THE UN AS A DISPUTE SETTLEMENT SYSTEM: THE ROLE OF THE SECURITY COUNCIL

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ABSTRACT

The concept of 'international security' implies a common interest in security transcending the particular interests of sovereign states. The recognition of that common interest carries with the aspiration to create a communal framework to replace the need for unilateral national security measures. From the very outset the establishment of a new framework for international security was seen as the United Nation's primary task. Chapter VI of the United Nations Charter, on the peaceful settlement of disputes, stands at the heart of the Organization's system of collective security. While the framers of the Charter understood clearly the need for an enforcement mechanism, and provided the use of force against threats to international peace and security, their hopes for a better world lay in the peaceful resolution of armed conflicts. When the Charter is viewed as a coherent legal text, Chapter VI appears as one of two sections at its very centre. I sets the overarching principles of the UN, the rules regarding membership, and the structure of the two major political organs. Chapter VI is the first chapter to provide detailed mechanisms for the implementation of the goals of the Organization. Immediately following it appear the other group of articles offering such mechanisms, Chapter VII and VIII, followed by issues deemed by its drafters less fundamental to maintenance of the peace, such as economic and social matters, non-self-governing territories and trusteeship, the International Court of Justice, and the Secretariat. This structure parallels the language of Article 1(1), which sets out the UN's first purpose as maintaining the peace and describes the two means to that end: eliminating threats to the peace and bringing about the 'adjustment or settlement' of disputes that could lead to such threats.

Keywords: United Nations, Dispute, Security Council, International Security, Sovereign States.

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Introduction

The concept of 'international security' implies a common interest framework of security transcending the particular interests of sovereign states. The recognition of that common interest carries the aspiration to create a communal framework to replace the need for unilateral national security measures. That aspiration had led the victorious powers, under the determined leadership of President Wilson, to create in 1919 a League of Nations whose collective action would provide security for each of members. Due to institutional setbacks, such as the lack of enforcement mechanisms, the League failed. This setback was recognized by the political elites of Great Britain and the USA and in World War II instead of disregarding the concept, they tried to revive it (Howard,1996:63).

From the very outset of a new framework for international security was seen as the UN primary task. President Roosevelt in particular welcomed the creation of the UN as the beginning of a new international order: 'It spells-and it ought to spell-the end of the system of unilateral action, exclusive alliances, and spheres of influence, and balances of power, and all the other expedients which have been tried for centuries and have always failed' (Urquart, 1986:3888).

As early as November 1943 the representatives of Britain, the USA, the Soviet Union, and China promulgated a Declaration on General Security in which they recognized 'the necessity of establishing at the earliest practicable date a general international organization . . . for the maintenance of international peace and security' (US2298,1945:6). When the Charter came to be drafted[1], the Preamble committed the signatories to unite their 'strength to maintain international peace and security, and to ensure . . . that armed force shall not used, save in the common interest'. And Article 1 of the Charter defines the primary purpose of the UN as being:

The maintain international peace and security, and to that end: to take effective 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

[1] By 1943 all the principal Allied nations were committed to outright victory and, thereafter, to an attempt to create a world in which "men in all lands may live out their lives in freedom from fear and want." But the basis for a world organization had yet to be defined, and such a definition came at the meeting of the Foreign Ministers of Great Britain, the United States and the Soviet Union in October 1943. The Dumbarton Oaks Conference constituted the first important step taken to carry out paragraph 4 of the Moscow Declaration of 1943, which recognized the need for a postwar international organization to succeed the League of Nations. See at: http://www.un.org/en/sections/history-united-nations-charter/index.html.

international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

Only later in Article 1 does the Charter speak of 'international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights'.[2]

The provisions of UN Charter reflects a great deal of lessons taken from the mistakes of the League experience. Accordingly, for a better understanding of the background of the UN system, provision of a brief summary of the League procedures regarding solution of disputes is necessary.

