Chapter 8

The Security Council and Impartiality in the Peaceful Settlement of Disputes

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Abstract

This chapter tests the assumption that impartial law-based dispute settlement by the Security Council is neither achievable because of its political nature nor required by the UN Charter. It may be expected that placing peaceful settlement in the hands of a political as opposed to a legal organ is bound to lead to a subjective and partial approach to dispute resolution. There are in effect two barriers to achieving impartiality: an internal one caused by the Security Council as a political institution dominated by the permanent members; and an external one, as to which rules, norms, and values should be applied – those of law, justice, peace, and security or simply those dictated by the national interests of the members of the Council? Despite these substantial barriers, there is certainly an expectation of objectivity and impartiality created by the provisions of the Charter. This Chapter analyses the provisions of the Charter and practice of the Security Council in the field of peaceful settlement looking for evidence of impartiality in both inter-state and intra-state disputes and assessing the influence of peacekeeping mandated by the Council upon impartiality. This analysis will show that the concept of impartiality in peaceful settlement has largely disappeared and asks, in the conclusion, whether it is possible and desirable to (re)turn to impartiality.

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1. Why Impartiality?

Writing in 1944, Hans Kelsen argued that it was essential to replace the political bias in the League of Nations' settlement system, stating that the only legitimate system of collective security would be one based on the enforcement of international law where the executive would enforce the judicial pronouncements of an international court. He was adamant that the judgment as to whether the law had been broken by any parties to a dispute had to be removed from States and be placed in an independent judicial body.[1] The establishment of such an independent and impartial judicial dispute settlement mechanism would help move the international legal system from one of primary rules enforced by methods of self-help towards a union of primary and secondary rules (including rules of adjudication) subsequently envisaged by Hart.[2]

However, although the UN Charter recognised the International Court of Justice (ICJ) as the 'principal judicial organ' of the UN,[3] and the Court does perform an important role in the peaceful settlement of disputes between States,[4] it was not a radical departure from the Permanent Court of International Justice which operated under the League system.[5] Instead, the drafters of the Charter placed greater emphasis on the role of the executive (the Security Council) in the peaceful settlement of disputes. This returns us to the presumption underlying Kelsen's proposition, namely that the independent and impartial application of the law to such disputes will be difficult to achieve in such a political organ. Following this line of thinking, instead of authoritative judgments

[1] Hans Kelsen, *Peace through Law* (Chapel Hill: University of North Carolina, 1944), pp. 13, 49, 67.
[2] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon, 1961), p. 94.
[3] Charter of the United Nations, San Francisco, 26 June 1945, in force 24 October 1945, 1 UNTS 16, Art. 92. See generally Mohamed Sameh M. Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* (The Hague: Kluwer, 2003).
[4] John G. Merrills, *International Dispute Settlement*, 6th edn (Cambridge: Cambridge University Press, 2017), pp. 171–6. But see Richard A. Falk, 'On identifying and solving the problem of compliance with international law' (1964) 58 *Proceedings of the American Society of International Law* 1–9 at 2.
[5] Manley O. Hudson, 'The succession of the International Court of Justice to the Permanent Court of International Justice' (1957) 51 AJIL 569–73.

and impartial decisions based on law, the role of law in the Council is mainly reduced to the adversarial legal arguments of the disputant States and their allies on the Security Council. Falk distinguishes adversarial arguments from impartial judgments in the following terms: 'In domestic society we have no problem in distinguishing the argument of counsel from the judgment of the court; the former is understood as adversary, the latter as impartial. In international society the absence of generally competent adjudicating institutions makes it very difficult to move beyond the adversary level of discourse.'[6]

Under this conception, the settlement of disputes based on international law can only be achieved through the Security Council if the member States have no national interests in the dispute – to enable them to remain above the fray and exercise impartiality in shaping a collective response, moreover, one based on law. If those conditions do not exist, the result will either be inaction due to lack of consensus or veto, or decisions based on political compromises about how to achieve international peace and security.

Falk discusses the structure of international society and the role of law in general terms:

> We associate the intervention of law in human affairs with the role of the third-party decision-maker who is entrusted with the task of sorting out adversary contentions. International society as it is decentralized often successfully works out the content of reasonableness through action and inaction of adversary parties, provided the issues at stake are not vital to national security or national honor. In the context of force, however, the differential of power between adversaries of unequal strength influences their degree of flexibility in responding to counterclaims; the differences between the results of adversary interaction and of impartial third-party judgment are likely to be pronounced. The substitution of law for force in any social order involves, then, the gradual replacement of the ideology of self-help by that of third-party judgment.[7]

[6] Richard A. Falk, 'New approaches to the study of international law' (1967) 61 AJIL 477–95 at 477–8.
[7] Richard A. Falk, *Legal Order in a Violent World* (Princeton, NJ: Princeton University Press, 1968), p. 270.

Falk recognises that in a decentralised international society impartiality in the absolute sense of the decision maker being indifferent to the adversarial arguments of the parties, applying objectively verifiable rules to resolve the dispute,[8] is rarely achievable. Even the ICJ allows judges from the disputant States not to recuse themselves from the case.[9] Falk argues that the 'absence of centralized procedures of interpretation and implementation in international society' means that 'the effectiveness of a decision' depends 'largely on voluntary patterns of compliance', which in turn is dependent on the 'persuasiveness' and 'authoritativeness' of the decision.[10] To be persuasive and authoritative the decision-maker has to recognise that international law has problems of indeterminacy and therefore account must be taken 'of value diversities, as well as value convergencies' in reaching or recommending terms of settlement.[11] The Charter stipulates that disputes should be settled peacefully in accordance with international law *and justice*, in recognition that certainly in complex disputes law by itself is often not enough. However, this flexibility in dispute settlement does not mean that impartiality is not possible, or at least it is a standard by which the authoritativeness and persuasiveness of the decision is to be measured. Impartiality in dispute settlement can be seen as a standard or principle that is to be aimed for but is not always achieved. The failure to be impartial, either wholly or in part, does not necessarily signify that the judgment of the decision maker will not be accepted by the disputants, but it will mean that its authoritativeness, particularly in the longer term, will be in doubt. Lack of impartiality is likely to mean that the settlement will not be founded on law but on more transient political factors, which are not only detrimental to the lasting worth of the settlement but undermine the development of the rule of law and the benefits of certainty and predictability that it brings to international relations.

