

# Image and Reality in the UN's Peaceful Settlement of Disputes

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Observers of the UN tend to fall into one of two camps when examining its role in the peaceful settlement of disputes. The first sees a glass more than half full, with far greater potential for the Organization if only its member States would utilize the processes contemplated in the Charter. This group tends to be institutionalist or functionalist in its political philosophy, positing the United Nations as an independent actor in global politics, one that can influence and settle disputes and thereby contribute to international peace. Chapter VI offers the non-forcible means to this end; lack of coercive measures does not diminish the UN's effectiveness.

In the other camp lie the sceptics of Chapter VI, and often of the UN as an institution. Seeing a glass nearly empty, they judge the UN a failure as an actor to end conflicts and any notion of collective security a farce. Typically realist in their political approach, the sceptics argue that the UN can reflect only the individual preferences of member States. Other than perhaps as a forum for negotiation, the Organization itself can exert little successful effort to further international peace and security.

Naturally, each camp has its empirical data. The optimists typically cite two categories of UN accomplishments – a history of UN diplomatic interventions that have defused tensions in certain situations; and the results of some UN peace-keeping operations.<sup>1</sup> The former typically consists of a litany of missions by the Secretary-General or his Special Representatives that aim to demonstrate how his manoeuvring avoided bloodshed and led to an eventual settlement. The latter

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1 See, e.g., Franck and Nolte, 'The Good Offices Function of the UN Secretary-General', and Morphet, 'UN Peace-keeping and Election-Monitoring', in A. Roberts and B. Kingsbury (eds), *United Nations, Divided World: The UN's Roles in International Relations* (2d ed., 1993) 143, 183.

emphasizes the results of peace-keeping in freezing and preventing the escalation of conflicts in Kashmir, Cyprus, the Golan Heights, and elsewhere. Into the bargain, the optimists can always emphasize the UN as a unique forum for the airing of disputes and the possibilities for neutral fact-finding.

The sceptics respond quickly. They offer studies showing a marginal, if not negligible, UN contribution to the resolution of disputes, especially those involving uses of force. The cases offered by the optimists are either exceptions to the general proposition or perhaps proof of it, insofar as they rarely show the UN definitively settling a conflict.<sup>2</sup>

The territory between the camps reflects, moreover, other divisions within the community of UN observers. The legal literature on Chapter VI remains sparse outside the traditional and more recent treatises on the Charter. To the extent legal scholars address the peaceful settlement of disputes, they focus upon the ever-expanding responsibilities of the Secretary-General and UN peace-keeping. They and other institutionalists discount the other processes under Chapter VI whose results offer a less rosy picture. UN supporters also use to their advantage the evidentiary challenge of proving causation and note that the UN's success cannot be demonstrated empirically.

Many political scientists tend to make little of the Charter and the framework it posits for UN involvement in settling disputes. They lack a constitutional vision of the document and simply analyze the behaviour of certain actors. This has led much of the work on the peaceful settlement of disputes to concentrate on mediation theory. Perhaps the key area of agreement between the camps is that although the Charter chapter entitled 'Pacific Settlement of Disputes' concerns primarily Security Council action, the true centre of action lies with the Secretary-General and his agents, whom, of course, Chapter VI never mentions. As a result, the literature lacks a comprehensive framework for the study of Chapter VI action.

Can the gap between the views be bridged? This essay attempts to shed light on some characteristics of UN action under Chapter VI that have rendered it vulnerable to such contrasting interpretations. These vulnerabilities originate in three areas – the place of Chapter VI in the Charter's overall scheme for international peace; the divergence of the practice of the UN from the Charter text; and the inherent contradictions among the various positions the UN must take in trying to settle disputes peaceably. I then examine the changes in the Council's role since 1989 that suggest it may be overcoming some of these liabilities in a way both camps should accept. I conclude with a few suggestions for continued improvement in these areas.

*Caveat lector:* This essay addresses Chapter VI as a process for UN decision-making in the peaceful settlement of disputes. Indeed, 'Chapter VI' has become a shorthand for all UN activities in this subject area, whether authorized by that

2 See, e.g., Touval, 'Why the UN Fails', *Foreign Affairs* (September/October 1994) at 44; Mearsheimer, 'The False Promise of International Institutions', *International Security* (Winter 1994/95) 5.

Chapter or elsewhere in the Charter. When the UN engages in the peaceful settlement of disputes, I assume here that Chapter VI and other parts of the Charter permit the Council (and, to a certain extent, the Assembly) to engage in a range of actions, with differing levels of obligation upon States, but do not permit coercion of States into compliance with its resolutions, which I take as the essence of enforcement under Chapter VII. Although I maintain that the Council can make binding decisions outside Chapter VII, this essay does not enter the debate over the precise legal effect of various Security Council actions.<sup>3</sup>

## **I. Chapter VI vs. Chapter VII: The Neglected Step-Child of the Charter**

When the Charter is viewed as a coherent legal text, Chapter VI appears as one of two sections at its very centre. Before it lie the overarching principles of the UN (Chapter I), the rules regarding membership (Chapter II), and the structure of the two major political organs (Chapters III-V). 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 (Chapters IX-X), non-self-governing territories and trusteeship (Chapters XI-XIII), the International Court of Justice (Chapter XIV), and the Secretariat (Chapter XV). 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.