Article 12 of the Covenant declared that any dispute likely to lead to a conflict between members was to be dealt with in one of three ways: by arbitration, by judicial settlement or by inquiry by the Council of the League. Article 15 noted that the Council was to try to effect a settlement of the dispute in question, but if that failed, it was to publish a report containing the facts of the case and 'the recommendations which are deemed just and proper in regard thereto'. This report was not, however, binding upon the parties, but if it was a unanimous one the League members were not to go to war 'with any party to the dispute which complies with the recommendations of the report'. If the report was merely a majority one, League members reserved to themselves 'the right to take such action as they shall consider necessary for the maintenance of right and justice'. In other words, in the latter case the Covenant did not absolutely prohibit the resort to war by members. Where a member resorted to war in disregard of the Covenant, then the various sanctions prescribed in article 16 might apply, although whether the circumstances in which sanctions might be enforced had actually arisen was a point to be decided by the individual members and not by the League itself. [3]

[2] The term 'collective security' was not used: it smelled of the failures of the 1930s. But the same intention was expressed in the phrase 'to unite our strength to maintain international peace and security'.

[3] Sanctions were in fact used against Italy in 1935-6, but in a half-hearted manner due to political considerations by the leading states at the time. See e.g. Raman, M., Dispute Settlement trough the UN (Oxford, 1977); Scott, G., The Rise and Fall of the League of Nations (London, 1973), Chapters 1 and 15.

1. The UN System

The United Nations has four purposes: to maintain international peace and security; to develop friendly relations among nations; to cooperate in solving international problems and in promoting respect for human rights; and to be a centre for harmonizing the actions of nations.[4]However, due to political conditions in international order, the system failed to operate as outlined in the Charter and adjustments had to be made as opportunities presented themselves. The Security Council was intended to function as the executive of the UN, with the General Assembly as the parliamentary forum. Both organs could contribute to the peaceful settlement of disputes through relatively traditional mechanisms of discussion, good offices and mediation. Only the Security Council could adopt binding decisions and that through the means of Chapter VII, while acting to restore international peace and security. But the pattern of development has proved rather less conductive to clear categorization. An influential attempt to detail the methods and mechanisms available to the UN in seeking to resolve disputes was made by UN Secretary-General in the immediate aftermath of the demise of the Soviet Union and the unmistakable ending of the Cold War (Shaw,1997: 399-340).

In *An Agenda for Peace*,[5] the Secretary-General, while emphasizing that respect for fundamental sovereignty and integrity of states constituted the foundation stone of the organization (General Assembly, 1992:9), noted the rapid changes affecting both states individually and the international community as a whole and emphasized the role of the UN in securing peace. The Report sought to categorize the types of actions that the organization was undertaking or could undertake. *Preventive Diplomacy* was action to prevent disputes from arising between states, to prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they occur.[6] *Peacemaking* involves action to bring the hostile parties to agreement, utilizing the peaceful means elaborated in Chapter VI of the Charter (General Assembly, 1992:28). *Peace-building* is action to identify and support structures that will assist peace (General Assembly, 1992:32). *Peace Enforcement* is peace-keeping not involving the

[4] Cooperating in this effort are more than 30 affiliated organizations, known together as the UN system.

[5] This was welcomed by the General Assembly in resolution 47/120. See also the Report of Secretary-General on the Implementation of the Recommendation in the 1992 Report, A/47/965.

[6] This included efforts such as fact-finding, good offices and goodwill missions. Ibid., p. 13.

consent of the parties, which would rest upon the enforcement provisions of Chapter VII of the Charter.[7]

Furthermore, in the dispute resolution literature, three general approaches to the controversy have been identified: 1) a power-based approach; 2) a rights-based approach and 3) an interest-based approach (Ury et al, 1988). In the first approach, disputing parties attempt to determine who is most powerful through a power contest. In international relations, war is the most obvious and extreme version of this approach, but less intense forms are also common. In rights-based approach, the parties try to determine who is right according to some standard. International Law is the standard most commonly used. Arguments and evidence are presented to prove that the other was in breach of some agreed-upon rule, such as treaty, convention or accepted custom. In interest-based approach, parties attempt to reconcile their underlying interests by discovering solutions which will bridge their different needs, aspirations, fears or concerns in a manner that is satisfactory to both.