[8] See Higgins' review of Falk's work in Rosalyn Higgins, 'Policy and impartiality: the uneasy relationship in international law' (1969) 23 Int'l Org. 914–31 at 930–1.
[9] Statute of the International Court of Justice, San Francisco, 26 June 1945, in force 24 October 1945, 33 UNTS 993, Art. 31.
[10] Richard A. Falk, 'On treaty interpretation and the New Haven Approach: achievements and prospects' (1968) 8 Va. J. Int'l L. 323–55 at 326–7.
[11] Ibid.

This chapter tests the assumption that impartial law-based dispute settlement by the Security Council is neither achievable because of its political nature nor required by the UN Charter. The chapter considers the functions and powers of the UN Security Council as the UN organ with 'primary responsibility for the maintenance of international peace and security',[12] granted powers regarding the peaceful or 'pacific settlement of disputes' under Chapter VI of the UN Charter. However, although the focus of the analysis is on Chapter VI of the Charter, the Council's coercive powers to take 'action with respect' to threats or breaches of the peace under Chapter VII must be considered. The UN Charter promises both coercive action and impartial dispute settlement when it declares that the UN's first purpose is:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[13]

A textual interpretation of this key provision signifies that peaceful settlement efforts by the UN should be in conformity with 'the principles of justice and international law', while collective measures are not so clearly confined. Following this line, a decision by the Security Council to take action under Chapter VII can create its own international laws, at least in relation to the specific situation deemed to be a threat to the peace.[14] The Security Council can thus both apply international law under Chapter VI and make international law under Chapter VII. Moreover, having both sets of powers (of peaceful settlement and enforcement) at its disposal has led to the

[12] UN Charter, Art. 24(1).
[13] Ibid., Art. 1(1).
[14] Ibid., Art. 25. As to whether the Security Council has a more general legislative competence, see the debates surrounding the adoption of Resolution 1373 in 2001 (UNSC Res. 1373 (28 September 2001) UN Doc. S/RES/1373), for example, Luis Miquel Hinojosa Martinez, 'The legislative role of the Security Council in its fight against terrorism: legal, political and practical limits' (2008) 57 ICLQ 333–59.

blurring of the two by the Security Council and to it exercising its range of powers in a discretionary, selective, and partial way. This descent towards arbitrariness has been fuelled by the expansion of the Council's peaceful settlement and peacekeeping functions from inter-state to intra-state disputes and situations.

It may be expected that placing peaceful settlement in the hands of a political as opposed to a legal organ is bound to lead to a subjective and partial approach to dispute resolution. There are in effect two barriers to achieving impartiality: an internal one caused by the Security Council as a political institution dominated by the permanent members; and an external one, as to which rules, norms, and values should be applied – those of law, justice, peace, and security or simply those dictated by the national interests of the members of the Council? Despite these substantial barriers, there is certainly an expectation of objectivity and impartiality created by the provisions of the Charter.[15] In addition to Article 1(1) cited above, the preamble of the Charter expresses a determination 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'. In addition to legal constraints, there are ones of legitimacy in that international organisations can only expect to 'build up enough authority to be successful' peace-brokers if they are seen as 'impartial agents'.[16]

This Chapter analyses the provisions of the Charter and practice of the Security Council in the field of peaceful settlement looking for evidence of impartiality in both inter-state and intra-state disputes and assessing the influence of peacekeeping mandated by the Council upon impartiality. This analysis will show that the concept of impartiality in peaceful settlement has largely

[15] See the step-by-step schemata of the Charter procedure for peaceful settlement in Hans Kelsen, *The Law of the United Nations* (New York: Praeger, 1950), pp. 381–7.
[16] Bob Reinalda and Bertjan Verbeek, 'Policy autonomy of international organizations', in Richard Collins and Nigel D. White (eds.), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (London: Routledge, 2011), p. 94.

disappeared and asks, in the conclusion, whether it is possible and desirable to (re)turn to impartiality.

2. The Pacific Settlement of Disputes under Chapter VI

Despite the promise of peaceful settlement in accordance with international law found in the Preamble and Article 1(1) of the UN Charter, as well as Article 2(3) and the provisions of Chapter VI (reviewed below), the lack of impartiality in practice is traceable to the institutional design of the UN Security Council. That body is accorded a key role in peaceful settlement under Chapter VI, thereby giving each of the permanent members ultimate control over this function. Further, the empowerment of the Council with both recommendatory and coercive competence under Chapter VII has led to the conceptual and practical conflation of peaceful settlement with peace enforcement. This is exemplified by the transition of peacekeeping from consensual operations designed to impartially support peaceful settlement by the parties towards coercive operations designed to secure settlement outcomes decided by the Council.

When considered in isolation, the provisions of the UN Charter on peaceful settlement hold a false promise of objective, impartial peaceful settlement of disputes in accordance with international law. Chapter VI reinforces this promise when detailing the obligation that member States have accepted in Article 2(3) of the Charter to 'settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'. The reference to 'justice' harks back to Article 1(1)'s reference to the 'principles of justice and international law' and the Preamble's promise 'to establish conditions under which justice and

respect for the obligations arising from treaties and other sources of international law can be maintained'.[17]

The opening provision of Chapter VI, Article 33(1), requires States that are parties 'to any dispute, the continuation of which is likely to endanger the maintenance of international peace and security' to, first of all, seek a solution using the traditional forms of peaceful settlement: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, or resort to regional organisations. Thereby, Chapter VI is demonstrably based on traditional forms of diplomacy and settlement.[18] Article 33(2) brings the Security Council into the equation by requiring it, where necessary, to call upon the parties to settle their disputes by such means. Thereafter, Chapter VI contains what have often been termed the Security Council's 'quasi-judicial' powers to: investigate disputes that are likely to endanger international peace and security (Article 34); recommend procedures or methods of adjustment to the disputants including reference to the ICJ in the case of 'legal disputes' (Article 36); or recommend terms of settlement to them (Article 37).[19] By tying the obligation to settle disputes placed on States to the powers of the Security Council the idea was that the Security Council would, as a third party, help the parties towards a settlement agreement after they had tried and failed to sort out their dispute themselves, although in practice the Security Council has not necessarily waited for this to happen.[20]

