

Together, we must draw a new circle that embraces all the world. Together, we must draw Lecky's circle.

This article is taken from the lecture given by James Bacchus at the Institute of Advanced Legal Studies on 10 April 2003. 

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The Security Council: an impediment to international justice?

by Nigel White

The author doubts whether the Council could survive another crisis of the type witnessed in Kosovo and Iraq without change.

INTRODUCTION

The crisis of 2002–2003, leading up to the application of military force against Iraq on 20 March 2003, raised fundamental questions over the future of the Security Council. From the American and British perspectives the inability of the Council to agree on a process for handling the Iraq crisis called into question the role, if any, to be played by the Security Council in the future. From the French perspective (and also probably from the Russian and Chinese perspectives) the Iraq crisis strengthened the Security Council, by showing that it will not simply agree to the demands of the sole remaining superpower. The principle seemingly being upheld by France, Russia and China, was that using force to resolve long standing problems should only occur once all diplomatic and non-forcible efforts to resolve the matter had been exhausted. It certainly seemed that the process of weapons inspection, restarted after Resolution 1441 of 8 November 2002, was precipitously curtailed by military action.

Nevertheless, to paint the picture of a Council protecting fundamental principles (the principle of the non-use of force) in the Iraq crisis may seem a little rich, given that, as with many other instances of Security

Council action and inaction, the application of principles of law and justice is selective and inconsistent, being dependent on the political configuration of Council membership, particularly the P5 (five permanent members), on any given issue. While the French government can probably claim the moral and legal high ground in the Iraq crisis in March 2003, how can it, along with China, France, and also the UK, explain its pragmatism in the case of voting for a US inspired resolution granting immunity from the International Criminal Court (ICC) to peacekeepers from certain countries serving with the UN in July 2002? Of course, pragmatists would argue that these are completely separate issues, involving different issues of power and law. That is certainly true, and it is to be expected in a political body.

The purpose here though, is not just to criticise the Council for its inconsistency, but to suggest ways in which the Council's discretion in the maintenance of international peace and security, and the discretion of each permanent member in exercising the veto, can be evaluated and perhaps regulated, so that principles of law and justice play a more significant role in decision making within the Council. Furthermore, the problem of inaction

due to the Council's collective inertia will be tackled by considering the duties of the permanent members.

THE REALITY OF THE VETO

If the UN Charter is seen as the constitution of the international community, embodying fundamental principles, then as Brierly pointed out in 1946, the presence of the veto is a significant flaw in that constitutional edifice (1946 23 *British Y.I.L.* 83 at 92). For Council action to be taken to uphold those principles, there must be agreement amongst the P5. This represents a realist core in the midst of an institutional framework. Agreement or disagreement among the P5 is the key to Security Council action or inaction, and negotiations among this group are shaped by the presence of the veto. Though not often wielded formally in open meetings in the post-Cold War era, the threat of the veto shapes negotiations as both the Iraq crisis, and the crisis over the jurisdiction of the ICC, show.

The "unreasonable" veto spoken about by the British Prime Minister in February and March 2003 in relation to the French (and Russian) threats to veto a second resolution on Iraq has no legal basis, at least in the sense used by the Prime Minister. The French veto, though galling to the UK, and to a lesser extent the US, and therefore unreasonable from their perspectives, was being threatened through a belief that the best way forward was not through the immediate use of force against Iraq but through a lengthier inspection process, a belief shared by the majority of the Council, and based on a perception of Security Council Resolution 1441. The UK felt aggrieved that its view of Resolution 1441, that its violation should have led to a second resolution authorising the use of force, or even to an acceptance of the use of force following mere discussions in the Council, was being ignored. However, the fact was that the will of the Council had been clearly expressed at the time of the adoption of 1441, even though the resolution itself was somewhat opaque, to the effect that there were no "triggers" or "automaticity" in the resolution establishing a legal basis for the use of force (4644th meeting of the Council, 8 November 2002). This signified that the French interpretation of the Resolution and the process that was to follow from it were not "unreasonable" even in a political sense, and certainly not in a legal sense. In the case of Iraq, the Council's failure to take further executive action seemed to be a product of genuine disagreement between the permanent members. At this stage it is worth remembering Inis Claude's reminder that the constitution of the Security Council signified that it would be as much a forum for diplomacy and negotiation as an executive body for taking police action (in E. Luard, *The Evolution of International Organizations* (1966), 66 at 87–88).

The veto is seen as a political expression of power reserved for the Big Five and this was brutally made clear at Yalta even before the San Francisco conference in 1945.

There seemed to be a general acceptance from that point on that it is an exercise of power untrammelled by law, and that is certainly the way it has been exercised since 1945. The veto though is contained in a legal document, and is defined in terms that signify that, formally at least, there are legal limitations, albeit limited ones, on its use. Thus there are Charter based legal limitations on the use of the veto; as well as other legal limitations that can be suggested as applicable, more *de lege ferenda* than *de lege lata*.

