



INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE
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Discussion Paper Based on Panel 1 of the series
“The Role of the Security Council in Strengthening a Rules-Based International System”

THE SECURITY COUNCIL AS WORLD LEGISLATOR?

Theoretical and practical aspects of law-making by the Security Council

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On the occasion of the International Law Week 2004, the Permanent Mission of Austria and the Institute for International Law and Justice at New York University School of Law convened a panel discussion on the question “The Security Council as World Legislator? Theoretical and practical aspects of law-making by the Security Council”.

Ambassador Hans Winkler (Legal Adviser, Austrian Federal Ministry for Foreign Affairs) and Under-Secretary-General Nicolas Michel (Legal Counsel, United Nations) welcomed the participants. Dr. Simon Chesterman (Institute for International Law and Justice, New York University School of Law) gave brief introductory remarks. The panel was chaired by Ambassador Mohamed Bennouna (Chairman of the Sixth Committee and Permanent Representative of Morocco) and comprised the following speakers: Professor Georges Abi-Saab (Graduate Institute of International Studies, Geneva), Ms. Carol Bellamy (Executive Director, UNICEF), Professor Thomas Franck (New York University School of Law), and Professor Martti Koskenniemi (University of Helsinki, Member of the ILC). Dr. Pemmaraju Sreenivasa Rao (Member of the ILC) participated as a discussant.

This document records some of the issues and concerns that were raised during the discussion, but is not intended to represent an agreed position of the participants or the organizers.

The report draws upon a preliminary summary of the November meeting prepared by Antonios Tzanakopoulos (New York University School of Law, LL.M. '05).

1 The Nature of a Rules-Based International System

One of the most important transformations in international law through the twentieth century was the shift from predominantly bilateral treaty relations to multilateral institutional relations. This has been an evolutionary process — a metaphor chosen carefully as it indicates the essentially random nature of many of the major changes and the tendency to judge them by reference to their effectiveness or capacity to survive.

This ends-driven approach to international institutions may explain, as Martti Koskenniemi suggested, the current fascination with the role of the Security Council. Drawing an analogy with the centralization of authority in the modern state, he cited Thomas Hobbes' argument that the necessary end of security in a state of nature required the transfer of the means to maintain that security to a Leviathan.

But is that what has happened in the current system? If there were some conscious effort to elevate the Security Council to the status of an international Leviathan, it would be necessary to provide it with the resources and the information necessary to do its job effectively. This has not happened. Instead, the Council operates with minimal Secretariat resources and depends almost entirely on the member states for information.

2 The Imperial Security Council

Lack of independent capacity has not, of course, prevented the Council from acting. It is clear that the delegates to the San Francisco conference in 1945 did not intend to establish a world government, as Thomas Franck emphasized, but the Council's powers have nonetheless grown exponentially through practice. Surprises for the delegates from San Francisco would include the

Council's role in delimiting borders, establishing international criminal tribunals, governing territory, and passing laws of general application on terrorism and nuclear proliferation.

In part this activism is tolerated due to the Charter mechanism of each organ determining its own competence (rather than having the International Court of Justice operate as a constitutional court, for example); in part it is encouraged by the Council's primary responsibility for international peace and security; and in part it is driven by the modest size of the Council and its domination by a small group of countries — especially during the periods of broad agreement among those countries on the appropriate response to certain incidents in the early 1990s and following the September 11 attacks in 2001.

As Georges Abi-Saab stressed, however, the fact that the Council has acted does not make its actions legitimate and will not always guarantee that its actions are lawful. The Council's actions must have some foundation in the Charter. It can, for example, impose the respect of a cease-fire or another existing line under Chapter VII, in response to a specific threat to peace and security, but cannot impose it as a legal boundary between two states where such a boundary is contested and had not been previously delimited.

The absence of formal review mechanisms may appear to be a prohibitive problem to establishing any check on the Council's expansive interpretation or its powers. Limits do exist, however. First, at the very best, the Council's own voting rules are a check on the unfettered exercise of those powers. Secondly, the General Assembly can challenge the Council's actions through a censure, question them through a request for an advisory opinion of the International Court of Justice, or curtail them through its control of the United Nations budget. Thirdly, the issue may be raised in an international tribunal as an incidental question in a case before it, as happened in the *Tadic* case before the ICTY. And finally, ultimate accountability lies in the respect accorded to the Council's decisions: if the Council's powers were stretched beyond credibility, States retain the power simply to ignore the expression of those powers and refuse to comply.

3 Legitimacy vs Effectiveness

The scope of the Council's expanding powers, then, is likely to be determined by the tension between the ends-driven demands of responding to perceived threats to peace and security, and the means-focused requirements of legitimacy. This tension plays out in all of the Council's actions, but is most graphically displayed in the passage of quasi-legislative resolutions.

The shortcut of legislation by Council resolution is a tantalizing short-cut to law, as Thomas Franck observed. The twelve years of negotiations on a Convention on the Law of the Sea contrast graphically with the swift creation of the International Criminal Tribunals for the former Yugoslavia and Rwanda. The temptations of legislation by Council fiat must be balanced, however, by a recognition that implementation depends on compliance by member states. And if the effectiveness of Council determinations depends on participation by member states, the legitimacy of those determinations will increasingly depend on participation in the process that makes those determinations.

In discussions of the legitimacy of Council actions, much emphasis tends to be placed on the structure of the Council. Representation is, of course, important; but expanding the Council to twenty-four members under either of the options set out by the High-Level Panel on Threats, Challenges, and Change will not answer the legitimacy problem — and it is an open question whether expanding the Council in this way will make it more effective or less.

A modest way forward, proposed by Thomas Franck, would be for the Council to develop its rules of procedure to require consultation when the Council purports to adopt resolutions that are general rather than particular in their effects. In the interests of efficiency, this could be done on the basis of regional groupings and groups with special interests making representations to the Council.

4 Conclusion

The Charter established the Council as an organ to deter instability, to police breaches of the peace, and to act swiftly to achieve these ends. These virtues of the Council as a police officer are precisely its vices as a legislator. Nonetheless, it is clear that the ends-driven demands of peace and security are winning the battle for the Council's role — a reality consistent with the history of the Council, where practice typically leads theory.

This is not to accept that the Council's powers are unlimited or that its legitimacy is unquestioned. In the absence of alternatives it may be necessary to accept legislation by the few, but only with the ongoing consent of the many.

APPENDIX: AGENDA

“The Security Council as World Legislator?” Theoretical and practical aspects of law-making by the Security Council

Thursday, November 4, 2004
3:00pm to 5:30pm

Dag Hammarskjöld Library Penthouse
United Nations, New York

- Welcome: Under-Secretary-General Nicolas Michel (Legal Counsel, United Nations)
- Introduction: Ambassador Hans Winkler (Legal Adviser, Austrian Federal Ministry for Foreign Affairs)
- Dr. Simon Chesterman (Institute for International Law and Justice, New York University School of Law)
- Chair: Ambassador Mohamed Bennouna (Chairman of the 6th Committee, Perm. Representative of Morocco)
- Panellists: Professor Georges Abi-Saab (Graduate Institute of International Studies, Geneva)
- Ms. Carol Bellamy (Executive Director, UNICEF)
- Professor Thomas Franck (New York University School of Law)
- Professor Martti Koskenniemi (University of Helsinki, Member of the International Law Commission)
- Discussant: Dr. Pemmaraju Sreenivasa Rao (Member of the International Law Commission)