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FOREWORD

WHAT'S THE SECURITY COUNCIL FOR?

*Jose E. Alvarez**

The Security Council has long served as international law's Rorschach test. Operating at the crossroads of international law and international relations, the post-Cold War Security Council embodies both politics and norm-making capabilities. What scholars see when they examine the inkblot which is today's Council says a great deal about contemporary schools of thought. What scholars say the Council is for, also says quite a bit about what they think international lawyering (and international law) is all about. In the process, Council analysts reveal themselves as political "realists," legal "utopians," nationalists, cosmopolitans, institutionalists, humanists, environmentalists, socialists, Europhiles, "Third World" sympathizers, feminists . . . and the list goes on. Council scholarship is often (inadvertently) personal, though usually cast as universal.

Students of the literature on the Security Council will recognize in these articles and essays, selected by the *Journal's* editors for this symposium issue, many representative strands in that ever-burgeoning literature. Although the *Journal's* editors accepted these articles and essays on an individual basis and no author was afforded the opportunity to read or react to others' contributions, the results are a fascinating counterpoint of views nonetheless. At times, it seems as if the contributors are reacting to each other's work.

Malvina Halberstam, John Quigley and Judith G. Gardam each choose to examine traditional legal problems at the heart of "public" international law posed by today's Council. They answer these with the legal tools long respected in the trade, primarily arguments grounded in treaty text and "intent" (of either the "original" or more teleological variety). Halberstam addresses a problem which arose most prominently on the eve of the Council's authorization to use force in the Gulf War: the legality of unilateral self-defense, pending Council action. Halberstam concludes "that the Charter was not intended to and should not be interpreted to deny a state the right of self-defense, even if the

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Security Council has taken measures to deal with the problem.”¹ Quigley addresses the legality of the Gulf War itself, as well as subsequent Council authorizations of military force. He argues that by contracting out the use of force to members of the organization (a process Quigley calls “privatization”), the Council “has relinquished its Charter defined role,” and has acted contrary to the express wording and intent of the Charter, with potentially adverse consequences.² Gardam, while also concerned with the Council’s resort to force, addresses other legal restraints on the Council, namely, limits on the use of force derived from humanitarian and general international law. She concludes that the Council, even if it was authorized to “delegate” the use of force to member states as it has repeatedly done, is limited by the general principles of proportionality and necessity that constrain the use of force by states.³ She further concludes that the Council is also “under a legal obligation to ensure that forces acting under its auspices comply with the appropriate customary rules of humanitarian law.”⁴

Although all three focus on military action, that is the extent of the similarities between Halberstam’s, Quigley’s, and Gardam’s respective contributions. Each of these authors has a radically different perspective on what the Security Council is all about.

The Security Council (along with the U.N. Charter), for Halberstam, seems to be but a mechanism to ensure the sanctity of states and their existing borders; the Council exists to buttress state sovereignty, not to undermine it. Under this state-centric view, what states might be said to have “consented” to in 1945 — cast as “original intent” — is conclusive. For Halberstam, fears of what states might do with their self-judging license to act in “self-defense” or what effects this might have on United Nations Purposes and Principles, including human rights and the ban on inter-state force in Article 2(4) of the Charter are secondary; Halberstam argues that whatever the cost, the U.N. Charter cannot be read as a suicide pact for existing states.

Although Quigley does not deal directly with the question that Halberstam chooses to address, his stance is antithetical to Halberstam’s. For him, the Council, far from being the handmaiden of states, is a

1. Malvina Halberstam, *The Right to Self-Defense Once the Security Council Takes Action*, 17 MICH. J. INT’L L. 229, 231 (1996).

2. John Quigley, *The “Privatization” of Security Council Enforcement Action: A Threat to Multilateralism*, 17 MICH. J. INT’L L. 249, 250, *passim* (1996).

3. Judith G. Gardam, *Legal Restraints on Security Council Military Enforcement Action*, 17 MICH. J. INT’L L. 285, 307–12 (1996).