Although international law is not expressly posited as the basis of peaceful settlement in any of these provisions, except for 'legal disputes' which should 'as a general rule be referred by the parties' to the ICJ,[21] the purposes and principles of the Charter referencing peaceful settlement

[17] See Kelsen, *Law of the UN*, p. 18, for a discussion of the potential differences between 'justice' and 'international law'.
[18] See generally Merrills, *International Dispute Settlement*; Leland M. Goodrich, 'Pacific settlement of disputes' (1945) 39 Am. Pol. Sc. Rev. 956–70.
[19] Kelsen, *Law of the UN*, p. 372.
[20] Christian Tomuschat, 'Article 33', in Bruno Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary*, 3rd edn (Oxford: Oxford University Press, 2012), p. 1072.
[21] UN Charter, Art. 36(3).

(Articles 1(1), 2(3) and the Preamble) make it clear that peaceful settlement should be undertaken in accordance with the principles of justice and international law. These foundational and underpinning Charter provisions require that settlement efforts by the Security Council (or other UN organs such as the General Assembly and the Secretariat) are framed by the norms of justice and international law and, consequently, must be undertaken in an impartial manner in order to achieve settlement in accordance with those norms. As has been indicated in section 1, impartiality is inherent in the notion of settlement by a third party in accordance with international law and justice: the third party must evaluate both sides' adversarial legal arguments in order to make an independent and objective judgment, decision, or recommendation based on the application of international law and justice.

3. Some Early Evidence of Objectivity and Impartiality

There is some early evidence of the willingness of the Security Council to undertake impartial peaceful settlement in the crises that emerged in the immediate shadow of the Second World War, including the Iranian,[22] Greek,[23] and Spanish Questions. However, the focus of the Council was more on the correct application of the internal law of the UN Charter, rather than the applications of external rules and principles of international law. In these crises the provisions of Chapter VI were discussed in the Security Council as were the 'triggers' that would unlock the Council's powers under Chapters VI or VII. The practice indicated that before any substantive resolutions could be adopted addressing an issue of peace and security, the Security Council had to determine whether it was a situation or dispute 'likely to endanger international peace and security' (Articles

[22] UNSC Res. 5 (8 May 1946) UN Doc. S/RES/5, in which the Security Council resolved to 'defer further proceedings on the Iranian matter in order that the Government of Iran may have time in which to ascertain … whether all USSR troops have been withdrawn from the whole of Iran'. The USSR was absent from the Council at the adoption of the resolution.

[23] UNSC Res. 15 (19 December 1946) UN Doc. S/RES/15, in which the Security Council established a Commission of Investigation under Art. 34 of the Charter to 'ascertain the facts relating to the alleged border violations' along borders between Greece on the one hand, and Albania, Bulgaria and Yugoslavia on the other.

33 and 34) and so appropriate for Chapter VI recommendations, or whether it was a 'threat to the peace, breach of the peace, or act of aggression' (Article 39) requiring recommendations for settlement or action under Chapter VII.

That these trigger terms are imprecise is shown by the fact that the original Dumbarton Oaks proposals for the UN Charter had provided for a link between Chapters VI and VII of the Charter. The proposals had a provision at the beginning of Chapter VII that empowered the Council to find a threat to the maintenance of international peace and security if the procedures in Article 33(1) or recommendations made under Article 36(1) had failed or had been ignored.[24] In other words, the scale or nature of the security situation might not have changed to signify a move into Chapter VII – rather, it may simply have been the case that the Council had failed to help settle it peacefully under Chapter VI. This provision was removed not because it muddied the distinction between a danger to the peace under Chapter VI and a threat to the peace under Chapter VII, but because it might have fettered the Council's power to make those determinations.[25] So even though the concepts of danger and threat have no determinate meaning, they are treated as preconditions before the Security Council can act under either Chapter VI or VII.

The purported need for a formal determination under Chapter VI or VII on the nature of the security situation was demonstrated by the Security Council's response to the 'Spanish Question' in 1946. The Council adopted a resolution establishing a sub-committee to determine whether the existence and activities of the Franco regime in Spain endangered international peace and security.[26] The sub-committee reported that the situation did not 'justify direct executive action by the Security Council itself under Chapter VII which deals with various types of enforcement action

[24] UN, *Documents of the United Nations Conference on International Organization (UNCIO)* (New York: UN, 1945-1954), vol. 3, p. 13.
[25] Ruth B. Russell and Jeannette E. Muther, *A History of the United Nations Charter* (Washington, DC: Brookings, 1958), pp. 669–70.
[26] UNSC Res. 4 (29 April 1946) UN Doc. S/RES/4.

which Members are obligated to take at the direction of the Security Council'.[27] It was of 'international concern' but not yet a 'threat to the peace' within Article 39.[28] There was a 'potential menace to international peace' and, therefore, a situation likely to endanger international peace within the meaning of Article 34 of Chapter VI.[29] Accordingly, it was held that the 'situation in Spain thus falls to be dealt with by the Security Council under Chapter VI of the Charter, which covers measures of peaceful settlement and adjustment'.[30]

