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The UN Charter – A Global Constitution?

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Is the UN Charter a constitution? Answering that question depends on what we mean by a constitution and to what alternative we are contrasting a constitution.

If the relevant contrast is to the U.S. Constitution – the constitution of a sovereign state – the answer is clearly no. The United Nations was not intended to create a world state. As the Charter's preamble announces, it was created for ambitious but specific purposes: "to save succeeding generations from the scourge of war," to "reaffirm faith in fundamental human rights," to "establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained," and to "promote social progress and better standards of life in larger freedom." The United Nations, moreover, is an organization based on the "sovereign equality of all its members" (art. 2.1), its membership being open to all "peace-loving states" (art. 4.1). This contrasts strikingly with the U.S. Constitution's much more general, sovereign-creating purposes: "to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare and secure the blessings of liberty to ourselves and our posterity."[1]

The UN Charter lacks at least two of the three key attributes that the Constitutional Court of South Africa identified as essential to a constitution.

[1] U.S. Const. pmbl.; *see* José E. Alvarez, International Organizations as Law-makers 67–68 (2006).

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In *Pharmaceutical*, the court averred that a constitution is a unified system of law: "There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control."[2] The Charter lacks what Frank Michelman, in commenting on the case, has called the attributes of, first, "pervasive law" (i.e., "all law is subject") and, second, "basic law" (i.e., "derives its force").[3] The UN Charter, instead, reflects what Laurence Helfer calls the "disaggregated and decentralized" character of the international order.[4] Neither is all international law subject to the United Nations nor is the Charter the legal source of all international law. Much international law precedes the Charter and has been developed in parallel to it, including fundamental elements of international law such as the Genocide Convention, which requires its signatories (and as *jus cogens*, all states) to prevent, stop, and punish genocide seemingly irrespective of whether genocide is an "essentially" domestic matter under article 2 (7) and whether the Security Council (hereinafter, "Council") has authority to act in matters beyond "international peace and security." The Charter does, however, have a degree of the third attribute of a constitution: supremacy.

If we contrast the Charter to a standard contract-like treaty, the differences are also clear.[5] The UN Charter is a treaty but a special treaty. Like a constitution, it has supremacy (art. 103) even over treaties that would normally supersede it by "the last in time" rule (Vienna Convention art. 30). This supremacy covers not all international law (it is not pervasive or basic) but only the aspects of the Charter in which it imposes "obligations," most particularly, peace and security. Like the U.S. Constitution (*U.S. v. White*), moreover, the Charter is perpetual; it cannot be revoked by its constituents. Indeed, while states can be expelled, there is no provision for resignation. Moreover, the Charter binds all states, whether members or not, in matters of peace and security (art. 39). Like a constitution, it is "indelible," in Thomas Franck's terminology.[6] Unlike most treaties, no reservations can limit its

[2] In re Pharm. Mfrs. Ass'n of S.A. 2000 (3) BCLR 241 (CC) at para. 44 (S. Afr.).

[3] Frank Michelman, *What Do Constitutions Do That Statutes Don't (Legally Speaking)? in* The Least Examined Branch: The Role of Legislatures in the Constitutional State 273 (Richard Bauman & Tzvi Kahana eds., 2006).

[4] Laurence R. Helfer, *Constitutional Analogies in the International Legal System*, 37 Loy. L.A. L. Rev. 193, 207–08 (2003).

[5] *See* Thomas Franck, *Is the UN Charter a Constitution? in* Verhandeln fur den Frieden 95 (Jochen Frowein et al. eds., 2003) for a discussion of these differences. *See also* Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 Colum. J. Transnat'l L. 529 (1998) for a wide-ranging survey of the debate on Charter constitutionalism.

[6] Thomas Franck, *op. cit.*, supra at 5.

effects on states that ratify it. And it is very hard to amend. Amendments require an international conference and a two-thirds affirmative vote of the entire membership, including all five permanent members of the Council (the "Permanent Five") (art. 109).

Last and most important, it has institutional, for lack of a better word, "supranationality" in the sense that it permits authoritative decisions without continuous consent.[7] Like many constitutions, it does so by dividing powers between constituents and the constituted institution.[8] The Charter establishes a division of powers among the functional components of governance – the Council, General Assembly (hereinafter, "Assembly"), Secretariat, International Court of Justice (ICJ), and so on – which have quasi-executive, legislative, administrative, and judicial functions. The UN Secretariat is pledged to international independence in the performance of its duties (art. 100). Crucially, the United Nations makes or is authorized to make decisions without the continuous consent of its member states. Budgets can be adopted by a two-thirds vote, and the ICJ has held them as binding on all the members, including those who voted against the substantive measures that the budget funds (ICJ *Expenses Case*). Council decisions taken under chapter 7 in matters of international peace and security – those with at least nine out of fifteen votes, including no vetoes by the Permanent Five – are binding on all states (arts. 25 and 48). The Charter has also been interpreted flexibly to make "necessary and proper" functions viable. The requirement that Council votes on substantive matters pass with affirmative votes of the Permanent Five, for example, has been flexibly interpreted to mean no negative votes (vetoes), allowing permanent members to abstain without vetoing.[9]

This supranationality might be seen as, first, simple agency on behalf of the member states, second, a delegation of specific functions to be administered independently, and third, a transfer of sovereign powers to a central and

[7] I do not mean that the United Nations is sovereign over the member states; the United Nations is an organization of the member states. Groping for a label, in an earlier draft I called this "governmentality." Thomas Franck calls this "institutional autochthony," stressing the independence (*competenz competenz*) of the institution. That is part of what I want to convey, but even more I want to highlight its ability of some member to bind all without explicit, case-by-case consent from each member.