Although Chapter VI shares the central position in the Charter with Chapter VII, the Charter's history makes clear that the latter would represent the key innovation of the Organization compared to the League of Nations. That chapter, to which the Allies devoted the most attention, would be the linchpin of the notion of collective security endorsed at San Francisco. It would transcend the Covenant by centralizing the enforcement mechanisms in the Council and requiring States to comply with any coercive measures, economic or military, ordered whenever it found a threat to the peace under Article 39. This coercive role would make the UN a *guarantor* of the peace, replacing the ad hoc guarantees in place since the Congress of Vienna with a

3 See the excellent discussions in Suy, 'Article 25', in J.-P. Cot and A. Pellet (eds), *La Charte des Nations Unies* (2d ed., 1991) 471; 'Article 25', in B. Simma (ed.), *The Charter of the United Nations. A Commentary* (1994) 407.

collective guarantee. In theory, any act of aggression would interest the entire community and merit a response according to the regime in Chapter VII.<sup>4</sup>

Chapter VI, on the other hand, emphasized the role for disputants in settling their disputes and did not empower the UN to actively enforce its policies against States. Although clearly important insofar as it envisaged Council – read Permanent Five – involvement in many situations that did not rise to the level of a ‘breach of the peace’, it seemed a mere continuation of some of the processes of the League. Indeed, on its face, it even lacked the League’s mechanisms, such as rapporteurs and commissions. Because the Allies regarded maintenance of the peace, not the final settlement of disputes, as the UN’s core mission, Chapter VI put the UN in a position more akin to a *facilitator* of the settlement of interstate conflicts.

Chapter VI’s status as the neglected step-brother of Chapter VII became most ironic during the first forty-five years of the UN’s history. During this period, Chapter VI issues became the bread and butter of the Council’s political work, which only rarely crossed into the mysterious realm of Chapter VII, and almost never beyond Article 40. States referred countless issues to the Council under Article 35, and the Assembly accepted its share of controversies as well. The Council’s members would debate many, and even occasionally pass, resolutions. Most resolutions, however, consisted of some type of benign recommendation urging restraint upon the parties and suggesting methods or, at times, principles for resolving a dispute.

Only when the UN seemed to be approaching enforcement action under Chapter VII would the realists take notice of it as an actor. This occurred in the rare cases of demands, sanctions, and, of course, peace-keeping, where the UN acted through the consensual basis characteristic of Chapter VI while deploying forces in a way echoing Chapter VII. Other than these instances, the bulk of Council decisions under Chapter VI seemed to have the marginal impact on the settlement of disputes predicted by the realists.<sup>5</sup>

The past five years have merely served to reinforce the notion that the peaceful settlement of disputes is not ‘where the action is’ regarding the UN. Government and academic observers of the UN typically consider the rebirth of Chapter VII as the most significant manifestation of the revived role for the UN after the Cold War. The string of resolutions on Iraq, especially the audacious Resolution 687 (3 April 1991), suggested a new political will among the Permanent Five to use enforcement measures frequently. Chapter VII became the eventual response to the crises in Somalia, Angola, the former Yugoslavia, Haiti, and Rwanda; and its use in the name of counterterrorism in the sanctions against Libya suggested even more novel

4 For classic studies of the UN as an organization of collective security, see I. Claude, Jr., *Power and International Relations* (1962) 155-90, 278-80; *id.*, *Swords into Plowshares: The Problems and Progress of International Organization* (4th ed., 1971) 245-85.

5 For two empirical studies, see Haas, ‘Regime Decay: Conflict Management and International Organizations, 1945-1981’, 37 *International Organization* (1983) 189; M. Allsebrook, *Prototypes of Peace-making: The First Forty Years of the United Nations* (1986).

directions. The United States and other member States have often regarded Chapter VI not as a process with its own dynamics, but as a mere weigh station on the road to enforcement measures, with the gatekeeping function of Article 39 often moribund.

The perceived secondary status of Chapter VI will prove difficult to overcome, because the realists mirror the populist sense that the UN has little prospect for restoring the peace unless it employs coercive measures. (Indeed, they remain dubious about the UN's ability to apply coercive instruments as well.) To them, international institutions can succeed principally in two situations – on highly technical issues (eliminating smallpox, allocating the radio spectrum, or drafting airport safety standards); and on those rare political issues where the great powers can unite to use coercion against a rogue State. Thus, in the areas of peace and security, issues concerning the use of force matter most. The debate on peace-keeping, an enterprise in theory falling under the rubric of the peaceful settlement of disputes, now centres on military issues, such as the UN's battle readiness or UN command over US troops.<sup>6</sup>

All these critics suffer from the same starting point: that war and bloodshed have greater importance to global politics than peace-making, or the use of the diplomatic instrument to bring parties to agreed solutions to their conflict. Who wants to watch pin-striped envoys shuttle in and out of conference rooms in Geneva when they can watch peace-keepers pinned down in a bunker somewhere in Bosnia? These criticisms mesh, of course, with those ontological challenges to international law generally. John Austin's simple dictum of law as no more than a sovereign command backed by force seems so appealing to those unable to see the processual aspects of law and the horizontal and other non-hierarchical means of its enforcement. Thus, international lawyers and institutionalists who highlight non-military activities by the UN to restore the peace are continually put on the defensive, condemned as out of touch for addressing marginal issues, and Chapter VI remains in the shadow of Chapter VII.

Furthermore, as the Council employs Chapter VII more frequently, it increases the likelihood that States will regard Chapter VI resolutions as merely suggestions that the parties may take or leave. Though the *Namibia* case<sup>7</sup> attempted to lay to rest once and for all arguments that Article 25 obligated States to 'accept and carry out' only those decisions of the Security Council made under Chapter VII, Chapter VI resolutions are too often treated by States as mere options. This conflates the many gradations of seriousness – in M. Reisman's phrase, 'control intention' – with which the Council acts ('requests,' 'urges', 'calls upon', 'demands') into one legal connotation. But if Chapter VI comes to represent a mere prelude to Chapter VII,

6 See, e.g., J. Mackinlay and J. Chopra, *A Draft Concept of Second Generation Multinational Operations 1993* (1993); Urquhart, 'For a UN Volunteer Military Force', *New York Review of Books*, 10 June 1993, 3-4.

