

# Introduction

This book is designed for students of international law and international relations studying the United Nations. By examining primary materials focused on the normative context within which the United Nations functions, students will develop an understanding of the interaction between law and practice. This is essential to a proper understanding of the UN Organization, but also to the possibilities and limitations of multilateral institutions more generally.

The book is organized in four parts. Part I, "Relevance," raises some preliminary questions about the role, legitimacy, and effectiveness of the United Nations, particularly in the area of peace and security. Part II, "Capacity," brings together materials on the nature and status of the United Nations. Part III, "Practice," examines how the United Nations has exercised its various powers. Part IV, "Accountability," concludes with materials on responsibility and accountability of the United Nations and its agents.

Each chapter begins with a short introductory essay by the authors. This describes how the documents that follow illustrate a set of legal, institutional, and political issues relevant to the practice of diplomacy and the development of public international law through the United Nations. Each chapter includes questions that may guide discussion of the primary materials and suggested further reading for additional secondary sources.

The emphasis on primary materials serves two purposes. First, such materials enable a realistic presentation of the work of international diplomacy; the negotiation and interpretation of such texts is an important part of what actually takes place at the United Nations and other international organizations. Secondly, it is hoped that students of these texts will develop the ability to read them critically, parsing not only the meaning but the politics behind such documents. Importantly, this second aim includes understanding the different types of material presented in this volume, each of which must be read differently: treaties and resolutions based on political compromises, judicial opinions that are based on legal reasoning, policy documents intended to justify specific actions, advocacy intended to pursue a national or other interest, and so on.

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The book is not intended to be a comprehensive reference work, which would require far more material. A volume such as this is can hardly aim to be unputdownable. But its authors must guard against it becoming unpick-upable. Accordingly, the present work draws selectively from six decades of practice to examine underlying themes and principles concerning the normative context within which the United Nations operates. For teaching purposes, it will be helpful to supplement the materials provided here with items currently on the agenda of the United Nations.

Given the normative focus of the book, the most important questions examined here tend to be what a body like the United Nations *may* or *must* do, rather than what it *might* or *should* do. The former are properly topics of legal analysis; the latter are more suggestive of policy questions in which law is a relevant but rarely conclusive factor. Whether the issue is sending peacekeepers to Darfur, establishing the Oil-for-Food Programme in Iraq, or coordinating relief in the wake of the 2004 Indian Ocean tsunami, the question of choosing the best policy will typically be a political one—the role of law is in defining the universe from which that choice is made or, more rarely, clarifying the extent of legal compulsion.

The focus on legal and normative considerations means it is only possible to get a snapshot of what actually happens on the ground. For example, the volume addresses the role of the United Nations in debates over economic development and the elaboration of new concepts and norms (such as the Millennium Development Goals and the Right to Development), but it does not examine UN development programming as such. Similarly, we consider the legal and political context of humanitarian assistance but do not directly focus on the programming and implementation quandaries that UN humanitarian staff face on a daily basis.

Within a domestic legal setting, the means of determining the limits of centralized power and the legal obligations of that authority are usually set out in a constitution or basic law. Though such analogies must be pursued with caution, the rest of this introduction raises basic questions about the nature of the United Nations and its Charter, framed around the question of whether that document might itself be considered a constitution. In our own teaching this question has been a recurrent theme and it may be helpful to revisit this question as one progresses through the text that follows. The complete text of the Charter is included in the appendix at the end of the book.

### **Is the UN Charter a Constitution?**<sup>1</sup>

The Charter of the United Nations is, of course, a treaty. That it also happens to be one of the most-widely ratified treaties in the history of international

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<sup>1</sup> This text draws upon passages first published in Thomas M. Franck, "Is the UN Charter a Constitution?" in Jochen Abr Frowein, *et al.* (eds.), *Verhandeln für den Frieden—Negotiating for Peace: Liber Amicorum Tono Eitel* (Berlin: Springer, 2003), pp. 95–106.

relations does signal the concomitant fact that it is not an ordinary treaty. But, a constitution? That, surely, would be a claim requiring very persuasive evidence.

Implicit in the claim is the even more controversial proposition that the members of the United Nations, by the fact of their membership, have not merely become parties to a treaty but members of a *community*. It is demonstrably possible to have a community without a formal constitution, but it is difficult to imagine a constitution without a community.

In traditional Lockean jurisprudential parlance, a community is constituted by a contract (that is, a treaty, in the system of states) in which the parties agree to be bound together for certain specified purposes. Such a *social contract* by which persons (or, in our instance, states) agree to enter a continuing relationship differs from an ordinary contract (or ordinary treaty) in that it *constitutes* an ongoing *process* of interaction and not simply a substantive set of rules. In that sense, the chosen instrument—by which the rights and obligations of an ongoing relationship are determined and agreed—becomes not merely normative but *constitutive*.

Such a constitutive instrument is distinguished in several ways. First is its tendency toward pervasive *perpetuity*. Real constitutions are usually hard to escape. The great US civil war (1861–1865) was fought to establish that states of the Union, once enlisted, had no right of exit. The theory behind this aspect of a constitutive instrument is that, unlike many (although not all) simple contracts or treaties, an agreement that establishes an on-going community creates a web of criss-crossing mutual expectations, duties, and entitlements that, being a carefully knotted skein, are not readily disentangled. To permit one to exit can be seen as a derogation from the legitimate expectations of all the remaining members and as an act that may be construed as damaging the community as a whole.

Does the UN Charter have this perpetuity-characteristic of a constitution? Notably, it has no provision for states' withdrawal from the Organization created by it. In this, the Charter constitutes a deliberate departure from the Covenant of the League of Nations, in which provision was made in Article 1(3) for exit upon giving two years' notice. At San Francisco, the issue was considered and it was decided to pass it over in silence in recognition of the Organization's aspiration to universality and what was designated as "the highest duty of the nations . . . to continue their cooperation within the Organization for the preservation of international peace and security."

In practice, the United Nations has studiously avoided validating a right of exit. In 1965, the Government of Indonesia, irked by failure to get support for its claim to North Borneo and Sarawak, announced its withdrawal from the Organization; but, when it changed its mind later, its delegation was seated in the General Assembly as if the withdrawal had been null and void. When the union between Egypt and Syria was dissolved in 1961, Syria automatically regained its seat, which had been in abeyance during its submergence as a partner in the United Arab Republic. Clearly, the institution has applied the

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Charter in such a way as to reinforce the tendency towards perpetuity of membership.

This tendency of the constitutive instrument to effect such pervasive perpetuity is underscored by a remarkable universalizing provision of the Charter that is not only absent from other treaties, but which may, indeed, be said to contradict the very essence of the ordinary contractual relationship. Article 2(6) provides that the “Organization shall ensure that states which are not Members of the United Nations act in accordance with the [Charter’s] Principles so far as may be necessary for the maintenance of international peace and security.” This provision not only seeks to ensure that states cannot escape the basic obligations established by the instrument—not even by purporting to refuse, or quitting, membership—but also purports to revoke the basic international legal principle that a sovereign state cannot be bound in law except by a free act of its own volition. The principles of the Charter claim the adherence not only of those states that have ratified that instrument, but also of those that have not. This is not a sustainable claim when advanced by parties to an ordinary treaty, but it is one enforced by the UN system. The Charter establishes a process by which one of its principal organs, the Security Council, may make a determination that the conduct of a state—member or non-member—constitutes a “threat to the peace, breach of the peace, or act of aggression” (Article 39) and may decide to bring collective measures to bear—ranging from diplomatic sanctions (Article 41) to military force (Article 42)—to ensure the compliance of the wrongdoer with community standards. None of this comports with the normal expectations of treaty law but does bear resemblance to a social compact or constitution.

A second characteristic is its *indelibility*. Real constitutions are not easily nipped and tucked or reconfigured to meet the needs of contemporary fashion. The Charter, like a constitutive instrument, is extraordinarily hard to amend. Except for a series of amendments in 1963–1973, which increased the size of the Security Council and the Economic and Social Council, there has been a notable absence of revision in its main terms, most evident in the important but frustrating recent essays to legitimate the Security Council by making it more inclusive and representative of the shifts in power that have occurred during the first six decades of the Organization’s existence. As with many national constitutions, the Charter (Article 109) creates a contract intended obdurately to withstand the vicissitudes of shifting political values and fortunes. To that end, proposed amendments must be put to a conference of all the members, be adopted by a two-thirds vote, and be ratified by two-thirds of the member governments, including those of all the permanent members of the Security Council. It is deliberate that this should be such a daunting hurdle to reform, and it is more characteristic of a constitution, rather than of an ordinary treaty.

Another aspect of indelibility is that the Charter does not permit the sort of pick-and-choose approach that traditionally has made many multilateral treaties exemplars of unequal obligations among the parties. No reservations

may be entered by any parties. All members are bound, identically, to all of the same provisions of the constitutive instrument.

A third characteristic of a constitutive instrument is its *primacy*. A constitutive instrument is usually accorded pre-eminence among legal instruments available to the community it serves. That there are normative constructs with priority over all others, implicitly, is what distinguishes “constitutional governance” from “parliamentary supremacy.” Not every community has such a principle of priority. In the British system, entrenchment of constitutive norms cannot be achieved without encountering the general rule that all acts of parliament are of equal effect and that the last in time repeals any inconsistent prior enactment. While it is thus demonstrably possible for a community to develop around a principle of normative equality, where normative priority is fundamental to a community’s system of law, it will always be found lodged in a constitutional instrument. In such states, organized around the principle of constitutional supremacy, the constitutive instrument trumps all inconsistent acts of governance, whether earlier or later in origin, save only amendments to the constitution itself. It is significant, in this respect, that the Charter (Article 103) makes the following claim:

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.

