States (ECOWAS); and Cambodia, where, in Resolution 792, the Council called for, but did not mandate, the prevention of the supply of petroleum products to any party not complying with the military provisions of the settlement accords. The Council further supports a moratorium on the export of logs and contemplates future measures, including a ban on export of minerals and gems, and possibly even the freezing of assets (this is mentioned explicitly as a possible future measure in the resolution) held by the Khmer Rouge outside Cambodia.

This is quite enough to set the stage for our speakers, who will talk about, among other things, the authority, legitimacy and effectiveness of the Council's actions. But I cannot resist saying a few words about some other actions of the Council which, did we not have so much else to talk about, would be worth detailed treatment because they are, in their own way, just as precedential as the ones I have already mentioned. I have in mind in particular Resolution 808 of February 22, 1993, under which the Council decided "that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." What we have here, in effect, is a political decision, for the first time since the Nuremberg and Tokyo tribunals, to create an international forum to adjudicate individual responsibility for violations of international law. In its own way, this resolution marks a significant advance beyond Nuremberg and Tokyo: it takes us beyond the imposition of criminal responsibility by the victors on the vanquished to a new stage in which the authority of the tribunal flows from the Security Council acting on behalf of the entire international community.

My final word is on some interesting things the Council is doing that we will not have time to discuss. These include the condemnation of the deportation by Israel of several hundred Palestinian civilians from the occupied territories, and the affirmation that this deportation contravenes Israel's obligations under the Fourth Geneva Convention of 1949. If we have time during the discussion period, I hope our panel will address this issue, particularly because of the concern very aptly expressed in Secretary-General Boutros-Ghali's report of January 25, 1993, pursuant to Resolution 799. In that report the Secretary-General states that "There is a growing perception, throughout the international community, that the Council, by not pressing for Israeli compliance with its resolutions . . . does not attach equal importance to the implementation of all of its decisions." That concern bears on all these issues of authority, effectiveness and legitimacy that we would like our panelists to address.

Our first speaker, David Caron, began systematically studying the Security Council during the Persian Gulf war of 1990-1991. The presentation he is about to give is the tip of the iceberg of this larger research project on the structure and the legitimacy of the Security Council. In December 1992, he presented a version of this paper at a seminar in Moscow held under the Society's Joint Research Activities in Public International Law with the former Soviet Union, of which I am the Director.

STRENGTHENING THE COLLECTIVE AUTHORITY OF THE SECURITY COUNCIL

*By David D. Caron**

At this pivotal point in history, a fundamental and oft-raised issue is "international governance." Indeed, that issue is the central theme of this annual meeting

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of The American Society of International Law. Developing means of effective governance is necessary to more complex arrangements of world order. But effective governance means the existence of institutions that govern and legislate, that is, institutions that make decisions binding on the whole. As a general matter, states have been skeptical of, if not hostile toward, and as a consequence unwilling to accept such governance. One notable exception is the UN Security Council which, in the sometimes broad, sometimes narrow, area of international peace and security, may take decisions in the name of, and potentially binding upon, all the international community.

It is thus no small irony that as the international community finally achieved what many of its members at least officially had sought—a functioning UN Security Council—many of that same community began to have second, if not third, thoughts about the legitimacy of the collective authority of that body. For some, this irony has yielded a cynicism regarding the Council. Given what is and what will be its central role, however, this irony must be the basis of a determination to renew the Council and to lay the basis for models of governance generally. It is important to situate this inquiry, because the impression I gain from those involved with the Security Council is that the cutting edge of their concerns regarding it is shifting. Two years, or even one year ago, the concern of a substantial group of states was the *legitimacy* of the power of the Security Council. Amidst the difficult situations in Bosnia and Cambodia and the hard task of finding resources to match both rhetoric and aspiration, the concern of many now is with the *reality* of Security Council “power.” If the United States is not willing to assume the burden of making real the orders of the Council as it did in the case of Iraq, then is the Council revealed as a paper tiger, mostly roaring condemnation and occasionally establishing regimes of economic sanctions of questionable efficacy? These concerns are serious. The important point is that this concern does moot the earlier concern with the legitimacy of Security Council power. The second concern may increasingly preoccupy those on the front line, but ultimately we also must address the first.