The three approaches, however, are often related. As Ury and his colleagues state: 'The reconciliation of interests takes place within the context of the parties' rights and power . . . Thus, in the process of resolving a dispute, the focus may shift from interest to rights to power and back again' (Ury et al, 1988:9)

Of course, all three approaches to dispute settlement are used not only by the parties themselves but by third parties in their attempt to help disputants resolve their conflict. Indeed, the League of Nations and the UN were both created to curb the excesses of the power-based approach, as manifested in the devastating catastrophes of I. and II. World War.

Both organizations were based primarily on a combined rights- and power-based approach. The idea was that the states should comply with certain international principles and laws. Principles, such as the Non-use of Force against States', Territorial Integrity and the Non-intervention in the Internal Affairs of States are set out in Article 38 of the Statute of the International Court of Justice. The intention was that if disputes between states occurred, the parties were supposed to resolve the problem by peaceful means through one of the procedures set out in Article 33. A judicial forum (the International Court of Justice) and a Political forum (the Security Council) were also available to assist them. If states could not settled their problems on their own or if they did not then abide by judgments

[7] See Report of the Secretary-General on the Work of the Organization, New York, 1993, p. 96.

and recommendations of the UN's organs and if their noncompliance caused a threat to the peace, a breach of the peace or an act of aggression, the UN was then authorized to use its own power-based methods on behalf of the international community to maintain or restore the peace and enforce compliance trough 'collective security'.

An interest-based approach, however, was also provided as part of the smorgasbord of possibilities set out in Article 33. Three of these methods: negotiation, good offices and mediation were basically interest-based. Although good offices and mediation were carried out from time to time by other actors in the system, the most common practitioner of this approach has been the Secretary-General or his representatives (Peck, 1996:10-13).

The Framers of the UN Charter incorporated all three approaches into the UN's structure. It can be argued that different organs of the UN focus roughly on each of the different approaches to dispute settlement. Good offices and mediation by the Secretary-General and his representatives appear to offer the most scope for interest-based dispute settlement. The International Court of Justice has the most important role to play in rights-based dispute settlement and the Security Council has a wide range of power-based procedures at its disposal.

Finally, since the end of the Cold war, the UN has utilized a wider range of its dispute settlement repertoire.[8] However, with lifting the Cold War's prohibition on action, another problem become increasingly apparent: UN's mandate was designed for a different strategic environment than the one which currently exists. The Founders of the Charter designed the organization to manage international conflicts.[9]

[8] Even as the Cold War was easting, the organization was able to play a larger role in conflict resolution, once the United States and Soviet Union had agreed to cease their involvement in regional conflicts. Political settlements in Namibia, El Salvador, Cambodia, and later in Mozambique, were followed by comprehensive peacekeeping missions whose aim was to implement the peace settlement and help these countries begin to rebuilt their war-torn societies through assistance with 'post-conflict peace-building'. Ibid., p. 16.

[9] Although, international disputes and conflicts still take place, it has now become clear that most of the problems facing the world today are occurring within states. Indeed, the prevalence of this type of conflicts is highlighted by Wallensteen and Axell, whose data show that for 1993 all 47 active conflicts were internal. See Wallensteen, P., and Axell, K., Conflict Resolution and the End of the Col War, 1989-93, Journal of Peace Research, 31 (1994), pp, 333-350. Moreover, during the period of 1989-94, only four of 94 armed conflicts were classical inter-state conflicts. See Wallensteen, P., and Sollenberg, M., After the Cold War: Emerging Patterns of Armed Conflicts 1989-94, Journal of Peace Research, 32 (1995), pp. 345-360.