The current legal limitation on the power of veto is that Article 27(3) requires that any member of the Security Council, including a permanent member, should abstain from voting, if a party to a dispute being dealt with by the Council under Chapter VI. Due to its wording this limitation appears to have been of limited relevance in practice, but it is a legal limitation nonetheless.

Legal restrictions on the veto should of course be extended to prevent the veto of Chapter VI resolutions *per se*. This was argued by the smaller powers at San Francisco, but that argument was lost. It has been revisited on numerous occasions by the UN's Open Ended Working Group on the Question of Equitable Representation, which has unsuccessfully tackled the issue of reform of the Council including the veto from 1994. There is no real reason why a permanent member should veto resolutions proposed under Chapter VI concerning the peaceful settlement of a dispute. The "chain of events" theory (that a Chapter VI, or indeed a procedural, resolution might be the first step to a Chapter VII resolution) posited at Yalta was disreputable then and discredited now. The real problem though is how to restrict the veto from operating to block legitimate Chapter VII resolutions.

Is it possible to avoid the position whereby a permanent member violates UN principles thereby causing a threat to or breach of the peace and then prevents Council action or even condemnation by the use of the veto? No, not while the veto remains, for it represents the core of the veto power, which is to prevent enforcement action being taken against a permanent member (the *negative* facet of the veto). A more practical question is how to avoid the problem whereby a permanent member vetoes a Chapter VII resolution for illegitimate reasons, that have nothing to do with the issue at hand, and nothing to do with preventing enforcement action from being taken against it?

A radical reform of the veto may seem a hopeless quest given that amendment, whether formal or informal, requires the consent of each permanent member. Furthermore, to argue for more legal limitations would be unrealistic, unless there were some mechanisms for review of Security Council practice, including the use of the veto. It is difficult enough for the International Court to undertake sporadic instances of review never mind developing a system of review. A reform of the veto would require a radical reform of the UN to include greater accountability, long overdue, but as far away as it has always

been. Nevertheless, even without formal avenues of accountability, having clear legal limitations of the right of veto would give substance to claims of unreasonableness, and would, within the current system whereby world opinion to a certain extent performs the function of review, allow the Assembly, states, organisations and individuals to evaluate the legality of the exercise of the veto, as well as the consequences following from its use. In practical terms it is unlikely that any Chapter VII action would be taken on the basis of a vetoed Council resolution, at least against a permanent member. But such defeated draft resolutions may have legal effects, instead of the current position whereby they have none. Confining the veto to proposed Chapter VII measures that truly effect the vital interests of a permanent member, requiring an explanation by that permanent member, as proposed by the Non Aligned members of the Working Group, may be a way forward.

More drastically, but probably less realistically, recognising that the principle of good faith applies to the veto may add substance. Recognising the requirement that a veto must be exercised in good faith, a principle that Franck argues is applicable to Security Council activities (*Fairness in International Law and Institutions* (1995), 51–53, 219–220), may serve to prevent the pernicious use of the veto. More realistically, as a right, power or privilege granted to specific member states by the Charter, it can be argued that its exercise must not violate the purposes and principles of the UN Charter. Just as Security Council action can be evaluated in terms of its compatibility with fundamental principles of international law, as well as the purposes and principles of the UN Charter, so it can be argued, should the exercise of the veto. How many of the Cold War vetoes would have stood up well against these requirements? Putting good faith and the veto together in one sentence may be going too far; but testing the veto against the Security Council's primary purpose, that of maintaining peace and security, is arguably legitimate. Furthermore, the veto should not be used to block action that is aimed at preventing or tackling violations of fundamental principles of international law.

Commentators have recognised that the veto is a “very special power” (Simma, *The Charter of the United Nations* (2nd ed., 2002), 508), entailing the grant of “extraordinary decision blocking competence” (Claude, *op.cit.*, 71). It is suggested here that such competence should be judged against the constitutional parameters of the organisation, and not merely by the ordinary rules governing voting. However, to argue that the veto is an institutional power or right, not merely the sovereign right of a handful of states, is contrary to the orthodoxy that clearly states that the veto vote, like any vote in an international body, is purely the exercise of a sovereign right.

But times have changed, and if post-Cold War practice is considered, where the veto is exercised with much more

caution, it may be concluded that such a limitation would be workable. For instances of past vetoes that would have fallen foul of the limitation, mention can be made of the Chinese veto preventing the sending of military observers to Guatemala in 1997 on the basis of Guatemala's perceived support for Taiwan. This was a short-lived blocking of action. More serious was the Chinese veto of the extension of the UN's preventive deployment of troops to Macedonia in February 1999.