Although the Security Council was unable to agree on a resolution under Chapter VI that would have led to settlement or agreement, the General Assembly did recommend the withdrawal of ambassadors from Spain,[31] and Spain remained outside the UN until 1955. Yet at the same time, no agreement was made in the UN on how to address the problems posed to peace by the last remaining Fascist regime in Europe, and one brought to power with the aid and assistance of Fascist Germany and Italy.[32] The sub-committee's report made it clear that Spain was a menace to neighbouring States – France having closed its border in 1946 – and to its own population: 'the Franco regime continues to practice those methods of persecution of political opponents and police supervision over its people which are characteristic of Fascist regimes and which are inconsistent with the principles of the United Nations concerning the respect for human rights and for the fundamental freedoms'.[33] The sub-committee's report opens the prospect of settlement based on principles of human rights, but the Council could not progress beyond narrow jurisdictional issues raised by the Charter to explore the international legal basis for settlement of the situation as required by Chapter VI. Once it has decided that Chapter VI was the appropriate framework for tackling the Spanish Question, the Council's attention should have turned to the

[27] UNSC, 'Report of the Sub-Committee on the Spanish Question' (1 June 1946) UN Doc. S/75, paras. 16 and 22.
[28] Ibid., paras. 3 and 22.
[29] Ibid., para. 30(a).
[30] Ibid., para. 27.
[31] UNGA, 'Relations of Members of the United Nations with Spain' (12 December 1946) UN Doc. A/RES/39(I).
[32] UNSC, 'Report of the Sub-Committee on the Spanish Question', para. 6(a).
[33] Ibid., para. 7.

applicable principles of international law and justice. Overt concern for the internal situation in Spain was an early sign of the Council's competence over intra-state situations and conflicts, but that did not lead to a development of law-based methods to settle such disputes.

Debates about the relationship between Chapter VI and VII were also evident in the Security Council's close involvement in helping achieve peaceful settlement in Indonesia,[34] an example of an armed struggle for independence from colonial rule (in that case from the Netherlands). Indeed, as Kelsen points out, the initial debate over Indonesia was concerned with whether this should be settled within the framework of Chapter VII on the basis that the situation constituted a threat to or breach of the peace under Article 39, bearing in mind that Article 39 does not necessarily mean that enforcement action will be taken but allows for the making of recommendations or for decisions imposing coercive measures.[35] Political pressures concerning the premature use of Chapter VII, and the unwillingness of some members to even suggest that the Council might 'decide' on the future status of Indonesia,[36] led to the removal of implied determinations under Article 39 in Security Council resolutions on Indonesia. This left the Council to operate under Chapter VI and guide the parties towards a peace settlement, culminating in the adoption of Resolution 67 on 28 January 1949. In this Resolution, the Council invoked its primary responsibility for peace and security and built on the expressed desires of both parties in the Linggadjati and Renville Agreements – facilitated with the aid of the Council's Committee of Good Offices for Indonesia – to establish a federal, independent and sovereign Indonesia.[37] The Council recommended the establishment of an interim federal government, elections to an Indonesian

[34] UNSC Res. 27 (1 August 1947) UN Doc. S/RES/27; UNSC Res. 30 (25 August 1947) UN Doc. S/RES/30; UNSC Res. 31 (25 August 1947) UN Doc. S/RES/31; UNSC Res. 36 (1 November 1947) UN Doc. S/RES/36; UNSC Res. 67 (28 January 1949) UN Doc. S/RES/67.
[35] Kelsen, *Law of the UN*, pp. 438–43.
[36] See statement by Belgium in UNSC, 'Official records, 4th year: 417th meeting, 11 March 1949, Lake Success, New York' (11 March 1949) UN Doc. S/PV/417, p. 9: 'With regard to the settlement of the substance of the question, the Council can only make recommendations, and it could not be otherwise. To acknowledge the Council's right to decide on the liberation of the peoples of Indonesia, or of any other people, would be the equivalent of granting it the authority to settle the fate of a territory'.
[37] UNSC Res. 67 (28 January 1949) UN Doc. S/RES/67.

constituent assembly, and the transfer of sovereignty to Indonesia, all within a specified timetable, and to be supported by a UN Commission for Indonesia.[38] Following these developments, Indonesia achieved independence from the Netherlands in December 1949.

In the Indonesian situation the Council acted as an impartial peace-broker, in effect treating the situation as a dispute between two equals even though it involved a colonial State and one of its colonies. Although Kelsen conservatively states that a 'civil war which takes place within a state Member of the United Nations is certainly not an international dispute within the meaning of Article 2, paragraph 3', the Security Council disregarded the arguments of the Netherlands to that effect and treated Indonesia as a separate State.[39] The approach to Indonesia highlighted the Council going beyond narrow issues of Charter law to act as an impartial peace-broker helping a colonised State achieve external self-determination, thereby bringing about a settlement of the situation based on principles of international law and justice. However, the situation also showed the potential limitations of that role – that for it to be triggered, the dispute has to be of an inter-state character or has to be construed as such. As shall become clear in section 6, one of the problems faced by the Council in brokering and supporting modern peace agreements concerning only one State is in identifying what principles to apply and whether one of those is impartiality between the parties.

4. The Broken Promise of Impartiality

The crucial importance of ensuring the impartiality of the Security Council as a third-party peacemaker, armed with several 'quasi-judicial' powers under Chapter VI,[40] is reflected in the only substantive limitation on the veto accorded to each of the five permanent members in Article 27(3)

[38] Ibid., paras. 3–4.
[39] Kelsen, *Law of the UN*, p. 365.
[40] Ibid., p. 372.

of the Charter. In the case of non-procedural matters, Article 27(3) requires the affirmative vote of nine members of the Council including the concurring votes of all the permanent members, provided that in decisions under Chapter VI 'a party to a dispute shall abstain from voting'.[41] Jenks clearly links this obligation to abstain to the quasi-judicial function of the Security Council when he wrote in 1945 that 'parties to a dispute are to abstain from voting while the Council is discharging its quasi-judicial function of promoting pacific settlement as distinguished from its political function of action for the maintenance of peace and security'.[42] Any member of the Security Council when it is a party to a dispute shall abstain from voting and, therefore, in the case of a permanent member abstain from vetoing a resolution proposed under Chapter VI when it is a party to a dispute. As Wortley states, this aspect of Article 27 contains a basic principle of natural justice that 'a party to a dispute shall not be a judge of its own cause and shall abstain from voting'.[43]

In 1945 the four sponsoring powers at the San Francisco conference issued a Joint Statement on voting procedures in the Security Council, which introduced the idea of a 'chain of events' as an explanation of why the veto should extend beyond Chapter VII resolutions to Chapter VI. However, even though this would allow for the encroachment of the Council's political function into its quasi-judicial one, the Statement recognised that there remained an obligation to abstain if a permanent member was a party to a dispute.