[8] States, for example, have reserved "essential" domestic jurisdiction for themselves, and granted the United Nations international jurisdiction, in article 2.6.

[9] The late Oscar Schachter of Columbia Law School is widely credited for this creative, constitutional interpretation made when he was UN deputy legal adviser. *See* Leo Gross, *Voting in the Security Council: Abstention from Voting and Absence from Meetings*, 60 Yale L.J. 209 (1951), and Myres S. McDougal & Richard N. Gardner, *The Veto and the Charter: An Interpretation for Survival*, 60 Yale L.J. 258–92 (1951) for further discussion of this topic.

independent institution, as Dan Sarooshi explicates in his valuable recent study of the question.[10] In this chapter, I add three elements to the issue.

First is the way in which in the United Nations' key Charter powers mix these three categories of delegation and how they do so asymmetrically vis-à-vis different member states, particularly with regard to peace and security.

Second is the manner in which seemingly pure administrative agency becomes inherently political and delegates executive powers, as Secretary-General (hereinafter, "SG") Dag Hammarskjöld famously anticipated they would.

Third is the way in which delegation of duties to the Secretariat leads to inadvertent transfers of authority within the wider UN system, as illustrated by the evolution of the peacekeeping and the Millennium Development Goals (MDGs).

In each case I will be looking at the rationale for the supranationality and the struggle that ensues between those authorized to act multilaterally and the efforts of states to restrict the authority granted. The UN Charter, like so many constitutions before it, is an invitation to struggle.[11]

The UN Charter: Supra over Some and Less So for Others

Supranationality in the Charter affects the responsibilities of all member states, but it affects some much more so than others. All states are affected by the UN's possession of a legal "personality" that permits it to undertake responsibilities and act on behalf of the membership. It can sue a member without the consent of the member and be sued by members without the consent of other members. In the *Reparations Case* involving reparations for the assassination of a UN official, Count Bernadotte, the ICJ declared that the United Nations

> [I]s at present the supreme type of international organization and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence to enable those functions to be effectively discharged.[12]

[10] Dan Sarooshi, International Organizations and Their Exercise of Sovereign Powers (2005).

[11] There are, of course, a number of other ways to explore the constitutionality of the UN system, including, for example, comparing the United Nations to other regional and international organizations, analyzing the separation of powers among its principal organs, and exploring the role played by the ICJ as a constitutional interpreter. Some of these examples are taken up by other authors in this volume.

[12] Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11).

The management of UN finances illustrates a more substantial facet of supranationality, and again one that bears on all members. In articles 17 and 18 the Assembly is given the authority to "consider and approve" the budget and the members undertake to bear those expenses "as apportioned by the General Assembly." The budget being an important matter, a two-thirds vote thus binds – in effect, taxes – the members to support the expenses of the organization. This differs notably from the League of Nations, where unanimity ruled.[13] The UN budget assessments, moreover, are enforced by the provision in article 19 whereby any member will lose its vote in the Assembly if it is two years or more in arrears.

In December 1961, following the controversy over payment for the UN Expeditionary Force in the Sinai and the UN operation in the Congo, and in particular the vehement rejections of financial responsibility by France and the Soviet Union, the Assembly requested an advisory opinion from the ICJ on whether the expenses the organization had "incurred" were obligatory under article 17. In its *Expenses Case* opinion of July 1962, the court's majority ruled expansively. Noting that even though some of the policy authorizations were made by the Assembly and not by the Council (which had "primary" responsibility for peace and security), the ICJ found that the Council did not have exclusive responsibility for peace and security. Furthermore, the obligatory character of the expenses, if properly approved by the Assembly, did not rest on the legitimacy of the underlying substantive purpose of the resolution.[14] This seemed to imply that the Assembly could legally tax where the United Nations could not otherwise legally oblige.[15]

But as interesting as the legal judgments were, political forces determined the outcome of the financing controversies. As early as 1946, money talked as the United States set limits on what it was prepared to pay (at 40 percent), whatever a pro rata estimate would indicate. When the Soviet Union fell two years in arrears in 1964 and 1965, the United States led a campaign to deprive the Soviet Union of its Assembly vote.[16] When this failed, the United States announced that it would also assume a right to regard the budget as nonbinding (i.e., the Goldberg Reservation). The Assembly then moved to a procedure that recognized functional consensus (will the taxpayers pay?)

[13] Leland Goodrich & Edvard Hambro, Charter of the United Nations: Commentary and Documents 183–91 (1949).

[14] *See* Certain Expenses of the United Nations (art. 17, ¶ 2, of the Charter), Advisory Opinion, 1962 I.C.J. 151 (July 20).

[15] *See* Stanley Hoffmann, *A World Divided and a World Court Confused: The World Court's Advisory Opinion on UN Financing, in* International Law and Political Crisis 251 (Lawrence Scheinman & David Wilkinson eds., 1968) for an illustrative interpretation.

