Realizing Utopia

*The Future of
International Law*

Edited by
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The Security Council: Progress is Possible but Unlikely

Bardo Fassbender

SUMMARY

In spite of all its shortcomings, there is broad agreement that it is better to have the Security Council with all its flaws than to have no such institution at all. It is difficult to envisage developments of the Security Council in the direction of an institution effectively promoting and sustaining a global community based on the values proclaimed by the UN Charter. Nevertheless, a set of fairly realistic measures can be suggested: (i) the Western members of the Council, especially the permanent members, should realize that their dominance is very fragile; (ii) the Security Council should attach more importance to collective goods and interests of all peoples inhabiting the earth than to the individual goods and interests of the states represented on the Council; (iii) the Council should have at its disposal more information from independent sources, gathered and evaluated in the Secretariat, instead of being dependent on information provided by member states, especially the permanent members, on the basis of the work of their secret services. The role of the Office of Legal Affairs in advising the Security Council in matters of international law should also be strengthened; (iv) action taken by the Council (in particular in the form of economic and military sanctions) needs to be more reliable and consistent, and less arbitrary. The Security Council should try to build a precedential case law which makes it possible to predict in general terms its course of action; and (v) sanctions imposed on individuals not belonging to a small circle of members of a government, military command, or the leadership of a non-state party to a conflict should remain an exception.

1. Introduction

Is there a place for the UN Security Council in a realistic utopia of international law? And, more specifically, can the Security Council substantially contribute to

making the world a 'global community' based on peaceful relations, justice, and solidarity? These are, I believe, the two questions put by the editor of the present volume. In trying to answer them, I proceed on the assumption that both the present international legal order in general and the United Nations as an organization continue to function, something which is not to be taken for granted.

The Security Council is deeply intertwined with the reality of international power relations. It is a result of a war, a creation of the winners of that war, a part of the effort to maintain and defend the superiority of the victorious powers in the peacetime to come. It is perhaps the most realistic element of a project infused with a lot of idealism or, to others, utopianism. The preamble and Articles 1 and 2 of the UN Charter are an eloquent expression of that idealistic or utopian aspect of the United Nations. In the organizational structure of the UN, the realization of that aspect was assigned to the General Assembly and the Economic and Social Council, which are not by chance deliberative bodies without decision-making competences beyond the inner affairs (in particular the budget) of the organization. From the start, the idealistic supporters of the UN regarded the Security Council with suspicion. Accordingly, a realistic utopia with a place for the Security Council would have to be very realistic indeed, provided that the Council is expected to continue playing the role given to it by the Charter.

For most of the history of the United Nations, the expectations or hopes placed on the Security Council were rather low, even in the small circles of diplomats and international lawyers familiar with the work of the United Nations, not to mention the wider public opinion as it appears in the voices of politicians, journalists, and businessmen. That so little was expected from the Council had the effect that disappointment about its failures was also limited; criticism never rose to a demand that the Council be abolished, as happened in the case of other institutions. There were only two short periods of enthusiasm about the role the Security Council could play in international politics, advancing the goal of a world without war—the years following the founding of the organization up to the beginning of the Cold War, and the early and mid-1990s after the end of the East–West confrontation which had subjected the Council to a decades-long stalemate. The enthusiasm of the first period was mainly expressed in the United States, that of the 1990s mainly in Europe. In both instances, it was supported by a desire to reconstruct the world on the model of one's own political ideals—as a kind of world federation based on a US Constitution writ large, or a multilateral state system similar to the European Union, respectively.

If they were still alive, the American and British diplomats and lawyers who devised the Council as the realistic cornerstone of the new world organization at the end of the Second World War would be astonished to see it was still operating in 2011. Their astonishment would be even greater when they saw that the Council still functioned in the form and according to the rules as written in 1944–45 (with the only exception being a rise in the number of non-permanent members from six to ten in 1963). The international organization specialists in the State Department and the Foreign Office had surely hoped that the United Nations would fare better than its unhappy predecessor, the League of Nations, which effectively operated

for barely 20 years. But a life of more than 60 years, or two generations, of an organization so deeply marked by the experience of the Second World War and the (mainly European) political developments leading up to it, was probably beyond their imagination. Even for a much shorter lifespan of the UN they had anticipated a need for major amendment of the Charter rules. The promise of a 'General Conference... for the purpose of reviewing the present Charter' (Art. 109(1)) was part of the compromise of the San Francisco Conference.