> … decisions and actions by the Security Council may well have major political consequences and may even initiate a chain of events which might, in the end, require the Council under its responsibilities to invoke measures of enforcement … This chain of events begins when the Council decides to make an investigation, or determines that the time has come to call upon states to settle their differences, or makes recommendations to the parties. It is to such decisions and actions that unanimity of the permanent members applies, with the important proviso … for abstention from voting by parties to a dispute.[44]

[41] UN Charter, Art. 27(3).
[42] Clarence Wilfred Jenks, 'Some constitutional problems of international organizations' (1945) 22 BYBIL 11–72 at 39.
[43] Ben A. Wortley, 'The veto and the security provisions of the UN Charter' (1946) 23 BYBIL 95–111 at 102.
[44] UN, *Documents of UNCIO*, vol. 11, p. 714.

Although this statement preserves the obligation to abstain and therefore supports the principle of impartiality in dispute settlement, the problem under Chapter VI is in identifying the parties to a dispute, which should trigger the obligation to abstain if any of the disputants are members of the Council. This issue arose early in the practice of the Security Council in 1946, when it was about to vote on the presence of British troops in Greece. The Netherlands asked whether the parties should vote in this matter, meaning the UK. The President declared that the Council had 'not declared the matter to be a dispute, and at such time as the Council declares any situation to be a question of dispute, it in that way brings into operation Article 27 of the Charter'.[45] It is very unlikely that a permanent member who might be seen to be party to a dispute will allow such a determination unless it is in their interests to do so. This same thinking undermines the whole of Chapter VI, at least where a permanent member is involved in a dispute. Under Article 33(2), for example, the Council is empowered to call upon the parties to settle their dispute by peaceful means. If a permanent member is alleged to be party to the dispute, it may veto any such call and in so doing may deny that it is a party, or claim that there is a 'situation' that endangers peace and not a 'dispute' between defined parties.[46] Thus, a permanent member can block Security Council involvement under Chapter VI even though objectively it is party to a dispute, in the absence of mechanisms to prevent this or to challenge the exercise of the veto in these circumstances.

If, under Article 35, a State brings a dispute to the attention of the Security Council and names a permanent member as one of the disputants, or if, under Article 99, the Secretary General uses the power to bring to the attention of the Security Council a 'matter' which may threaten international peace and security and, in so doing, identifies the matter as a dispute involving a permanent

[45] Loraine Sievers and Sam Daws, *The Procedure of the UN Security Council*, 4th edn (Oxford: Oxford University Press, 2014), p. 341.
[46] Wortley, 'Veto and security provisions', 99, 104. Also 100 where he explains that the difference between a 'dispute' and a 'situation' 'would appear to be that there are *defined parties* to a dispute, whereas a situation does not necessarily present itself as an issue between defined states'.

member, could the permanent member still ignore its obligation to abstain and use its veto? There remains the problem of how that veto could be challenged, for example by the remainder of the Security Council agreeing that there is a dispute involving a permanent member and that its negative vote is invalid, or that it should be treated somehow as an abstention. Despite Kelsen's statement that a negative vote cast in these circumstances is illegal and 'must not be counted',[47] practice does not support any sustained challenge to the veto, although there have been limited criticisms in the Security Council chamber over the misuse of the veto.[48] Sievers and Daws review State practice and conclude:

> The Security Council has developed no consistent practice with respect to when the restrictions of Article 27(3) should apply, either for permanent or non-permanent members. In fact, while abstention under the conditions set out by Article 27(3) is considered *obligatory*, in practice, when a Council member has abstained in that context, the decision to do has actually been *voluntary* on the part of that member, rather than imposed by the Council.[49]

Zimmermann's review of practice is even more damning, demonstrating that it is the Security Council 'that not only decides whether a dispute has arisen but also, ultimately, who the parties to the dispute are'.[50] Thus each permanent member has the power of veto over the issues of whether there is a dispute and who the parties to it are. It must not be forgotten that it is not just practice that has driven this but the design of the Security Council, where, in these matters at least, it is impossible to draw a clear line between Security Council as corporate actor and the powers and privileges of each permanent member. Design and practice have effectively allowed each permanent member a veto over proposed resolutions purporting to tackle disputes in which it is a party (or situations in which it is involved) and, furthermore, this blocking effect has been extended

[47] Kelsen, *Law of the UN*, p. 264.
[48] Wortley, 'Veto and security provisions', 104 on early practice.
[49] Sievers and Daws, *Procedure of the UNSC*, p. 350. An example of a voluntary abstention (or more accurately in this case - non-participation in the vote) is that of the UK on a Chapter VI resolution referring the dispute between the UK and Albania over incidents in the Corfu Channel to the International Court of Justice under Art. 36(3) – UNSC Res. 22 (9 April 1947) UN Doc. S/RES/22.
[50] Andreas Zimmerman, 'Article 27', in Bruno Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary*, 3rd edn (Oxford: Oxford University Press, 2012), p. 925.

to cover the client countries of each permanent member.[51] Together these represent a series of moves away from the idea of the Security Council as an impartial third-party when it exercises its quasi-judicial powers under Chapter VI.

Initiatives to curtail the exercise of the veto such as a proposed Code of Conduct are aimed at establishing a form of non-binding convention creating an expectation that permanent members would refrain from the use of the veto to prevent appropriate action to address core crimes under Chapter VII.[52] The focus on increasing Chapter VII measures reflects the misconception that has been present since the inception of the UN Charter in 1945, namely that the Security Council should be an organ of action, when its constitutional makeup with the veto at its heart inevitably meant that its basic function was to be a facilitator for diplomacy and peaceful settlement.[53] However, the pervasive and unrestricted use of the veto to thwart resolutions under both Chapters VI and VII signifies that the Council is neither an organ of action nor an impartial peace-broker, at least in a predictable, sustained, and coherent sense.