Such an assertion of instrumental supremacy over both prior and subsequent commitments of states in the exercise of their sovereign rights strongly suggests an intent to create the constitutive foundations of a functioning community. This trumping of subsequent treaties by operation of the Charter (and by operation of decisions of the Security Council when exercising its Charter-bestowed powers) was tacitly acknowledged by the International Court of Justice (ICJ) at the interim measures phase of the *Lockerbie* case.<sup>2</sup>

A fourth characteristic of a constitutive instrument is its aspiration to *institutional autochthony*. Perhaps the most important characteristic of a constitution is that it creates a machine that runs by itself. This unique legal quality of constitutions has two components. First, the autochthonous instrument establishes the basic *loci* of governmental power and designates the appropriate parameters of power allotted to each. The legislative power may be defined and vested in a parliamentary assembly, the executive power in a presidency, and the judicial function in various courts. There may also be a sharing-out of powers between the center and the constituent provinces. Second, there is usually provision for the umpiring and implementing of these allocations of function and jurisdiction. In some constitutional systems—such as those of Germany, Canada, Australia, the United States,

<sup>2</sup>See chapter 3 in this volume.

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and, increasingly, France—this “umpiring function” is assigned to courts. In others, it is shared by courts and political, administrative, or even religious bodies.

A constituent instrument may discharge these two requisites efficiently or inefficiently, but discharge them it must. The autochthony of a constitutional instrument is demonstrated by the capacity of institutions created by it to function through a decision-making and rule-applying process that does not require, in each instance, a negotiation to secure the consent of all the participating parties. Such return to instrumental renegotiation will be obviated by lodging the power to create new obligations in a judiciary, an administrative-executive secretariat and/or a political-parliamentary institution. The UN Charter has established forms of all three.

The Charter thus markedly simulates the requisites of a constitutive instrument. In Article 7(1) it sets out the jurisdictional parameters, and delimits the functions, of the principal organs through which the Organization is to operate: the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council (now defunct), the International Court of Justice, and the Secretariat. At the founders’ conference in 1945 at San Francisco, there were vigorous debates about the “umpiring function,” with a narrow majority favoring the Court as sole final arbiter; but the Big Powers resisted such judicial supremacy. In the event, it was decided, fractiously, that the *kompetenz-kompetenz* should be exercised, first, by each principal organ in its own assigned bailiwick and, secondarily, by the Court when an issue arose in litigation between two member states or when the judges were requested by the Council or Assembly to render an advisory opinion (Article 96). Efficient or not, the result was that the Charter designed an instrument that could run by itself.

To ensure this, it provided a Secretariat, which was to operate free of instruction by the states of the civil servants’ nationality. The international public servants were to constitute the intendency of the machine, headed by an impartial Secretary-General vested with sufficient power and resources to ensure the integrity of the process (Articles 97–101).

The independence of the Secretariat is an important part of the Charter’s constitutionalism, for it was established to ensure that the United Nations would not be merely a continuing conference of states (in the sense, for example, of the Congress of Vienna) but that, to paraphrase Mark Twain in another context, there would demonstrably be “a *there* there.” In instituting this independence, the Charter does not merely state that the Secretary-General and his or her staff “shall not seek or receive instructions from any government or any other authority external to the Organization,” but further requires member states “to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities” (Article 100). One can reasonably conclude that the Charter may be, in form, a treaty among state-parties, but it is one which intentionally created a legal entity with rights and responsibilities separate from those of the members. For example, Article 99

bestows on the Secretary-General broad authority to “bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.” This power has been used creatively by successive Secretaries-General to establish an important and independent jurisdiction to investigate looming crises and to propose initiatives for pre-empting them.

The General Assembly, the system’s parliamentary institution, has also been endowed with autochthonous jurisdiction. An example is Article 17 of the Charter, which imposes on all members the duty to bear expenses approved and apportioned by the requisite majority. That this obligation is binding even on states that opposed and voted against a particular activity of the Organization has been made clear by the ICJ in the *Certain Expenses* case. It is thus apparent that when a voting majority of members decides to undertake a task, it is not legally open to opponents of that project to continue their opposition to it by withholding their share of contributions necessary to cover the cost of carrying it out.<sup>3</sup> This illustrates that membership by a sovereign state in the Organization necessarily involves adherence to a system of governance that, to some degree, is capable of generating new obligations not specified in the Charter itself, and to do so without the consent of all the parties to the compact.

The same autochthony is illustrated by the action of the Security Council in creating courts to bring to trial persons accused of war crimes and crimes against humanity in the Former Yugoslavia and Rwanda. Acting under its mandatory Chapter VII powers, the Council created entirely new obligations on all member states—including any opposed to this action—that oblige them to surrender for trial any persons (including their own citizens) indicted by the new courts. The Council also defined the law that the new tribunals were to apply. None of this could be said to have been expressed in the original treaty establishing the United Nations. Instead, the Charter established the institutional jurisdiction and powers that enabled the Security Council to create a new set of courts, define the law these tribunals were to apply, and endow them with jurisdiction over persons, wherever found, accused of violating those laws by an international prosecutor whose office and jurisdiction were also created by decision of the Council.

Perpetuity, indelibility, primacy, and institutional autochthony: these four characteristics of the UN Charter relate that unique treaty more proximately to a constitution than to an ordinary contractual normative arrangement. But does it make any difference? Indeed it does. Whether or not the Charter is a constitution affects the way in which the norms of systemic interaction are to be interpreted by the judiciary, by the political organs, and by the Secretary-General.

Contracts between private parties, and bilateral treaties, should be construed narrowly to reflect precisely the literal text and the intent of the

<sup>3</sup>See chapter 6 in this volume.

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negotiators at the time of their negotiation. A constitution, however, calls for another interpretative mode altogether. As the Judicial Committee of the Imperial Privy Council observed, when speaking of the Canadian constitution, such an instrument, meant to last for the ages, should be seen as “a living tree.”<sup>4</sup> The same expansive view of constitutional interpretation has been taken by the US Supreme Court, not least by Chief Justice John Marshall in *McCulloch v. Maryland*, in which he construed the constitution’s “necessary and proper” clause to permit Congress to exercise powers not specifically assigned to it but which, nevertheless, are “appropriate” to carrying out the “letter and spirit of the Constitution.”<sup>5</sup> As Justice Holmes said in *Missouri v. Holland*, “when we are dealing with words that are also a constituent act . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism.”<sup>6</sup> Applied to the interpretation of the UN Charter, this means, at the least, that the constitutive instrument establishing the United Nations should be read broadly so as to advance, rather than encumber, its institutional ability to accomplish the purposes for which it was created.

Gratifyingly, this is what has been happening. In the seminal *Reparations* case, the ICJ was called upon to pronounce whether the United Nations has the legal capacity to bring a claim for damages in its own right against a state on behalf of one of its officials, killed while on active duty in that state. The Charter, as the Court observed, is silent as to the matter. Its view is worth quoting *in extenso*:

In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged. Accordingly, the Court has come to the conclusion that the Organization is an international person.<sup>7</sup>

This was taken to mean that the United Nations “is a subject of international law and capable of possessing international rights and duties, and

<sup>4</sup> *Edwards v. Attorney-General for Canada*, [1930] AC 124 (PC), at p. 136 (Lord Sankey).

<sup>5</sup> *McCulloch v. Maryland*, 17 US 316, 421 (1819).

<sup>6</sup> *Missouri v. Holland*, 252 US 416, 433 (1920) (Holmes, J.).

<sup>7</sup> *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (1949) ICJ Rep. 174, pp. 179-180.

that it has capacity to maintain its rights by bringing international claims."<sup>8</sup>

This was not, however, a necessary inference from the *text* of the Charter, nor was it one that could have been derived from reading the Charter as if it were an ordinary contract between nations. In such a more traditional mode of treaty interpretation, the Court would have said that if the parties had wished to invest the United Nations with legal personality and its prerogatives, they could have said so explicitly. That they did *not* would be taken to imply that no such constitutive endowment was intended. Fortunately, the Court has had the wisdom to eschew such extrapolations from contract law and to construe the Charter as a living tree.

Another example is afforded by the way in which the Security Council (and then the Court) has construed Article 27(3) of the Charter. This provision states:

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, however, the members have for many years, and in hundreds of votes, interpreted an abstention by a permanent member as not constituting a veto. This is a sensible embroidery of the text that has the great advantage of allowing a permanent member to abstain—thereby expressing reservations—without killing an otherwise widely accepted initiative of the majority. In a 1971 advisory opinion, the ICJ gave its approval to this auto-interpretation by the Council of the legal consequences of a permanent member's abstention, even though a literal reading of the text in a narrow contractual mode would have compelled the opposite conclusion.<sup>9</sup>

Whether the Charter continues to be regarded as a "living tree" will be further tested by the system's current response to *les petites crises* of law engendered by *les grandes crises* of politics: the 1999 war in Kosovo, the invasion and occupation of Iraq from 2003, ongoing efforts to counter the threats of terrorism and proliferation of weapons of mass destruction.<sup>10</sup>

NATO's action in Kosovo was not authorized in advance by the Security Council. Neither, earlier in the same decade, was the decision by the West African Community (ECOWAS) to despatch a military force (ECOMOG) to end the fighting and enforce a truce in Liberia and Sierra Leone. The Security Council, however, did turn down by twelve votes to three a resolution offered by Russia to condemn the NATO intervention and, thereafter, the Council

<sup>8</sup> *Ibid.*

<sup>9</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* (1971) ICJ Rep 16.

<sup>10</sup> See further chapter 2 in this volume.

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agreed to participate in the “rapid implementation” of the settlement that had been imposed on Yugoslavia by the interveners. This might be construed as a form of *nunc pro tunc* authorization. In the West African case, the Council did not authorize the ECOMOG interventions until many months after they had begun, and, even then, did so only tacitly.