7 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ (1971) 16, 52-53 (June 21).

how can one be surprised that States act upon this discredited view of their obligations? The ICJ's initial decision in *Lockerbie* – relying solely upon the Chapter VII resolution against Libya to refuse to grant provisional measures – reinforces this unfortunate trend.<sup>8</sup>

## II. Charter Text vs. UN Practice: Forty-Five Years of Paralysis

The polarization of views over Chapter VI is exacerbated by the small degree to which the Council's members have employed its procedures since 1945, both in terms of the number of occasions and the depth of involvement. For nearly forty-five years, the application by the political organs and the Secretary-General did little to embellish the artifice drafted at Dumbarton Oaks and San Francisco, and made confusing the Council's precise role under Chapter VI.

On its face, Chapter VI gives the UN a general and somewhat tepid mandate in the pacific settlement of disputes. It begins with the obligation in Article 33 of all States to settle their disputes peacefully. The drafters were concerned that the Dumbarton Oaks proposal to place the Council's power to investigate first would diminish the responsibility of States, and therefore moved it back to Article 34.<sup>9</sup> As for substantive recommendations, the Charter gives the Council four independent authorities – (1) to urge the parties to any dispute to end it by one of the traditional peaceful means of settlement (Article 33(2)); (2) to investigate disputes to determine if they are 'likely to endanger' the peace (Article 34); (3) to recommend 'appropriate procedures or methods of adjustment' for such disputes (Article 36(1)); and (4) to recommend terms of settlement for such disputes (Article 37(2)). In addition, under Article 38, if the parties ask the Council, it can make recommendations to them.

### A. Underlying Causes

The absence of any impressive body of practice under Chapter VI lies precisely in the one unalterable fact that realists have used to impugn international organizations in general – that the political organs comprise merely a group of States and cannot act independently of their wishes. As such, political concerns necessarily guide the Council and the Assembly, as opposed to the theory behind those organs deciding based on legal principles (the ICJ), or institutional continuity and impartiality (the Secretariat).

The Council's political nature brought about its meagre record under Chapter VI in two senses. First, and most significantly, during the Cold War, the superpowers

<sup>8</sup> Cf. Reisman, 'The Constitutional Crisis in the United Nations', 87 *AJIL* (1993) 83, 89.

<sup>9</sup> L.M. Goodrich, E. Hambro and A.P. Simons, *Charter of the United Nations: Commentary and Documents* (3d rev. ed., 1969) 259-60.

treated nearly every issue that reached the Council as a possible area of confrontation. The cooperation among the Permanent Five necessary for effective functioning of Chapter VI gave way to impasse, with issues tabled, numerous uses of the veto, and watering-down of draft resolutions to garner superpower consensus. This acrimony squandered the critical advantages of the Council for serious peace-making, namely its small size and exclusive membership.

Second, diplomacy through a multilateral organ such as the Council, where one State could not force its views upon the others, ran counter to the tradition of bilateral diplomacy among the great powers. Among the permanent members and their non-permanent counterparts, world peace often represented too diffuse a policy goal to create incentives for coordinated action. As a result, the Council never built up the ingrained mechanisms and practices (apart from merely procedural ones) that are the hallmarks of a true institution. It never found a trajectory toward increasing power and increasingly creative uses of that power – a path on which the Secretary-General would embark beginning with Dag Hammarskjöld.

## B. The Record

Thus, from its earliest days, the members of the Council proved unable to agree upon any dynamic interpretation of Chapter VI. Rather, its members fell back on those articles that, on their face, suggested a limited role in solving the handful of disputes it addressed (for the first thirty-five years, primarily Palestine, India/Pakistan, Indonesia, and southern Africa). While its members urged parties to cease hostilities, they confined their views on the solution to a conflict to requests to settle or, on occasion, recommendations as to particular procedures of settlement. In its first three years, it recommended that Britain and Albania take their dispute over mines in the Corfu Channel to the World Court;<sup>10</sup> recommended that India and Pakistan settle their dispute over Kashmir through a plebiscite under the control of a UN-appointed administrator;<sup>11</sup> urged Israel and the Arab States to cooperate with the UN Mediator;<sup>12</sup> and recommended to the Netherlands and Indonesia that they resolve their dispute through the work of a UN Commission for Indonesia.<sup>13</sup>

The Council's members did unite to test the waters somewhat. First, they explored the possibility of action beyond recommendation of procedures, and toward recommendation of terms under Article 37(2). For example, the 1949 Indonesia resolution endorsed a middle alternative, *principles* for a settlement, and the 1948 Kashmir peace plan also went beyond mere procedures. These trends continued in that most famous of Security Council resolutions recommending

10 SC Res. 22 of 9 April 1947, UN SCOR, Res. and Dec., 2nd Year, at 3, S/INF/2/Rev.1 (II).

11 SC Res. 47 of 21 April 1948, UN SCOR, Res. and Dec., 3rd Year, at 3, S/INF/2/Rev.1 (III).

12 SC Res. 50 of 29 May 1948, *ibid.*, at 20.

13 SC Res. 67 of 28 January 1949, UN SCOR, Res. and Dec., 4th Year, at 2, S/INF/3/Rev.1.

principles for a settlement, Resolution 242 of 22 November 1967, hammered out by the Council in lengthy negotiations.<sup>14</sup>

Second, the Council's members confronted the question of whether they would recommend procedures, principles, or terms if the parties themselves had not consented to them in advance. This raised the fundamental issue of consent: did the 'peaceful' settlement of disputes imply only a recommendation of ideas that the parties had already accepted, or extend to proposals they had not yet endorsed? At first blush, this question seemed quite simple – Chapter VI nowhere suggests any limitation of Council recommendations to those with which the parties agree. The 'peaceful' settlement of disputes does not equate with the 'passive' settlement of disputes; it means their settlement short of the enforcement processes of Chapter VII.