In the Council chamber Macedonia stated that the Chinese veto was based on “bilateral considerations” which “we all consider to be in contradiction with the Charter”. Canada also criticised China for acting out of concern for “bilateral concerns unrelated to UNPREDEP”. The US regretted the use of the veto stating that “the overall interests of security in the region ... should be sufficiently compelling to outweigh other considerations”. Slovenia stated that the failure to extend UNPREDEP's mandate reinforced the need to reform the veto. China at first stated that the stability of Macedonia meant that there was no need to extend the mandate; but later in the meeting, in response to criticisms, stated that the accusations were unfounded and that “deciding on the merits of an issue was the sovereign right of every State” (3982nd meeting of the Council, 25 February 1999).

Both of these Chinese vetoes were based on grounds unrelated to peace and security, and could be said to be instances of the exercise of power that were contrary to the purposes of the UN as regards the maintenance of peace and security. The veto of the UN Preventive Force in Macedonia, a rare instance of UN preventive peacekeeping, was shown to be disastrous, as that country suffered a spillover of violence from the Kosovo crisis, necessitating belated reactive military deployment by NATO in September 2001. The threatened US veto in July 2002 of an extension of the mandate of the UN mission in Bosnia, unless immunity from the ICC was granted to its peacekeepers, could also be viewed as problematic. The desire of the US to protect its personnel from prosecution seemed to be unconnected to the peace and security of Bosnia, though the threat of the veto itself did engender a potential security crisis in that country.

However, the limitation on the veto imposed by the UN's purposes and principles will only catch the most obvious abuses. Of course a balance must be achieved between limiting the exercise of the veto and its *positive* aspect, that it ensures that Council action has the support of the most powerful members. As the debates in the Working Group show, the veto is unlikely to be given up by members of the P5, but they may be willing, if they wish the Security Council *containing a veto power* for certain states to have a future role, to subject it to standards that would allow for some form of accountability for its use.

THE PURSUIT OF PEACE AND JUSTICE

Though it was the veto that largely prevented Council action during the Cold War, the recent Iraq crisis is perhaps misleading if it suggests that current Council inactions are mainly due to the veto. The last decade, with the veto reduced in application, has brought to the fore the selectivity of Council action. There has been an unwillingness by member states to initiate or contribute to effective action in certain conflicts, for example in Rwanda in 1994. The current inhumane conflict in the Congo is the current test of the Council's resolve to deal with conflicts that do not concern its permanent membership. While the French and British contributed to a force sent to the north east of the Congo in June 2003, its size (1,400) suggests a continued lack of real commitment. This is borne out by a leaked French military briefing document obtained by the *Guardian* that was pessimistic as to the value of the force, stating that the "operation is politically and militarily high risk; very sensitive and complex. France has no specific interest in the area except solidarity with the international community" (*Guardian Weekly*, June 12–18, 2003, 4).

Clearly the selectivity of the Council is a major issue for its continued credibility. This could be remedied by each permanent member taking its responsibility for international peace and security seriously, rather than each being primarily concerned with threats to its peace. It is argued here that the Council's primary responsibility for peace and security is the responsibility of each permanent member. It is often recognised, not least in the rhetoric of the permanent members, that the special position of permanent membership entails duties, although there needs to be specification of those duties. An inability in the current P5 to accept their general responsibility for threats to and breaches of the peace wherever they occur may well be the best justification for expanding the permanent membership to include states that can bring initiatives and resources to the Council for dealing with conflicts in Africa and other neglected areas of the world.

In contrast, even within its current constitutional limitations (in the shape of the veto), and political limitations manifested in selectivity, the Security Council has managed to stretch its powers so that there is a significant body of practice that seems to push against the constitutional framework of the Charter as a whole, indeed, in some cases arguably beyond that framework. The point is that even a Council with these limitations has been able to act very vigorously, if not always to the satisfaction of some of its members.

It is not proposed here to detail legally problematic measures taken by the Council. There has been a continuing debate since the measures taken against Libya in 1992 about the limitations on the competence of the Security Council. Libya raised concerns regarding the use or misuse of the concept of threat to the peace by the

Council, as well as the ability of the Council to override existing treaty rights and duties of states by virtue of Article 103 of the Charter (in that case the treaty rights of Libya to prosecute the two suspects arising under the Montreal Convention of 1971). The issue was intensified with the adoption of Resolution 1422 in 2002 in relation to immunity of peacekeepers before the ICC where there was no explicit finding of a threat to the peace in what purported to be a Chapter VII resolution, and the Council was not simply overriding the obligations of member states under the ICC Statute but the obligations of the Court itself.

