Collective Enforcement of International Obligations

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An important anniversary of a great university is an occasion for rejoicing by the entire international community of scholars. Yet the topic that was assigned to me is anything but joyful. I am to speak about collective enforcement of international obligations, excluding regional enforcement. I have the melancholy task to comment on noble visions that have turned out to be deceptive illusions, on the decline of collective security and more generally on what Richard Falk calls "the normative regression", that is the decline of the normative element of the respect for the law in national foreign policies[1].

Even if one does not accept the Hobbes-Bentham-Austin line of thought that there is no law without centralized enforcement, it is not just the positivist doctrine that considers the possibility of enforcement an important characteristic of any law, including international law. Who today would endorse Gerhard Niemeyer's proposition that international law must be "law without force"[2]?

The international legal order was reconstituted in formal terms at San Francisco in 1945, as it was previously in modern history in 1648, 1815 and 1919. The ambitious 1945 enterprise of institution building envisioned international cooperation in all major fields of human needs and endeavor, but at its core was the centralized system for the enforcement of peace, if not of international law generally. There is an obvious direct line from the

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[1] R. Falk, The Decline of International Order: Normative Regression and Geopolitical Maelstrom, 36 Yearbook of World Affairs, 10 at 12 (1982).

[2] Quoted in J. L. Kunz, Sanctions in International Law, 54 American Journal of International Law (A.J.I.L.), 324 at 327 (1960).

League of Nations and the Kellogg-Briand Pact to the United Nations, yet I can recall from my personal experience in Washington, our studied effort to disassociate the United Nations from the League parentage, to stress the differences and the more advanced nature of the United Nations: the across-the-board prohibition of any force or threat of force in Art.2 (4) of the Charter and the elaborate instrumentarium for economic, political and – above all – military collective enforcement measures against aggression. This mechanism was given a monopoly enforcement power subject to two exceptions only: first, the unilateral or collective right of self-defense against armed attack in Art.51, and second, enforcement measures by regional organizations authorized by the Security Council according to Art.53.

The General Assembly was given a back-up function in the field of peace maintenance, and its role was strengthened at the 1945 San Francisco Conference in response to the demands of smaller powers and the United States.

The political role of the Secretary General, the third principal organ, was expanded as compared with his position in the League.

The shattering World War II experience provided the motivation and the United States supplied the leadership for the creation of the United Nations. Yet the new system was inherently fragile, primarily because it postulated a continuing cooperation of the five major allied powers.

The Security Council registered some early successes, such as in helping to induce the withdrawal of the Soviet troops from Northern Iran which they had occupied during the war[3]. Some of us had hoped against hope that the Council, although admittedly a political body, would deal with problems of peace if not in a quasi-judicial way, at least with some degree of impartiality, and through more or less "lawyerly" procedures. Efforts were made in the early phase to elaborate procedural guidelines, to build upon procedural precedents, to provide agreed definitions of the many opaque Charter terms. How, for instance, should one define the term "dispute" in Chapter VI of the Charter so as to enable the Council to determine the application of the Charter provision requiring a member of the Council to abstain from voting on a dispute to which it is a party? The upcoming cold war shifted the focus in other directions and changed more than the atmosphere in the Council.

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[3] Security Council Resolutions no.2 (1946) of 30 January 1946, no.3 (1946) of 4 April 1946 and no.5 (1946) of 8 May 1946, 1 S.C.O.R., Res. and Dec. at 1–4 (1946). See generally 1946/47 Yearbook of the United Nations, 327–336 (1947).

This is not the occasion to attempt a detailed allocation of responsibilities. Just a few words on the position of the Soviet Union. At San Francisco the Soviet delegation almost wrecked the conference by insisting on a veto in the Security Council even on the decision to take up a problem for discussion. The Soviet Union has viewed the United Nations as an institutional superstructure controlled by inherently hostile forces. It has been the Soviet policy to block any move that could in the remotest way interfere with the consolidation and expansion of its empire but to support any action elsewhere that would conform to its national and party policy. The most disheartening feature of the early Soviet behavior in the Council was its use of the veto not only against proposals which it opposed, but also against resolutions which in its view "did not go far enough"[4]. Such an attitude obviously made any compromise impossible and any differences irreconcilable.