Yet the Council's paralysis manifested itself in this realm as well. In the 1949 Indonesia Resolution, the parties had already accepted the principles endorsed by the Council in earlier agreements and through their discussions with the UN's Committee on Good Offices. Although the Council did take a fairly strong position on the Kashmir dispute notwithstanding Indian opposition at the time, this was more the exception than the practice. When States asked the Council to propose or endorse ideas without the parties' assent, it – or rather, one permanent member – usually balked.

Thus, in early October 1956, with war in the Suez looming, the Council adopted part of a UK-French proposal knowing that Egypt had already accepted it in private meetings with Hammarskjöld; the Soviet Union vetoed additional provisions that Egypt opposed.<sup>15</sup> Similarly, in 1957, when the Council attempted to pass a new resolution on Kashmir that included provisions objectionable to India, the Soviet Union threatened a veto and the Council replaced it with an innocuous resolution.<sup>16</sup> Even Resolution 242 was adopted only after it became clear that Israel and the Arab States would accept it.<sup>17</sup> Numerous other requests for Council involvement never even succeeded in reaching the stage of a draft resolution.

Only in the decolonization context did such restraint not obtain, permitting action even under Articles 40 and 41 in Chapter VII. The Assembly and Council endorsed procedures and principles agreed to by the parties, as in West Irian, North Borneo, and Bahrain, but also went further. Together or separately, they repeatedly condemned Portugal for its policies in Africa; endorsed outcomes for the Congo notwithstanding the views of Belgium or the Katangese secessionists; terminated South Africa's League mandate over Namibia; and imposed economic embargoes on South Africa and Rhodesia.

14 See also 'Article 37', in B. Simma, *supra* note 3, at 547, 557-60.

15 SC Res. 118 of 13 October 1956, UN SCOR, Res. and Dec., 11th Year, at 7, S/INF/11/Rev.1.

16 SC Res. 123 of 21 February 1957, UN SCOR, Res. and Dec., 12th Year, at 2, S/INF/12/Rev.1.

17 S.D. Bailey, *The Making of Resolution 242* (1985) 143-58.



### C. The Consequences

The general inability of the Permanent Five to agree upon imaginative and expansive applications of Chapter VI had two important by-products that institutionalists consider great UN innovations, but that also offer further evidence of the Council's small role in bringing about peaceful settlements. First, the Council delegated peace-making responsibilities to the Secretary-General and his Special Representatives. The Council's members were effectively saying to him with their resolutions, 'This is the best we can come up with; now you take these principles or procedures and bring the parties to a real settlement' – hardly what the Charter envisioned in Article 37(2). The Charter mandate for the Council as facilitator of settlements yielded to the Secretary-General's role as attempted *mediator* of settlements. This duty, of course, Hammarskjöld and his successors relished. But the Secretary-General served as the action officer, while the political organs could not issue him detailed instructions.

Second was the development of interpositional peace-keeping, beginning with the UN Truce Supervision Organization, the UN Military Observer Group in India and Pakistan, and the UN Emergency Force, and continuing, during the UN's first forty years, with missions in Yemen, Lebanon, Cyprus, the Sinai, and the Golan Heights. Interpositional peace-keeping truly deserved the praise institutionalists heaped upon it, for it effectively confined disputes. But as both commentators and UN officials have lamented, it can also forestall, and even prevent, final settlements. In deploying this kind of peace-keeping, the Council's members sent the message: 'We cannot propose a solution but will offer you this so at least you will not fight.' The Council's dispute settlement powers remained as weak as ever.

To add fire to the brew, parts of the artifice for the peaceful settlement of disputes seemingly chipped off entirely, through what Yehuda Blum has called 'erosions' in the Charter.<sup>18</sup> Among the more notorious are: (1) Article 38, which States have rarely, if ever, invoked, thereby inhibiting any use of the Council in a quasi-arbitral role intended by the drafters (and aspired for in later Assembly resolutions on the subject);<sup>19</sup> (2) Article 12, meant to prevent simultaneous Assembly and Security Council resolutions on the same issue, which has been dead for years (as seen most recently in the Assembly's 1993 and 1994 calls upon the Council to lift the arms embargo on Bosnia-Herzegovina);<sup>20</sup> and (3) Article 27(3), precluding a 'party to a dispute' from voting on Council resolutions under Chapter VI, which has faced near-total desuetude, as States assert that they are not parties to the dispute, or that the 'dispute' is really a 'situation'.

18 Y.Z. Blum, *Eroding the United Nations Charter* (1993).

19 Manila Declaration on the Peaceful Settlement of International Disputes, G.A. Res. 37/10, UN GAOR, 37th Sess., Supp. No. 51, at 261, A/37/51 (1982); Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field, G.A. Res. 43/51, UN GAOR, 43rd Sess., Supp. No. 49, at 276, A/43/49 (1988).