[16] Ruth Russell, *United Nations Financing and the Law of the Charter*, 5 Colum. J. Transnat'l L. 68, 83–85 (1966).

as the basis for budgeting. In practice, this allowed the eight countries that, on average, paid 75 percent of the budget to have a veto equivalent to the other 180-plus members. The United States, regarding the budget as advisory, then regularly withheld assessments as leverage to promote institutional and other changes it sought to impose on the organization. Political pushback thus effectively amended the Charter in a pragmatic – but far from organizationally effective – direction as a wide range of states each adopted a bargaining veto vis-à-vis the biennial budget negotiations.

The most striking governmental features of the Charter system are of course the provisions of chapter 7 with regard to international peace and security. Here the United Nations is both supranational and discriminatory. In matters of international peace and security (art. 39), Council decisions bind all UN members (arts. 25 and 48) when they garner the requisite nine votes, including no vetoes by the Permanent Five. Nine members can govern the whole. But the Permanent Five – the United States, the United Kingdom, France, Russia, and China – have the unequal right to remain unbound unless they concur or abstain. The working interpretation that abstentions by the Permanent Five do not count as vetoes reinforces their special status, allowing them the unique discretion not to veto without necessarily affirming and establishing informal precedents they might not want to recognize.[17]

In the *Lockerbie Case*, the ICJ majority held that Council Resolution 748 trumped the provisions of the Montreal Convention that allowed Libya at its discretion to either extradite or try suspected criminals (*aut dedere aut judicare*). In doing so it affirmed the supremacy of Council resolutions over conflicting international law.[18] Statements by the ICJ judges left open the

[17] See fn x, supra.

[18] Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom; Libya v. United States), Provisional Measures, 1992 I.C.J. 114 (Apr. 14). *See also* Michael Plachta, *The Lockerbie Case: The Role of the Security Council in Enforcing the Principles of Aut Dedere aut Judicare*, 12 Eur. J. Int'l L. 125 (2001). Recent European jurisprudence affirms similar Council authority in counterterrorism. There are currently 359 people on the Council's counterterrorism list. Described as "punishment without trial" by German lawyer Gul Pinar (who represents one of the people named on the list), Council procedures allowed no court process before someone is added to the list and no appeal afterward, other than through national processes that might lead the individual's home government to petition to have the individual removed from the list. If an individual's home government used Council Resolution 1267 or 1373 procedures to condemn, for example, a dissident, there was no recourse. Named individuals were banned from international travel, had their bank accounts frozen, and suffered other restrictions on economic activity. The Council of Europe has determined that Resolution 1267 procedures do not meet the standards of the European Convention on Human Rights. For a discussion of these issues, *see* David Crawford, *The*

possibility that Council resolutions might be held ultra vires by the ICJ if a relevant case were put before the court, but the overall weight of the opinion strongly reinforced the supranationality of the United Nations in peace and security vis-à-vis all member states, whether or not they had approved the particular Council decision.

This led some to question just how legitimate and representative the Council was when considered as a world governmental body.[19] But the more usual sovereign pushback was the refusal to negotiate agreements under articles 43 to 47 to allocate forces under the direct command of the Council. The original Charter conception involved division-sized forces of aircraft, naval, and ground forces, all subject to the Council and commanded by the postwar equivalent of the World War II Allied joint command, a military staff committee appointed by the Council. Absent such "special agreements," states retained the right to refuse to deploy forces at the call of the Council, which was reduced to negotiating with potential troop contributors to form, in Brian Urquhart's phrase, the UN equivalent of a "sheriff's posse."[20] In this way sovereignty was reaffirmed.

The International Civil Servant as Neutral Man

Secretary-General Dag Hammarskjöld began his famous 1961 lecture "The International Civil Servant" (hereinafter, the "Oxford lecture") with a reference to and quotation from a then recent interview with Chairman Nikita Khrushchev in which the Soviet leader stated that "while there are neutral

Black Hole of a U.N. Blacklist, Wall St. J., Oct. 2, 2006, at A6, and a reply by Ambassador John R. Bolton, *Letter to the Editor: U.N. Rightly Imposed Sanctions on Terrorists*, Wall St. J., Oct. 6, 2006, at A15. *See also* David Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68 Law & Contemp. Probs. 127 (2005). Two recent developments have improved the rights of those accused of terrorist connections. First, while affirming the nonreviewability of Council resolutions other than by jus cogens standards (the *Yusuf* and *Kadi* cases), the European Court of First Instance held that European Community decisions that interpret and apply Council resolutions are reviewable (the *Ayadi* and *Hassan* decisions). It then overturned, on European human rights grounds, the Community regulations implementing Council Resolution 1373. Second, Council Resolution 1730 (Dec. 19, 2006) created a review process that gives individuals a right to submit petitions to, but not participate in, an appeal at the Sanctions Committee. Governments, however, must consent if their nationals are removed from the sanctions list. Chia Lehnardt, *European Court Rules on UN and EU Terrorist Suspects*, ASIL Insight, Jan. 31, 2007, *available at* http://www.asil.org/insights/2007/01/insights070131.html.

[19] *See* Derek Bowett, *The Impact of Security Council Decisions on Dispute Settlement Procedures*, 5 Eur. J. Int'l L. 1 (1994); *see also* Michael Reisman, *Constitutional Crisis in the United Nations*, 87 Am. J. Int'l L. 83 (1993).