And, indeed, it is surprising that the compromises made more than 60 years ago (mainly between the United States and the Soviet Union, and between the 'Great Powers' and the 'smaller powers', respectively) with regard to the competences of the Council, its relationship with the General Assembly, and its voting procedure survived a number of fundamental changes in international relations and still last today. Of course, underneath the surface of the provisions of the UN Charter many changes occurred which modified the original rules and adapted them to changed circumstances. But there is enough old 'hard law' still in place, not suitable for such informal modification, to be astonished about, such as the rules about membership in the Council (Art. 23) and the Council's voting procedure (Art. 27), with the essential element of the right of veto of the permanent members.

2. Observations on the performance of the Security Council in the past

This is not the place to draw up a detailed balance sheet of the accomplishments and failures of the Council since it took up its work in 1946. To take stock is not at all easy. What is the standard against which to measure the performance of the Council? The Council was not conceived of as a 'world government' with a comprehensive responsibility for the well-being of the world population. Its very name, deliberately chosen in contrast to the 'Council' of the League of Nations, was meant to express its limited jurisdiction. However, the body was entrusted with the task of safeguarding what since the beginning of modern political thought has been regarded as the first and primary condition for any performance of governmental functions in a community, namely the absence of armed violence between the community members. In the case of the 'international community', this meant the prevention (and, if necessary, the suppression) of war between independent states. In the words of the UN Charter (Art. 24, para. 1), 'primary responsibility for the maintenance of international peace and security' was bestowed upon the Security Council.

Did the Council carry out this mandate? Did it live up to the expectation of its founders? It is true, since 1945 no war of the scale of the two world wars of the twentieth century took place—the kind of war which the Charter sought to prevent in the first place. Equally, there was no war between any of the states which in 1945 were regarded as 'Great Powers' and which were made permanent members of the Security Council. The defeated nations, Germany and Japan, did not go to

war again and were integrated in the system of the United Nations. Except for the conflicts accompanying, and arising from, the break-up of Yugoslavia, no other war took place in Europe, the continent whose quarrels had been the source of the two world wars. Transatlantic peace between the United States and the European powers was preserved. Compared to the past (the nineteenth century and the first half of the twentieth century) the number of inter-state wars has decreased sharply. But it is hard to say whether, or to what extent, the existence and work of the Security Council contributed to those positive results. Have not other factors been much more decisive, such as the mutual fear of nuclear destruction during the time of the Cold War, or the common interest in economic stability and undisturbed world trade in the era since 1989–90, or the changes in military technology, or, as regards the absence of war in Europe, the demise of traditional nationalism and the growth of a European identity? Which outbreak of hostilities was actually prevented by measures taken by the Council? Which admonitions, warnings, and demands made by the Council were heeded by the parties to a conflict? What kind of positive effect on world peace had the secret discussions among members of the Council, and between Council members and states involved in a conflict? If we imagine a world without the Security Council, would it have been more violent in the last 60 years, or would the deals struck in the Council have just been made in other forms and fora? All these questions are difficult to answer. There is only a handful of careful case studies, not enough to form a basis for more general conclusions.

However, what can safely be said (in perhaps overly moderate language), looking back on the many wars of the past six decades, is that the Security Council accomplished its object of maintaining 'international peace and security' (understood as global peace) only very inadequately. War asserted its terrible presence. It did so not in the centre of 'Western civilization' but in the 'periphery'. The truth is that the founders of the UN had not intended to promise global peace in the sense that we think of it today. Colonialism limited the effective range of authority of the United Nations. The founders' Africa, in particular, was still a continent for which the colonial powers were responsible. 'War in Africa' could only become a business of the Council in the unlikely event of a transoceanic war between those powers. Further, violent conflict in Central and South America was tacitly left to the United States and the OAS. War between the East European states politically and militarily controlled by the Soviet Union seemed impossible, and in any case would be a matter for the USSR. Finally, and very importantly, the idea that international peace and security could be threatened by civil strife or serious violations of human rights had not yet arisen.