20 E.g., G.A. Res. 48/88, UN GAOR, 48th Sess., Supp. No. 49, at 40, 42, A/48/49 (1993).

The Council's work thus proved quite distinct from the powers laid out in Chapter VI – investigation, recommendation of procedures, and recommendation of terms. Over time delegates to Council meetings cited its specific articles less frequently. If this lack of references to the Charter suggested a flexible interpretation by the Council, it would merit acclaim as evidence of a process of employing a constitutive document to resolve real-life problems. But in the case of Chapter VI, the Council has exercised even *less* authority than it would have had under the plain meaning of the document. The only exception to this proposition during the UN's first forty-five years would appear to be the growth of peace-keeping.

The result of the divergence between the Charter and reality was an operational code for the Council that varied greatly from the text and intent of the Charter.<sup>21</sup> That code for Chapter VI, as directed to member States, went something like this (in all but the decolonization disputes):

1. You can bring your dispute to the Security Council, but the Council may not even put it on the agenda. If it does, it will usually only discuss the matter or, at best, simply call on you and your adversary to settle it.
2. If armed conflict breaks out, and the superpowers manage to agree, the Council will usually pass an anodyne resolution calling upon you and your adversary to cease hostilities and settle it peaceably. If the matter is truly serious, the Council might be able to negotiate some principles for you to apply during your negotiations (if you ever have any).
3. In these cases of armed conflict, the Council will dispatch the Secretary-General to try to resolve the issue. Serious cases may merit a peace-keeping force to keep the situation calm.

This lack of fidelity to, and imaginative applications of, the Charter resulting from the Cold War provided tough medicine for States seeing the UN as a last resort for resolving their conflicts. The critics saw the UN as a failure; the optimists suggested that matters would be far worse without Chapter VI.

### **III. Taking a Stand vs. Remaining Neutral: The Impartiality Dilemma**

The final shadow lurking over the UN's approach to the peaceful settlement of disputes consists of a core dilemma that the Security Council and the General Assembly seem to confront each time States seek action on a conflict – whether the UN should act as a conscience of mankind, engaging in what Inis Claude has called the process of 'collective legitimization',<sup>22</sup> and adopt a clear position on the

21 See W.M. Reisman, *Folded Lies: Bribery Crusades and Reforms* (1977) 16.

22 Claude, 'Collective Legitimization as a Political Function of the United Nations', 20 *International Organization* (1966) 367. See also T.M. Franck, *The Power of Legitimacy Among Nations* (1990) 183-94.

underlying merits of a dispute, or whether it should strive only to find areas of agreement in the spirit of mediation.

Considered opinion is divided on this question, and not along the lines of optimists vs. sceptics. Rather, one group sees Chapter VI resolutions as necessary to signal to the parties and other States the outlines of an acceptable settlement and the norms of international law that need to be respected in it. Some even cite studies to say that parties take them seriously in their negotiations for a solution.<sup>23</sup> Others say that any resolutions that address the merits of a dispute become straitjackets for the UN, tying the hands of the parties and the Special Representatives whom the Council sends to resolve a problem and not adapting sufficiently to the changing political realities of the conflict.<sup>24</sup>

Within this dilemma stand two additional tensions. First, the key member States must inevitably decide in each conflict their willingness to take sides in order to defend a core community policy. Member States and observers of the UN agree that the Council cannot and should not always be neutral. The Council or Assembly plays an important role as legitimizer when it authoritatively condemns violations of key norms, such as the ban on the use of force, the sanctity of treaties, or core human rights protections. But a condemnation of one party for violating community policies may brand the UN as partial during the negotiations to follow. If it further recommends principles of settlement that one party rejects, that party may refrain from cooperating with a UN mediator bound by those terms. This explains the refusal of UN mediation by Israel since 1967, by Iran during the 1979-81 hostage crisis, or by Vietnam after its invasion of Cambodia.

Second, the Council's members are also gauging the balance of public vs. private diplomacy to employ. Building on Wilson's vision of the League as a forum for 'open covenants, openly arrived at', the drafters of the Charter saw the General Assembly, and to a certain extent the Council, as venues for open discussion of issues of international interest. They hoped that public airing of differences would, through the educative process, prove conducive to a solution. An Assembly or Council resolution represents a form of public diplomacy, telling the sides what certain member States (or, in the case of the Assembly, most member States) think of the conflict.

Yet such debates rarely end in a solution to a conflict, and public airing of grievances is more likely to polarize the two sides, as they grandstand or seek to appear principled before various audiences, domestic and foreign.<sup>25</sup> If the political organ decides to pass a resolution, the more details of a settlement it recommends, the fewer issues it leaves for private, quiet, and probably more fruitful negotiations. This can also constrain an appointed negotiator when he needs flexibility and cause

23 See Vayrynen, 'The United Nations and the Resolution of International Conflicts', 20 *Cooperation and Conflict* (1985) 141, 164-65.

24 S.D. Bailey, *How Wars End: The United Nations and the Termination of Armed Conflict, 1946-64*, vol. I (1982) 168.

25 See C. Cruise O'Brien and F. Topolski, *The United Nations: Sacred Drama* (1968) 72-119.

issues to be re-aired in public, pulling the sides apart. Even worse, if ignored by the parties, resolutions become a substitute for more productive instruments of power and diplomacy and exacerbate a rift between the UN and the realities of the dispute.

Thus, although the Council still receives praise as a forum for discussion, or even a theatre during certain high-stakes confrontations, more commonly these tensions lead to attacks on the UN as either too 'one-sided' or too 'conciliatory'. The former critics ironically include institutionalists in the form of advocates of power to the Secretary-General. They condemn the Council or Assembly when they take a firm stance on an issue and turn the Secretary-General into a mere letter-carrier, rather than an effective negotiator. The latter viewpoint prefers strong positions by the political organs that show the key member States willing to speak out against illegal or outrageous acts and accept a role in managing and solving the conflict.