[20] Brian Urquhart, *Beyond the Sheriff's Posse*, 32:3 (May–June, 1990) Survival, 196–205.

countries, there are no neutral men."[21] The chairman had become concerned that the SG was harming, or at least not promoting, Soviet interests in the Middle East and Africa. This led him to propose a troika leadership for the United Nations – three co-SGs, one appointed by Moscow, able to veto one another's actions. Then, he hoped, Soviet interests would be suitably protected from an interested, political administration.

The founders of the United Nations imbued the role of SG and the Secretariat with various tensions. The essence of the position was to be administrative. The SG was the "chief administrative officer of the Organization" (art. 97). He or she was to administer the various tasks assigned by the political principal organs (e.g., the Council, Assembly, Economic and Social Council) and direct the Secretariat. The founders at San Francisco debated whether to "elect" the SG but instead chose the word *appoint* to emphasize the administrative, nonpolitical character. Rejecting a three-year term as too short and subject to too much control, they favored a longer term to encourage independence from the Permanent Five, whose approval would be needed for selection.[22] They embodied these principles in the requirement that the Secretariat be independent – of "an exclusively international character" – and that it would neither seek "instructions" from the members nor would the members seek to "influence" it (art. 100). The Secretariat, moreover, would be chosen for "efficiency, competence, and integrity" with due regard being paid to recruitment "on as wide a geographical basis as possible" (art. 101).

Responding to the pressure of sovereign pushback, the effective independence of the Secretariat was curbed. It soon became the norm that Secretariat positions would be allocated by national quotas. At the higher reaches, leading member states would insist on holding specific posts and in some instances filling them with nationals whom they would specifically name.[23] All of this limited the administrative independence of the Secretariat. For the SG the most consequential effect was the inability to form a governmental cabinet of like-minded followers, such as a typical prime minister or president would do.[24] The SG chooses only his or her small executive office.

[21] Dag Hammarskjöld, *The International Civil Servant in Law and Fact, Oxford Lecture (May 30, 1961)*, *in* Dag Hammarskjöld: Servant of Peace 329 (William Foote ed., 1962) [hereinafter Servant of Peace].

[22] Report of Rapporteur of Committee I/2 on Chapter X (The Secretariat), 3–4, Doc. 1155 I/2/74(2), 7 U.N.C.I.O. Docs. 386 (1945).

[23] SG Annan waged a quiet campaign to persuade member states to present three nominees for "their" open posts. He did not usually succeed. For a valuable survey of the role, see Secretary or General: The UN Secretary General in World Politics (Simon Chesterman ed., 2007).

[24] Dag Hammarskjöld, *The Development of a Constitutional Framework for International Cooperation, in* Servant of Peace, *supra* note 21, at 259.

The SG had more success in transcending a purely administrative understanding of his role. Hammarskjöld, in the Oxford lecture, made a powerful case for neutrality as the ideal of the international civil servant. But he also noted that he could neither be neutral "as regards the Charter" nor "as regards facts."[25] Moreover, he was bound to become nonneutral, and inevitably political, when an organ of the United Nations assigned him responsibilities that conflicted with the interests of one or more member states.[26] In addition, he had one more key responsibility. Article 99 reads, "The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security." This was an inherently political capacity and an important responsibility.

Though rarely invoked, article 99 was the foundation for the ever-increasing political role of the SG as mediator and, to some, "world's chief diplomat." Apart from their role with the Council, SGs saw themselves as representatives of the entire Untied Nations (the so-called Peking formula), particularly when the Council was locked in a confrontation with a state, as it was with China in the 1950s when Hammarskjöld began a delicate series of negotiations to free captured U.S. airmen.[27]

Transitional Peace Operations Authority

Supranationality to one degree or another is nearly inevitable in the complicated UN-managed transitions from war to peace and often, simultaneously, from autocracy to democracy and from state to market.

A transitional peace operation usually needs two authorizations: one is international and the other domestic. The two need not be always connected. An internationally authorized humanitarian intervention could proceed without host-state authorization (but it will not succeed unless it wins the support of significant majority of the local population). And a sovereign government can invite foreign forces to assist it without recourse to the United Nations or a regional organization for authorization. But the two usually are connected. (It is worth noting that even the forcible interventions in Somalia, Haiti, and Kosovo each had prior domestic authorizations, albeit each under duress, and in the Somali case from factions rather than from a functioning national government).

[25] The International Civil Servant, *supra* note 21, at 351–52.

[26] *Id.* at 344.

[27] See Ian Johnstone, *The Role of the Secretary-General: The Power of Persuasion Based on Law*, 9 Global Governance 441, 443 (2003); Mark Zacher, *The Secretary-General and the United Nations' Function of Peaceful Settlement*, 20 Int'l Org. 724, 728 (1966).