More often than not the failure attributed to the Council was not really a failure of 'the Council' but of the individual UN member states represented on it, in particular the five permanent members. This is certainly true for the 'proxy wars' instigated by the Soviet Union and the United States as part of their ideological struggle, as well as for the open or secret interventions of one of the P5 in its respective 'sphere of influence', including the former colonies. It is also true for the silence of the Council in many conflicts which were of no interest (neither political nor

economic) to any of the P5, and, conversely, for its silence in conflicts in which one of the P5 was involved or took a strong interest.

A second observation which is hardly contestable is that the system of collective security envisaged by the drafters of the Charter never became effective. That system had a realistic and an idealistic component. The realistic pillar was a political and military hegemony of the 'Great Powers', in the first place the United States (supported by the United Kingdom, France, and China) and the Soviet Union. The idea was that those states would continue their close and successful cooperation of the wartime, which had brought about effective institutions both in the military and in the political field. The combined military power of the United States, Great Britain, and the USSR, made available to a Security Council controlled by the same states, would simply be irresistible, the post-war schemers thought. The idealistic component, on the other hand, was the idea of a universal solidarity of states resulting in collective action whenever a state became a victim of aggression: 'one for all, and all for one'. This component had been carried over from the League of Nations to the UN. The United States and the Soviet Union never believed in it; whether other states did is unclear. When the realistic pillar of the Charter system of collective security broke down at the beginning of the Cold War between the former allies, the idealistic pillar quickly followed suit. It became clear that its basis, a universal bond of solidarity between states, had been just a phantom. Consequently, whatever trust states had placed in the Security Council as a defender of their freedom and independence waned. Instead, states relied on the old means of their own standing armies as well equipped as they could afford, military alliances, and open or secret treaties about mutual assistance. Instead of Article 2(4) of the UN Charter, the general prohibition of war to be enforced by the Security Council, Article 51, the right to individual and collective self-defence, became the central effective norm 'regulating' the use of force in international relations. Both NATO and the Warsaw Pact were built on that right. In those circumstances, the veto power of the permanent members meant in practice that not only the P5 were effectively exempt from the Charter prohibition of the use of force but that any state relying on the argument of self-defence which was supported by any one of the P5 was given a free hand; such state could be sure that the Security Council would not interfere with its military operations.

The hope of the 1990s that the end of the Cold War would mean a 'rebirth' of collective security and a 'revival' of the Security Council was short-lived. The former antagonism between two inimical blocs was replaced by a more complicated concert of powers with shifting configurations and majorities—a concert, however, in which the United States is the central player. The United States cannot force the other players into performing, but when *it* does not appear on the stage the concert must be called off. What did not change after 1990 was the spirit of egoism dominating the political strategies of the states involved. The decisive aspect guiding a state's action and voting behaviour in the Security Council is still the 'national interest' of that state, that is, a consideration of what consequences a certain decision entails for the state's political, economic, and military situation

and interests. Altruistic concern for the welfare of others, or for the 'common good' of all states and peoples, remains a rare exception. In addition, the political, economic, and military means necessary to enforce the Charter rules regarding international peace and security remain in the hands of individual states. The Security Council has no such means at its disposal. As a last resort, it can only 'authorize' the use of military force by particular states, thus completely relying on those states' willingness to make their armed forces available, and the course of military action chosen by those states.