While these precedents cannot yet be said to have confirmed an accepted rule for construing Article 53 in a more flexible, less literal, manner, it is possible that future practice will confirm a normative expectation not precisely configured by that of the states gathered in San Francisco in 1945. It is entirely conceivable, for example, that the requirement for Security Council consent to military action by a regional organization could become—through practice of the Council and/or decision of the ICJ—a less rigid requirement that could be satisfied by *subsequent* approval or acquiescence. Such transformation-in-practice of the text of a written contractual instrument would be inadmissible, except in instances where the instrument is also a constitution of an organic community.

This does not argue, of course, that every departure from strict textuality by the Security Council, General Assembly, or Secretariat should be construed as Charter reform. In any legal system based at least in part on customary practice it is always both necessary, and necessarily difficult, to draw a line between the violation of law and its adaptation through practice. While it is necessary to acknowledge that the Charter, as treaty law, is not as evidently amenable to the reconstructive effects of practice as is “mere” custom, it is also true that, in construing a constitution, the practice of the organs created by it tend to have an important place in determining what that instrument means at any particular juncture of its history. Without reference to the historically evolved practices of the US President and Congress, for example, any effort to understand the constitutional law pertaining to the making of both war and international commitments solely by reliance on the text would be horrendously misleading. A constitution develops its own customary law of interpretation in part through the dynamic interaction of the parts of the system it has set in motion and that penumbra is formed through practice.

A simple forward-looking example will suffice. Suppose the Security Council, determined to oversee the disarmament of an aggressor state defeated in a conflict that had been authorized in accordance with Charter Chapter VII, were to create an international inspectorate with authority to investigate compliance. Suppose, further, that in authorizing this process of inspection, the Council stipulated that violations reported by the inspectors would give rise to a right of any state or “coalition of the willing” to use sufficient force to compel compliance *if the report were approved by any ten members of the Council* in a procedural vote to accept it. Is there any reason why the permanent members of the Security Council, utilizing such a resolution, could not make this arrangement—a commitment *in futuro* not to cast a veto that would prevent enforcement of the agreed disarmament inspection rules? Such an arrangement would have the practical advantage of ensuring that no

one state could bar the use of force if the inspectors found a serious violation of their mandate, but that, equally, it would not relegate enforcement to the sole judgment of the inspectors or any one member state. It could be argued that the effect of such a resolution would be to devalue the power of the veto stipulated by Article 27 of the Charter. But, if the Charter is indeed a constitution, then the agreement of the members, including the permanent members, to restrain use of the veto in a particular circumstance would surely carry legal as well as political significance.

Thus, it appears, the question—is the UN Charter a constitution?—is not one of purely theoretical interest, nor one of import only to academics. Indeed, how it is answered may well determine the ability of the Organization to continue to reinvent itself in the face of new challenges, thereby assuring its enduring relevance to the needs of states and the emergence of an international community.

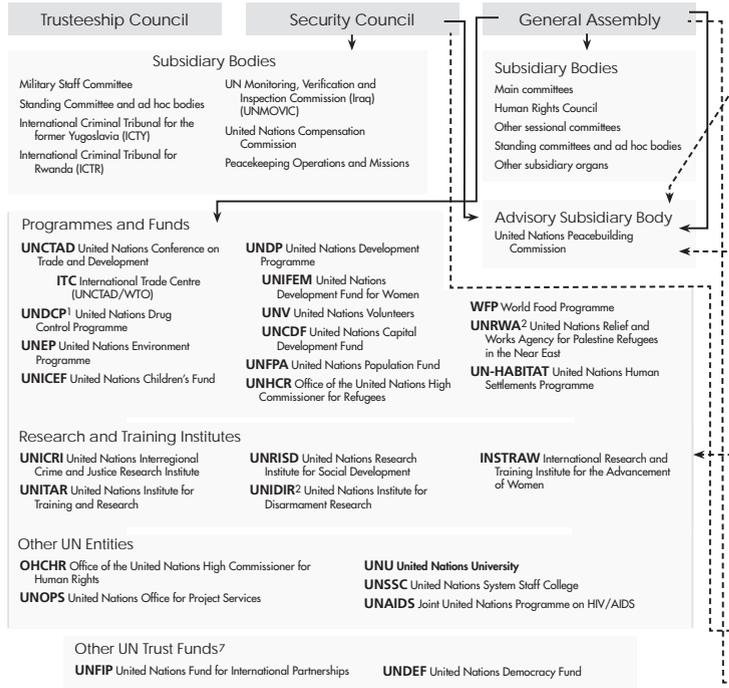
### **A Note on Sources**

Many of the documents used in this volume are available in full on the Internet. The UN Document system, indicated by the UN document symbol “UN Doc. xxx,” enables retrieval of a document, normally in all six UN languages, from the website <http://documents.un.org>. Another useful site from which to obtain the most current materials on matters currently on the agenda of the various UN bodies is <http://www.un.org/documents>.



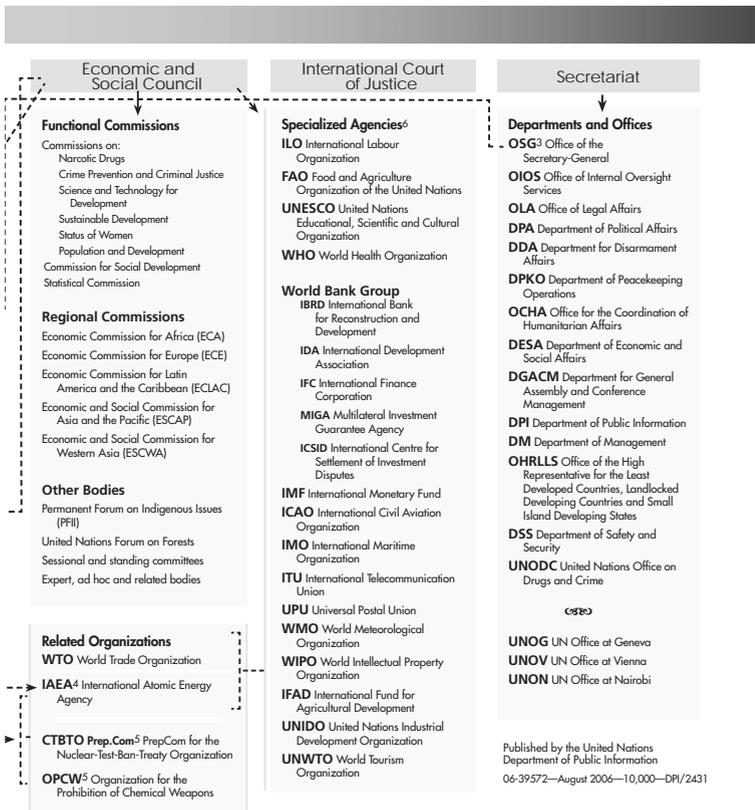
# The United Nations System

## Principal Organs



**NOTES:** Solid lines from a Principal Organ indicate a direct reporting relationship; dashes indicate a non-subsidiary relationship.

- <sup>1</sup> The UN Drug Control Programme is part of the UN Office on Drugs and Crime
- <sup>2</sup> UNRWA and UNIDIR report only to the GA
- <sup>3</sup> The United Nations Ethics Office and the United Nations Ombudsman's Office report directly to the Secretary-General
- <sup>4</sup> IAEA reports to the Security Council and the General Assembly (GA)
- <sup>5</sup> The CTBTO Prep.Com and OPCW report to the GA
- <sup>6</sup> Specialized agencies are autonomous organizations working with the UN and each other through the coordinating machinery of the ECOSOC at the intergovernmental level, and through the Chief Executives Board for coordination (CEB) at the inter-secretariat level
- <sup>7</sup> UNFIP is an autonomous trust fund operating under the leadership of the United Nations Deputy Secretary-General. UNDEF's advisory board recommends funding proposals for approval by the Secretary-General.



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*chapter one*

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## The UN Charter

The role of international law in international relations and in the nature of relations between states after 1945 remains heavily influenced by the two World Wars (1914–1918 and 1939–1945) that wracked Europe and, in the case of World War II, the Pacific Basin and much in between. The human, economic, and material costs of these wars were so devastating that the design of an international system to prevent their recurrence proved of the highest priority both in 1919 and in 1945. The failures of design and implementation of the League of Nations contributed to the march to war of the 1930s, but the League’s collapse did not discourage US presidents Franklin D. Roosevelt and Harry S. Truman from their belief that only a strengthened collective security system could prevent, in the language of the UN Charter, “the scourge of war.” The provisions of the Charter, drawing on manifold sources, were much debated prior to and during the San Francisco Conference of 1945, at the conclusion of which its terms were adopted by participating states. These debates still provide useful insights for those seeking to ascertain the intentions of the founders of the UN.

While the League’s Covenant emphasized a legal approach to the prevention of war, by placing specific obligations on all its members, the UN Charter anticipated more proactive, pragmatic, and political strategies. Unlike the Covenant, the Charter recognized that the United Nations would not be effective in keeping the peace if it were challenged by a great power, and thus that collective action by the great powers to protect the peace was critical to the success of the UN.

Key differences between the League Covenant and the UN Charter can be summed up as follows: (a) the United States was to be at the core of the Organization and its key organ, the Security Council, from the outset (the US Senate had prevented the United States from joining the League); (b) the United States and four other powerful states were given special privileges, including permanent seats on the Security Council and veto powers to induce their active involvement in the Organization; and (c) the Security Council was empowered to impose, indeed enforce, its decisions when adopted under the

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terms of Chapter VII of the UN Charter. While the veto power was a topic of controversy at the San Francisco Conference (as were criteria for future membership, the extent to which regional organizations and alliances were to be subordinated to the Security Council's oversight, and the status of non-self governing territories and more broadly the future of the colonial and trusteeship system), realism won out over concern for the equality of states, an important principle formally enshrined in the Charter, discussed below.

