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978-0-521-19413-6 - The United Nations Secretariat and the Use of Force in a Unipolar World

Ralph Zacklin

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The United Nations Secretariat and the Use of Force in a Unipolar World

The end of the Cold War appeared to revitalize the Security Council and offered the prospect of restoring the United Nations to its central role in the maintenance of international peace and security. Between the Gulf War of 1990 and the 2003 invasion of Iraq, the UN Secretariat found itself in the midst of an unprecedented period of activity involving authorized and unauthorized actions leading to the use of force.

Ralph Zacklin examines the tensions that developed between the Secretariat and Member States, particularly the five permanent members of the Security Council, concerning the process and content of the Council's actions in the Gulf War, Bosnia, Kosovo, and the Iraq War as the Secretariat strove to give effect to the fundamental principles of the Charter.

RALPH ZACKLIN joined the United Nations Office of Legal Affairs in 1973, where he was Assistant Secretary-General for Legal Affairs from 1998 to 2005.

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To Lyda,
for her unwavering idealism and
to Xochil and Xavier that they
might inherit a world free
from the scourge of war

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“Civilization is nothing more than
the effort to reduce the use of
force to the last resort.”

José Ortega y Gasset

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Preface

This book is based on the Sir Hersch Lauterpacht Memorial Lectures which I delivered in Cambridge in January 2008. Although a number of changes and additions have been made in order to conform to the book format, overall I have attempted to maintain the style and feel of the Lectures.

I am grateful to Sir Elihu Lauterpacht for his invitation to take part in the Lecture Series and to his colleagues in the Lauterpacht Centre for the support and warm hospitality that was extended to me. My thanks go particularly to Professor James Crawford, Anita Rutherford, Kirsten Hollis and Michelle Bradfield.

I owe an intellectual and personal debt of gratitude to many former colleagues in the United Nations Secretariat who directly or indirectly contributed to the collective endeavour that is described in this book. They are too numerous to name but they will recognize their role in the narrative of events. I must, however, single out for special recognition the two who held the office of Legal Counsel of the United Nations during the period when these events took place and who gave their imprint to the legal advice that forms the spine of this book: the late Carl-August Fleischhauer and Hans Corell. Each of them brought a distinctive legal philosophy and personality to bear on the issues that confronted them and each carried on the great tradition of the international civil service and of the rule of law that had been espoused by their predecessors.

Sir Michael Wood whose own series of Lectures preceded mine was kind enough to read my early draft manuscript and offer valuable comments.

In the final stages of the preparation of the manuscript I was assisted by David Hutchinson, Razan Jafar, a Research Assistant at the Lauterpacht

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Centre and now a Trainee Solicitor with Norton Rose LLP, Mona Khalil, Senior Legal Officer at the International Atomic Energy Agency, for her perceptive suggestions regarding the title of the book, and last but not least Ofelia Ortiz, my long-time Personal Assistant at the United Nations who provided me with much needed technical support.

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The Lauterpacht Centre for International Law which celebrated its twenty-fifth anniversary in July 2008 has acquired a well-earned reputation for excellence in teaching and research in international law. It has attracted scholars and students from around the world and, under the guidance of its founder, Sir Elihu Lauterpacht, has contributed significantly to the development of international law in the international community.

The Sir Hersch Lauterpacht Memorial Lectures, a three-part lecture given annually in Cambridge, commemorates the unique contribution to the development of international law of the late Hersch Lauterpacht, noted scholar, teacher and judge of the International Court of Justice. In recent years the focus of these lectures has been on the United Nations and the use of force. Three of the lectures have in fact constituted a kind of trilogy: the 2004 lectures by Hans Blix on the ‘The United Nations and Iraq – reflections on the use of force, on international inspections and on UN reform’; the 2006 lectures by Michael Wood dealt with ‘The United Nations Security Council and international law’; and in 2008 Ralph Zacklin delivered the lectures entitled ‘The UN Secretariat and the use of force in a unipolar world’. Although each of these lectures is a self-contained series, the fact that they were delivered by the former Executive Chairman of the United Nations Monitoring, Verification and Inspection Commission, a former Legal Adviser of the Foreign and Commonwealth Office, and a former Assistant Secretary-General for Legal Affairs of the United Nations produced an unusual and interesting synergy in the examination of some of the most dramatic events of our recent history.

This book is an expanded version of the lectures delivered by Ralph Zacklin in 2008. His choice of subject matter is a welcome one since it focuses on the use of force in a unipolar world from the perspective of

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the UN Secretariat, a little-understood actor in the unfolding of the events of the period, and one whose contribution to the efforts to uphold the principles of the Charter has often been overlooked. The book examines the tensions that developed in the relations between Member States and the Secretariat regarding the use of force through the prism of four major events: the Gulf War, the Bosnia conflict, the intervention in Kosovo, and the Iraq War. It is a history and a narrative that deserves to be told and no one is better qualified to do so than Ralph Zacklin. As the Director of the Office of the Legal Counsel and subsequently Assistant-Secretary-General for Legal Affairs, Mr Zacklin was at the heart of United Nations legal advising during the entire period covering the 1990 Gulf War until the Iraq War in 2003. As a career United Nations official he brings to this book the unique perspective of the international civil service, a much maligned and misunderstood concept.