This talk is like a “shaggy dog story” in one respect—there is a long buildup to the punchline. I will first offer a few observations about the relevance of legitimacy; secondly, I will describe five circumstances underlying the perception of illegitimacy; thirdly, I will consider the reforms often mentioned and the degree to which they address these circumstances; and finally—for the punchline—I’ll focus on a particular, yet fundamental, challenge to the legitimacy of the Council and offer a proposal for reform.

The Relevance of Legitimacy

Over the past several years, there has been substantial discussion within the international law academic community of “legitimacy.” Is this discussion justified? Does the presence or absence of legitimacy really matter? Why do we care, and is our concern justified? These questions about the significance of a perception of illegitimacy are important as a practical matter, because the states allegedly dominating the Council need to understand why such perception should be of concern.

In this brief presentation, I cannot review the work on this subject of Thomas Franck, Ernst Haas and Tom Tyler; let me instead point out some of the conclusions I reach. Most importantly, power, to protect itself, seeks to be perceived as legitimate. As Jürgen Habermas posited: “Legitimacy means a political order’s

worthiness to be recognized . . . the stability of the order of domination depends on its (at least) *de facto* recognition.”¹

It is the frank recognition of the fact that the power of the Security Council can be used despite a perception of illegitimacy regarding that power, however, that should force us to ask, How significant a force is legitimacy? As Ernst Haas observed, “States may grudgingly meet the organization’s expectations without at the same time appreciating or valuing them.”² Nonetheless, as Inis Claude wrote almost thirty years ago, in an article that deserves revisiting, “[p]olitics is not merely a struggle for power but also a contest over legitimacy, a competition in which the conferment or denial, the confirmation or revocation, of legitimacy is an important stake.”³

How may the perception of illegitimacy work against the effectiveness of the Security Council? Let me suggest five possible instances. (1) It may lead to the failure to pass a resolution, not necessarily because the basic objective is questioned, but because there is a suspicion of the details and of where it will lead. (2) More likely, it may lead to the refusal to adopt as strong a resolution. (3) It may make it difficult for states domestically to build the support necessary to act under a resolution—for example, to convince a citizenry that the granting of landing rights to aircraft en route to a UN-authorized action is supportive of community concerns rather than merely aiding the thinly veiled imperialism of the permanent members of the Council. (4) It may lead states to simply move more slowly in supporting the resolution, in terms of the sending of troops, the pledging of financial support, and the enforcement of embargoes. (5) It may lead, either intentionally or accidentally, to actions and strategies that weaken the Council.

Circumstances Underlying the Perception of Illegitimacy

The current challenge to the legitimacy of the Security Council’s use of its authority may be seen to have at least two major dimensions. Moreover, if one probes into these two dimensions, one finds five circumstances that give rise to the negative perceptions. Some circumstances are often discussed, others rarely mentioned, and one, which is crucially important in my view, apparently has gone unnoted. Although not wholly separate, the two broad dimensions of the challenge to the legitimacy of the Security Council’s use of its authority are (1) a perception that the Security Council is dominated by a few states and (2) a perception that the veto held by the permanent members is unfair and a part of that domination.

The charge of domination is striking because, although the Security Council’s voting rules require that at least nine of the fifteen members vote in favor of an action potentially binding all the members of the United Nations, the Council nonetheless suffers from the allegation of dominance by a subgroup of two, possibly three, or sometimes all five permanent members. Despite the fact that at least ten, and most often thirteen or fourteen, members of the Council have voted in favor of all the recent Council decisions, the legitimacy concerns expressed tend to focus on the membership in the Council of the United States, France and the United Kingdom. The assumption appears to be that, although Third World countries such as Colombia and Malaysia also voted in favor of the resolutions

¹ Jürgen Habermas, *Legitimation Problems in the Modern State*, in HABERMAS (ED.), *COMMUNICATION AND THE EVOLUTION OF SOCIETY* 178 (T. McCarthy, trans. 1979).