Remarkably, the UN Charter, to a much greater extent than is generally recognized in superficial examinations of international relations, continues to guide the practice of states and broader debate on critical issues such as the use of force. Much has occurred since 1945 to complement, enrich, and qualify the terms of the Charter, but the text itself has stood up remarkably well to the test of time. It has lent itself to evolving interpretations of several of its key provisions as the circumstances of international relations evolved also, but its key principles remain intact. The notion of respect for the rule of law internationally is at the heart of the Charter, and at the heart of the foreign policy of most countries.

Not surprisingly, its central features address threats to the peace and how to manage them. While the Charter's stated central purpose is to prevent war, its key security provisions are couched in more reactive terms, dealing primarily with how to deal with threats to the peace. A broader vision, enshrined in the sweeping opening lines of the Charter, lays out how war itself is to be averted—through efforts to achieve interlocking security, economic, and social goals (including the attainment of human rights for all equally) that, it was hoped, would make the recourse to violent conflict redundant.

## UN CHARTER, PREAMBLE

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,  
AND FOR THESE ENDS

to practice tolerance and live together in peace with one another as good neighbours, and

to unite our strength to maintain international peace and security, and  
to ensure by the acceptance of principles and the institution of methods,  
that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples,  
 HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

Soon after the adoption of the Charter, the Cold War divided most members of the United Nations into rival blocs centered on Washington and Moscow. Avoiding nuclear war became the central challenge of the Cold War years, one in which the United Nations sometimes served as a meeting ground for ideological sparring. The Security Council Chamber was the cockpit for public confrontation between Moscow and Washington during the Cuban Missile Crisis of 1961, without doubt the most dangerous moment in international relations since 1945.

The Cold War seriously impeded implementation of many of the Charter's aims. It gave rise to many "regional" conflicts in Central America, Southern and Eastern Africa, South-East Asia, and elsewhere, pitting proxies of the superpowers against each other. It also acted as a brake on achievement of the Charter's ambitious economic and social goals. But, in retrospect, surprisingly, it did not slow (and may have accelerated) the remarkable development of norms through myriad treaties and through practice, initiated by the Universal Declaration of Human Rights in 1948. The Security Council, while marginal to many of the conflicts of the Cold War period, remained intact to assume much greater responsibilities in the post-Cold War era.

The Charter's focus on security, while eminently sensible for those countries that had experienced the two World Wars first hand, came to be challenged in the 1960s and 1970s by the many newly decolonized developing countries for which economic development was the over-riding objective. Since those years, serious tensions have existed within the Organization over its central goals, reflected, for example, in preparatory discussions of the UN Summit of 2005. But the related claims and counter-claims of states continue to draw upon the Charter and many of the texts developed under its authority by UN member states since 1945.

This chapter explores the question of why states still ground so many of their aspirations and arguments in the provisions of the Charter. As in domestic law, the discipline imposed by international law aims to protect all from all—an attractive proposition in theory, though sometimes inconvenient in practice for those with the power to disregard international criticism. Though explanations for compliance with or deviation from international norms are many, it is at least noteworthy that even when the most powerful member states violate the terms of the Charter, in particular since the end of

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the Cold War, they generally articulate justifications that draw upon UN decisions and practices—even if only after the fact.

Such extreme cases will be considered in chapter 2. The present chapter first examines the provisions of the Charter before tackling three recent turning points in its interpretation and implementation: the reinvigoration of the UN Security Council as a means of ensuring international peace and security after the Cold War; attempts to put development back at the heart of the UN agenda in 2000; and efforts to respond to the challenges to the effectiveness and legitimacy of the UN following the US-led invasion of Iraq in 2003.

### 1.1 Select Provisions of the Charter

What were the concerns of delegates at the San Francisco conference and how were the design flaws of the League of Nations remedied? Chapter I of the Charter outlines the new Organization's purposes and principles.

## UN CHARTER, CHAPTER I—PURPOSES AND PRINCIPLES

### Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

### Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. 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 other manner inconsistent with the Purposes of the United Nations.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

“Sovereign equality” is, some argue, the constitutive fiction of the international order. We have already seen how the accordance of special privileges to major powers was an important departure from the League of Nations intended to ensure the participation of major states in its successor body. Article 2 nevertheless puts this at the heart of the Organization. At the San Francisco conference, aspects of sovereign equality addressed by delegates included: (a) the legal equality of states, (b) the enjoyment by each state of the rights inherent in full sovereignty, (c) respect for the personality of the state, as well as its territorial integrity and political independence, and (d) the compliance by the state with its international duties and obligations.<sup>1</sup>

<sup>1</sup>In fact, the UN was founded on the basis of a compromise between the reality of power politics and the legal principle of sovereign equality, a compromise highly relevant to efforts at achieving UN reform ever since. On security matters, the UN founders sought to avoid the equalization of state power through a consensus system. In 1963, the UN Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States, established under GA Res. 1966

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Other principles relate to state behavior in the event of threats to the peace. However, the very last provision of Article 2 is the one cited most often in UN debates. This paragraph was initially interpreted as highly restrictive of the capacity of the United Nations to involve itself in the internal affairs of states, except at the invitation of the governments of those states or under treaty terms freely entered into by them. The UN was not to be an intrusive organization. There was not much reason to revisit this interpretation of the text as long as the provisions of Chapter VII of the Charter remained largely a dead letter, as they were for the most part from 1945 until 1990.

Before the action against Iraq in 1990–1991, the Council had authorized what might be considered enforcement actions only twice: in 1950 the Council “recommended” action in Korea under the unified command of the United States;<sup>2</sup> in 1966 it “called upon” the United Kingdom to use force to prevent the violation of sanctions against Southern Rhodesia.<sup>3</sup> In addition, the Council authorized the use of force by the United Nations and the Secretary-General in the course of the peacekeeping operation in the Congo.<sup>4</sup> The Council also imposed mandatory sanctions on two occasions in this period: the economic blockade of Southern Rhodesia (1966–1979)<sup>5</sup> and the arms embargo on South Africa (1977–1994).<sup>6</sup>

In its first forty-four years, twenty-four Security Council resolutions cited or used the terms of Chapter VII; by 1993 it was adopting that many such resolutions every year. This repeated recourse to the terms of Chapter VII was seen by some as a challenge to traditional conceptions of sovereignty, but more worrying to some member states was the manner in which this reflected a larger erosion of the protections of Article 2(7).

Chapter II of the Charter deals with membership. As in any club, the threshold for membership is set by requirements, in this case it being “open to . . . peace-loving states which accept the obligations contained in the . . . Charter and, in the judgment of the Organization, are able and willing to carry out these obligations” (Article 4). As a means of regulating membership, provision is made for the suspension of membership of countries against which the Security Council has taken action on a case-by-case basis. This was, arguably, the basis upon which South Africa and the Serb splinter state

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(XVII), considered various proposals to expand or explain the meaning of sovereign equality, eventually adopting some not terribly illuminating consensus conclusions to be found in 20 UN GAOR, agenda items 90 and 94, p. 134, UN Doc. A/5746 (1965).

<sup>2</sup>See chapter 8 in this volume.

<sup>3</sup>See chapter 10 in this volume.

<sup>4</sup>See chapter 6 in this volume.

<sup>5</sup>SC Res. 232 (1966); SC Res. 253 (1968); SC Res. 277 (1970).

<sup>6</sup>SC Res. 418 (1977).

emerging from the Former Yugoslavia lost access to their seats in the General Assembly for some years (Article 5).<sup>7</sup>

Chapter III of the Charter establishes the Organization's "principal organs," defined as a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat. Importantly, the Charter does not set a hierarchy as between these organs and, while providing for particular responsibilities and powers of each, does not regulate how they should relate to each other.<sup>8</sup> Further, it does not narrowly delineate the competence of each organ. Thus, the principal organs largely set their own competence. This is particularly true of the Security Council, provided with the most extensive powers of all. While the General Assembly in Article 10 is empowered to "make recommendations" to the membership and to the Security Council, the Security Council can take decisions which, if adopted under the provisions of Chapter VII of the Charter, are binding on all states. The scope of the Council's discretion remaining undefined in the Charter text, this has left open a fairly vast field for improvisation under the general heading of peace and security, of which the Council has been exploring the full extent since 1990, for example addressing the spread of AIDS in Africa as a security threat.

The core of the Charter lies in Chapters V–VII relating to the Security Council's powers and functions, the Charter's directives for the pacific settlement of disputes, and the responses it envisages to breaches of the peace.

The Council's membership has, for some years, been quite controversial. In order to secure the continuing engagement of the great powers in the work of the Organization, five of them—China (initially the Nationalist Kuomintang regime, confined from 1949 to the island of Taiwan, but from 1971 the Communist mainland government with its capital in Beijing), France, the Soviet Union (later succeeded by the Russian Federation), the United Kingdom, and the United States—were granted permanent seats and the right to veto any "substantive" resolution advanced for decision. While this provision has, by and large, kept all five countries engaged in the Organization, other member states have been less satisfied. For one thing, during the Cold War years vetoes proliferated, contributing to the marginalization at that time of the Council. On the other, several of these countries have waned as major powers, while others such as Japan, Germany, India, and Brazil have since emerged or re-emerged as major players. Efforts aimed at addressing imbalances among member states have failed to date, although it was possible in

<sup>7</sup> Article 19 stipulates that member states can also lose their right to vote in the General Assembly when in arrear of dues to the UN by more than two years. See further chapter 5 in this volume.

<sup>8</sup> An exception is the provision in Article 12 concerning the General Assembly's competences with respect to matters being dealt with by the Security Council. This is discussed further in the *Certain Expenses* case in chapter 6.

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the period 1963–1965 to add four non-permanent seats (for a total of ten, and a Council membership of fifteen) to grant greater representation to newly decolonized countries.