At the peak of its power, the United States, confident of the support by the "mechanical majority", viewed the United Nations as the epitome of new statecraft and championed a normative approach based on the Charter. That posture, at that time, generally conformed to American interests. Yet, even at the early stage, the United States with its allies did not resist the temptation of employing the Security Council for propaganda purposes of their own.

There was the 1948 blockade of Berlin where the United Nations provided a forum for negotiations and settlement; there was the same year the take-over of Czechoslovakia when the Security Council failed to act in the face of a *fait accompli*. The Security Council debate – and non-action – in the Guatemalan case concerning the overthrow of the Arbenz régime confirmed that some members did not accept the Security Council's superiority over regional organizations[5].

One of the early casualties of the cold war was the Charter scheme for armed forces that would be available to the Security Council for enforcement action in case of an aggression. On the record, the scheme collapsed because of the differences between the Western allies and China on one side and the Soviet Union on the other, regarding the composition of the national contingents that were to be placed under Security Council control. There is some evidence that the Soviet refusal to compromise may have been due – at least in part – to the improvident remark by the United States Representative that the forces could conceivably be employed also against a permanent member. I person-

[4] E.g. Syrian and Lebanese Questions, S.C. meetings February 14–16, 1946, 1946/47 Yearbook of the United Nations, 341–344, particularly at 344 (1947).

[5] T. Franck, Nation Against Nation, 30–33 (Berlin), 60 (Czechoslovakia), 60–62 (Guatemala) (1985).

ally believe that – after the outbreak of the cold war at any rate – Marshall Stalin was not prepared to accept a United Nations security force in any form or composition whatsoever.

Be it as it may, the military enforcement provisions in Arts.43–50 have not been applied, but the Security Council did succeed in adopting economic enforcement measures in two cases, against Rhodesia in a series of resolutions between 1966 and 1977, and against the Republic of South Africa between 1963 and 1977[6].

The cold war and the deadlock in the Security Council had major consequences outside and within the United Nations. One was the proliferation of regional security pacts purporting to turn the Charter right of collective self-defense into a treaty obligation. Another result was a major drive orchestrated by the United States to reform the United Nations, without formally amending the Charter. There were three strands to this drive.

First, an attempt to confine the use of the veto to major decisions. The idea was for the General Assembly to recommend to the Council a list of the non-vetoable decisions. The Soviet Union rejected the recommendation of the Assembly[7].

Second, the move to broaden the General Assembly functions and powers in the security field that culminated in the aftermath of the North Korean invasion; and finally,

Third, and somewhat less emphatic, the effort to build up the role of the Secretary General in the political and security field.