#### **IV. Signs of Revival**

The place of the UN in the peaceful settlement of disputes appears destined for perpetual misunderstanding as long as realists dismiss Chapter VI action as another manifestation of the UN's impotency as a global actor, and institutionalists offer encomiums even where the UN has played at best a marginal role in ending conflict. Rather, a middle position of candour is needed. Realists need to take account of the critical changes in the scope of Council power since the end of the Cold War. Institutionalists must adopt realistic expectations of the Organization's limitations in the peaceful settlement of disputes, even after the Cold War.

Three major developments suggest the outlines of a new place for the UN under Chapter VI. They intimate a more significant, though still circumscribed, role for the Organization, one that the two camps need not view with such inconsistent interpretations.

##### **A. New Peace-making Endeavours**

At its core, Chapter VI offers a process for bringing parties to a political settlement of their differences. The last half-decade of UN action provides evidence that realists must acknowledge of a Council able to take a more active part in addressing the merits of a conflict. The end of the Cold War has supplanted the earlier-described operational code with a new one. This transformation had earlier roots, such as Resolution 435 (1978), in which the Council explicitly endorsed principles for a settlement that had been developed by the western 'Contact Group' for Namibia. The Council's members could agree on Namibia because it concerned a decolonization and racial issue on which they had long ago achieved a basic consensus.

Since 1989, the Council has regularly either endorsed or proposed principles and terms for settlement of conflicts. The Council supported various agreements among the Central American States meant to end the cross-border and civil wars in Nicaragua, Honduras, El Salvador, and Guatemala.<sup>26</sup> The negotiations among the Permanent Five in 1990 over Cambodia represented a critical advance. Building upon earlier work by regional powers, the Five drew up detailed terms of a settlement and thereby pushed the peace process forward toward the conclusion of the Paris Agreements the following year.<sup>27</sup> The Council did not debate over whether it had the authority to act under Articles 36, 37, or 38. Its permanent members simply seized an opportunity after the Cambodian factions seemed incapable of resolving their differences. Similar active Council intervention occurred over Angola and Mozambique.

The impact of these Security Council resolutions on belligerents is not to be underestimated. While they will not sway the most belligerent of parties – the Karadzics and Milosivecs of this world – they do affect other negotiations. They represent guidance to the Secretary-General and the parties about the kind of settlement the international community, and the major powers in particular, are seeking. Chapter VI resolutions are no longer few and far between, but track the flow of a conflict and its resolution. The Council still faces the classic dilemma of impartiality vs. collective legitimization. But as its members at least follow more disputes more closely than before, they may succeed in adopting a stance that keeps a peace process moving without sacrificing the legitimating function.

The Security Council has developed the 'Friends' process as a way of spreading the burden and consolidating expertise on peace-making. A small group of States, typically consisting of some of the Permanent Five as well as interested regional actors, actively follow the dispute, draft resolutions, and consult frequently with the Secretary-General and the interested players, both in New York and in the affected region. This new mechanism for direct Council engagement can contribute to a revival of its role in solving disputes. Friends became important players in Cambodia, Central America, and southern Africa.

These latest accomplishments do not, however, sway the sceptics. They argue that the UN is not truly settling the conflict, but merely supporting others' efforts. Relying upon precedents like Kissinger's efforts in the Middle East, they continue to argue that the Secretary-General makes a marginal contribution, and that only independent statesmen (Oscar Arias for Central America, Ali Alatas for Cambodia, Chester Crocker for Namibia) bring about results. They point out the many conflicts that the Secretary-General has not resolved, such as Cyprus, Afghanistan, and Kashmir. Cambodia and Central America are regarded as unique because the superpowers could back up their views by cutting off arms to any side that did not

26 SC Res. 637 of 27 July 1989, UN SCOR, Res. and Dec., 44th Year, at 19, S/INF/45.

27 See SC Res. 668 of 20 September 1990, UN SCOR, Res. and Dec., 45th Year, at 28, S/INF/46 (endorsing Permanent Five plan).

support the outcome. With the Cold War over, the Permanent Five's leverage has disappeared, and with it the incentives for cooperation with the Council or the Secretary-General in mediation.

As with all of the realists' critiques, these arguments prove persuasive but incomplete. They do not demonstrate that the UN had a marginal role in settling these conflicts or is destined to have one forever. Rather, they simply reinforce the unexceptionable proposition that the UN rarely can act alone. The UN's endorsement of the settlement terms in those conflicts constituted turning points in the peace processes, for thereafter those documents became the sole internationally endorsed detailed plan for settlements. Recalcitrant parties found it difficult, if not impossible, to reject Chapter VI proposals that had received the blessing of players outside the region through the support (typically unanimous) of the Council or Assembly.

## **B. Second-Generation Peace-keeping**

Beyond these pre-agreement peace-making efforts, the UN has assumed a dramatic *operational* role in the peaceful settlement of disputes. This centres upon its leading position in the execution of political settlements through second-generation peace-keeping. In second-generation peace-keeping as I define it, the UN assists the parties to an interstate or an internal conflict to implement an agreed solution. The peace-keeping operation no longer watches the cease-fire lines while the combatants negotiate (or, most of the time, do not negotiate) an end to their differences. Rather, it undertakes executive responsibilities according to the terms of a peace accord.<sup>28</sup>

Clearly, peace-keeping of whatever generation diverges from paradigmatic Chapter VI activity, and this essay shall not futilely attempt to squeeze peace-keeping into some provision in Chapter VI or, alternatively, question its underlying lawfulness in the absence of explicit textual authority. But peace-keeping is, to paraphrase the US Supreme Court, part of the 'penumbra' of Chapter VI insofar as it represents a uniquely UN mechanism for the peaceful settlement of disputes. It remains more closely affiliated with Chapter VI than with any other part of the Charter because it is based upon the consent of the parties, rather than coercion, and forms part of a process of encouraging, rather than forcing, parties to a dispute to settle it.