In view of the ineffectiveness of the normative system at the centre of which the Security Council was placed it is rather astonishing that so far all states, including the powerful states, have clung to the Council. No state was ready to take the risk of testing the importance of the Council for the stability of the international order by calling for its abolition. This is even true for states which question the legitimacy of the Council, or states which see themselves as 'victims' of groundless sanctions imposed by the Council. States continue to invest much effort in obtaining a non-permanent seat on the Council. Some states have fought hard for a permanent seat. There is broad agreement that it is better to have the Security Council with all its shortcomings than to have no such institution at all. In other words, for lack of agreement on any alternative mechanism states prefer to keep the Council in existence as it is—a standing body observing certain rules of procedure, an institution every state can turn and appeal to, a body which under favourable circumstances can at least delay, confine, or keep within limits a use of force contrary to the rules of the UN Charter. States also realize that discarding the Council would mean destroying the United Nations as a whole because the balanced structure of the principal organs established in 1945 could not survive without the Council.

3. The place of the Security Council in a realistic utopia of international law

Let us return to the question of what kind of place the Security Council could find in a realistic utopia of international law. The conditions outlined above severely restrict a development of the Council in the direction of an institution effectively promoting and sustaining a global community based on the values proclaimed by the UN Charter. To put it differently, the contribution of the Security Council to such a utopia will probably be only a very modest one. Some would even say that we must consider ourselves lucky if the Council does not stand in the way of a development towards a better future for the international order.

One important limiting factor is the composition of the Council which is increasingly untenable but has proved unalterable. While there is almost universal agreement that the membership of the Security Council must be adapted to present conditions of international life, and that especially the circle of states which were made permanent members in 1945 cannot remain the same, all efforts of the past 20 years to arrive at an agreement on Charter reform have been fruitless. The reasons for this are manifold.

Basically, there is a deadlock between the states which would be the winners and those which would be the losers if the membership of the Council is changed. Among the potential losers are all present permanent members, either because they are likely to lose their permanent seat, or because their present position would be weakened by the addition of new permanent seats. This deadlock mirrors the present world situation in which the new and rising powers are not yet strong enough to dispossess the old, one of their weaknesses being the rivalries and antagonisms among themselves. The decisive question is how long the states and regions not adequately represented in the Council will tolerate the present composition. As said before, so far they prefer having a Council with a contestable membership to not having a Council at all. But that disposition could easily change. As with every rigid structure, the Council runs the risk of breaking into pieces as soon as it collides with a strong opposing force.

A second limiting aspect is the fact that the law the Security Council is meant to apply has become increasingly unclear. The prohibition of the use of force in international relations has become what Napoleon is reported to have said about a constitution: that it must be brief and obscure. Issues of cardinal significance (such as the use of force by non-state actors, the limits of the right of self-defence, the lawfulness of 'humanitarian interventions' in their different manifestations, the exact meaning of a 'responsibility to protect', or the work of private military companies engaged by states) are highly controversial, and agreement (preferably in the form of written law) is not on the horizon. The ground on which the Council is operating is shaky.

Thirdly, the Council is ill-prepared for new threats to international peace and security, in particular conflicts arising from environmental disasters, the scarcity of natural resources, including fresh water and grain, or large-scale migrations of people seeking a habitable climate. Rules about how to deal with such threats do not exist, and its weak legitimacy will hardly allow the Council to create them ad hoc.

In these conditions, what kind of conduct could one recommend to the Security Council, or its individual members, to strengthen the Council as a positive force in international relations?

First, the Western members of the Council, especially the permanent members, should realize that their dominance is very fragile. It must be handled with care as long as it is not openly rejected. The Council members representing the Northern industrialized world would act wisely if they increasingly, and credibly, had regard for the collective interests and the good of the world population.

Secondly, and more generally, one could hope for a Council which attaches more importance to collective goods and interests of all peoples inhabiting the earth than to the individual goods and interests of the states represented in the Council. Some states must begin to set aside their egoism for the benefit of the common good of the world even if that demands a price. Only then the 'international community' will stop being a rhetoric expression and turn into a real social phenomenon. In the work of the Council, all elements should be strengthened which promote such a turn towards community interest. For instance, the President of the Security Council should

understand his or her office as a responsibility to bring to the Council's attention issues and perspectives reflecting the interests of the 'international community as a whole'. The President should not so much be a spokesperson for the 15 members of the Council but rather be a voice for the UN membership at large, and especially for interests and policy goals not expressed by the states represented in the Council. Further, the Council should rely much more often and consistently on the advice of independent experts and NGOs, and consult with representatives of other UN organs, in particular the General Assembly, the Human Rights Council, and the International Court of Justice. The open thematic debates of the Council held in the last few years set a good example. The Council should have at its disposal more information from independent sources, gathered and evaluated in the Secretariat, instead of being dependent on information provided by member states, especially the permanent members, on the basis of the work of their secret services. The role of the Office of Legal Affairs in advising the Council in matters of international law should also be strengthened.