Each of Chapter VI and Chapter VII, with their carefully constructed and implicitly incremental approaches, are worth considering in their entirety. Chapter VII provides the Council with by far the most sweeping powers of any multilateral institution to date. They continue to serve as the foundation of virtually all action the Council undertakes, while their terms, more broadly, also affect actions of individual governments and of regional organizations.

## UN CHARTER, CHAPTER VI—PACIFIC SETTLEMENT OF DISPUTES

### Article 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

### Article 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

### Article 35

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.

2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.

3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

### Article 36

1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.
2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.
3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

### Article 37

1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.
2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

### Article 38

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

## **UN CHARTER, CHAPTER VII—ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION**

### Article 39

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

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## Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

## Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

## Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

## Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

## Article 44

When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

## Article 45

In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

## Article 42

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

## Article 47

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional sub-committees.

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Article 48

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Article 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The Charter covers much other ground. For example, Chapter VIII discusses Regional Arrangements (mostly seen nowadays as applying to Regional Organizations such as the Organization of American States, the European Union, and the African Union), which it casts as subsidiary to (but not in competition with) the Security Council in the "pacific settlement of local disputes," reserving for the Council the mandating of any coercive ac-

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tion required.<sup>9</sup> In practice, with the Security Council heavily burdened by a very ambitious agenda combined with limited means since 1990, partnerships between the United Nations and a number of regional organizations, arrangements and military alliances (such as NATO) have proliferated in recent years, providing regional organizations with a much greater role in the Council's strategies than was the case during the Cold War years.

While both the League Covenant and the UN Charter emphasized the maintenance of peace as a primary objective, the Charter recognizes the importance of international cooperation in dealing with economic and social problems, as well as the need to safeguard basic human rights in order to prevent another war. This is not surprising, given the role of economics and social dislocation in the lead up to World War II, and the extent to which denial of human rights had been associated with aggressive regimes. In Chapters IX and X, the Charter discusses the UN's role and action in the economic and social spheres, in Article 55 citing its central aims as being the promotion of "(a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

In fact, extraordinary progress has been achieved on basic living standards, life expectancy, the struggle against disease and the attainment of literacy since 1945, much of it due to the efforts of various agencies that had not yet fully taken shape in 1945. Some of this activity occurs within the UN umbrella, in its Development Programme (UNDP). Other activities are vaguely associated with the Organization. The International Bank for Reconstruction and Development (the World Bank) and the International Monetary Fund, created as part of the UN system, since 1945 have become independent of UN oversight and cooperate with the United Nations only loosely. The General Agreement on Trade and Tariffs (GATT) of 1948, and its successor institution, the World Trade Organization (WTO) were never organically linked to the United Nations. Meaningful economic development activity and its related institutional architecture thus developed outside the United Nations. Its normative role, however, remains significant, for example through the Millennium Development commitments of the year 2000 and the related Millennium Development Goals. These topics are revisited in chapter 11.

On human rights and fundamental freedoms, major progress has also been made, but on these issues the United Nations has been front and center, and continues to serve as the anchor of the international human rights system,

<sup>9</sup> Article 53 provides that "No enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council."

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discussed in chapter 13. Here, too, parallel and complementary developments occur in a dense “confederal” relation to the United Nations. The human rights activities pursued by the Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR) are but one example.

Chapters XI–XIII of the Charter address non-self governing territories and the practice of trusteeship, applied by the League of Nations (as mandates) and subsequently the United Nations to a number of entities of uncertain status, the administration of which was typically entrusted to a colonial power. While trusteeship narrowly defined was irrelevant to most colonial territories, the process of widespread decolonization, initiated with the independence of India and Pakistan in 1947 and accelerating through the 1950s and 1960s, was a defining feature of the international agenda. With the independence of the last Trust Territory, Palau, in 1994, the Trusteeship Council became dormant, but the needs of several territories, particularly war-torn ones, for governance has led to the revival of a notion of “virtual trusteeship” in instances where the United Nations has taken on oversight and administration for several years of such places as East Timor and Kosovo. We will return to this in chapter 9.

The International Court of Justice, whose Statute is annexed to the Charter, is discussed in Chapter XIV. While the Court has played an important role in adjudicating disputes between states, and could play an even more active such role in the future, it is the dramatic development of other specialized courts and tribunals for trade, criminal law, and law of the sea that has largely monopolized the limelight. See further chapter 3.

The other “principal organ” of the United Nations, the Secretariat, is addressed rather summarily in Chapter XV of the Charter. The Secretary-General is cast very much as the chief administrative officer of the institution rather than as its global leader. That said, in Article 99, the Secretary-General is provided with an important opening into the procedures and proceedings of the UN’s most powerful body. He or she “may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.” Successive Secretaries-General have built on this provision to enhance the position’s international leadership functions in the prevention and management of violent conflict.

Several important miscellaneous provisions round out the Charter. Article 103 gives precedence to obligations under the UN Charter over any other commitments by member states. Article 104 provides an early indication of the need for the United Nations to enjoy legal standing to carry out its many functions: “The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes,” to which Article 105 adds provision for legal immunities and privileges for the Organization. Subsequent articles deal with procedures for amending the Charter, its signature and ratification.

The entire text of the Charter is reproduced in the appendix to this volume.

## QUESTIONS .....

1. The UN Charter lists four purposes in Article 1. What institutions and powers does it include to advance these purposes? Can they be ranked in order of importance?
2. Former Secretary-General of the UN Dag Hammarskjöld said in 1954 that the United Nations was created not to bring humanity to heaven but to save it from hell. Against what standards should the success or failure of the United Nations be judged?
3. Is the UN Charter like a national constitution? In what aspects is it like one; in what aspects is it not? How does this affect: (a) international relations; (b) member states of the UN; and (c) other entities?

### 1.2 The New Interventionism: The UN Charter After the Cold War

The first major crisis of the post-Cold War era emerged soon after the fall of the Berlin Wall, with Iraq's 1990 invasion and then annexation of Kuwait. This was a potentially explosive development given the economic and geo-strategic sensitivity of the Gulf area, where so much of the world's oil production is concentrated. US President George H. W. Bush responded through a strategy centered on the Security Council's capacity to authorize progressively more severe coercive measures. On 11 September 1990, six weeks after Iraq's invasion, President Bush spoke to a Joint Session of Congress.

#### GEORGE H. W. BUSH, ADDRESS BEFORE A JOINT SESSION OF CONGRESS, 11 SEPTEMBER 1990

Our objectives in the Persian Gulf are clear, our goals defined and familiar: Iraq must withdraw from Kuwait completely, immediately, and without condition. Kuwait's legitimate government must be restored. The security and stability of the Persian Gulf must be assured. And American citizens abroad must be protected. These goals are not ours alone. They've been endorsed by the United Nations Security Council five times in as many weeks. Most countries share our concern for principle. And many have a stake in the stability of the Persian Gulf. This is not, as Saddam Hussein would have it, the United States against Iraq. It is Iraq against the world.

As you know, I've just returned from a very productive meeting with Soviet President Gorbachev. And I am pleased that we are working together to build a new relationship. In Helsinki, our joint statement affirmed to the world our shared resolve to counter Iraq's threat to peace. Let me quote: "We are united in the belief that Iraq's aggression must not be tolerated. No

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peaceful international order is possible if larger states can devour their smaller neighbors." Clearly, no longer can a dictator count on East-West confrontation to stymie concerted United Nations action against aggression. A new partnership of nations has begun.

We stand today at a unique and extraordinary moment. The crisis in the Persian Gulf, as grave as it is, also offers a rare opportunity to move toward an historic period of cooperation. Out of these troubled times, our fifth objective—a new world order—can emerge: a new era—freer from the threat of terror, stronger in the pursuit of justice, and more secure in the quest for peace. An era in which the nations of the world, East and West, North and South, can prosper and live in harmony. A hundred generations have searched for this elusive path to peace, while a thousand wars raged across the span of human endeavor. Today that new world is struggling to be born, a world quite different from the one we've known. A world where the rule of law supplants the rule of the jungle. A world in which nations recognize the shared responsibility for freedom and justice. A world where the strong respect the rights of the weak. This is the vision that I shared with President Gorbachev in Helsinki. He and other leaders from Europe, the Gulf, and around the world understand that how we manage this crisis today could shape the future for generations to come.

The test we face is great, and so are the stakes. This is the first assault on the new world that we seek, the first test of our mettle. Had we not responded to this first provocation with clarity of purpose, if we do not continue to demonstrate our determination, it would be a signal to actual and potential despots around the world. America and the world must defend common vital interests—and we will. America and the world must support the rule of law—and we will. America and the world must stand up to aggression—and we will. And one thing more: In the pursuit of these goals America will not be intimidated.

Vital issues of principle are at stake. Saddam Hussein is literally trying to wipe a country off the face of the Earth. We do not exaggerate. Nor do we exaggerate when we say Saddam Hussein will fail. Vital economic interests are at risk as well. Iraq itself controls some 10 percent of the world's proven oil reserves. Iraq plus Kuwait controls twice that. An Iraq permitted to swallow Kuwait would have the economic and military power, as well as the arrogance, to intimidate and coerce its neighbors—neighbors who control the lion's share of the world's remaining oil reserves. We cannot permit a resource so vital to be dominated by one so ruthless. And we won't.

We can now point to five United Nations Security Council resolutions that condemn Iraq's aggression. They call for Iraq's immediate and unconditional withdrawal, the restoration of Kuwait's legitimate government, and categorically reject Iraq's cynical and self-serving attempt to annex Kuwait. Finally, the United Nations has demanded the release of all foreign nationals held hostage against their will and in contravention of international law. It is a mockery of human decency to call these people "guests." They are hostages, and the whole world knows it. . . .

Prime Minister Margaret Thatcher, a dependable ally, said it all: “We do not bargain over hostages. We will not stoop to the level of using human beings as bargaining chips ever.” Of course, of course, our hearts go out to the hostages and to their families. But our policy cannot change, and it will not change. America and the world will not be blackmailed by this ruthless policy.