It is widely believed even today that the Korean case raised an almost

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[6] Southern Rhodesian Question, Security Council Resolutions: Res. no.232 (1966) of 16 December 1966, 21 S.C.O.R., Res. and Dec. at 7–9 (1966) (based on Arts.39 and 41); Res. no.253 (1968) of 29 May 1968, 23 S.C.O.R., Res. and Dec. at 5–7 (1968) (based on Chapter VII); Res. no.277 (1970) of 18 March 1970 and no.288 (1970) of 17 November 1970, 25 S.C.O.R., Res. and Dec. at 4–7 (1970); Res. no.314 (1972) of 28 February 1972, no.318 (1972) of 28 July 1972, and no.320 (1972) of 29 September 1972, 27 S.C.O.R., Res. and Dec. at 7–9 (1972); Res. no.333 (1973) of 22 May 1973, 28 S.C.O.R., Res. and Dec. at 14 (1973); Res. no.386 (1976) of 17 March 1976, and Res. no.388 (1976) of 6 April 1976, 31 S.C.O.R., Res. and Dec. at 6–7 (1976); Res. no.409 (1977) of 27 May 1977 and 411 (1977) of 30 June 1977, 32 S.C.O.R., Res. and Dec. at 8–11 (1977); South African Question, see e.g. Security Council Resolutions: Res. nos.181 (1963) of 7 August 1963 and 182 (1963) of 4 December 1963, 18 S.C.O.R., Res. and Dec. at 7–10 (1963); Res. no.191 (1964) of 18 June 1964, 19 S.C.O.R., Res. and Dec. at 13–15 (1964); Res. no.282 (1970) of 23 July 1970, 25 S.C.O.R., Res. and Dec. at 12 (1970); Res. no.418 (1977) of 4 November 1977, 32 S.C.O.R., Res. and Dec. at 5–6 (1977) (based explicitly on Chapter VII).

[7] GA Res.267 (III), 14 April 1949, 3 UN GAOR, pt.2 (Resolutions), at 7–10, UN Doc. A/900.

existential question for the United Nations. Had the United Nations stood by as its own ward, the Republic of Korea, was being destroyed by an overt large scale invasion, it might have been the end – then and there – of the organization as a relevant actor in peace maintenance. There is no question that the normative concern for preserving the viability of the new institution was a major consideration in President Truman's decision to engage American military power. The basic Security Council resolution was a recommendation to use force under Art.39 of Chapter VII[8] which meant that the military response was a United Nations' undertaking; some commentators on the other hand spoke of a collective self-defense action blessed by the Security Council pursuant to Art.51[9].

We all are aware of the important part chance and coincidence play in our individual affairs. The Korean case illustrates the play of the chance in international affairs. In the Korean situation the Security Council was able to act with the necessary speed due to three fortuitous circumstances: the voluntary absence of the Soviet representative, the availability of an impartial on-the-site report by a United Nations Commission stationed in South Korea, and the availability of the American Air Force and troops in Japan.

This experience provided the groundwork for the controversial Uniting for Peace Resolution of 1950, proposed by the United States with the somewhat less than enthusiastic support of its major allies[10]. Under this resolution, adopted by the General Assembly over Soviet opposition, if the Security Council fails to act because of a veto, the General Assembly takes over in an emergency session and it may recommend, if necessary, a voluntary military action in response to an aggression. In anticipation of a potential crisis, the Assembly would send out an observation group to an area of tension, which would assure prompt and impartial reports, and finally, a standing Assembly committee would develop a plan for or-

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[8] S.C. Res. no.83 (1950) of 27 June 1950, UN Doc.S/1511, 5 S.C.O.R., Res. and Dec. at 5 (1950).

[9] F. Vallat, The General Assembly and the Security Council of the United Nations, 29 British Year Book of International Law, 63, 90 (1952); cf. I. Brownlie, International Law and the Use of Force by States, 331 (1963); J. Stone, Legal Controls of International Conflict, 232–235 (1954) (as an alternative explanation); cf. D. Bowett, Self-Defense in International Law, 194–195 (1958); H. Kelsen, The Law of the United Nations, 932–935 (1951).

[10] GA Res.377 (V) of 3 November 1950, 5 UN GAOR Supp. (No.20), at 10–12, UN Doc.A/1775. See generally E. Stein/R. Morrissey, Uniting for Peace Resolution, in: Instalment 5, Encyclopedia of Public International Law (ed. by R. Bernhardt), 379–382 (1983).

ganizing military contingents made available on a voluntary basis by the member states for use by the Security Council or the Assembly.

