

**Brazilian Yearbook of International Law**

The *Jus ad Bellum* in the Age of Weapons of Mass Destruction

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Article 2(4) of the United Nations Charter says that “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any way inconsistent with the Purposes of the United Nations.”

To this there are two exceptions. First, Article 51 permits states an armed response “if an armed attack occurs against a Member of the United Nations” and, second, under the terms of Article 39, states may use force if the Security Council determines “the existence of any threat to the peace, breach of the peace, or act of aggression.”

That’s it. No recourse to force is allowed, unless there has been an armed attack or the Security Council has agreed to respond to a threat to the peace. How responsive is that law to contemporary realities?

That depends on the way we see “the real.” To scofflaws, the reality is simple. In an era of weapons of mass destruction, it is unrealistic to expect any nation to abdicate its sovereign prerogative to act to preempt any threat from anyone.

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But that isn't the reality of the vast majority of the world's population. Their reality is that the abandonment of international law and institutions, and the return to unbridled sovereignty, spells a looming human rights catastrophe.

In World War I, ten million people died. In World War II, with advances in both fanaticism and technology, sixty million died.<sup>2</sup> In an age of weapons of mass destruction, the threat of war can now be seen in terms of fatal casualties potentially measurable in the hundreds of millions.

In an effort to fulfill its central mission, the U.N. Charter establishes as the Organization's first Purpose (Art. 1(1)) "To maintain international peace and security, and to that end: to take effective collective measures...." In 1945, the design of this new system for the prevention of war was clear: nations were to renounce the "threat or use of force" except when actually attacked. But—and it's a big but—in return, the members of the U.N., upon a determination of "the existence of a threat to the peace, breach of the peace, or act of aggression" were to take the collective measures necessary "to maintain or restore international peace and security". These measures were to be real, and could include "action by air, sea, or land forces" if less draconian measures fail to maintain or restore peace (Art. 42).

This, then, was the design of a radical new regime for collective measures that would make unilateral state recourse to force unnecessary, unjustifiable, immoral and illegal.

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<sup>2</sup> Paul Heinbecker, "The Way Forward," in *Irrelevant or Indispensable? The United Nations in the 21<sup>st</sup> Century*, Heinbecker and Goff eds., 183 (2005).

Right from its inception, however, the design evinced serious flaws. In recent years, these flaws have become life-threatening: not just to the new system itself, but to millions of persons who have seen the promise of a pacific life become a chimera.

These failures of the system have been exaggerated by critics, and the successes have been excessively discounted. In the words of Canada's longtime Ambassador to the U.N., Paul Heinbecker:

The UN gave birth to a body of international law that stigmatized aggression and created a strong norm against it. Although the Cold War saw international law breached by both sides, the norm against aggression was much more respected than not, as was the legal force of the Charter. There were fewer interstate wars in the second half of the twentieth century than in the first half, despite a nearly four-fold increase in the number of states. While the Cold War destroyed the post-war consensus, hobbling the security vocation of the UN for many years, and the prevention of World War III owed at least as much to nuclear deterrence and collective defence through NATO, there is no doubt that the world would have been a much bloodier place in the last fifty years without the world body.<sup>3</sup>

Still, the flaws can no longer be ignored. So let us examine them.

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<sup>3</sup> Id. p. 184

Collective security under U.N. auspices has been exposed as a weak reed upon which to rely in return for states' renunciation of the right to use force unilaterally to protect their security and advance their national interest. It is a particularly weak reed upon which to base a human right to be protected from abuses, whether from others or from one's own rulers.

### Weaknesses of U.N. Collective Security

The first flaw to appear in the Charter's design was the failure of member states to give effect to Article 43, by which they had undertaken "to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces...necessary for the purpose of maintaining international peace and security."