² ERNST B. HAAS, *WHEN KNOWLEDGE IS POWER: THREE MODELS OF CHANGE IN INTERNATIONAL ORGANIZATIONS* 87 (1990).

³ Inis Claude, Jr., *Collective Legitimacy as a Political Function of the United Nations*, 20 INT’L ORG. 367 (1966).

authorizing force against Iraq and were, with others, necessary to the passage of such resolutions, in fact the Council is dominated by certain members who can, if motivated, get a resolution adopted. In this situation, dominance consists of the ability to push a *certain* proposal through to adoption.

Although not articulated by those concerned with dominance, this dominance can be seen as arising in two ways that should be carefully distinguished. First, and mentioned in the literature, dominance can flow from the power of certain countries in international affairs generally—power allowing them to influence, outside of the Council, the behavior of states within the Council.

Second, but not often discussed, dominance can flow from the capabilities and staffs of the representatives of certain states within the Council—capabilities allowing them to influence greatly the outcome of Council proceedings. In simple terms, the delegations of the nonpermanent members are overwhelmed by the capabilities of delegations of such members as the United States. As in litigation, the initiative in the process resides with those with the greatest capabilities. The other side is reduced to the position of trying to respond to the initiatives of the more capable. The drafts under discussion thus are offered by the United States or the United Kingdom, and the scheduling of meetings and informal discussions is quite naturally dominated by those who can be most present. This is not to suggest that the capabilities of certain states within the Council should be curbed dramatically. Indeed, given the weakness and even passivity of others, it can be argued with force that if certain states did not draft and then push resolutions nothing would be passed, and the Organization would be ineffective. Rather, it is to suggest that we consider how institutional structures may ensure that all members of the Council play a role in the Council's task of governance, despite differences in capabilities.

Related to, yet also independent from, this charge of dominance is the relative weakness in the Security Council of the nonpermanent members, the weakness of the Secretary-General as referee in the Council, and the lack of transparency of the Council's proceedings to nonmembers and the public generally.

The perception of unfairness (and domination) surrounding the veto has been present in discussion of the Council since its birth. The essential insight needed at present is how the end of the Cold War has transformed the concern over the veto. Before the end of the Cold War, the primary concern centered on how the veto disabled the Council from doing anything. The concern now, amidst active times for the Council, has not been fully articulated, but I would assert it has two aspects.

First, the five holders of the veto, and any state that any of those five is willing to shield, potentially is free from the governance of the Council. Since for almost all of the Council's existence it did not act, the freedom from governance of some was not a significant problem because few states, if any, were governed. But as the Council begins to function, the question becomes, Will certain states be governed and others not?

Secondly, in addition to raising the specter of a double standard in governance, the veto distorts the process of any governance undertaken, because it severely limits the basis of possible discourse. This is the end to the tale that I will shortly reach. What is important to see at this point is that this impact of the veto reinforces both the perception and the reality of dominance of the Council by its permanent members.

There are thus five challenges to the legitimacy of the Council's use of its authority. As to the perception of dominance of the Security Council by a few states,

there are three: (1) dominance because of the power of those states in international affairs generally; (2) dominance because of the capabilities of those states within the Council; and (3) dominance because of the relative weakness of the nonpermanent members, the Secretary-General and institutional controls. As to the perception of unfairness surrounding the veto, there are two: (4) unfairness because of the possibility of a double standard in governance engendered by the veto; and (5) unfairness and dominance of certain states because of the disabling effect the veto has on participatory governance.