4. *Id.* at 321.

multilateral counterpoint to them; the Council is intended to ensure that "collective force will be used only in pursuit of commonly held objectives of the international community."⁵ It is precisely because Quigley fears that individual states, even when licensed by the Council, may act for motivations inconsistent with the *community* goals outlined in the United Nations' Purposes and Principles that Quigley opposes delegating the use of force to states. He favors instead truly multilateral action deployed, directed, and commanded by the United Nations itself and not by Council-authorized permanent members.

Gardam also grounds her perspective on the broad Purposes and Principles stated in Articles 1 and 2 of the U.N. Charter. Like Quigley, she implicitly assumes that the Security Council exists to further community goals and that these goals are not always consistent with the protection of states *qua* states. But whereas Quigley tends to equate community goals with multilateral action by the organization, Gardam focuses her attention on the impact of Council action on the ground. She wants to ensure that under the law, combatants, civilians, and non-combatants will be as protected during the United Nations' use of force as they would be during a war between states. For Gardam, the Council ultimately exists to respect existing rules of law, including those on the use of force and the conduct of war.

Fernando R. Tesón goes much further than Gardam. He assumes that the Council is limited by Gardam's humanitarian principles but what he seeks to establish is the Council's normative impact on general international law, and specifically on the doctrine of "collective humanitarian intervention." Tesón is not satisfied with existing international norms — not if they stop at the borders of a state and can be read to prohibit collective intervention to remedy gross human rights abuses within those borders. For Tesón, recent Council actions — intended to protect the Kurds in Iraq, ensure humanitarian assistance to starving Somalis, return a democratically elected government to power in Haiti, and prevent further gross violations of human rights in Rwanda and Bosnia — constitute significant legal precedents to the contrary. Regardless of what the Council says it is doing, or the caution with which it establishes the "uniqueness" of its actions, for Tesón the Council is helping to shrink dramatically the concept of exclusive "domestic jurisdiction" immune from international scrutiny. For Tesón, the Council exists for one purpose, the one "morally defensible foundation of international law" — respect for democracy and human rights which together

5. Quigley, *supra* note at 2.

are "essential for the preservation of peace in the new international order."⁶ Tesón sees this moral imperative as a license that permits the Council to change the law as necessary. Unlike Halberstam, Tesón is not interested in the Council as *status quo* protector of state boundaries and his teleological perspective on the scope of the Council's powers is at odds with Halberstam's, Quigley's, and even Gardam's more cautious, restrictive approach to Charter interpretation.

Anne Orford is also interested in the Council's impact on human beings and their rights but her conclusions are dramatically opposed to those of Tesón, et al. Orford directs her attention to the gender-differentiated effects of Council actions. She argues that Council actions have made women less secure in Kuwait, Iraq, Cambodia, Somalia, Mozambique, Bosnia, and even (through the encouragement given to militarization) the United States. Further, she argues that the assumptions which underlie the United Nations collective security system, far from reflecting "community" or universal goals (as Quigley and Tesón, for example, suggest), in fact privilege the position of elite men and ignore the legitimate desires of the majority of humankind, especially women. Orford challenges Tesón's belief that the Council has a mandate to promote Western-style democracy and that it may intervene at will, even by force, in Third World states. Orford's view is also totally at odds with Halberstam's defense of the statist *status quo*; Orford finds international law's reliance on state sovereignty to be a bankrupt notion since states have long failed to protect women's security. For Orford, the Security Council should, ideally, present a forum for rethinking fundamental concepts of "sovereignty, political identity, and security in ways that draw on feminist attempts to value difference while redefining community."⁷ Orford has no faith that these goals will be achieved either by Quigley's or Tesón's versions of multilateralism, or by Gardam's reliance on established rules of law.