That the members failed in their obligation to give the Security Council stand-by military forces was partly obscured by the Cold War, which, anyway, would have made it virtually impossible to deploy any such forces, among other things by reason of the frequent recourse to the veto by the Soviet Union. Such recurrent use of the veto by one or more of the permanent members of the Council, then and now, illustrates the second flaw in the Charter's design which, understandably, makes nations very cautious about abjuring their right to deploy force unilaterally to protect their security and national interest. That second flaw is the flagrant abuse and unjustified over-use of the veto. The exposure of these two flaws has made everyone very skeptical about the real force of the new multilateral system of collective security.

These abuses of the veto are even greater than is indicated by the voting record of the Security Council. Every government and, indeed, most persons by now are aware that the U.N.'s capacity to come to their defense is limited not only by the actual veto of collective measures but by the mere threat that such a veto would be used to prevent action even when a coalition of the willing is available to undertake it. This has led to the failure to make timely response to the most evident threats and has prompted states willing to act – usually neighboring states in the region - to proceed without seeking prior Security Council authorization as required by Article 53 of the Charter. Action by ECOMOG states in Liberia and Sierra Leone, as well as NATO action with respect to Kosovo, illustrates the problem and its very *ad hoc* solution.

These considerable flaws in the original design have been somewhat mitigated in practice, but they have not been cured by several ingenious improvisations in the way the system works. Peace-keeping operations were invented to keep parties to a conflict from resuming it after establishment of a cease-fire.<sup>4</sup> These contingents have served, with varying degrees of success, on the Israeli-Syrian, Lebanese, Indo-Pakistani and Egyptian borders, in both of the Congos, and in Cyprus, Namibia, Cambodia, Mozambique, Haiti,

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<sup>4</sup> See, for example: UNTSO established by S.C. Res. 50 of 29 May 1948; UNEF established by G.A. Res. 1000 and 1001 of 5 and 7 Nov. 1956; UNFICYP established by S.C. Res. 186 of 4 March 1964; UNTAG established by S.C. Res. 435 of 29 Sept. 1978; UNTAC established by S.C. Res. 745 of 28 Feb. 1991; ONUMOZ established by S.C. Res. 797 of 16 Dec. 1992; UNMIH established by S.C. Res. 867 of 23 Dec. 1993; UNSMIH, established by S.C. Res. 1063 of 28 June 1996; UNTMIH established by S.C. Res. 1123 of 30 July 1997; MIPONUH established by S.C. Res. 1141 of 28 Nov. 1997; MINUSTAH established by S.C. Res. 1542 of 30 April 2004; UNOMIL established by S.C. Res. 866 of 22 Sept. 1993; UNMSIL established by S.C. Res. 1181 of 13 July 1998; MINUCI established by S.C. Res. 1479 of 13 May 2003; UNOCI established by S.C., Res. 1528 of 27 Feb. 2004; UNMIK established by S.C. Res. 1244 of 10 June 1999; UNOSOM I established by S.C. Res. 751 of 24 April 1992; UNITAF authorized by S.C. Res. 794 of 3 Dec. 1992; UNOSOM II authorized by S.C. Res. 814 of 26 March 1993; UMOMUR established by S.C. Res. 846 of 22 June 1993; UNAMIR established by S.C. Res. 872 of 5 Oct. 1993; UNPROFOR established by S.C. Res. 743 of 21 Feb. 1992.

Liberia, Sierra Leone, the Ivory Coast, Kosovo, Somalia, Rwanda, and the Former Yugoslavia. While the forces thus deployed were, in each instance, made up of troops volunteered ad hoc by member states, they operated under United Nations mandates and, in some instances, under U.N. command. Peacekeeping forces are not envisaged under the Charter and are a good example of the sort of creative interpretation of texts that keeps old laws functioning in new circumstances. Nevertheless, these peacekeeping forces take considerable periods of time to be put together and, for the most part, they can be deployed only with the consent of the states in which they are to operate. Only in the instance of the collective measures implemented in response to invasions of South Korea<sup>5</sup> and Kuwait<sup>6</sup> has the Council actually used its powers to authorize collective military action to rescue a state from attack. Even in those two instances, the force had to be constituted *ad hoc* from contingents volunteered by member states.