The prohibition on intervention in the internal affairs of a Member State, as set out in Article 2(7) of the Charter, has generated much disagreement over whether and when the UN should become involved. Lacking consensus, the organization has tended to wait until a situation deteriorates to such an extent that it is a grave threat to international peace and security through spill-over effects- or when a major humanitarian crisis or massive abuse of human rights exists.[10] The consequence has been that preventive efforts are still bypassed by the organization, as the international community waits for given situation to become so intolerable that it must intervene in spite of Article 2(7).[11]

In spite of Article 2(7), much of the UN's effort in recent years has been concentrated on what could be considered to be internal problems. Most large peacekeeping missions have been related to intra-state problems.[12] Most of its peacekeeping efforts have also dealt with such problems. Since these are largely undertaken under Chapter VI, they are carried out with the consent of the parties, that is, with the consent of the government of state concerned. In addition, Article 2(7) has been used as smokescreen to cover fears that UN intervention might embarrass the government involved and give recognition and encouragement to opposition groups. Some may also fear that, once seized of the matter, the Council might take some more coercive action with regard to a particular problem. In this context, as Pack says it is interesting to note that Article 2(7) does not apply to action under Chapter VII.[13] Article 2(7) reads: "Nothing contained in the present Charter shall authorize the UN 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 present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII".

[10] In some notable crises (e.g. Rwanda), it has not intervened even then.

[11] The Foreign Minister, Gareth Evans categorizes the spectrum of UN activities in the peace and security area as: 1) building peace (within states and by international organizations); 2) maintaining peace (preventive diplomacy and preventive deployment); 3) restoring peace (peacemaking and peacekeeping) and 4) enforcing peace (sanctions and peace enforcement). See Evans, G., Cooperating for Peace: The Global Agenda for the 1990s and Beyond (Allen and Unwin, 1993).

[12] Those in Angola, Cambodia, El Salvador, Haiti, Mozambique, Namibia, Rwanda, Somalia, and the former Yugoslavia. See, The United Nations as a Dispute Settlement System: Improving Mechanisms for the Prevention and Resolution of Conflict. By Connie Peck. The Hague: Kluwer Law International, 1996. xii + 301 pp, at: https://academic.oup.com/bybil/article-abstract/70/1/267/377005 ? redirected From=fulltext.

[13] Ibid. Supra, 9, p.21.

As stated above, Chapter VII involvement is, in any case, permissible. Most truly serious intra-state problems often do create a threat to international peace and security through refugee flows and other cross-border effect. This was the argument that was accepted in the case of Somalia. Thus, it can be argued that states have more to fear by not seeking assistance in accommodating their disaffected communal groups and risking escalation of such dispute into crises which might invite the 'interference' of the international community.

However, the principal purpose of the UN is clearly stated in paragraph 3 of Article 1 of the Chapter: '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 fundamental freedoms for all without distinction as to race, sex, language, or religion'.

The main elements in human security are defined in that paragraph. While the drafters of the Charter saw these elements as potentially causative factors in inter-state war, they are today patently causative factors in intra-state conflict. If the UN has as its principal mandate the preservation of peace, it cannot ignore that the principal form in which peace is broken today is through intra-state conflict and violence. Member States cannot, therefore, ignore these causative factors and meet their responsibilities under the Charter. Similarly, it is not a question of whether the UN should be involved in maintenance of human security; the question is whether it has the capacity to so effectively and how much should be left to others – to regional arrangements, to national governments and non-governmental organizations. Measures can and should be taken – if not collectively, at least in cooperation – to alleviate threats to human security (Sutterlin,1995:36).

2. The UN Power-Based Approach: Security Council

When the UN was formed, the Security Council was established primarily responsible for the maintenance of international peace and security and given virtually unlimited powers to ensure 'collective security'. By Article 24, the members of the UN conferred on the Security Council primary responsibility for the maintenance of international peace and security, and by Article 25 agreed to accept and carry out the decisions of the Security Council. The International Court of Justice in the *Namibia* case[14] drew attention to the fact that the

[14] ICJ Reports, 1971, pp. 16, 52-3.