We’re now in sight of a United Nations that performs as envisioned by its founders. We owe much to the outstanding leadership of Secretary-General Javier Perez de Cuellar. The United Nations is backing up its words with action. The Security Council has imposed mandatory economic sanctions on Iraq, designed to force Iraq to relinquish the spoils of its illegal conquest. The Security Council has also taken the decisive step of authorizing the use of all means necessary to ensure compliance with these sanctions. Together with our friends and allies, ships of the United States Navy are today patrolling Mideast waters. They’ve already intercepted more than 700 ships to enforce the sanctions. Three regional leaders I spoke with just yesterday told me that these sanctions are working. Iraq is feeling the heat. We continue to hope that Iraq’s leaders will recalculate just what their aggression has cost them. They are cut off from world trade, unable to sell their oil. And only a tiny fraction of goods gets through. . . .

I cannot predict just how long it will take to convince Iraq to withdraw from Kuwait. Sanctions will take time to have their full intended effect. We will continue to review all options with our allies, but let it be clear: we will not let this aggression stand.<sup>10</sup>

As we now know, sanctions were not enough to persuade Saddam Hussein to abandon Kuwait. After several months of gradually increasing pressure, the Security Council, acting explicitly under Chapter VII of the Charter, adopted Security Council resolution 678 on 29 November 1990, authorizing member states to use “all necessary means” to evict Iraq from Kuwait and thus to restore international peace and security in the area. Military action by a broad US-led coalition of countries acted on this mandate in January 1991. (This action—and the contrast with the US-led invasion of Iraq in 2003—is discussed in chapter 2.)

One year later, on 31 January 1992, largely in response to these momentous developments that made clear a new willingness of the Security Council to unify on key threats, the first ever Security Council Summit convened. The President of the Council was authorized to discuss the conclusions of Council leaders in the following terms. This statement represents a high water mark in the belief among world leaders that the Security Council could and would play the central role multilaterally on security issues in the post-Cold War era:

<sup>10</sup> Full text available from [http://millercenter.virginia.edu/scripps/diglibrary/prez\\_speeches/ghbush/ghb\\_1990\\_0911.html](http://millercenter.virginia.edu/scripps/diglibrary/prez_speeches/ghbush/ghb_1990_0911.html).

**SECURITY COUNCIL SUMMIT STATEMENT CONCERNING  
THE COUNCIL'S RESPONSIBILITY IN THE MAINTENANCE  
OF INTERNATIONAL PEACE AND SECURITY,  
31 JANUARY 1992<sup>11</sup>**

This meeting takes place at a time of momentous change. The ending of the Cold War has raised hopes for a safer, more equitable and more humane world. Rapid progress has been made, in many regions of the world, towards democracy and responsive forms of government, as well as towards achieving the Purposes set out in the Charter. The completion of the dismantling of apartheid in South Africa would constitute a major contribution to these Purposes and positive trends, including to the encouragement of respect for human rights and fundamental freedoms.

Last year, under the authority of the United Nations, the international community succeeded in enabling Kuwait to regain its sovereignty and territorial integrity, which it had lost as a result of Iraqi aggression. The resolutions adopted by the Security Council remain essential to the restoration of peace and stability in the region and must be fully implemented. At the same time the members of the Council are concerned by the humanitarian situation of the innocent civilian population of Iraq.

The members of the Council . . . welcome the role the United Nations has been able to play under the Charter in progress towards settling long-standing regional disputes, and will work for further progress towards their resolution. They applaud the valuable contribution being made by United Nations peacekeeping forces now operating in Asia, Africa, Latin America and Europe.

The members of the Council note that United Nations peacekeeping tasks have increased and broadened considerably in recent years. Election monitoring, human rights verification and the repatriation of refugees have in the settlement of some regional conflicts, at the request or with the agreement of the parties concerned, been integral parts of the Security Council's effort to maintain international peace and security. They welcome these developments.

The members of the Council also recognize that change, however welcome, has brought new risks for stability and security. Some of the most acute problems result from changes to State structures. . . .

The international community therefore faces new challenges in the search for peace. All Member States expect the United Nations to play a central role at this crucial stage. The members of the Council stress the importance of strengthening and improving the United Nations to increase its effectiveness. They are determined to assume fully their responsibilities within the United Nations Organization in the framework of the Charter.

<sup>11</sup>UN Doc. S/23500 (1992).

The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters.

The members of the Council pledge their commitment to international law and to the United Nations Charter. All disputes between States should be peacefully resolved in accordance with the provisions of the Charter.

The members of the Council reaffirm their commitment to the collective security system of the Charter to deal with threats to peace and to reverse acts of aggression.

The members of the Council express their deep concern over acts of international terrorism and emphasize the need for the international community to deal effectively with all such acts.

To strengthen the effectiveness of these commitments, and in order that the Security Council should have the means to discharge its primary responsibility under the Charter for the maintenance of international peace and security, the members of the Council have decided on the following approach.

They invite the Secretary-General to prepare, for circulation to the Members of the United Nations by 1 July 1992, his analysis and recommendations on ways of strengthening and making more efficient within the framework and provisions of the Charter the capacity of the United Nations for preventive diplomacy, for peacemaking and for peacekeeping. . . .

The members of the Council, while fully conscious of the responsibilities of other organs of the United Nations in the fields of disarmament, arms control and non-proliferation, reaffirm the crucial contribution which progress in these areas can make to the maintenance of international peace and security. They express their commitment to take concrete steps to enhance the effectiveness of the United Nations in these areas.

The members of the Council underline the need for all Member States to fulfil their obligations in relation to arms control and disarmament; to prevent the proliferation in all its aspects of all weapons of mass destruction; to avoid excessive and destabilizing accumulations and transfers of arms; and to resolve peacefully in accordance with the Charter any problems concerning these matters threatening or disrupting the maintenance of regional and global stability. . . .

In conclusion, the members of the Security Council affirm their determination to build on the initiative of their meeting in order to secure positive advances in promoting International peace and security. They agree that the United Nations Secretary-General has a crucial role to play. . . .

The members of the Council agree that the world now has the best chance of achieving international peace and security since the foundation of the United Nations. They undertake to work in close cooperation with other United Nations Member States in their own efforts to achieve this, as well as

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to address urgently all the other problems, in particular those of economic and social development, requiring the collective response of the international community. They recognize that peace and prosperity are indivisible and that lasting peace and stability require effective international cooperation for the eradication of poverty and the promotion of a better life for all in larger freedom.<sup>12</sup>

## QUESTIONS

4. How important is international law, such as that reflected in the UN Charter, in the conduct of international relations? President Bush referred to the rule of law supplanting the rule of the jungle in international affairs. What might this mean?
5. The United Nations in the 1990s experienced crises of legitimacy but also crises of expectations. Were statements such as that adopted by the Security Council in January 1992 overly ambitious?

### 1.3 Putting Development Back on the Agenda

By 2000, a sense had developed among member states that the UN's economic development objectives were being neglected. This led to a Millennium Summit focused mostly on development challenges facing the globe, although a number of salient security issues, for example relating to weapons of mass destruction and the trade in small arms, received prominent attention.

#### MILLENNIUM DECLARATION, 8 SEPTEMBER 2000<sup>13</sup>

2. We recognize that, in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level. As leaders we have a duty therefore to all the world's people, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs.

3. We reaffirm our commitment to the purposes and principles of the Charter of the United Nations, which have proved timeless and universal.

<sup>12</sup> UN Doc. S/23500, 31 January 1992.

<sup>13</sup> GA Res. 55/2 (2000).

Indeed, their relevance and capacity to inspire have increased, as nations and peoples have become increasingly interconnected and interdependent.

4. We are determined to establish a just and lasting peace all over the world in accordance with the purposes and principles of the Charter. We rededicate ourselves to support all efforts to uphold the sovereign equality of all States, respect for their territorial integrity and political independence, resolution of disputes by peaceful means and in conformity with the principles of justice and international law, the right to self-determination of peoples which remain under colonial domination and foreign occupation, non-interference in the internal affairs of States, respect for human rights and fundamental freedoms, respect for the equal rights of all without distinction as to race, sex, language or religion and international cooperation in solving international problems of an economic, social, cultural or humanitarian character.

5. We believe that the central challenge we face today is to ensure that globalization becomes a positive force for all the world's people. For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed. We recognize that developing countries and countries with economies in transition face special difficulties in responding to this central challenge. Thus, only through broad and sustained efforts to create a shared future, based upon our common humanity in all its diversity, can globalization be made fully inclusive and equitable. These efforts must include policies and measures, at the global level, which correspond to the needs of developing countries and economies in transition and are formulated and implemented with their effective participation.

6. We consider certain fundamental values to be essential to international relations in the twenty-first century. These include:

- **Freedom.** Men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice. Democratic and participatory governance based on the will of the people best assures these rights.
- **Equality.** No individual and no nation must be denied the opportunity to benefit from development. The equal rights and opportunities of women and men must be assured.
- **Solidarity.** Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most.
- **Tolerance.** Human beings must respect one other, in all their diversity of belief, culture and language. Differences within and between societies should be neither feared nor repressed, but cherished as a precious asset of humanity. A culture of peace and dialogue among all civilizations should be actively promoted.
- **Respect for nature.** Prudence must be shown in the management of all living species and natural resources, in accordance with the precepts of

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sustainable development. Only in this way can the immeasurable riches provided to us by nature be preserved and passed on to our descendants. The current unsustainable patterns of production and consumption must be changed in the interest of our future welfare and that of our descendants.

- **Shared responsibility.** Responsibility for managing worldwide economic and social development, as well as threats to international peace and security, must be shared among the nations of the world and should be exercised multilaterally. As the most universal and most representative organization in the world, the United Nations must play the central role.