Potential Reform Measures

Having sketched out circumstances that give rise to a perception of illegitimacy, I turn to how the reforms often discussed might address these circumstances. This discussion is particularly important, because we have too often overlooked the fact that the motives behind some proposals have little to do with addressing such circumstances.

In this sense I wish to emphasize that the objective of reform must be an *effective* Security Council that also is viewed as *legitimate*. Until quite recently, the major criticism of the Council was its ineffectiveness. Now that it is acting, it can be argued that legitimacy is essential to ensure its long-term effectiveness. But, just as it seems wrong to gain effectiveness at too great an expense to legitimacy, so also it does not make sense to increase legitimacy at the expense of a significant loss in effectiveness.

The reforms often mentioned fall into three broad categories. First, there is reform of the veto. On this, let me say only that the scenario under which the veto would be eliminated, or even limited, is hard to envision; the interests are great and the amendment process in Article 108 is a tremendous barrier to change. Moreover—recognizing that no one provided a scenario anticipating the end of the Cold War—if reform of the veto were to come about, the necessary Charter amendment process likely would take until the year 2000—perhaps too late to address the current challenge. Finally, despite the first two points, I endorse the view of my colleague, Ernst Haas, that alternative voting formulas need be devised; and that job falls to us in the academy.

The second direction of reform is an increase in the membership of the Council. But if an effective and legitimate Security Council is the objective, should we not take care before rushing to increase the size of the Council? That states individually desire the status of membership and propose such expansion does not mean that it collectively makes sense. It seems quite likely the Council may expand somewhat without significantly decreasing its effectiveness. The issue, however, is whether a Council of twenty-five members could remain effective. Would we instead see the emergence of the unending procedural spirals seemingly endemic in the Second Committee of the General Assembly? I note that yesterday Brian Urquhart said he thought there would be a loss of effectiveness with an even smaller increase in size. More fundamentally, how do such proposals further the objective of maximizing both the effectiveness and the legitimacy of the Council? Why does adding more states lead to less domination? One way it does so is by reducing how often the representatives of the present permanent members will serve as President of the Council. (That change was of concern to the permanent members at the time of the last increase in the size of the Council.) But otherwise, if current Council members Colombia and Malaysia cannot be said to represent the developing world, then why would the addition of three more representatives of the developing world improve its representation (particularly given the fact that

Germany and Japan would be added at the same time)? Are we simply increasing the number of countries the United States needs to convince to go along with a resolution? What is it that makes a nonpermanent member of the Council also an effective representative of the remaining members of the General Assembly? These considerations point to the importance of thinking through the need for strengthening the relationship of the Council to the Assembly generally, and for adding members as appropriate to solidify that relationship, while simultaneously not weakening either the effectiveness or the legitimacy of the Council. Referring to the several increases in membership that occurred in the case of the Council of the League of Nations, E. H. Carr wrote that "[t]he Council, in becoming more 'representative,' lost much of its effectiveness as a political instrument. Reality was sacrificed to an abstract principle."⁴

This raises the third and, to me, most helpful line of reform proposals—that is, proposals that tend to seek to open Council proceedings, through various means, to the General Assembly, thereby increasing the sense of participatory governance and in some measure creating political accountability for the Council's nonpermanent members.

The difficulty is that these proposals do not alter the dominance of the few within the Council, when there is a sense of urgency. This is a fundamental challenge, because much of the Council's agenda is "urgent," or can be argued to be so. In moments of urgency, consultation and caucuses are slow and unwieldy compared to the speed with which draft resolutions may be offered by the permanent members. It is here, in my view, that the real root of dominance lies—namely, that Council proceedings often focus on a moment in time and all efforts converge on a single vote, which, when coupled with a sense of urgency, provides the greatest leverage to the greater capabilities of the permanent members within the Council. It is to this aspect that I now turn.

Proposal for Reform

What has been missed over the past two years is that use of the veto has been threatened in a fundamentally different way than previously. Moreover, it is the new use of the veto that particularly threatens the legitimacy of the authority of the Council, because it significantly reduces the need for the maintenance of consensus in a policy.