From the international point of view, peace operations – which intrude upon the domestic sovereignty of states – come to be established in two ways. First, under chapter 6 of the UN Charter, they reflect the negotiated consent of the parties and then are governed by a series of status-of-forces agreements that specify the legal terms for the presence of foreign forces. Or, second, they are established under chapter 7, which permits the overriding of domestic jurisdiction (arts. 2–7) without consent of the local parties. These enforcement operations draw upon the authority of article 42, which permits the Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security"; article 25, under which member states "agree to accept and carry out the decisions of the Security Council"; and article 43, in which they agree to "make available to the Security Council, on its call, . . . armed forces, assistance and facilities." Troop-contributing countries in these cases negotiate in detail the terms of the participation of their forces: either under UN command and thus with the SG in charge (as in El Salvador or Cambodia): with a regional organization authorized as delegated in chapter 8; or with the leader of a multinational "coalition of the willing" authorized under chapter 7 (as was the case of U.S. leadership of the Unified Task Force in Somalia). Many operations draw on combinations of authorizations: peace treaties among factions, backed up or supplemented by other measures authorized (e.g., arms embargoes, no-fly zones) under chapter 7, as did the various UN Protection Force and Implementation Force operations.[28] "Chinese Chapter 7" – as employed to authorize the use of force for the UN Transitional Administration for Eastern Slavonia – has emerged as a new signal of firm intent to enforce a chapter 6 operation, though in essence it reaffirms the Katanga rule of the UN Operation in the Congo: the traditional principle that force can be used both in self-defense of peacekeeping troops and of the mission (mobility of the force).

From the domestic point of view, a local authority (or authorities) shares temporarily and, usually, conditionally some of its (or their) own legitimacy with the international peace operation. Domestic authority can be examined in the light of the classic types of authorization and imperative coordination. Max Weber outlined three ideal types of imperative coordination: traditional, charismatic, and rational.[29] The first two types of authority may be rare in civil war transitions. Traditional authority – an established belief in

[28] For a valuable discussion of the international law on the use of force and its bearing on authority for peace operations, *see* Karen Guttieri, *Symptom of the Moment: A Juridical Gap for U.S. Occupation Forces*, 13 Int'l Insights 131 (Fall 1997).

[29] Max Weber, The Theory of Social and Economic Organization 324–33 (A. M. Henderson & Talcott Parsons trans., 1947).

the sanctity of immemorial traditions and of the status of those exercising authority under them – has often broken down. Under the pressures of economic growth and social mobilization, tradition tends to erode and traditional states collapse. Charismatic authority – resting on devotion to the sanctity, heroism, or exemplary character of the individual leader and the order ordained by him or her – is often in excess supply, claimed by each of the faction leaders. Usually, therefore, rational authority – the legality of patterns of normative rules and the right of those elevated under such rules to exercise commands – has to do the work of reconstruction, and often in competition with preexisting but weakened traditional and charismatic sources of authority. Transitional authority must be constructed through painstaking negotiation, taking some cognizance of widely recognized international human rights norms and endorsed through negotiated schemes of power sharing or popular elections.

It is difficult, for example, to imagine the success, limited as it is, that Cambodia has achieved without the leadership of King Sihanouk. He repeatedly served as a catalyst for difficult decisions and a bridge between competing factions that would only contact each other under his auspices. The charismatic authority enjoyed by Nelson Mandela was an equally vital part of the difficult transition under way in South Africa. Lacking these forms of unifying authority in Somalia, El Salvador, Guatemala, and Bosnia, peace operations had to rely on enforceable or continually renegotiated agreements, which made the quality of international transitional authority a key component of success or failure.

Straightforward as these authorizations are, each leaves room for unanticipated but inevitable instances where delegated authority turns into what Ian Johnstone called "open-ended consent."[30] In chapter 7 enforcement operations, authority derives from a Council resolution, but no committee of fifteen can anticipate or manage the ensuing process of reconstructing domestic authority thousands of miles away. Even chapter 6 operations that rest on a painstakingly negotiated peace treaty cannot anticipate the myriad operational circumstances that will require decisions.[31] Special representatives, exercising command from the saddle, then learn to treat their Council mandates as either ceilings that cannot be breached or floors that support extended action, depending on the local circumstances. Should, for example,

[30] Ian Johnstone, Rights and Reconciliation in El Salvador (1995).

[31] *See generally* Steven Ratner, The New UN Peacekeeping: Building Peace in Lands of Conflict (1995). For varying discussions of types of transitional authority, see Jarat Chopra, Peace Maintenance (1999) and Michael Doyle, *Transitional Authority*, *in* Ending Civil Wars 71 (Stephen Stedman et al. eds., 2002).

the peace process continue if one or more of the parties has breached the peace agreement by not disarming, as occurred in the middle of the Cambodian peace? Special Representative Yasushi Akashi, with the support of the Council and some, but not all, Cambodian parties decided to continue, contained the spoilers, and succeeded in organizing a (barely) free and fair election that legitimated a new sovereign government of Cambodia. Reginald Austin, head of the Cambodian peace's electoral component, recognized a similar choice and degree of discretion when he asked:

"What are the "true objectives of [the UN Transitional Authority in Cambodia]: Is it a political operation seeking the immediate solution to an armed conflict by all means possible? Or does it have a wider objective: to implant democracy, change values, and establish a new pattern of governance based on multipartism and free and fair elections?"[32]

Extensive and open ended as this delegated authority is, inevitably here, too, one finds significant sovereign pushback against supranationality. Noted earlier was the insistence by China to constrain the independent exercise of coercive force by peacekeeping operations ("Chinese Chapter 7"). But even more significant in shaping contemporary peacekeeping is pushback by two other key participants: the peace-kept and the troop contributors.