7. In order to translate these shared values into actions, we have identified key objectives to which we assign special significance. . . .

11. We will spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want.

12. We resolve therefore to create an environment—at the national and global levels alike—which is conducive to development and to the elimination of poverty.

13. Success in meeting these objectives depends, inter alia, on good governance within each country. It also depends on good governance at the international level and on transparency in the financial, monetary and trading systems. We are committed to an open, equitable, rule-based, predictable and non-discriminatory multilateral trading and financial system.

14. We are concerned about the obstacles developing countries face in mobilizing the resources needed to finance their sustained development. . . .

15. We call on the industrialized countries:

- To adopt . . . a policy of duty- and quota-free access for essentially all exports from the least developed countries;
- To implement the enhanced programme of debt relief for the heavily indebted poor countries without further delay and to agree to cancel all official bilateral debts of those countries in return for their making demonstrable commitments to poverty reduction; and
- To grant more generous development assistance, especially to countries that are genuinely making an effort to apply their resources to poverty reduction.

16. We are also determined to deal comprehensively and effectively with the debt problems of low- and middle-income developing countries, through various national and international measures designed to make their debt sustainable in the long term. . . .

19. We resolve further:

- To halve, by the year 2015, the proportion of the world's people whose income is less than one dollar a day and the proportion of people who

suffer from hunger and, by the same date, to halve the proportion of people who are unable to reach or to afford safe drinking water.

- To ensure that, by the same date, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling and that girls and boys will have equal access to all levels of education.
- By the same date, to have reduced maternal mortality by three quarters, and under-five child mortality by two thirds, of their current rates.
- To have, by then, halted, and begun to reverse, the spread of HIV/AIDS, the scourge of malaria and other major diseases that afflict humanity.
- To provide special assistance to children orphaned by HIV/AIDS.
- By 2020, to have achieved a significant improvement in the lives of at least 100 million slum dwellers as proposed in the "Cities Without Slums" initiative.

20. We also resolve:

- To promote gender equality and the empowerment of women as effective ways to combat poverty, hunger and disease and to stimulate development that is truly sustainable.
- To develop and implement strategies that give young people everywhere a real chance to find decent and productive work.
- To encourage the pharmaceutical industry to make essential drugs more widely available and affordable by all who need them in developing countries.
- To develop strong partnerships with the private sector and with civil society organizations in pursuit of development and poverty eradication.
- To ensure that the benefits of new technologies, especially information and communication technologies, in conformity with recommendations contained in the ECOSOC 2000 Ministerial Declaration, are available to all. . . .
- To make every effort to ensure the entry into force of the Kyoto Protocol, preferably by the tenth anniversary of the United Nations Conference on Environment and Development in 2002, and to embark on the required reduction in emissions of greenhouse gases.
- To intensify our collective efforts for the management, conservation and sustainable development of all types of forests.
- To press for the full implementation of the Convention on Biological Diversity and the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa.
- To stop the unsustainable exploitation of water resources by developing water management strategies at the regional, national and local levels, which promote both equitable access and adequate supplies.
- To intensify cooperation to reduce the number and effects of natural and man-made disasters.

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- To ensure free access to information on the human genome sequence. . . .
- To respect fully and uphold the Universal Declaration of Human Rights.
- To strive for the full protection and promotion in all our countries of civil, political, economic, social and cultural rights for all.
- To strengthen the capacity of all our countries to implement the principles and practices of democracy and respect for human rights, including minority rights.
- To combat all forms of violence against women and to implement the Convention on the Elimination of All Forms of Discrimination against Women.
- To take measures to ensure respect for and protection of the human rights of migrants, migrant workers and their families, to eliminate the increasing acts of racism and xenophobia in many societies and to promote greater harmony and tolerance in all societies.
- To work collectively for more inclusive political processes, allowing genuine participation by all citizens in all our countries.
- To ensure the freedom of the media to perform their essential role and the right of the public to have access to information. . . .
- To expand and strengthen the protection of civilians in complex emergencies, in conformity with international humanitarian law.
- To strengthen international cooperation, including burden sharing in, and the coordination of humanitarian assistance to, countries hosting refugees and to help all refugees and displaced persons to return voluntarily to their homes, in safety and dignity and to be smoothly reintegrated into their societies.
- To encourage the ratification and full implementation of the Convention on the Rights of the Child and its optional protocols on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography. . . .
- To give full support to the political and institutional structures of emerging democracies in Africa.
- To encourage and sustain regional and subregional mechanisms for preventing conflict and promoting political stability, and to ensure a reliable flow of resources for peacekeeping operations on the continent.
- To take special measures to address the challenges of poverty eradication and sustainable development in Africa, including debt cancellation, improved market access, enhanced Official Development Assistance and increased flows of Foreign Direct Investment, as well as transfers of technology.
- To help Africa build up its capacity to tackle the spread of the HIV/AIDS pandemic and other infectious diseases.

Further commitments in other fields were also identified. In sum, it was a vast project but one of critical importance to the majority of humanity. As member states settled down to work on implementing this program of action, two developments shook the United Nations: the first, the terrorist attacks against New York and Washington on 11 September 2001, the second, a damaging deadlock in the UN Security Council over Iraq in March 2003. These events, which Secretary-General Kofi Annan saw as potentially undermining the role of the UN in managing international security, led to a flurry of activity culminating in his report "In Larger Freedom." This was intended to chart a course for the UN Summit of 2005 (initially conceived in 2000 to follow on the Millennium Summit's development objectives).

**IN LARGER FREEDOM: TOWARDS DEVELOPMENT, SECURITY,  
AND HUMAN RIGHTS FOR ALL (REPORT OF THE  
SECRETARY-GENERAL), 21 MARCH 2005<sup>14</sup>**

6. In the Millennium Declaration, world leaders were confident that humanity could, in the years ahead, make measurable progress towards peace, security, disarmament, human rights, democracy and good governance. They called for a global partnership for development to achieve agreed goals by 2015. They vowed to protect the vulnerable and meet the special needs of Africa. And they agreed that the United Nations needed to become more, not less, actively engaged in shaping our common future. . . .

8. Much has happened since the adoption of the Millennium Declaration to compel such an approach. Small networks of non-State actors—terrorists—have, since the horrendous attacks of 11 September 2001, made even the most powerful States feel vulnerable. At the same time, many States have begun to feel that the sheer imbalance of power in the world is a source of instability. Divisions between major powers on key issues have revealed a lack of consensus about goals and methods. Meanwhile, over 40 countries have been scarred by violent conflict. Today, the number of internally displaced people stands at roughly 25 million, nearly one third of whom are beyond the reach of United Nations assistance, in addition to the global refugee population of 11 to 12 million, and some of them have been the victims of war crimes and crimes against humanity.

9. Many countries have been torn apart and hollowed out by violence of a different sort. HIV/AIDS, the plague of the modern world, has killed over 20 million men, women and children and the number of people infected has surged to over 40 million. The promise of the Millennium Development Goals

<sup>14</sup> UN Doc. A/59/2005 (2005).

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still remains distant for many. More than one billion people still live below the extreme poverty line of one dollar per day, and 20,000 die from poverty each day. Overall global wealth has grown but is less and less evenly distributed within countries, within regions and in the world as a whole. While there has been real progress towards some of the Goals in some countries, too few Governments—from both the developed and developing world—have taken sufficient action to reach the targets by 2015. And while important work has been done on issues as diverse as migration and climate change, the scale of such long-term challenges is far greater than our collective action to date to meet them.

10. Events in recent years have also led to declining public confidence in the United Nations itself, often for opposite reasons. For instance, both sides of the debate on the Iraq war feel let down by the Organization—for failing, as one side saw it, to enforce its own resolutions, or as the other side saw it, for not being able to prevent a premature or unnecessary war. Yet most people who criticize the United Nations do so precisely because they think the Organization is vitally important to our world. Declining confidence in the institution is matched by a growing belief in the importance of effective multilateralism.

11. I do not suggest that there has been no good news in the last five years. On the contrary, there is plenty we can point to which demonstrates that collective action can produce real results, from the impressive unity of the world after 11 September 2001 to the resolution of a number of civil conflicts, and from the appreciable increase of resources for development to the steady progress achieved in building peace and democracy in some war-torn lands. We should never despair. Our problems are not beyond our power to meet them. But we cannot be content with incomplete successes and we cannot make do with incremental responses to the shortcomings that have been revealed. Instead, we must come together to bring about far-reaching change. . . .

16. Not only are development, security and human rights all imperative; they also reinforce each other. This relationship has only been strengthened in our era of rapid technological advances, increasing economic interdependence, globalization and dramatic geopolitical change. While poverty and denial of human rights may not be said to “cause” civil war, terrorism or organized crime, they all greatly increase the risk of instability and violence. Similarly, war and atrocities are far from the only reasons that countries are trapped in poverty, but they undoubtedly set back development. Again, catastrophic terrorism on one side of the globe, for example an attack against a major financial centre in a rich country, could affect the development prospects of millions on the other by causing a major economic downturn and plunging millions into poverty. And countries which are well governed and respect the human rights of their citizens are better placed to avoid the horrors of conflict and to overcome obstacles to development. . . .

19. . . . Sovereign States are the basic and indispensable building blocks of the international system. It is their job to guarantee the rights of their citizens, to protect them from crime, violence and aggression, and to provide the framework of freedom under law in which individuals can prosper and society develop. If States are fragile, the peoples of the world will not enjoy the security, development and justice that are their right. Therefore, one of the great challenges of the new millennium is to ensure that all States are strong enough to meet the many challenges they face.

20. States, however, cannot do the job alone. We need an active civil society and a dynamic private sector. Both occupy an increasingly large and important share of the space formerly reserved for States alone, and it is plain that the goals outlined here will not be achieved without their full engagement.

