection from – abstaining permanent members. It may be concluded that the treaty text of Article 27(3) now conveniently permits a permanent member to register discomfort with a proposed course of action by abstaining on a resolution authorizing it, while still permitting the resolution to pass and, by virtue of Article 25, to become binding on all members. The Court has given this interpretation-in-practice its blessing. In the 1971 Namibian advisory opinion, it found "abundant evidence" of members' acceptance of the principle that a voluntary abstention by a permanent member does not constitute a veto.[17] The

[16] While it is not always clear whether a Security Council Resolution decides a procedural matter for the purposes of article 27(2) of the UN Charter, it can be approximated that, as of 2001, the Security Council had adopted 319 resolutions on non-procedural matters in which at least one permanent member either abstained or did not participate in the vote. These resolutions include the following: S/RES/4 (1946); S/RES/17, 18, 19, 22, 23, 28, 30, 31, 32, 35, 36 (1947); S/RES/38, 39, 40, 41, 42, 46, 48, 49, 51, 52, 53, 54, 55, 61, 63, 64, 65, 66 (1948); S/RES/68, 69, 70, 71, 73, 74, 75, 76, 77, 78 (1949); S/RES/79, 80, 81, 82, 83, 84, 85, 86, 89 (1950); S/RES/91, 92, 93, 95, 96 (1951); S/RES/98 (1952); S/RES/101, 102, 103 (1953); S/RES/109, 110 (1955); S/RES/122, 123, 126 (1957); S/RES/128, 131, 134, 135, 138, 143, 146, 156, 157 (1960); S/RES/161, 162, 163, 164, 166, 167, 169 (1961); S/RES/171, 176 (1962); S/RES/179, 180, 181, 183 (1963); S/RES/188, 190, 191, 193, 199 (1964); S/RES/202, 205, 215, 216, 217, 218 (1965); S/RES/221, 232 (1966); S/RES/252, 255, 259 (1968); S/RES/264, 265, 268, 269, 271, 273, 275 (1969); S/RES/276, 280, 282, 283, 284, 285, 290 (1970); S/RES/294, 301, 302, 305, 307 (1971); S/RES/309, 310, 311, 312, 314, 315, 316, 317, 318, 319, 320, 321, 323, 324 (1972); S/RES/326, 327, 328, 330, 332, 333, 334, 338, 339 340, 341, 343, 344 (1973); S/RES/346, 347, 348, 349, 350, 355, 359, 360, 362, 363, 364 (1974); S/RES/368, 369, 370, 371, 376, 378, 381, 383 (1975); S/RES/387, 389, 390, 391, 393, 396, 397, 398, 401 (1976); S/RES/403, 408, 410, 415, 416, 420, 422 (1977); S/RES/423, 425, 426, 427, 429, 430, 431, 434, 435, 437, 438, 439, 441, 443 (1978); S/RES/444, 445, 446, 447, 448, 449, 450, 451, 452, 454, 456, 458, 459, 460, 461 (1979); S/RES/463, 467, 468, 469, 470, 471, 472, 474, 475, 476, 478, 481, 482, 483 (1980); S/RES/485, 486, 488, 493, 498 (1981); S/RES/501, 502, 511, 515, 517, 519, 523 (1982); S/RES/529, 536, 538, 539, 545 (1983); S/RES/546, 549, 550, 554, 555, 556 (1984); S/RES/561, 566, 569, 573, 575 (1985); S/RES/581, 587, 592 (1986); S/RES/601, 605 (1987); S/RES/608, 611, 623 (1988); S/RES/636, 641 (1989); S/RES/678 (1990); S/RES/686, 688 (1991); S/RES/748, 757, 770, 776, 777, 778, 781, 787, 792 (1992); S/RES/816, 820, 821, 825, 855, 883 (1993); S/RES/929, 940, 942, 944 946, 955, 964 (1994); S/RES/970, 975, 988, 998, 1003, 1021 (1995); S/RES/1054, 1058, 1067, 1070, 1073, 1077, 1082 (1996); S/RES/1101, 1114, 1129, 1134 (1997); S/RES/1160, 1180, 1199, 1203, 1207, 1212 (1998); S/RES/1239, 1244, 1249, 1277, 1280 (1999); S/RES/1290, 1305, 1322 (2000).