Paradoxically, the Uniting for Peace Resolution was first invoked in 1956 not against the Soviet Union but against France, the United Kingdom and Israel in order to stop their military action against Egypt which they took in response to the seizure of the Suez Canal[11]. As in the Korean situation, it was the concern for preserving the integrity of the Charter, along with other foreign policy considerations, that induced the United States to join the Soviet Union in demanding the withdrawal of the invading forces from Egypt. As I see it, this case marks the apex of the influence of the normative element in the American policy making process. The withdrawal of the foreign forces from Egypt in the wake of the deployment of the United Nation peace-keeping force was hailed as a significant affirmation of the Charter prohibition against unilateral use of force.

The military intervention in Egypt coincided with the Soviet armed intervention in Hungary. The General Assembly, meeting in a parallel emergency session, called for the cessation of the Soviet intervention in Hungary[12] but, in stark contrast to the Egyptian situation, there was no response to the Assembly call, only embarrassed silence. I would suggest, with the benefit of hindsight, that the startling juxtaposition of the Suez-Hungarian affairs marked the beginning of the erosion of American public opinion support for the United Nations[13].

First and foremost among the factors responsible for the erosion of American support and influence was the influx since 1955 of more than one hundred new members, most of them newly independent, radically anti-colonial, anti-racist and "anti-imperialist", concerned with their own agenda, unwilling to take sides on matters which they felt did not concern them directly, and unwilling or unable to provide alternative leadership. The other factor of overriding impact was the changing power balance away from United States monopoly of nuclear weapons and toward bipolarity.

The Cuban quarantine incident in 1962, perhaps the most dangerous episode since the end of World War II because of the direct confrontation

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[11] S.C. Res. no.119 (1956) of 31 October 1956, UN Doc.3721, 11 S.C.O.R., Res. and Dec. at 9 (1956); GA Res.997 (ES-I) of 2 November 1956, GAOR, 1 E.S.S., Supp.1, UN Doc. A/Res./390. See generally 1956 Yearbook of the United Nations, 19–39 (1957).

[12] S.C. Res. no.1004 (ES-II) of 4 November 1956 and no.1005 (ES-II) of 9 November 1956, GAOR, 2 E.S.S., Supp.1. See generally 1956 Yearbook of the United Nations, 67–88 (1957).

[13] See generally Franck (note 5), at 67–70.

between the two super powers, took place before the perceived strategic change and at the high point of American power. It is interesting that even at that point of time the United States sought to base its unilateral action on the authority of a regional organization, the Organization of American States, and on the fact that the Security Council was seized of the matter, rather than exclusively on the self-defense Art.51[14]. Similarly, the United States avoided relying on Art.51 in the Dominican imbroglio of 1965[15] and in the Grenada invasion of 1984[16]. But the crux of the legal brief on Vietnam was collective self-defense[17].

In 1958, Eduardo Jiménez de Aréchaga wrote enthusiastically about the Uniting for Peace Resolution as having "the transcendental consequence ... to democratize the security and to make disappear the essential defect, the inherent vice of the structure drafted at San Francisco ... the system of impunity"[18]. In fact, by the end of the fifties, the only aspect of the American reform plan that had proved serviceable was the provision for calling an emergency Assembly session in case of a veto in the Security Council. This provision was invoked nine times, and it has been accepted apparently even by those who had originally opposed the entire scheme. Although the contested constitutionality of the Uniting for Peace Resolution, including the Assembly's power to recommend action, was upheld by the International Court of Justice[19], the authority to mobilize a United Nations fighting force has never been employed since the Korean war. Generally, the United Nations' function in peace maintenance has been reduced to the helpful, but clearly ancillary, peace-keeping arrangements: military personnel made available by selected member states performs observation and policing duties in areas of tension. Even here, however, on

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[14] A. Chayes, Legal Adviser, The Legal Case for U.S. Action on Cuba, November 19, 1962, 47 Department of State Bull., No.1221, 763–765 (1962).

[15] Protecting U.S. nationals and preserving the capacity to act of the Organization of American States. L. Meeker, The Dominican Situation in the Perspective of International Law, July 12, 1965, 53 Department of State Bull., No.1359, 60, 62 (1965).