Thirdly, while the Security Council was rightly given broad discretionary power to decide when and in what way it intervenes for the sake of international peace and security, action taken by the Council (in particular that in the form of economic and military sanctions) needs to be more reliable and consistent, and less arbitrary. The Council should try to build a precedential case law which makes it possible to predict in general terms its course of action. To that end, the Council could adopt resolutions providing a frame, or general structure, for its later action in specific cases. It could, for instance, spell out in which cases and under which conditions the Council feels obliged to intervene for the benefit of a population which is the victim of severe violations of human rights. With that proposal we reach, however, the limits of a realistic utopia because so far the Council has categorically refused to bind itself in the form of general commitments.

The fourth recommendation is that the Security Council should carefully consider whether it wants to take up a position on a particular situation or conflict. It should do so only if it is prepared to follow its words with action, that is, if it can muster the majority necessary for imposing economic or military sanctions, and if it is likely that those sanctions will be effectively implemented. Otherwise the Council will impair its authority and become the proverbial paper tiger. A realistic assessment of its means and resources should make the Council cautious about supporting the expectation that it will come to the assistance of every people suffering from internal conflict or human rights violations.

Fifthly, sanctions imposed on individuals not belonging to a small circle of members of a government, military command, or the leadership of a non-state party to a conflict should remain an exception, both in terms of numbers and time. Not only are such sanctions alien to the inter-state system of the UN Charter but the Council also lacks the means of identifying the persons it has defined in abstract terms as a threat to international peace and security, and it is unable to afford the targeted individuals the protection of the law to which they are entitled. Criminal law (national and international) and the mechanisms of international assistance in criminal matters (such as Interpol and the network of bilateral extradition treaties) offer better, and arguably

more effective, methods of bringing to justice individuals charged with crimes of an international dimension, in particular terrorist activities.

I do not want to stop here without at least outlining a future for the Security Council beyond the narrow confines of what seems realistic today. In an 'unrealistic utopia', the Council would take a more proactive attitude and seek to identify and improve, in accordance with Article 34 of the UN Charter, situations 'which might lead to international friction or give rise to a dispute', including long-term developments like desertification, overpopulation, and climate change. The Council would no longer ignore the many arbitrarily defined borders between states which are a constant cause of disputes. In an 'unrealistic utopia', the Council would systematically determine which peoples, minorities, and other sections of a population are oppressed or deprived of their fundamental human rights by their respective governments, and demand and encourage improvements to their situation. In an 'unrealistic utopia', the Council would eventually take seriously the mission assigned to it in Article 26 of the UN Charter and formulate 'plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments'. It would address the nuclear armaments piled up by states which menace the existence of humankind. In an 'unrealistic utopia', UN member states would agree on a fundamental reform of the UN Charter (including a reform of the membership, working methods, and voting procedure of the Security Council) so that the Charter could function as a viable constitution of a truly international community of the twenty-first century. Such Charter reform would preserve the provisions of the instrument which have been tested and proved good. It would maintain the Purposes and Principles of the United Nations which are by no means obsolete but add to them new objectives and fundamental rules made necessary by new challenges. At the same time, reform would overhaul the machinery of the organization established in 1945, examine the existing organs for repair or revision, improve their interaction and cooperation, and add new organs to the present structure if necessary. Such reform would bring about a Security Council that would wisely, justly, and impartially maintain international peace and security for the benefit of the entire world population. But, alas, the doors of such an unrealistic utopia will remain closed. Paradise, the dictionary tells us, is the name of a town in North California only.