The Covenant of the League of Nations was in some ways more effective in removing a member State from voting on matters in which it was involved. Under Article 15 member States agreed to submit disputes to the Council of the League, which 'shall endeavour to effect a settlement of the dispute'. If unsuccessful in this endeavour, the Council was required to produce a report, either unanimously or by majority vote, containing a statement of the facts of the dispute and 'the recommendations which are deemed just and proper in regard thereto'. Article 15(6) stated that if the report was agreed unanimously by members of the Council 'other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go

[51] Wortley, 'Veto and security provisions', 105.
[52] UNGA and UNSC, 'Code of conduct regarding Security Council action against genocide, crimes against humanity or war crimes' (14 December 2015) UN Doc. A/70/621-S/2015/978.
[53] Inis L. Claude Jr., 'The Security Council', in Evan Luard (ed.), *The Evolution of International Organizations* (London: Thames and Hudson, 1966), p. 68.

to war with any party to the dispute which complies with the recommendations of the report'. These are significant departures from the basic principle of unanimity found in Article 5 of the Covenant and they maintained the impartiality of the Council of the League by disregarding the votes of disputants. In other words, in the Council of the League of Nations a great power was unable to block the adoption of a resolution which purported to address it as a party to a dispute.

According to McNair the Report generated under Article 15(6), 'which when adopted unanimously (excluding the disputing parties)' should have 'definite legal consequences', illustrated by the dispute between Italy and Abyssinia when sanctions were ultimately imposed by States on Italy despite its opposition.[54] It must be remembered that Italy was one of the great powers in the League's Council. In effect, the League could act in dispute settlement and enforcement (through sanctions or military action) without being stopped by the negative vote of a great power. This may appear to be a counterintuitive conclusion when considering that the League is often characterised as being hindered by the requirements of unanimity in contrast to majority voting in the UN. However, the conclusion that the principle of natural justice whereby a party to a dispute should not be able to vote on any organisational initiative to settle that dispute was more effectively upheld in the League than in the UN is a result of the increased centralisation engineered by the drafters of the UN Charter, and also because of the more legalistic approach of the Covenant when compared to the UN Charter.[55] The centralised and politicised approach of the Charter meant that the Security Council amassed significant collective powers, but the exercise of those had to be approved by each and every permanent member. While this might be expected to be the case when the Council is exercising its 'political' executive function under Chapter VII, it seriously undermines the Council as an impartial actor performing its 'quasi-judicial' function under Chapter VI.[56] The League appeared institutionally weak and hobbled by the requirements of unanimity,

[54] Arnold D. McNair, 'Collective security' (1936) 17 BYBIL 150–64 at 155.
[55] J. L. Brierly, 'The Covenant and the Charter' (1946) 23 BYBIL 83–94.
[56] Jenks, 'Some constitutional problems', 39.

which seemingly gave every State a veto. But this was not the case as the Council of the League could disregard the negative vote of any State deemed to be a party to the dispute. The weaknesses of the League lay elsewhere.[57]

5. Inter-State and Intra-State Dispute Settlement

The powers granted to the Security Council under Chapter VI are firmly based on the traditional paradigm that international disputes are those that occur between States, and further that the applicable rules of international law to such disputes revolve around conceptions of state sovereignty, political independence, and territorial integrity. There was also evidence in early and later Security Council practice of support for the application of the principle of external self-determination in the achievement of independence for territories under colonial or similar rule. In these cases, the Security Council was prepared to treat the situation as being equivalent to an inter-state dispute, thereby stretching the inter-state paradigm. The Security Council demonstrated that it could exercise its powers of peaceful settlement in an impartial way that accords with such basic axioms of international law in the struggle for Indonesian independence discussed in section 3. Indeed, the situation in Indonesia in the late 1940s demonstrated that the Council could be innovative within the inter-state paradigm when it approached the issue as a dispute or situation involving two States, namely the colonial State and the emerging post-colonial State, one enabling settlement that resulted in the achievement of independence for the Indonesian people.

Within this extended inter-state dispute paradigm Security Council practice has inevitably been uneven, so that when the interests of the permanent members have more directly been engaged, impartiality is significantly eroded. Resolution 242, adopted following the Six-Day War of 1967

[57] Nigel D. White, 'From Covenant to Charter: a legacy squandered?' (2020) 22 Int. C. L. Rev. 310–30.

when Israel captured large tracts of territory in pre-emptive military operations against its Arab neighbours, appears to be an impartial attempt to bring peace to the Middle East.[58] Resolution 242 appeared to be built upon respect for fundamental principles of international law – the non-use of force, territorial integrity, and sovereignty. However, the desire to keep Israel engaged with the peace process meant that law played a secondary role to the politics of peace, since the Resolution did not make it clear that Israel should withdraw from 'all' the occupied territories, an interpretation Israel has followed to this day. Moreover, by solely focusing on the inter-state aspects of the situation, the Resolution ignores the Palestinian right to self-determination, even though this right has been subsequently recognised by other organs in the UN system.[59] The Security Council failed to stretch its understanding of the inter-state paradigm to cover the dispute between Israel and an emerging State of Palestine. While often cited as the basis for a peace agreement in the Middle East,[60] Resolution 242 is arguably too flawed to carry that weight.