### Overcoming the Weakness of Collective Security

It is apparent that the design concept of collective security embodied in the U.N. Charter is most deeply flawed by the actuality and threat of the veto. Unless this problem is addressed, the flaw will cause the principal purpose of the system to fail. Collective security is impossible without addressing this problem. Unless the system can provide a sustainable faith in real collective security, states cannot be expected to surrender their right to use force at their own discretion.

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<sup>5</sup> S.C. Res. 82 of 25 June 1950.

<sup>6</sup> S.C. Res. 678 of 29 Nov. 1990

There may be remedies for such institutional stasis.

One is to increase modestly the ambit for discretionary state initiatives that may be taken lawfully, even without prior Security Council authorization. While this involves the risk of relaxing too much the prohibition on the unilateral, self-interested use of force by states, it is not reasonable, in the age of nuclear weapons and long-range missiles, to expect states to wait to be attacked before responding to clear evidence of a planned attack. An effort must be made to redefine the understood meaning of “armed attack” in Article 51. Just such an initiative has come from the High Level Panel appointed by Secretary General Kofi Annan, which, last year, set forth a consensus that prevalent practice under the Charter now permits “a threatened State” to “take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate.”<sup>7</sup> This calibrated reinterpretation of Article 51’s right of self-defense – a right exercisable unilaterally by the threatened state and its allies – constitutes a laudable effort to keep the Charter from becoming obsolete by making it responsive to states’ need to retain some degree of freedom of action when, as has happened too frequently, needed collective measures have not been taken, or have been taken too late, to deter a credible threat to their security or to the security of a large part of a population.<sup>8</sup>

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<sup>7</sup> *A More Secure World: Our Shared Responsibility*, Report of the Secretary General’s High level Panel on Threats, Challenges and Change, para. 188, (2004).

<sup>8</sup> The problem does not arise only in situations of a threat of external armed attack, but also in situations like that in Rwanda during the genocidal massacre of 800,000 Tutsis.

Another potential reform intended to overcome institutional stasis is the recently emerging practice of recognizing the right of regional organizations and “coalitions of the willing” to take collective measures for the protection of a threatened state or vulnerable population, even in the absence of the requisite prior authorization by the Security Council<sup>9</sup> if – and the caveat is an important one -- the Council majority’s manifest support for preventive action is blocked by the threatened or actual veto of one or two permanent members. In such situations, effectively retroactive Council approval has been secured after the end of a collective action, on a showing of its overwhelming necessity. Most legal systems tend to make allowance for technically unlawful actions taken manifestly to prevent the happening of some much greater wrong. Key to this is that the “greater wrong” be almost universally recognized as such. Such retrospective validation may be read into the Council’s actions in blessing, however belatedly, the ECOMOG military interventions in Sierra Leone<sup>10</sup> and Liberia<sup>11</sup> as well as the NATO action in Kosovo.<sup>12</sup> That a regional organization should act *in extremis*, if necessary even without prior Council authorization, is also recognized by the new Constitutive Act and Protocol of the African Union which establishes a Union right to intervene in a member state “in respect of grave circumstances, namely war crimes, genocide and crimes against

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<sup>9</sup> Such approval is required by a strict reading on Charter Art. 53.

<sup>10</sup> Presidential Statement, SC/6481, 26 Feb. 1998. This commends ECOWAS’ role.

<sup>11</sup> S.C. Res. 788 of 19 Nov. 1992. This “commends” ECOWAS for its unauthorized actions.

<sup>12</sup> The possible retroactive validation in this instance came in the form of the overwhelming defeat of the proposed Russian resolution censuring NATO. SCOR (LIV), 3989<sup>th</sup> Meeting, 26 March 1999 at 6. Only Russia, China and Namibia voted in favor of the censure.



humanity” and, since the provision was amended in 2003, also against “a serious threat to legitimate order.”<sup>13</sup>