The breadth of functions undertaken in the new operations includes military issues, elections, human rights, governmental administration, refugees, economic rehabilitation, and law and order. The depth of the operation's involvement has also varied – from mere monitoring of the parties, to supervision of their conduct (the authority to note violations and request changes), to control (direct line authority over certain domestic actors, with the ability to order them to take action), to

28 Rätner, *supra* note \*, at 16-24.

conduct (authority to implement aspects of the settlement directly, such as running an election or repatriating refugees).

This new peace-keeping has radically transformed the UN's political roles. First, the UN's role as *guarantor* has changed. The image of a guarantor of international peace sought in Chapter VII was that of the traditional great-power guarantor, ready to use any means up to force to ensure a given outcome (such as the preservation of a peace treaty). Today the UN has moved toward serving as a modern guarantor of some political settlements, that is, an international actor ready to respond to threats to an agreement through the use of diplomatic or other tools that attempt to put the parties back on track. In second-generation peace-keeping, the parties turn to the UN to keep the post-agreement peace process alive by building confidence among the parties and serving as the first response to threats to a settlement.

Second, the UN's role as *mediator* has shifted. Before it only offered assistance to the parties in pre-agreement peace-making, with, as the realists have convincingly demonstrated, a worse than mediocre record of success. Now the UN has emerged as a mediator after the settlement of the conflict. How can this be? – because the conclusion of a 'comprehensive' peace hardly settles all issues, as the implementation of an accord invites the parties to offer interpretations of the agreements to buttress their political ends. In second-generation peace-keeping, the UN has to continually negotiate with the parties on their continued compliance. The Secretary-General's Special Representative inevitably assumes the first line of defence in this regard due to its proximity to the immediate actors.

Third, the UN has served as the *administrator*, or *executor*, of parts of the political solution, taking in new directions Hammarskjöld's vision of the UN as an executive agency to further international peace.<sup>29</sup> It has undertaken specific parts of the settlement and deployed thousands of military and civilian personnel for this function. They have verified troop demobilizations, supervised elections, educated on human rights, and repatriated refugees. Here again, the Secretary-General has necessarily assumed the leading role in galvanizing the lumbering institution to dispatch these missions.

The transformation of the UN's executive, mediatory, and guarantor roles through second-generation peace-keeping has begun to work to the benefit of all three. Critics cite in their condemnation of the UN as a weak actor the failure to create its own army under Article 43, the ultimate UN executive body to enforce the peace. Yet this perception lacks any appreciation of the effective (though by no means unflawed) dispatch of sizeable operations to Namibia, Mozambique, and Central America to supervise complex peace accords. The impressive work of the UN Transitional Authority in Cambodia (UNTAC) in organizing and conducting an election, as well as its repatriation of nearly a half a million refugees, shows a UN

29 See Introduction to the Annual Report of the Secretary-General on the Work of the Organization, 16 June 1960-15 June 1961, UN GAOR, 16th Sess., Supp. No. 1A, at 1, 7, A/4800/Add.1 (1961).

whose status on the international stage cannot be dismissed simply because it remains without an integrated military force.

As for the UN's mediation function, Saadia Touval and others properly criticize institutionalists for failing to consider that the UN lacks the tools – the rewards and sanctions – that empower mediators to push parties effectively toward settlements.<sup>30</sup> Mediation conducted within a framework of an effective second-generation peace-keeping operation, however, offers these levers to the UN, for it can hold out its cooperation, and the international legitimacy that it offers, until the recalcitrant party begins to cooperate. This worked effectively with the UN Transitional Assistance Group in Namibia, where Special Representative Martti Ahtisaari used the threat of non-certification of the fairness of the electoral process to pressure the South African Government to cooperate (though not to the satisfaction of all observers). In most cases, parties to peace accords do not want to so antagonize the UN that it decides to withdraw. The UN might even use the prospect of a future peace-keeping operation, with its possibility of increased international attention and foreign aid flows, as leverage to push the parties toward a durable peace accord.

Second-generation peace-keeping also enhances the UN's guarantor function, providing an alternative to Chapter VII as a means by which the UN can 'guarantee' the peace. A more subtle, contemporary, and realistic form of guarantee is at work, one that shows the UN as confidence-builder and peace-builder, rather than armed guarantor of the realist paradigm. This helps rehabilitate the original idea behind Chapter VI, namely, that the UN can help maintain international peace without having to enforce it under Chapter VII.

### C. New Notions of Consent

All UN operations in the peaceful settlement of disputes entailing the dispatch of personnel to a zone of conflict depend, first and foremost, upon the consent of the relevant parties; unless the Council switches to enforcement action, it cannot force States to accept UN personnel. Recently, the Council's members have tested the idea of consent for its operations taken under Chapter VI and its penumbra. They have moved light-years away from the first forty years, when they typically could not even agree to propose terms of settlement that the parties had not approved in advance. Their latest efforts show the flexibility inherent in the 'peaceful' settlement of disputes and the multitude of actions possible short of Chapter VII. Several examples demonstrate this trend.