Nevertheless, when the political context allowed, the Security Council has been able to settle colonial and post-colonial conflicts in an impartial manner following axioms of international law. For instance, in relation to South Africa's occupation of Namibia, the Security Council exercised quasi-judicial settlement powers over a long period. In 1969 the Council decided 'that the continued occupation of the Territory of Namibia by the South African authorities constitutes an aggressive encroachment on the authority of the United Nations, a violation of the territorial integrity and a denial of the political sovereignty of the peoples of Namibia'.[61] In 1978, the Council reaffirmed 'the legal responsibility of the United Nations over Namibia' and approved the

[58] UNSC Res. 242 (22 November 1967) UN Doc. S/RES/242. Adopted unanimously.
[59] See, for example, UNGA, 'Question of Palestine' (10 November 1975) UN Doc. A/RES/3236 (XXIX).
[60] See, for example, the preamble to the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Washington, DC, 28 September 1995, which states, in part, 'that the aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, amongst other things, to establish a Palestinian Interim Self-Government Authority … for a transitional period not exceeding five years … leading to a permanent settlement based on Security Council Resolutions 242 and 338'. UNSC Res. 338 (22 October 1973) UN Doc. S/RES/338 was adopted during the 1973 conflict in the Middle East, simply called for a cease-fire and for the implementation of Resolution 242 and decided that negotiations shall start 'aimed at establishing a just and durable peace in the Middle East' (para. 3).
[61] UNSC Res. 269 (12 August 1969) UN Doc. S/RES/269. France, the US and UK abstained.

Secretary General's proposal for the settlement of the Namibia situation, involving the withdrawal of South Africa's illegal administration from Namibia, the transfer of power to the people of Namibia with the assistance of a UN Transition Assistance Group (UNTAG), and the early independence of Namibia through free elections under the supervision and control of the UN.[62] UNTAG was not deployed until 1989,[63] marking the beginning of the implementation of this plan and leading to Namibia's independence.

UNTAG was deployed at the cusp of a transition in the practice of the Security Council from addressing the legacies of colonialism by supporting the external self-determination of peoples struggling for independence (for example, in Indonesia, Rhodesia and Namibia), towards its post-Cold War concern with supporting peace settlements and processes aimed at achieving internal self-determination in already independent States fractured by intra-state conflict. At this point it appears that the inter-state dispute settlement paradigm was not extended any further. Although the Council became extensively involved in these situations, the normative framework of Chapter VI did not appear to play a significant constraining role in this regard and, further, the wider normative framework of international law was a disputed one, revolving around the contested concept of democracy. As shall be seen in section 6, the matter has been intimately linked to the development of peacekeeping, operating in the murky waters of implied powers and the space between Chapters VI and VII, underpinned somewhat shakily by the UN's move towards supporting the emergence of democratic States as a way of achieving internal self-determination.[64]

Irrespective of this significant development in UN practice regarding the settlement of intra-state conflicts, there has been little attempt to bring it within the framework of Chapter VI. In other words, there has been a failure to modernise dispute settlement to include intra-state disputes as

[62] UNSC Res. 435 (29 September 1978) UN Doc. S/RES/435. Soviet Union abstained.
[63] UNSC Res. 632 (16 February 1989) UN Doc. S/RES/632. Adopted unanimously.
[64] Thomas M. Franck, 'The emerging right to democratic governance' (1992) 86 AJIL 46–91.

well as inter-state ones. Indeed, there has been little normative development of peaceful settlement for inter-state disputes beyond a re-iteration of the core obligations on States and the powers of the Security Council and General Assembly in a number of Assembly resolutions, including the Declaration on Friendly Relations of 1970 and the Manila Declaration of 1982.[65] A strengthening of the normative framework might have improved both the legitimacy and effectiveness of peaceful settlement, especially by developing the nexus between the obligations of States, the methods of peaceful settlement, and the powers of the Council. The re-packaging of peaceful settlement as 'peacemaking' has made little difference normatively. 'Peacemaking' was defined by the UN Secretary General Boutros Boutros-Ghali in 'An Agenda for Peace' (1992) as 'action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations'.[66] The Office of Legal Affairs' *Handbook on the Peaceful Settlement of Disputes* of 1992 is primarily confined to the methods and mechanisms available to States and, therefore, provided flesh on the bare bones of the methods listed in Article 33. The *Handbook* is stated to have been 'prepared in strict conformity with the Charter of the United Nations; being descriptive in nature and not a legal instrument'. Further, it is confined to disputes between States, excluding any internal disputes.[67] Peaceful settlement between States seems to have remained firmly rooted in traditional concepts of international law such as sovereign equality, consent and agreement embodied in Chapter VI of the UN Charter.[68] Peaceful settlement within States is underdeveloped and contested, both normatively and in practice.

[65] UNGA, 'Declaration on principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations' (24 October 1970) UN Doc. A/RES/2625(XXV); UNGA, 'Manila declaration on the peaceful settlement of international disputes' (30 November 1982) UN Doc. A/RES/37/10, para. II.4.
[66] UN Secretary-General, 'An agenda for peace' (17 June 1992) UN Doc. A/47/277, para. 20.
[67] OLA, *Handbook on the Peaceful Settlement of Disputes between States* (New York: UN, 1992), p. 1, adopted pursuant to UNGA Res. 39/79 (13 December 1984) UN Doc. A/RES/39/79 and UNGA Res. 39/88 (13 December 1984) UN Doc. A/RES/39/88.
[68] Nigel D. White, 'The Security Council, peace-making and peace settlement: between executive and pragmatic' in Marc Weller, Mark Retter and Andrea Varga (eds.), *International Law and Peace Settlements* (Cambridge: Cambridge University Press, 2021), p. 237.

The post-Cold War era has been characterised by efforts to unlock the peace enforcement powers of the Security Council under Chapter VII rather than improving the UN's record in peaceful settlement under Chapter VI: leading examples are found in *An Agenda for Peace* 1992, the High Level Panel Report of 2004, and the World Summit Outcome Document of 2005.[69] These documents recognised the reality of the UN being faced with threats caused by civil wars, but they failed to produce concrete recommendations as to how to bring the parties to such conflicts to a peaceful solution. Chapter VI is predicated on disputes between States being the subject of recommendatory powers of the Security Council and, although the provisions of Chapter VI can be used by way of analogy to end civil wars and other violent or potentially violent intra-state disputes and conflicts, there is the need to develop a set of impartially exercised peaceful settlement powers for intra-state conflicts based on principles of international law and justice.