[16] Invitation by the local authority, regional organization, and protection of U.S. nationals. Letter of Davies R. Robinson, Legal Adviser of the Department of State, reprinted in J.N. Moore, Law and the Grenada Mission, 125–129 (Center for Law and National Security, University of Virginia Law School, Charlottesville, VA, 1984).

[17] The Legality of United States Participation in the Defense of Vietnam, Memorandum of L. Meeker, Legal Adviser of the Department of State, March 4, 1966, 54 Department of State Bull., 474–489 (1966).

[18] E. Jiménez de Aréchaga, Derecho Constitucional de las Naciones Unidas, 205 (1959).

[19] *Certain Expenses of the United Nations* (1962) I.C.J. Reports 151.

the insistence of the Soviet Union, the Assembly eventually has left the job of deciding on peace-keeping operations to the Security Council.

It seemed for a period of time, culminating during the Congo controversy, that another aspect of the reform plan would be realized, consisting of an increase in the political role for the Secretary General, particularly in peace-keeping. This hope was dashed by Nikita Krushchev's attack on Dag Hammerskjold and his campaign for replacing the Secretary General's position by a troika. Today, many problems dealt with in the organization are eventually dropped in the lap of the Secretary General but he is closely controlled by the governments in matters of any political import and is compelled to act with great restraint and with anything but independent authority.

Some concluding thoughts come to mind. It was United States diplomacy that championed the normative-institutional approach to peace maintenance. Without American support there seemed little strength behind the Charter claim of prohibition of force. With the "normative retreat" by the United States, due as much to the changed constituency of the world community as to Soviet policy and to the emerging limits of American power, the United Nations claim to the role of centralized peace enforcement lost any reality. However, regardless of the vagaries of public and governmental opinion of the day, the United Nations still has a necessary function, particularly when it refocuses its agenda, streamlines its operations and improves its political process. It has a modest role to play in the dispute settlement area although today major political conflicts are beyond its reach and the Charter rules on collective enforcement action remain dead letter. As a corollary, states have increasingly resorted to military options as a means of vindicating what they considered their legitimate interest. Back in 1957, a member of the Institute of International Law commented on the Charter system: one pretends to forbid the states any recourse to force, whereas one does not give them any means to make their rights respected. «Un tel système ne peut être viable à la longue»[20]!

As international lawyers we are faced with the question whether the Charter prohibition against unilateral threat or use of force in Art.2 (4), which is widely viewed as the most important Charter rule, is still a part of the body of living international law.

The International Court of Justice has made it clear that the principle of non-use of force is not conditioned by provisions relating to collective

[20] Observations de M. Emile Giraud, 47 Annuaire de l'Institut de Droit International, I, 267, 277 (1957).

security or to Charter enforcement facilities[21]. We might find some reassurance from the fact that in those cases of military action which were brought to the United Nations, the General Assembly condemned in more or less specific language what it viewed as violations of Art.2 (4). On that score, as Franck has shown in his most recent book, there has been generally speaking no double standard on the part of the majority – only the individual members of the shifting majority may be properly accused of double or triple standards[22].

Henkin finds further consolation in the attempts on the part of governments to justify their unilateral actions as falling within more or less imaginary exceptions to Art.2 (4) or as self-defense under Art.51. This may, he says, amount to "polite confessions"[23]. The controversy over the interpretation and relationship of these two articles that periodically flares up has not been resolved and the most recent pronouncement by the International Court of Justice is probably not the last word on the issue[24]. There is a danger that the strained interpretations offered by the governments over time could sap any vitality from the Charter provisions. One cannot overlook the stark discrepancy between the rhetorical assertions of the formal principle and the actual practice.