In Cambodia, the Permanent Five sought the endorsement of the four factions vying for power for the entry of a UN 'transitional authority'. The incumbent regime still saw itself as the effective government of Cambodia, though the UN had

30 Touval, *supra* note 2; Rubin, 'International Mediation in Context', in J. Bercovitch and J.Z. Rubin (eds), *Mediation in International Relations: Multiple Approaches to Conflict Management* (1992) 249, 254-56, 264-66.



repeatedly denied it seating and relatively few States recognized it. The other three had formed a coalition government of convenience to occupy the UN seat and stake a claim to be the only lawful regime. To gain the consent of all four groups, the Permanent Five invented and pressured the Cambodians to accept the idea of a Supreme National Council, a shell to embody Cambodian 'sovereignty' and formally agree to the presence of UNTAC. This creative ambiguity finessed which regime was the government and which the opposition. When combined with significant diplomatic pressure from the factions' allies and other actors, it enabled the peace process to move past the dead-end negotiations among the factions on sharing power.

In Somalia, the Council also pushed consent further when it deployed the UN's first operation, UNOSOM I, in mid-1992 to separate warring combatants and help delivery of humanitarian relief. Somalia lacked any true government at the time, so the UN considered the consent of several key warlords in Mogadishu sufficient legal authority for UNOSOM I to enter and operate without invoking Chapter VII.<sup>31</sup> Subsequent events on the ground, however, showed the limitations of this solution. Fighting continued and armed gangs blocked distribution of food aid, showing that this contrived consent had effectively collapsed. UNOSOM I had no power or authority to do anything about it. The Council's members saw a switch to Chapter VII as their only option, ultimately abandoning consent for peace enforcement in December 1992.<sup>32</sup>

Lastly, the stretched notions of consent have also played themselves out within peace-keeping operations, when the consent of parties to a UN role in a political settlement has not translated into cooperation with the UN. In the most significant instance of revoked consent to peace-keeping of the interpositional variety, Nasser's eviction of the first UN Emergency Force in May 1967, U Thant withdrew the force (too) quickly. His reaction suggested that the host State's initial consent was fully revocable: the mission can perform its job only if it maintains the complete, ongoing consent of the parties. Without full cooperation, the UN would have to withdraw or switch to peace enforcement.

In the second generation, a more nuanced and assertive approach has prevailed. The Council, Secretary-General and donors of personnel have appraised the quality of the underlying consent: if the overall consent appears durable, reflecting a bona fide commitment by the relevant parties to solve the conflict, then small deviations have not halted the process. Clearly, the UN cannot stretch consent to the point of full irrevocability, such that peace-keepers could fight battles with recalcitrant parties while claiming to act peacefully based on the initial consent. But the Council and Secretary-General have carefully examined the degree, context, and consequences of the non-cooperation before responding.

31 SC Res. 767 of 27 July 1992, UN SCOR, Res. and Dec., 47th Year, at 59, S/INF/48.

32 SC Res. 794 of 3 December 1992, *ibid.*, at 63.

In some situations, the UN has held the parties to their word and proceeded with implementation of an operation's mandate through assertive, or arguably coercive, measures. These included, in the context of Cambodia, for example, searches of incumbent government offices and implementation of an election law that contained provisions opposed by all factions. In others, it has backed down; thus the UN Observer Mission in El Salvador did not push parts of the Salvadoran Government to implement reforms, and a US ship carrying the first contingent of the UN Mission in Haiti in 1993 turned around after Haitian thugs frightened it away from the dock.

Have these reactions gone too far – is this malleability of consent as extreme as the Council's earlier, paralytic approach to consent through significant deference to States' wishes? Do they not simply endorse the realist critique that Chapter VI offers no important role for the UN in settling conflicts except when the UN moves closer to Chapter VII?

Certainly, the line between pacific settlement and enforcement has blurred, although even in earlier years the line lacked much clarity concerning many provisional measures that the Council passed (were they Article 36 recommendations, Article 40 decisions, or something else?).<sup>33</sup> But any precision of that distinction stemmed precisely from the Council's inability to employ either set of processes with any vigour. When one forgoes the ability to paint grey, the line between black and white is quite stark indeed. The ambiguity that disturbs so many international lawyers today reflects simply an inevitable product of a more activist Council exploring new ways to persuade uncooperative parties to follow its resolutions or adhere to peace accords.

The latest views of the Council's members on the malleability of consent thus constitute a positive development for the peaceful settlement of disputes. They acknowledge the realists' observation of the shortcomings of passive UN mediation efforts and the occasional advantages of what are best deemed semi-coercive processes. At the same time, these attempts by the Council to employ creative notions of consent should not be mistaken for validation of the more severe realist critique that only enforcement and force matter. Rather than justifying an abandonment of Chapter VI's framework as unworkable, these actions intimate the potential for making the peaceful settlement of disputes more effective – without taking the step of imposing enforcement measures. One can only hope for continued evidence of such creativity as an antidote to the hasty resort to enforcement measures.

33 See Simon, 'Article 40', in *La Charte des Nations Unies*, *supra* note 3, at 667-689.

## V. Issues for Further Study

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 peace-maker vs. the principled legitimizer, even if that were possible. And the age-old need to distinguish between issues that merit its attention and those to direct to other diplomatic players remains only partially addressed, although the 'Friends' process deserves tribute. 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).

One possibility for at least a somewhat more regularized process would entail some type of revitalization of the League of Nations' system of rapporteurs, a practice that the Council has rejected except for its occasional creation of fact-finding missions. The rapporteurs would prove of particular use in defining the Council's role *vis-à-vis* other actors – whether it will take the lead, or simply follow interested member States, regional organizations, and other players.

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. The risk remains that a Permanent Ten or Twelve can less effectively agree upon terms for settlements than the Five. The alternative, though, is a risky disengagement by important member States.

Finally, the wild rush and enthusiasm about Chapter VII must end. 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 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. If indeed the Permanent Five hope to 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.