The Charter of the United Nations describes the Secretary-General as the chief administrative officer of the Organization but it also accords to the office of Secretary-General broad political power which provides the basis for what has been described as the political personality of the Secretary-General. Such political personality is a product of many objective factors but all Secretaries-General ultimately arrive at their own individual conception of the office as they see it within the confines of the Charter-mandated functions.

The political power of the Secretary-General under the Charter is generally referred to as 'implied', a notion that conveys both the ambiguity of the Charter provisions that were adopted at San Francisco and the expectation that these particular provisions, like many others, would be interpreted flexibly over time as befits the constitutional character of that document.

The relationship of the Secretary-General to the Charter is one that has preoccupied successive Secretaries-General since, in the eyes of the public at large and in the view of the Secretariat, the Secretary-General is the guardian of the Charter and the principles it enunciates and represents. The first Secretary-General to truly capture the public's imagination was Dag Hammarskjöld, whose tenure was tragically cut short by his untimely death in the crash of his aircraft at Ndola in 1961. For Hammarskjöld the Secretary-General was a servant of the principles of the Charter and he applied himself to this role with an almost religious fervour.

No principle of the Charter is more important than the principle of the non-use of force as embodied in Article 2, paragraph 4, the Holy Grail of the Charter system. Secretaries-General confront many challenges in the course of their tenures but the challenge that tests them and defines them

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inevitably involves the use of force. Hammarskjöld, who was Secretary-General at the height of the Cold War when the Security Council was effectively silenced, made brilliant use of his implied powers to introduce the concept of peacekeeping in his efforts to overcome the Suez Crisis of 1956.

Peacekeeping apart, the room for manoeuvre of Secretaries-General throughout the Cold War period was severely constricted and the exercises of good offices functions were few and far between.

The end of the Cold War ushered in a period of revitalization of the Security Council and with it the role of the Secretary-General and the Secretariat. The first signs of this renewal emerged under the Secretary-Generalship of Javier Perez de Cuellar, who was able to successfully guide the United Nations Transition Assistance Group (UNTAG) in Namibia which had been on the front-line of the proxy Cold War for years. He then engaged in a good offices exercise in an attempt to end the Iran–Iraq conflict in 1988–9.

Prior to the Security Council's authorization to use force in the Gulf War in 1990, the Council had exercised this authority only once. Much had changed between the 1950 Korean War and the onset of the Gulf War in 1990. The Security Council's involvement in the Gulf War was of a very different order in terms of its scope and the comprehensive use of all the tools available to the Council at the time. In retrospect, we can now see that the 1990 Gulf War was the beginning of a period of the exercise of power which called into question the use of force principles in the Charter in a variety of circumstances: the reversal of aggression in Kuwait; the imposition of peace in the Balkans; the imperative of humanitarian intervention in Kosovo; and regime change in Iraq. This was an unprecedented period in the history of the United Nations and in many respects the Secretariat found itself in uncharted waters. In all of these cases, tensions developed between Member States and the Secretariat. Mr Perez de Cuellar had to deal with the problems arising from an authorized use of force that was effectively beyond the control of the Organization's main security organ; Mr Boutros-Ghali found himself mired in disagreements concerning the use or misuse of peacekeeping, the establishment of safe-havens without the corresponding resources to implement them and sharp differences of opinion regarding the interpretation of Security Council resolutions on the use of air power.

For my part I was confronted with the challenge of framing and developing a doctrine of humanitarian intervention in Kosovo and, most difficult

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of all, the erosion of Charter principles and multilateral institutional mechanisms in the Iraq War.

The great merit of Ralph Zacklin's treatment of the legal issues that arose in connection with these events is that through his knowledge of the legal opinions and memoranda that were generated at the request of the various Secretaries-General or department heads he brings to life and illuminates the complexity of the issues that confronted the senior officials of the Secretariat at the time. The weakening authority of the Security Council, the abandonment of Charter principles and the flight from a multilateral approach to the maintenance of international peace and security all gathered pace in these years and this book shows how the Secretariat strove to stem the tide.

In his Oxford University lecture of May 1961, Dag Hammarskjöld mounted a vigorous defence of the international civil service when he personally came under attack by the then Soviet Union. The demise of the concept of a truly international civil service, he said, might well prove to be the Munich of international cooperation. Mr Zacklin's book is a powerful argument for the retention of that concept as the United Nations seeks to re-establish its relevance in a time of old challenges and new threats.

Kofi Annan
Geneva, 2009