A third possibility is that the General Assembly may arrogate to itself the power to authorize collective actions, including military actions by coalitions of the willing, in the event such authorization is blocked in the Security Council by spurious recourse to the veto by one permanent member in defiance of the will of the majority. True, The Assembly, by Article 10 of the Charter, is limited to making “recommendations” and, by Article 11(2) is not to do so “when action is necessary,” in which case the matter “shall be referred to the Security Council”. Nevertheless, the International Court of Justice, in the *Certain Expenses case*<sup>14</sup> has held that, since Article 24 confers on the Council “primary responsibility for the maintenance of international peace and security,” it follows that there must be a “secondary” responsibility for peace and security that is lodged in the General Assembly, a power which can be activated when the Council is prevented from acting.<sup>15</sup>

There is a fourth possible approach to stasis in the taking of collective measures, one as yet but little canvassed, although somewhat tentatively broached by Britain. This is for the permanent members of the Security Council to attempt to place some voluntary restraints on their right to threaten, or use, the veto, and thereby restore some of the lost faith in collective security. A fantasy? Admittedly, it will not be easy to accomplish.

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<sup>13</sup> Constitutive Act of the African Union, Article 4(h); Protocol Relating to the Establishment of the Peace and Security Council (2002), Article 4(j), as amended February, 2003.

<sup>14</sup> *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter)*, I.C. Rep., 1962, 151

<sup>15</sup> *Id.* at 163

Certainly it cannot be expected to happen through Charter amendment, since such amendment could not happen without the consent of all the permanent members, themselves. In any event, the veto still has its legitimate uses. The objective should be to modulate recourse to the veto, not to eliminate it.

The modality for accomplishing such modulation might be a side-bar agreement among the permanent members. For example, all permanent members – or, initially, as many as were willing - might agree among themselves not to invoke the veto, or threat of a veto, when its effect would be to bar recourse to collective military measures when, in the opinion of most Council members, a state demonstrably has failed to respond to a mandatory order of the Security Council, made under Article 39, and only when such a failure has been certified by those authorized by the Council to report on compliance.

Such an agreement would not deprive permanent members of their right to prevent action by the Security Council. Rather, it would require them to signal their real intention before, not after, the Council has determined that a threat to the peace has arisen and before it has concluded that those responsible must take specified remedial action. At worst, this would discourage the hypocrisy of permanent members agreeing to order compliance with remedial measure but then blocking all attempts to implement them. At best, it would discourage non-compliance by the state from which the threat emanates, a defiance now too often facilitated by the malfeasant's confident reliance on the veto of a patron able to block any genuine effort to enforce the Council's orders.

There is a precedent for such a side-bar agreement altering the way permanent members exercise their Charter powers. The San Francisco Four Power Agreement, later adhered to by France, established a practice that came to be known as the “double veto.”<sup>16</sup> It is a reciprocal agreement among some members, binding only *inter se*, obliging them not to exercise an explicit power under certain defined circumstances. The same procedural device could be used to set out agreed circumstances in which the veto would not be used to block enforcement against a scofflaw state in circumstances previously designated by the Council as a threat to the peace. It is difficult to see how a permanent member could justify an insistence upon an absolute right to block any implementation of the Charter’s promise of collective measures, no matter how urgent the circumstances, how persuasive the evidence, and how willing all other states might be to take the action promised by the Charter to remedy a commonly-perceived threat to the peace.

### Conclusion

The Charter’s system of collective security both envisages timely action to secure a state from attack and to prevent outrages against the rights of humankind. It also seeks to limit the recourse to force for other, less worthy, objectives. Although much has changed in the six decades since the Charter’s inception, these remain valid objectives.

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<sup>16</sup> The Five-Powers San Francisco Declaration on the veto power. San Francisco, 7 June 1945. UNCIO Doc. 852, III/1/27(1), vol. II UNCIO, pp. 711-14.

The law of the Charter has proven to be highly adaptable, making it possible for the Organization to deploy its norms creatively, in order to respond to new challenges not envisaged by the drafters. More such adaptations are both necessary and possible. In any event, it is perfectly clear that, were the United Nations to fail, nothing remotely as imaginative or as functional could today be reinvented. That, surely, is sufficient reason to preserve and to improve what we have.