Peace operations are political. Spoilers resist the terms of peace treaties, and agreements tend to be fluid. In the new civil conflicts, leaders are reluctant to give up power, and where they are willing to share power, they find that they often lack the ability to maintain a difficult process of reconciliation leading to a reestablishment of national sovereignty. The South West African People's Organization in Namibia, the Farabundo Martí Liberation Front in El Salvador, and the Khmer Rouge in Cambodia all defected from (or failed to implement) crucial elements of the peace within months and, in some cases, days.[33] Nearly equal challenges arise in managing peace operations by coordinating rivalrous international agencies or mobilizing government contingents. Each participant in the combined effort wants a lead role, and few are prepared to be led or coordinated.[34]

[32] For a discussion of these themes see Dr. Reginald Austin, UNTAC, Chief Electoral Officer's Electoral Evaluation: Summary Report 14 (1993); Michael Doyle, The UN in Cambodia: UNTAC's Civil Mandate (1995).

[33] *See* Stephen Stedman, *Policy Implications*, *in* Ending Civil Wars, *supra* note 31, at 663; Page Fortna, *Does Peacekeeping Keep the Peace?*, 48 Int'l Stud. Q. 269 (2004). *See also* Michael Doyle & Nicholas Sambanis, Making War and Building Peace (2006).

[34] *See* Bruce Jones, *The Challenges of Strategic Coordination*, *in* Ending Civil Wars, *supra* note 31, at 89; Terje Roed-Laursen & Rick Hooper, Command from the Saddle (1999).

The MDGs: Road Map to Confrontation

Supranationality also appears in legislative delegation by the General Assembly. In the United Nations, as in most institutions, principals delegate to agents (e.g., member states to the Secretariat) because implementation is too detailed an activity to be managed by 192 states. The agents' job becomes problematic, controversial, and sometimes supranational when the program outlined by the principals is ambiguous or contested (i.e., other than unanimous among the principals). Then the Secretariat is inherently engaged in supranational governance. This is what happened when the "Road map" report to implement the Millennium Declaration was delegated to the Secretariat.

At the UN Millennium Summit in September 2000, the members formally dedicated themselves to a redefinition of goals and means. Since its inception the United Nations has been an organization by, for, and of states – and so it remained. But in 2000, under the leadership of SG Kofi Annan, it set out to acquire a parallel identity, a new model of itself. It was redefining the meaning of global good citizenship for our time by putting people rather than states at the center of its agenda. The Millennium Declaration set this agenda.[35]

At the Millennium Summit, world leaders agreed to a set of breathtakingly broad goals that are global, public commitments on behalf of "we the peoples" to promote seven agendas:

> Peace, security and disarmament,
> development and poverty eradication,
> protecting our common environment;
> human rights democracy and good governance;
> protecting the vulnerable;
> special needs of Africa;
> and strengthening UN institutions.

Promising an agenda for action – the international community's marching orders for the next fifteen years – the member states blithely transferred responsibility for designing a road map to implement these goals to the SG. "The Follow-up to the Outcome of the Millennium Summit" requested "the Secretary-General urgently to prepare a long-term 'road map' towards the implementation of the Millennium Declaration within the UN system and to submit it to the General Assembly at its 56th session [nine months later]."[36]

[35] United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 8, 2000), *available at* http://www.un.org/millennium/declaration/ares552e.pdf.

[36] G.A. Res. 55/162, ¶ 18, U.N. Doc. A/RES/55/162 (Dec. 18, 2000). SG Kofi Annan assigned me the task of putting together this report when I arrived at the UN as his special adviser

This report was to incorporate annual monitoring focusing on "results and benchmarks achieved," to recognize that the primary responsibility for success lay with the member states of the UN themselves, to reflect the capacities of the entire UN system including the World Trade Organization and Bretton Woods institutions, and to outline practical measures to meet the ambitious targets.

A small coordinating team in the Executive Office of the SG, the Strategic Planning Unit, set about collecting from all the United Nations' agencies and programs information on what the UN system was already doing to promote these goals and what next steps seemed practicable to advance them. Once compressed and simplified, this encyclopedic list became the Roadmap Report.[37] The striking part of the report was the treatment of the development goals, which came to be called the MDGs.

Drawn from the development and environment chapters of the Millennium Declaration, the MDGs defined common aspirations in the worldwide effort to alleviate poverty and promote sustainable economic and social development. They pledged to "spare no effort to free our fellow men, women and children from the abject and dehumanizing condition of extreme poverty" and "to create an environment – at the national and global levels alike – which is conducive to development and the eradication of poverty." The eight MDGs that an interagency UN team crystallized from the two chapters of the Millennium Declaration were the following:[38]

1. Eradicate extreme poverty and hunger
   Target for 2015: Halve the proportion of people living on less than a dollar a day and those who suffer from hunger.
2. Achieve universal primary education
   Target for 2015: Ensure that all boys and girls complete primary school.
3. Promote gender equality and empower women
   Targets for 2005 and 2015: Eliminate gender disparities in primary and secondary education preferably by 2005, and at all levels by 2015.
4. Reduce child mortality
   Target for 2015: Reduce by two thirds the mortality rate among children under five.

in April, 2001, four months after the GA authorization. Dr. Abiodun Williams, head of the Strategic Planning Unit, managed the information collection process of UN experience in addressing the many goals in Millennium Declaration and Jan Vandermoortele of UNDP cochaired with me the meeting of UN experts who developed the indicators for the MDGs.