[17] *Legal Consequences for States of the Continuing Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, [1971] I.C.J. Rep. 16 at 22, para. 22.

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long-term implications of that adaption have been immense. For example, the Council was able to authorize Operation Desert Storm against Iraq in November 1990 despite the abstention of China.[18] So, too, the 1999 resolution establishing the interim international administration for Kosovo was adopted by the Council despite China's abstention.[19]

There are many other instances of such adaption, effected by the practice of the principal organs. We shall be examining this practice insofar as it pertains to the use of force. What such an examination will demonstrate, aside from substantive changes in an applicable norm, is the system's capacity for change.

Of course, one must be parsimonious in advancing this thesis, lest, as Lauterpacht warned, the line between violation and adaption becomes hopelessly blurred. Nevertheless, the Charter cannot today be understood without regard for these changes. In particular, we will examine the effect of Charter adaption in two respects not contemplated by its authors:

1. Where collective force has been deployed or authorized *by the United Nations itself* to confront a *threat to the peace or breach of the peace* that has arisen not solely out of state-to-state aggression but, also, from events occurring solely or primarily within one state.
2. Where force has been deployed autonomously *by states* claiming to act in individual or collective *self-defense* not against an actual military attack by an aggressor state but either in anticipation of such an attack or in response to indirect aggression such as the harbouring of insurgents or terrorists; or in response to an act by a terrorist group that is not a state; or in an assertion of a right of *self-help* to end persistent and egregious violations of international law and human rights.

Before addressing in detail the Charter adaptions that may have occurred through institutional or state action, it is useful to consider the historical context of the salient Charter provisions and how they came to be shaped in the inceptive period, 1943–45.

War in the pre-Charter era

The League Covenant and the UN Charter together mark a radical departure in systemic response to violence among states. The Lauterpachtian first law of an international order – "there shall be no

[18] S/RES 678, of 29 November 1990. [19] S/RES 1244, of 10 June 1999.

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violence" – is a radical innovation in a legal system which had hitherto been careful to distinguish between legally permissible and impermissible wars and permissible and impermissible modes of conducting war.[20] Neither the *jus ad bellum* nor the *jus in bello* regarded recourse to violence as a wrong *per se*. Oppenheim, writing in 1906, castigated naive "fanatics of international peace" who "frequently consider war and law inconsistent . . . It is not difficult," he said, "to show the absurdity of this opinion."[21]

A dozen years later, viewed across the killing-grounds of the First World War, the "opinion" began to seem less "absurd." The first indications of the very modern idea that the use of force by a state against another could itself be violative of the legal order's very foundations is found in the Covenant of the League of Nations, which set forth some elementary provisions intended to limit the right of states to make war, and sought to impose a mandatory "cooling off period" on disputants.[22] While the Covenant did not precisely prohibit war, it did oblige states not to resort to force as long as a dispute was under consideration by the League's Council. However, once this process failed to produce a settlement the disputants remained free "to take such action as they shall consider necessary for the maintenance of right and justice."[23]

The Covenant also empowered the League Council to impose collective sanctions on states resorting to war in violation of its stated requirement to seek peaceful settlement[24] and obliged states to act individually or collectively through the Council to defend victims of aggression.[25] Thus, for the first time, the Lauterpachtian injunction – "there shall be no violence" – is both stated and given rudimentary tools of enforcement. Nevertheless, these injunctions were directed (in Articles 12 and 16) only against states' "resort to war" – a very narrow term of the draftsman's art invoking a formal declaration – even though earlier drafts of the Covenant had proposed a much wider ban on "resort to armed force."[26]

In the inter-war period, a series of multilateral treaties attempted to reinforce the new rule against war-making. In Article 2 of the Locarno Treaty, Germany, Belgium, and France undertook "in no case [to] attack or invade each other or to resort to war" and, more

[20] A history of these distinctions is found in Thomas M. Franck, *Fairness in International Law and Institutions* 245–83 (1995).
[21] Lassa Oppenheim, II *International Law* 55 (1906).
[22] F.S. Northedge, *The League of Nations* 2 (1986).
[23] League of Nations, Covenant, Article 15(7).
[24] League of Nations, Covenant, Article 16.
[25] League of Nations, Covenant, Article 10.
[26] Ian Brownlie, *International Law and the Use of Force by States* 60 (1963).

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