David P. Fidler's article might help to explain why the differing perspectives of scholars like Halberstam, Quigley, Gardam, and Orford, remain possible fifty years after the creation of the Council. Fidler explains contradictory contemporary visions for the Council in terms of competing perspectives within the "liberal" tradition, namely, "liberal internationalism" (focusing on the prospects for cooperation through international organizations), "liberal realism" (emphasizing the need for

6. Fernando R. Tesón, *Collective Humanitarian Intervention*, 17 MICH. J. INT'L L. 323, 371 (1996).

7. Anne Orford, *The Politics of Collective Security*, 17 MICH. J. INT'L L. 373, 405 (1996).

a balance of power among democratic states), and "liberal globalism" (concentrating on the like-mindedness of individuals, especially economic interdependence). As Fidler sees it, each of these liberal perspectives has a different vision of what the Council is for: to actively promote peace, as a figleaf for hegemonic power, or as an indirect agent of economic interdependence. Fidler contends that while all three perspectives share some common assumptions, liberals' failure to reach consensus about the purpose and potential for the Security Council complicates the potential for a viable United Nations reform agenda. It remains to be seen where along his spectrum of "liberalism" Fidler would place Halberstam, Quigley, Gardam, Tesón, and Orford.

Martti Koskenniemi similarly takes a step back, to examine the role of law and lawyers in the Council's work. Here, as elsewhere,⁸ Koskenniemi's concern is with the Council's legitimacy. In this issue, Koskenniemi responds to realist critics of the Council who have argued that it does not and can not apply rules and that politicized selectivity is unavoidable. Koskenniemi tackles realist assumptions — especially the assumed primacy of balance of power and military concerns and the supposition that monolithic "state" interests exist — and argues, largely based on the author's own experiences as a legal advisor to a member of the Council, that normative rules of international law are constitutive and not merely *post-hoc* rationalizations for what the Council does. He suggests that in the day-to-day practice of the Council, law and politics develop in tandem as action, turned into "precedent," invokes demands for consistency. He argues that those engaged in the Council's work, even in a period of crisis such as the Gulf War, are situated in and committed to a "legal culture." Moreover, Koskenniemi argues that this is a desirable outcome in that such "situatedness" permits an open dialogue with other members of the same community and helps to define the organization's identity. Koskenniemi concludes with recommendations intended to strengthen the Council's legal culture, involving reforms to promote greater transparency, procedural safeguards, and enhanced accountability. For Koskenniemi, the Council exists, at least in part, as a forum for a working legal culture that helps to "civilize" discussions of security.

Elements of Koskenniemi's rich and interesting perspective are taken up in the prescriptions for reform made by essayists Richard Falk, Linda A. Malone and A. Peter Mutharika. Like Koskenniemi, Falk is concerned with the "admixture of politics, morality, and law" evident

8. See, e.g., Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT'L L. 325 (1995).

in the Council's decisions to intervene in the affairs of states. Falk surveys the historical development of each of these three dimensions and identifies how, in conjunction, political, moral, and legal considerations set the stage for Council decisions. Like Tesón, Falk reads recent Council actions as part of "welcome" trends in favor of humanitarian intervention to alleviate human suffering and he concludes with specific recommendations (some reminiscent of those made by Koskenniemi) to further this development.

Malone takes reform in a different direction. She relies on recent precedents by the Council to identify the environmental components of international peace and security and argues that Article 2(7)'s "domestic jurisdiction" no longer prevents enforcement action directed at environmental disasters. She proposes a reform agenda intended to secure Council involvement in "environmental management."

For his part, Mutharika draws lessons for the handling of conflicts in Africa from the "integrated global peace management strategy" evinced in the Bosnian peace settlement. After identifying sources of conflict in Africa and synthesizing the successes and failures of United Nations peace management strategies in five African conflicts, Mutharika advocates structural and other reforms that in his view would best enable the Council to handle future African conflicts.

Each of the articles and essays in this volume share connections with particular sub-bodies of scholarship within the literature relating to the Security Council. Halberstam's, Quigley's, and Gardam's specific inquiries have been the subject of prior scholarly analyses.⁹ Tesón shares concerns evident in a vast literature on the scope of humanitarian intervention¹⁰ and like much recent scholarship that is both critical and laudatory of the Council, his work assumes that the Council regularly produces legally relevant precedents.¹¹ Moreover, Tesón's moralistic

9. With respect to Halberstam, see Halberstam, *supra* note 1, at 230 n.8; with respect to Quigley, some of the literature is surveyed in Gardam, *supra* note 2, at 287 n.8; with respect to Gardam, see, e.g., Richard D. Glick, *Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces*, 17 MICH. J. INT'L L. 53 (1995).