Some major conflicts such as the Vietnam and the Iraq-Iran wars have never even reached either of the two principal United Nations organs; and in cases that come before the United Nations, little is done to follow-up word with action. As a telling example, Bowett has shown as early as in 1972 how little effect the Security Council resolutions have had on the Arab and Israeli governments after the early years of United Nations involvement in the Middle East conflict. In this conflict, the Security Council has repeatedly threatened sanctions according to Chapter VII, but its threats have lost all deterrent effect[25].

It would be premature to suggest that the fundamental Charter principle prohibiting the use of force has become obsolete by inconsistent practice. But the precarious state of a system without a collective enforcement mechanism is self-evident. Even if the United Nations International Law Commission should succeed in its efforts to provide broadly acceptable

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[21] Military and Paramilitary Activities In and Against Nicaragua *(Nicaragua* v. *United States of America)* Merits (1986) I.C.J. Reports 89 para.188.

[22] Franck (note 5), at 226.

[23] L. Henkin, How Nations Behave, 43 (2nd ed. 1979).

[24] (1986) I.C.J. Reports (note 21), 93 para.195 and *passim*.

[25] D. W. Bowett, Reprisals Involving Recourse to Armed Force, 66 A.J.I.L., 1, 25 (1972).

definitions of all "internationally wrongful acts" and corresponding legitimate "countermeasures", the lack of effective enforcement would undercut in some measure the credibility of its work[26].

For more than forty years there has been no war between the principal powers, due paradoxically – this seems to be the common wisdom – to the deterrence by strategic nuclear weapons, the use of which is contrary to classic international law because of their indiscriminate effect. The hope has been that the fear of a nuclear holocaust will preserve this situation until a more effective system is devised. Yet the recourse to force has increased particularly since the 1970's, and the episodes have become more perilous as seen in the Iraq-Iran war, the Kampuchea invasion and the unilateral responses to terrorism.

In the long run, nothing short of another reconstitution of the international order will do. At that time, the American reform plan with appropriate modifications may again become actual; the reports of the Collective Measures Committee organized under the Uniting for Peace Resolution may prove a source of practical ideas for organizing collective enforcement. The question is whether such reconstitution will take place without another still more catastrophic conflagration or whether it will be achieved through a gradual evolution. However, experience in modern international organization has shown that the gradualism envisaged by the functionalist theories will have to be propelled by significant political decisions.

One can only hope, if not expect, for a gradual mitigation of the effects of the globalization of the nation-state system, for public recognition of common interests among nations and for a new breed of statesmanship.

In the shorter run perspective it would be in the interest of all United Nations members to strengthen the influence and credibility of the Secretary General. He should have at his disposal a group of seasoned diplomats who would assist in his work of peaceful persuasion and in building alliances in support of his initiative.

But we still face crucial problems of mitigating the consequences of the absence of a global enforcement mechanism in a world in which violence is rampant. I would suggest that it is important for states to seek some third party role, some institutional legitimization before force is employed. Action by a regional organization or even by a group of like-minded states might be preferable to unilateral force. The process of reaching group

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[26] Part 1 (Origin of State Responsibility), Yearbook of the International Law Commission, 1980 II, Part 2, p.30ff.; Part 2 (Contents, Forms and Degrees of State Responsibility), UN GAOR 40th Sess. No.10, Doc. A/40/10, p.52ff.; UN Doc. A/CN.4/397.

consensus may not assure in every instance that the "normative concerns" will prevail, as has been shown by the Warsaw Pact action against Czechoslovakia in 1968; nevertheless, it may influence the choice of the options employed.

As for the United States and its allies, the need for more consistent consultation cannot be overemphasized. In situations where NATO is not the most propitious forum, consideration should be given to a more intimate arrangement fashioned perhaps after the European Political Cooperation mechanism of the 12 members of the European Community which is in the process of being incorporated into a treaty framework[27].

The pursuit of the regional approach, however, should not be inconsistent with taking advantage of any sign of a broader consensus that would make possible a recourse to global institutions.

[27] Single European Act, Bulletin of the European Communities, Supp.2/86; reprinted in 25 ILM 503–518 (1986).