[37] U.N. Doc. A/56/326 (Sept. 6, 2001).

[38] Report of the Secretary-General, *Road Map towards the Implementation of the UN Millennium Declaration*, A/56/326 (6 September, 2001).

5. Improve maternal health
   Target for 2015: Reduce by three-quarters the ratio of women dying in childbirth.
6. Combat HIV/AIDS, malaria and other diseases
   Target for 2015: Halt and begin to reverse the spread of HIV/AIDS and the incidence of malaria and other major diseases.
7. Ensure environmental sustainability
   Targets:
   - Integrate the principles of sustainable development into country policies and programs and reverse the loss of environmental resources.
   - By 2015, reduce by half the proportion of people without access to safe drinking water.
   - By 2020 achieve significant improvement in the lives of at least 100 million slum dwellers.
8. Develop a global partnership for development
   Targets:
   - Develop further an open trading and financial system that includes a commitment to good governance, development and poverty reduction – nationally and internationally.
   - Address the least developed countries' special needs, and the special needs of landlocked and small island developing States.
   - Deal comprehensively with developing countries' debt problems.
   - Develop decent and productive work for youth.
   - In cooperation with pharmaceutical companies, provide access to affordable essential drugs in developing countries.
   - In cooperation with the private sector, make available the benefits of new technologies – especially information and communications technologies.

The MDGs soon became controversial and allegedly ultra vires bureaucratic impositions that went beyond what the member states had authorized as goals in the Millennium Declaration. The United States[39] refused to acknowledge

[39] The actual source of U.S. discontent seemed to me to be a policy disagreement. The Bush administration was launching the Millennium Challenge Account, which made governance reform (e.g., marketization, private enterprise, fiscal balance, open current accounts for international finance, democratization) the precondition for foreign aid. Once the political appointees in the administration had come into office in late 2001, they saw the MDGs as a reflection of the "old ideology" of northern responsibility for southern poverty and an ideological platform to make the shortfall in foreign aid the excuse for development failures. My response was that the MDGs were a thermometer designed to measure progress, not

the MDGs as such, referring to them instead as the "internationally recognized development goals in the Millennium Declaration," making the United Nations' effort to promote and brand the goals difficult. The crescendo of attack peaked with the rhetoric of Ambassador John Bolton, who used them as one more reason to reject the outcome consensus on UN reform in the summer of 2005, until at last he was overridden by President George W. Bush, who accepted the MDGs by word and title in his September 2005 speech.

The MDG goals, targets, and indicators in reality had three sources. The interagency team from the entire UN system that met over the spring and summer of 2001 drew first and most importantly on the Millennium Declaration. Contrary to the U.S. critics, every goal had a textual source with painstaking provenance in the declaration's text. Every significant commitment in the declaration's development chapter found a place in the MDGs as goal, target, or indicator. But the MDGs were not a verbatim copy of the declaration. The development chapter of the declaration, for example, had fourteen bulleted goals; the MDGs, eight. Some declaration goals were specific, time bound, and targeted; others were vague and aspirational. All the MDGs had a similarly mandatory and exhortatory character.

The second source was the preexisting development goals of the international community, most particularly the seven International Development Goals (IDGs). First developed in 1996 by the Organisation for Economic Co-operation and Development (OECD), they won the endorsement of the World Bank, OECD, International Monetary Fund (IMF), and UN SG Kofi Annan in the June 2000 report *Better World for All: Progress Towards the International Development Goals* (hereinafter, "BWfA Report"). The IDGs included goals and targets to reduce extreme poverty, and to promote education and maternal health – all of which reappeared in the Millennium Declaration.

The BWfA Report soon became shrouded in controversy. Many developing states and many in the world of development nongovernmental organizations rejected the seemingly one-sided program to monitor third-world progress without an equivalent measure of the contribution the wealthy countries were making to global progress. Some countries (Catholic and Muslim and, after January 2001, the United States under the Bush administration) objected

a strategy. There was no reason not to portray the MCA as the best (U.S.) strategy for meeting the MDGs. This argument was welcomed in the U.S. Treasury, but not in the State Department.

to the "reproductive health goal," which seemed to endorse birth control and possibly abortion services. The developing world critics soon tagged the report with the title "Bretton Woods for All." Nonetheless, key development actors, including the Bretton Woods institutions and the influential U.K. Department for International Development (DFID), had a stake in the viability of the IDGs and the principles of multidimensional, human-centered, output-oriented, and measurable development they embodied.

The UN system interagency team adopted the framework of the IDGs, replaced "reproductive health" from the IDGs with "HIV/AIDS " from the Millennium Declaration, and added an eighth goal – a "global partnership for development" that assembled a variety of commitments in trade, finance, and development aid made by the wealthy countries and embodied in the Millennium Declaration. The result was the new eight that in late June 2001 they decided to call "The Millennium Development Goals."[40]

The third source was a determination to overcome generations of dispute among the Bretton Woods institutions, the UN Development Programme (UNDP), the UN Conference on Trade and Development, and other UN agencies. Each had grown into the habit of criticizing the others' reports and strategies, producing a cacophony on what development meant, how it should be measured, and whether progress was being made. The UN system interagency team assembled to create a road map of the development section of the Millennium Declaration was a team of experts, particularly involving the heads of the statistical services within the respective organizations. Acutely aware that agreed indicators would shape development policy coordination and determine the high-priority statistics that national and international statistical agencies would collect, they took great care in choosing – within the usual confines of agency stakes and commitments – the best forty-eight indicators then available to measure eighteen targets that defined the eight goals.