provision in Article 25 was not limited to enforcement actions under Chapter VII of the Charter but applied to 'decisions of the Security Council' adopted in accordance with the Charter'. Accordingly a declaration of the Council taken under Article 24 in the exercise of its primary responsibility. . . could constitute a decision under Article 25 so that Member States 'would be expected to act in consequence of the declaration made on their behalf' (Higgins, 1972:270). Whether a particular resolution. While actions adopted by Security Council in pursuance of Chapter VI of the Charter, dealing with the pacific settlement of disputes, are purely recommendatory, matters concerning threats to, or breach of, the peace or acts of aggression, under Chapter VII give rise to decision-making powers on the part of the Council. This is an important distinction and emphasizes the priority accorded within the system to the preservation of peace and the degree of authority awarded to the Security Council to achieve this. The system is completed by Article 103 which declares that obligations under the Charter prevail over obligations contained in other international agreements.[15]

Once the Security Council has resolved that particular dispute or situation involves a threat to the peace or act of aggression, the way is open to take further measures. Such further measures may, however, be preceded by provisional action taken to prevent the aggravation of the situation. This action, provided by Article 40 of the Chapter, is without prejudice to the rights or claims of the parties, and is intended as a provisional measure to stabilize a crisis situation.[16]

The action adopted by the Council, once it has decided that there exists with regard to a situation a threat to peace, breach of peace or act of aggression, may fall into either of two categories. It may amount to the application of measures not involving the use of armed force under Article 41, such as the disruption of economic relations or the severance of diplomatic relations, or may call for the use of such force as my be necessary to maintain or restore international peace and security under Article 42.

Finally, it should be note that perceptions of Security Council's legitimacy are premised on how representative it is considered to be; perceptions of its fairness, on the consistency with which it appears to apply its principles; and perceptions of both issues are colored by the transparency of the Council's decision-making

[15] See the Lockerbie case, ICJ Reports, 1992, p. 3.

[16] Usual examples of action taken by the Security Council under this provision include calls for cease-fires and calls for the withdrawal of troops from foreign territory.. See the Security Council Resolutions 234 (1967) and 338 (1973), the Middle East in 1967 and 1973; Security Council Resolution 509 (1882), with regard to Israel's invasion of Lebanon.

processes. Concern about all three factors has been expressed by a large proportion of UN membership. [17]

Underlying the first issue is the fact that membership in the Council has not been recently modified to represent the growth in overall membership of the organization.[18]Today, Members feel that a similar adjustment is needed to make the Council more representative.[19] The Secretary General's 1992 call for Member States to express their ideas on the membership of the Council resulted in a plethora of models. While it is true that choosing between the various options is complex and politically sensitive, it is important that this decision be reached as quickly as possible to ensure that the Council is provided with maximum credibility in the eyes of Member States.

The second issue – that of fairness - relates to the consistency with which the Council applies international law to different situations. When it seems to be acting inconsistently, it is assumed to be biased and the perception of fairness is undermined. Many Members feel that the Council has, indeed, acted inconsistently in the past and some believe that some Council Members, especially the Great Powers, too often act on the basis of their own geopolitical interest rather than the common good, particularly in the use of the veto.[20]

The final issue concerns the need for Council to operate with greater transparency and to consult more widely before taking decisions. As Roberts said 'two suggestions are worth mentioning which would enhance not only the quality of Council's decision-making, but also the Council's image. The first is for the Council to seek adequate legal consultation in its decision-making process. Since Council decisions can have the force of international law, it is essential that they are consistent with the law . . . Regular consultations between the President of the Security Council or Council as a whole and the Office of Legal Affairs in the UN Secretariat, which has a great deal of expertise in these matters, could facilitate better decision-making' [21]

[17] Ibid. Supra 17.

[18] The Council's membership was last adjusted in 1963.

[19] As well, there have been calls for Germany and Japan to be included as Permanent Members of the Council (although few want them to be given the veto).

[20] Ibid. Supra 9, pp217-218.

[21] Ibid.,supra 17

Upon this point, there is a need for clearer mandates to be given by the Council for operational activities so that the extent and limitations of the operation are understood and its legal basis is clearly defined. Fromuth (1996:363-4) sums up the need for reforms:

"Since its decisions are not self-executing but require vigorous compliance by member-states, legitimacy matters. Perceptions of illegitimacy lead a large number of states to non-compliance or outright opposition, and their actions could nullify any measures the Security Council might adopt, threatening a return to the paralysis of the Cold War years".