21. . . . As globalization shrinks distances around the globe and these issues become increasingly interconnected, the comparative advantages of the United Nations become ever more evident. So too, however, do some of its real weaknesses. From overhauling basic management practices and building a more transparent, efficient and effective United Nations system to re-vamping our major intergovernmental institutions so that they reflect today's world and advance the priorities set forth in the present report, we must reshape the Organization in ways not previously imagined and with a boldness and speed not previously shown. . . .

24. In today's world, no State, however powerful, can protect itself on its own. Likewise, no country, weak or strong, can realize prosperity in a vacuum. We can and must act together. We owe it to each other to do so, and we owe each other an account of how we do so. If we live up to those mutual commitments, we can make the new millennium worthy of its name.

Two other key issues had been identified by the Secretary-General's High-Level Panel on Threats, Challenges and Change. Among other things, its report contemplated the nature of sovereignty in a changing world and endorsed the notion of "sovereignty as responsibility," adopting the concept of a "responsibility to protect." It also addressed the related issue of the need for the Security Council to consider criteria governing its approach to the use of force.<sup>15</sup>

<sup>15</sup> The Report of the High-Level Panel is also discussed in chapters 4, 9, 13, and 17.

**REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES,  
AND CHANGE: A MORE SECURE WORLD: OUR SHARED  
RESPONSIBILITY, 1 DECEMBER 2004<sup>16</sup>**

29. In signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept its responsibilities. Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community. But history teaches us all too clearly that it cannot be assumed that every State will always be able, or willing, to meet its responsibilities to protect its own people and avoid harming its neighbours. And in those circumstances, the principles of collective security mean that some portion of those responsibilities should be taken up by the international community, acting in accordance with the Charter of the United Nations and the Universal Declaration of Human Rights, to help build the necessary capacity or supply the necessary protection, as the case may be. . . .

183. The framers of the Charter of the United Nations recognized that force may be necessary for the “prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.” Military force, legally and properly applied, is a vital component of any workable system of collective security, whether defined in the traditional narrow sense or more broadly as we would prefer. But few contemporary policy issues cause more difficulty, or involve higher stakes, than the principles concerning its use and application to individual cases. . . .

185. The Charter of the United Nations, in Article 2.4, expressly prohibits Member States from using or threatening force against each other, allowing only two exceptions: self-defence under Article 51, and military measures authorized by the Security Council under Chapter VII (and by extension for regional organizations under Chapter VIII) in response to “any threat to the peace, breach of the peace or act of aggression.”

186. For the first 44 years of the United Nations, Member States often violated these rules and used military force literally hundreds of times, with a paralysed Security Council passing very few Chapter VII resolutions and Article 51 only rarely providing credible cover. Since the end of the cold war, however, the yearning for an international system governed by the rule of law has grown. There is little evident international acceptance of the idea of security being best preserved by a balance of power, or by any single—even benignly motivated—superpower.

<sup>16</sup>UN Doc. A/59/565 (2004).

187. But in seeking to apply the express language of the Charter, three particularly difficult questions arise in practice: first, when a State claims the right to strike preventively, in self-defence, in response to a threat which is not imminent; secondly, when a State appears to be posing an external threat, actual or potential, to other States or people outside its borders, but there is disagreement in the Security Council as to what to do about it; and thirdly, where the threat is primarily internal, to a State's own people.

188. The language of [Article 51 of the Charter] is restrictive: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures to maintain international peace and security." However, a threatened State, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate. The problem arises where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons-making capability.

189. Can a State, without going to the Security Council, claim in these circumstances the right to act, in anticipatory self-defence, not just preemptively (against an imminent or proximate threat) but preventively (against a non-imminent or non-proximate one)? Those who say "yes" argue that the potential harm from some threats (e.g., terrorists armed with a nuclear weapon) is so great that one simply cannot risk waiting until they become imminent, and that less harm may be done (e.g., avoiding a nuclear exchange or radioactive fallout from a reactor destruction) by acting earlier.

190. The short answer is that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment—and to visit again the military option.

191. For those impatient with such a response, the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.

192. We do not favour the rewriting or reinterpretation of Article 51.

193. In the case of a State posing a threat to other States, people outside its borders or to international order more generally, the language of Chapter VII is inherently broad enough, and has been interpreted broadly enough, to allow the Security Council to approve any coercive action at all, including military action, against a State when it deems this "necessary to maintain or restore international peace and security." That is the case whether the threat is occurring now, in the imminent future or more distant future; whether it involves the State's own actions or those of non-State actors it harbours or

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supports; or whether it takes the form of an act or omission, an actual or potential act of violence or simply a challenge to the Council's authority.

194. We emphasize that the concerns we expressed about the legality of the preventive use of military force in the case of self-defence under Article 51 are not applicable in the case of collective action authorized under Chapter VII. . . .

195. Questions of legality apart, there will be issues of prudence, or legitimacy, about whether such preventive action should be taken: crucial among them is whether there is credible evidence of the reality of the threat in question (taking into account both capability and specific intent) and whether the military response is the only reasonable one in the circumstances. We address these issues further below.

196. It may be that some States will always feel that they have the obligation to their own citizens, and the capacity, to do whatever they feel they need to do, unburdened by the constraints of collective Security Council process. But however understandable that approach may have been in the cold war years, when the United Nations was manifestly not operating as an effective collective security system, the world has now changed and expectations about legal compliance are very much higher.

197. One of the reasons why States may want to bypass the Security Council is a lack of confidence in the quality and objectivity of its decision-making. The Council's decisions have often been less than consistent, less than persuasive and less than fully responsive to very real State and human security needs. But the solution is not to reduce the Council to impotence and irrelevance: it is to work from within to reform it, including in the ways we propose in the present report. . . .

199. The Charter of the United Nations is not as clear as it could be when it comes to saving lives within countries in situations of mass atrocity. It "re-affirm(s) faith in fundamental human rights" but does not do much to protect them, and Article 2.7 prohibits intervention "in matters which are essentially within the jurisdiction of any State." There has been, as a result, a long-standing argument in the international community between those who insist on a "right to intervene" in man-made catastrophes and those who argue that the Security Council, for all its powers under Chapter VII to "maintain or restore international security," is prohibited from authorizing any coercive action against sovereign States for whatever happens within their borders.

200. Under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), States have agreed that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish. Since then it has been understood that genocide anywhere is a threat to the security of all and should never be tolerated.

The principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing, which can

properly be considered a threat to international security and as such provoke action by the Security Council.

201. The successive humanitarian disasters in Somalia, Bosnia and Herzegovina, Rwanda, Kosovo and now Darfur, Sudan, have concentrated attention not on the immunities of sovereign Governments but their responsibilities, both to their own people and to the wider international community. There is a growing recognition that the issue is not the “right to intervene” of any State, but the “responsibility to protect” of every State when it comes to people suffering from avoidable catastrophe—mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease. And there is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community—with it spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies. The primary focus should be on assisting the cessation of violence through mediation and other tools and the protection of people through such measures as the dispatch of humanitarian, human rights and police missions. Force, if it needs to be used, should be deployed as a last resort.

202. The Security Council so far has been neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all. But step by step, the Council and the wider international community have come to accept that, under Chapter VII and in pursuit of the emerging norm of a collective international responsibility to protect, it can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a “threat to international peace and security,” not especially difficult when breaches of international law are involved.

203. We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.

204. The effectiveness of the global collective security system, as with any other legal order, depends ultimately not only on the legality of decisions but also on the common perception of their legitimacy—their being made on solid evidentiary grounds, and for the right reasons, morally as well as legally.

205. If the Security Council is to win the respect it must have as the primary body in the collective security system, it is critical that its most important and influential decisions, those with large-scale life-and-death impact, be better made, better substantiated and better communicated. In particular, in deciding whether or not to authorize the use of force, the Council should adopt and systematically address a set of agreed guidelines, going directly not to

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whether force can legally be used but whether, as a matter of good conscience and good sense, it should be.

206. The guidelines we propose will not produce agreed conclusions with push-button predictability. The point of adopting them is not to guarantee that the objectively best outcome will always prevail. It is rather to maximize the possibility of achieving Security Council consensus around when it is appropriate or not to use coercive action, including armed force; to maximize international support for whatever the Security Council decides; and to minimize the possibility of individual Member States bypassing the Security Council.

207. In considering whether to authorize or endorse the use of military force, the Security Council should always address—whatever other considerations it may take into account—at least the following five basic criteria of legitimacy:

(a) Seriousness of threat. Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?

(b) Proper purpose. Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?

(c) Last resort. Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?

(d) Proportional means. Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?

(e) Balance of consequences. Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?<sup>17</sup>

## QUESTIONS .....

6. Are targets such as those adopted in the Millennium Declaration intended to be binding obligations? If so, how might they be enforced? If not, do they serve any purpose?
7. In his reform document "In Larger Freedom," Secretary-General Kofi Annan wrote that the United Nations had three essential purposes: development, security, and human rights. Are these priorities equally reflected in the UN Charter? If they are not, how and why have they emerged over time?

<sup>17</sup>UN Doc. A/59/565 (2 December 2004).

8. What does the “responsibility to protect” entail? Is it a legal obligation or a legal right? Whose obligation or right is it? What means are legally and politically available to pursue and discharge the “responsibility to protect”? Is there a sequence for the implementation of these means?

### Further Reading

- Goodrich, Leland M. “From League of Nations to United Nations.” *International Organization*, vol. 1 (1947), p. 3.
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- Meisler, Stanley. *United Nations: The First Fifty Years*. New York: Atlantic Monthly Press, 1995.
- Simma, Bruno, ed. *The Charter of the United Nations: A Commentary*, 2nd edn. Oxford: Oxford University Press, 2002.
- Schlesinger, Stephen. *Act of Creation: The Founding of the United Nations*. Boulder, CO: Westview, 2003.