Resolution 1422 also illustrates the problem of the UN's executive organ developing legislative supranational powers of a *general* nature when the Charter only seems to provide for lawmaking power of a *specific* nature, principally the enactment of sanctions regimes against particular threats to or breaches of the peace (in practice individual states) under Article 41 of the Charter. The development of general legislative powers, whether to grant immunity to UN personnel, or to combat terrorism (as was the case with Resolution 1373 adopted after the events of 11 September 2001), is legally controversial, bypassing as it does the normal methods of lawmaking between states (treaties and custom). However, in contrast to the self-serving granting of immunity to peacekeepers from certain states, the tackling of terrorism, the effects of which violate individuals' right to life and security, seems to be a positive development. However, the Council must balance its desire to deal with terrorists with proper respect for the human rights of those suspected of terrorism. This concern is applicable in the case of Security Council resolutions on terrorism imposing sanctions against the Taliban and Osama Bin Laden and persons and bodies associated with him (for example Resolution 1390, 28 Jan.2002). Pursuant to these resolutions, the Security Council's Taliban Sanctions Committee has listed individuals and organisations whose funds and financial resources should be frozen by member states without proper regard to due process. Lack of due process in the Council, even in a rudimentary form, is also applicable to actions taken against individual states, which takes us back to the measures taken against Libya from 1992.

Furthermore, there is no specific Charter provision in Chapter VII that can expressly or implicitly be used to justify the decision made in Resolution 1422. Article 41 has been used as the peg on which to hang new developments by the Security Council: for example international criminal tribunals for the former Yugoslavia and Rwanda, and modern day protectorates in Kosovo and East Timor. Both of these developments can be seen as encouraging legitimate developments of the Security Council's concern to promote a positive peace, a peace where protection of human rights is combined with security. Thus they are compatible with the purposes of the UN as developed in practice since 1945. However, it is

stretching Article 41 beyond breaking point to see the immunity of certain personnel serving in UN forces as a “measure not involving the use of armed force”. It is certainly not a “measure” in the sense of economic or diplomatic sanctions, or even international criminal tribunals or fourth generation style peacekeeping operations.

CONCLUSION

The Security Council is a political body, this is not only reflected in its chequered history in the realm of collective security, but also by its make-up and the wide discretion given to it in the UN Charter. In such a body it is inevitable that a member or group of members wanting it to act in a certain way must persuade the remaining members to its way of thinking. In contrast to the failed proposed second resolution against Iraq, the United States won the argument in the case of Resolution 1422. Should this mean the end of the matter since in the words of the International Court in the *Namibia* opinion “a resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ’s rules of procedure, and is declared by the President to have been so passed, must be presumed to have been validly adopted” (ICJ Rep. 1971, 16 at para.20)? However, sole reliance on that presumption without any accompanying attempt to address the underlying legal problems with the resolution, undermines the legitimacy of the Council. The Council is a political body, with wide discretionary powers, but that discretion is granted to it by a legal document, the UN Charter. Discretion should and can be exercised in accordance with the law. As early as 1948 the International Court stated in the *Admissions* opinion that the “political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment” (ICJ Rep. 1948, 57 at 64).

The Council, even with the limitation of the veto, has taken measures that may be questionable in terms of the Charter and undermine the development of peace and security based on respect for human rights, or what could more widely be termed the pursuit of international justice.

On the other hand its development of international criminal tribunals and fourth generation type peace support operations illustrates how the Council can develop its powers to promote a positive peace. The dominant desire in the international community for the UN to play the leading role in post-conflict Iraq, reflects the unique legitimacy of the UN in this role, developed by its practice in Kosovo and East Timor. The Security Council’s endorsement of a post-conflict coalition of the willing in Iraq (in Resolution 1483, 22 May 2003) is a positive development in the sense that it at least shows a recognition of the legitimacy that such authority confers by those states previously questioning the relevance of the Council. It is a less appealing development given that the role of the UN in the post-conflict stage is much reduced, though Afghanistan also manifested a downplaying of the UN’s role in post-conflict administration. Resolution 1483 does though make it clear that the US and UK must act consistently with the Charter and other principles of international law in post-conflict Iraq.

Has the Iraq crisis left the Council hanging on to its role by a thread? Although it seems to be business as usual after the adoption of Resolution 1483, it may be doubted whether the Council could survive another crisis of the type witnessed in Kosovo and Iraq. Without change that thread may break and the Council’s relevance will be much reduced. With change – which has to be driven by the permanent members limiting their right of veto, recognising their responsibilities for peace wherever it is ruptured, and proposing resolutions and measures that accord with the Charter and fundamental principles of international law – it stands a chance of performing a central role in maintaining peace and securing justice. 🇬🇧

- This article is based on a lecture given in the issues in international justice series at the Institute of Advanced Legal Studies on 30 April 2003

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