10. See, e.g., Jarat Chopra & Thomas G. Weiss, *Sovereignty Is No Longer Sacrosanct: Codifying Humanitarian Intervention*, 6 ETHICS & INT'L AFF. 95 (1992); Juan Antonio Carrillo Salcedo, *Le rôle du Conseil de Sécurité dans l'organisation et la réglementation du "droit d'assistance humanitaire"*, in PEACE-KEEPING AND PEACE-BUILDING: THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL 157 (René-Jean Dupuy ed., 1993); David J. Scheffer, *Toward A Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253 (1992).

11. For an early view of the normative impact of the Council, see Oscar Schachter, *The Quasi-Judicial Rôle of the Security Council and the General Assembly*, 58 AM. J. INT'L L. 960 (1964); for a more recent view, see, Vera Gowlland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 INT'L & COMP. L.Q. 55 (1994). For a more critical view of Council "precedents," see, e.g., Ruth Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond*, 15 MICH. J. INT'L L. 519 (1994).

stance revives a natural law strain within international law scholarship.¹² Orford's work is an offshoot of a new wave of feminist critiques of international law, peace, and security issues, and the United Nations.¹³ It also shares connections with an emerging body of "new stream" or "critical" legal studies of international law.¹⁴ Koskenniemi, one of the prominent authors within this "critical stream," in this issue shares concerns with more traditional "legitimation" scholars.¹⁵ His work, along with Fidler's and Falk's, also reflects an effort to "build bridges" between legal and international relations scholars.¹⁶ Their efforts contribute to a debate currently raging within political science circles, namely, whether institutions like the Council matter?¹⁷

Finally, the prescriptions for change proposed by Koskenniemi, Falk, Malone, and Mutharika are modern-day versions of a reformist literature of considerable pedigree. Indeed, the United Nations itself was inspired by notable blueprints for institutionalist designs to handle peace and security.¹⁸ These latest guideposts for reform suggest that despite the pessimism and post-Somalia/Bosnia malaise which has settled upon the

12. See also Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992).

13. See, e.g., Orford, *supra* note 7, at 374 n.3, 376 n.5, 408 n.153; Hilary Charlesworth, *Transforming the United Men's Club: Feminist Futures for the United Nations*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 421 (1994).

14. See, e.g., DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987); MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989); David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L.J. 1 (1988); Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81 (1991).

15. See, e.g., THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552 (1993). See also ABRAM CHAYES & ANTONIA H. CHAYES, *THE NEW SOVEREIGNTY* (1995) (examining the determinants of compliance).

16. See, e.g., *International Law and International Relations Theory: Building Bridges*, 86 PROC. AM. SOC'Y INT'L L. 167 (1992).

17. See, e.g., John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SEC. 5 (Winter 1994-95). Responses to Mearsheimer are contained in a symposium, *Promises, Promises: Can Institutions Deliver?*, 20 INT'L SEC. 39, 39-81 (Summer 1995) (responses by Robert O. Keohane, Lisa L. Martin, Charles A. Kupchan, Clifford A. Kupchan, John Gerard Ruggie, and Alexander Wendt).

18. For an overview of the reformist literature as related to the creation of the United Nations' predecessor, the League of Nations, see David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841 (1987). For an early attempt at United Nations reform, see GRENVILLE CLARK & LOUIS B. SOHN, *WORLD PEACE THROUGH WORLD LAW* (1958). For more recent efforts, see, e.g., Saul H. Mendlovitz & Burns H. Weston, *From Geopolitics to Humane Governance: Transition Steps*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 669 (1994). For a useful overview, see, e.g., Maurice Bertrand, *The Historical Development of Efforts to Reform the UN*, in UNITED NATIONS, DIVIDED WORLD 420 (Adam Roberts & Benedict Kingsbury eds., 2d ed. 1993).

Council, compounded by the United Nations' profound financial troubles, hope for the Council's prospects to handle the world's problems springs eternal.