To sum up: because of the dissensions among its leading members the UN failed, or rather the nations composing it failed, to create the framework of international security intended by its founders. And it was the failure, as Urquhart pointed out, which rendered nugatory all the rhetoric and exhortation about disarmament. 'It is now seldom recalled that the original Charter idea was that the collective security system of the UN would provide the sense of security and mutual confidence which would allow disarmament and arms control to proceed under the auspices of the Security Council' (Urquart, 1990:393). It is indeed clear that, unless such a sense of security could be established, the demands and proposals sponsored by the General Assembly would continue to be totally ineffective- however numerous, repetitive, and well meant.

The UN has achieved much. It preserved those elements of international cooperation- The World Health Organization, the International Labour Organization, and the International Court of Justice- which already existed, and added to them many more. It eased the transformation of the world from a Eurocentric to a truly global system, and can take much of the credit for the remarkably orderly and comparatively amicable fashion in which this took place. It provided, and continues to provide, a focus for world politics which enables the smallest and least considerable of its members to feel themselves part of world community. But it has not succeeded in its primary task. It has not created a new world order in which every state derives its security from the collective strength of the whole. It has been able only to reflect the disorders, fears, and rivalries of the world, and do what it could to mitigate them.

It remains to be seen whether the end of Cold War will eventually restore the capacity of the UN to fulfil the role set out in its Charter; or whether, as seems more likely, the disappearance of superpower confrontation will only reveal deeper systemic obstacles to the creation of an effective global structure of international society.

Conclusion

Despite the resurgence of consent-based solutions to conflicts since the end of the Cold War, the Council (and the Assembly to a more limited extent) still have much work before them to apply the framework offered by Chapter VI more fully.

First, the realists properly recognize that the Council, as an organ of States, will only respond to those issues that its members deem important. Given the perpetual kinesis of those States on most international issues, the prospects for any type of overall Council strategy under Chapter VI seem rather dim. Thus, the Council does not appear on the verge of a coherent approach to the dilemma of the neutral peacemaker vs. the principled legitimizer, even if that were possible.[22]

Second, the current debate on an enlarged Council (the euphemistically phrased 'reform' in its membership) has as many ramifications for Chapter VI as for Chapter VII. New power realities demand recognition as much when the UN coaxes the disputants toward a conclusion as when it forces them toward one. Expanding the permanent membership of the Council, to include both large financial contributors and significant regional powers, will increase their engagement in both pre-agreement peace-making and post-agreement peace-keeping.

To sum up, because of the dissensions among its leading members the UN failed, or rather the nations composing it failed, to create the framework of international security intended by its founders. And it was that failure, as Urquhart pointed out 'It is now seldom recalled that the original Charter idea was that the collective security system of the UN would provide the sense of security and mutual confidence which would allow disarmament and arms control to proceed under the auspices of the Security Council'.[23] The wild rush and enthusiasm about Chapter VII must end.[24] If indeed the Permanent Five hope to

[22] Moreover, those perpetually unsolved conflicts in Cyprus, Kashmir, and the Middle East remain beyond solution by mere Council recommendation, even if the Council has the authority to do so under Article 37(2).

[23] Urquhart, B., Role of UN, http://eng.globalaffairs.ru/number/n_3370.

[24] As its boundaries are pushed, more States refuse to comply by its decisions, as seen in the sanctions on Libya and Bosnia-Herzegovina. The increased use of Chapter VII shows as much the failure of diplomacy as any revived UN power. Heightened respect for Chapter VII turns upon an understanding that it represents a last resort, and one that the key member States will back up with their political weight and levers. Chapter VI provides a mechanism to keep Chapter VII the

build up a common law for the UN, they had best do so through the softer touch of Chapter VI than the heavy hammer of enforcement measures.

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exception. It also offers the link with consent and 'sovereignty' that most States find necessary to accept expanding the UN's authority in new directions.

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