In addition to rejecting the MDG framework in general, the Bush administration later objected that one of the forty-eight indicators proposed by officials of the World Bank, the IMF, and the UN Secretariat to measure progress on the goals and targets mentions the international goal of seven-tenths of 1 percent of wealthy nations' gross domestic products for development

[40] I took considerable effort to discuss drafts of the emerging MDGs with various UN delegations, including the G77 developing country caucus, the European Union caucus, and the U.S. delegation during the summer of 2001 in order to make sure that the necessary votes for approval would be forthcoming when the road map was presented to the General Assembly in the coming September.

assistance. The United States (i.e., the Bush administration) itself affirmed this internationally agreed target at the Monterrey Conference in 2001. But the larger source of U.S. concern was that the goals reflected a hardening of soft law. Unlike the other Millennium Declaration goals in peace and security and humanitarian protection, the Millennium *Development* Goals (MDGs) had moved from very soft law – an Assembly resolution – to hard international public policy endorsed officially by operative institutions such as the World Bank, the IMF, the World Health Organization, and others – bypassing an interstate treaty or agreement.

If we measure the hardness of law by how obligatory and either delegated or precise it is,[41] then the MDGs have significantly hardened the issues they cover in the Millennium Declaration. The Millennium Declaration started out as a soft Assembly resolution: vague, hortatory, and undelegated in substance. When the member states delegated the formulation of the road map to the Secretariat, they set in motion a hardening process that resulted in the MDGs. While all eight MDGs have textual support in the principles and authority provided by various parts of the declaration, now they have become precise targets and measurable indicators. More important, they have become the template for development for the World Bank, IMF, and United Nations. They shape the World Bank's Poverty Reduction Strategy Papers and the UN Development Assistance Frameworks that measure the progress of developing countries seeking development grants and loans from the World Bank, IMF, and the UNDP. They increasingly influence bilateral donors. In effect, the MDGs are quasi legislative in the developing world, a long step from the rhetoric they appeared to be in September 2000.

If the pushback from sovereign states was most striking in the U.S. campaign to undermine the MDGs and in Ambassador Bolton's perfervid rhetoric, the more subtle and important pushback came from a much more important source. The goals were hortatory; the key source of implementation was national, not the UN system. Whether the developing countries would actually adopt them in practice and whether the developed world would respond with a genuine partnership to create additional international opportunities for growth were the two decisive factors in what has become the MDGs' mixed record of success.[42] This was soon reflected in the natural development of country-level MDGs that mixed existing development

[41] *See* Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 Int'l Org. 421 (2000) (drawing these distinctions).

[42] *See* the annual MDG reports of SG, *available at* www.un.org/documents/repsc.htm.

planning with the MDG framework. In some national development plans, the MDGs served as rhetorical window dressing; in others, they played an operational role and became the operative framework for assessing the World Bank's Poverty Reduction Strategy Papers and the UNDP's UN Development Assistance Framework.[43]

Conclusion

Supranationality is a key element of a constitutional order that separates a constitution from an ordinary treaty. It opens the door to complex agency on behalf of the member states in which authoritative decisions are taken without continuous sovereign consent.

It is worth recalling, however, that these decisions are inherently asymmetric, different for some than for other states. This is clearly the case in Charter-based allocations of rights and responsibilities in peace and security, but it appears whenever the underlying circumstances of state inequality cannot be rectified by the formal equality of multilateral institutions.

In addition, supranationality appears in the manner in which seemingly pure administrative agency becomes inherently political when it delegates executive powers. Secretary-General Dag Hammarskjöld famously anticipated this, and the practice of SGs in active mediation in international disputes has confirmed it.

Supranationality also emerges in the delegation of duties to the Secretariat when it leads to inadvertent transfers of authority within the wider UN system, as illustrated by the operation of peacekeeping and the evolution of the MDGs.

Sometimes, in world politics, the constitutions of international organizations deepen supranationality. Where the stakes are high, where a small group of leading states is closely connected, there supranational solutions to cooperation problems sometimes grow.[44] The evolution from the General Agreement on Tariffs and Trade to the World Trade Organization, from a veto to implement to a veto to prevent the enforcement of a trade ruling, is a classic instance. But where the constitution reflects a hegemonic constitutional

[43] *See, e.g.*, IMF, PRSP Factsheet (Apr. 2008), *available at* http://www.imf.org/external/np/exr/facts/prsp.htm (last visited April 14, 2008) ("PRSPs aim to provide the crucial link between national public actions, donor support, and the development outcomes needed to meet the United Nations' Millennium Development Goals (MDGs)").

[44] *See* Mancur Olson, The Logic of Collective Action (1965); Duncan Snidal, *The Limits of Hegemonic Stability Theory*, 39 Int'l Org. 579 (1985).

moment, as the UN Charter did with the predominance of the United States at the end of World War II, then the evolution tends to go in the opposite direction.[45] Supranationality generates sovereign pushback. Weak as it was and is, the UN "constitution" of 1945 still authorizes more than the members are now prepared to cede.

[45] *See* Robert Keohane, After Hegemony (1984); John Ikenberry, After Victory (2001).