In the closing days of the Gulf war, the threat of a veto in the Security Council was raised in a fundamentally new circumstance. The veto in that instance would not potentially have blocked the United Nations from undertaking an action; rather, it would have prevented the Organization from backing off from something it had already authorized. In essence, we need to distinguish between the power to initiate and the power to modify what has been initiated. In particular, the Security Council in Resolution 687 authorized "Member States co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement [the Security Council's resolutions regarding the Iraqi invasion] and to restore international peace and security to the area." But as Iraq withered beneath the air attacks of the coalition, peace initiatives were actively pursued by a number of countries. In response particularly to the Soviet peace efforts at that time, both the United States and the United Kingdom reportedly stated that they had the power to maintain the UN sanctions and to continue the use of force authorized by the Security Council, because any alteration of the sanctions or of the authoriza-

⁴E. H. CARR, *THE TWENTY YEARS' CRISIS: 1919-1939* 29 (2d ed. 1945).

tion of the use of force would require a new resolution—and they, as permanent members, could veto that resolution.

Since then, other references to a reverse veto have been made. Prime Minister John Major, for example, reportedly stated in May 1991 that the United Kingdom would veto any resolution aimed at easing the sanctions imposed against Iraq as long as Iraqi President Saddam Hussein remained in power.

The critical point to observe here is that these threatened uses of the veto turn the realists' justification for the veto completely on its head. In the realist argument, a properly assigned veto is justified because all major players should be in agreement on any peace-enforcing effort. Here, however, the players having jointly authorized the use of force or the imposition of sanctions, the veto means that any one of the major players may force the authorization or imposition to continue. Moreover, this reverse veto reinforces both an attitude among the permanent five of "all we need to do is push it through" and a sense of resignation in nonpermanent members once it has been passed.

What can be done? Unlike the case generally with the veto, addressing the threat of a veto on action taken or authorized need not require an amendment. In essence, the approach I propose would be that *any resolution taking a decision should simultaneously set forward a modified voting procedure to be employed in future consideration of modifying the decision included in the original resolution*. The idea appears both possible and desirable.

It is legally possible. When I proposed this mechanism to a lawyer serving with the Mission of one of the permanent members to the United Nations, his reaction was quick and dismissive. He stated that such a "bootstrap approach" was not possible—that a permanent member cannot agree to waive its veto. As a matter of treaty law, I can discern no support for his argument. First, it is clear that the Council could, if it desired, simply place a termination date on any authorization—a waiver not only of the veto but also of the vote. Secondly, and more importantly, the Security Council has on at least one occasion already in essence altered its voting procedures via resolution. In Resolution 687, the Security Council created a Compensation Commission to address claims against Iraq arising out of the Gulf war. That Commission functions under the authority of the Security Council and is a subsidiary organ thereof. The "principal organ" and policy-making body of the Commission is a "15-member Governing Council composed of the representatives of the current members of the Security Council at any given time" whose decisions are taken for the most part without veto.

The proposal is politically possible because, although the concurring votes of the nonpermanent members are necessary for the passage of any Council resolution, and although those members may not be able to offer alternative plans of action quickly, they can demand the inclusion of language setting up a modified voting procedure for future reconsideration of the decision.

The proposal should be desirable from the perspective of the permanent members, because it protects them from the abusive veto of any of the other permanent members. It is desirable from the perspective of the nonpermanent members, because it overcomes the staffing weakness of many of those members by allowing them to revisit the question at a later date. It is desirable from the perspective of collective authority, because the modification of decision making *increases* its legitimacy by forcing an ongoing maintenance of consensus. It is desirable in terms of the objectives of sanctions in that it makes it possible for the state targeted by the sanctions to act so as to end the sanctions. If the target state and its citizenry conclude that, no matter what they do, the sanctions will remain in place, this