The lack of preparation by the UN for intra-state conflicts, often involving outside States such as has been occurring in Syria for over a decade, is encapsulated in a 2014 Resolution in which the Security Council recognised that 'some of the tools in Chapter VI … which can be used for conflict prevention, have not been fully utilized', but then simply listed the methods that States should use under Article 33, rather than asserting and developing the powers of the Security Council regarding peaceful settlement.[70]

It remains the case that peaceful settlement is modelled on settling disputes between States and not settling disputes within States where the government is normally the only recognised international actor. There are exceptions in international law, for example when the armed group represents a people fighting for self-determination, but that is narrowly confined to colonial and

[69] UN Secretary General, 'Agenda for peace', para. 20; UN Secretary-General, 'A more secure world: our shared responsibility. Report of the High-level Panel on Threats, Challenges and Changes' (2 December 2004) UN Doc. A/59/565, para. 84; UNGA, '2005 World Summit Outcome' (24 October 2005) UN Doc. A/RES/60/1, paras. 73–6.
[70] UNSC Res. 2171 (21 August 2014) UN Doc. S/RES/2171.

similar situations, and does not extend to a people struggling to overthrow an undemocratic regime.[71] Thus two of the problems of peacemaking in Syria are the lack of legal parity between the parties to the conflict, the dependency of any effective peacemaking on the Security Council or the agreement of that body to any settlement proposal, and the practical mixture of these two issues with permanent members intervening on both sides of the conflict. How can the Security Council be an impartial third-party when Russia, the US, UK and France, each holding a veto, are parties to the conflict or conflicts raging inside Syria?

There have been numerous resolutions addressing aspects of the conflict in Syria, including demands for a cease-fire,[72] but it was not until December 2015 that the Council moved towards a more impartial and comprehensive approach. In Resolution 2254 the Security Council set out a framework for settlement in Syria, involving UN-mediated political talks, a national cease-fire, and a two year period to achieve a political transition.[73] In a March 2017 press statement, in furtherance of this Resolution (2254), the Security Council: supported the Secretary General's Special Envoy's efforts to facilitate a lasting political settlement of the Syrian crisis 'through an inclusive and Syrian-led political process that meets the legitimate aspirations of the Syrian people'; and welcomed the reopening of talks in Geneva, while reaffirming a commitment to the sovereignty, independence, unity, and territorial integrity of Syria.[74] The adoption of Resolution 2254, and the continuing although faltering attempts to implement it,[75] provide some glimmer of hope for the people of

[71] James Crawford, *Brownlie's Principles of Public International Law*, 8th edn (Oxford: Oxford University Press, 2012), pp. 646–7.
[72] UNSC Res. 2268 (26 February 2016) UN Doc. S/RES/2268; UNSC Res. 2401 (24 February 2018) UN Doc. S/RES/2401.
[73] UNSC Res. 2254 (18 December 2015) UN Doc. S/RES/2254.
[74] UN Doc SC/2749 (2017).
[75] UN Doc S/RES/2236 (2016), welcoming mediation by Turkey and Russia. Russia, Turkey and Iran sponsored the 'Astana' talks, involving the Syrian government and an opposition delegation, starting in January 2017, and said to be within the framework of Resolution 2254. In December 2018 the Security Council adopted a resolution in which it reiterated 'that the situation will continue to deteriorate further in the absence of a political solution to the Syrian conflict and *recalls* its demand for the full and immediate implementation of resolution 2254 (2015) to facilitate a Syrian-led and Syrian-owned political transition, in accordance with the Geneva Communiqué as set forth in the ISSG Statements, in order to end the conflict in Syria and *stresses* again that the Syrian people will decide the future of Syria' – UNSC Res. 2449 (13 December 2018) UN Doc. S/RES/2449.

Syria.[76] However, the need for a peace agreement on Syria involving the parties, their backers, and other guaranteeing States and organisations, based on respect for both the sovereignty of Syria and the human rights of its people, remains all too apparent.[77]

6. Peacekeeping and the Settlement of Intra-State Disputes

When it was conceived in 1956 peacekeeping was a measure aimed at securing a cease-fire and withdrawal of troops from a conflict zone as a prequel to efforts to settle the underlying dispute. Peacekeeping was consistent with the UN acting as an impartial actor, promoting peaceful settlement within the parameters of basic principles international law, reflected in Article 2, paragraphs 1, 4 and 7 of the UN Charter, namely of sovereignty, non-intervention, and non-aggression. Peacekeeping was based on the consent of the host State or States and, even though it appeared to constitute military intervention, its respect for sovereignty was reflected in the neutrality of such a force between States. Peacekeeping also provided breathing space for the disputing States to settle their dispute peacefully, exemplified by the withdrawal of British and French forces from Suez in 1956 and the eventual agreement in 1979 of Israel to withdraw from Egyptian territory in the Sinai.

The fact that the UN General Assembly mandated the original force (UNEF I) is no coincidence,[78] in that its functions reflected the views of the Non-Aligned majority of member States as well as traditional principles of international law that gave such States protection from intervention. The ICJ recognised the constitutionality of the Assembly exercising its subsidiary powers in peace and

[76] But see recent Security Council resolutions on Syria, which have focused solely on the humanitarian situation in Syria: UNSC Res. 2504 (10 January 2020) UN Doc. S/RES/2504; UNSC Res. 2533 (11 July 2020) UN Doc. S/RES/2533; UNSC Res. 2585 (9 July 2021) UN Doc. S/RES/2585.
[77] See the Geneva Peace talks of 2014, 2016, and 2017 — Robert S. Ford, 'Keeping out of Syria: the least bad option' (2017) 96(6) *Foreign Affairs* 16–22 at 18; Anon., 'Talks to draft Syria's constitution to resume on October 18', *Al Jazeera*, 28 September 2021, www.aljazeera.com/news/2021/9/28/syria-constitution-talks-to-resume-october-18-in-geneva-un accessed 29 October 2021.
[78] UNGA Ress. 998–1101 (November 1956) UN Docs. A/RES/998–1001.

security under Articles 11 and 14 of the UN Charter to mandate peacekeeping forces at the request of the States concerned, and the Court found that such forces did not impinge upon the exclusive mandatory enforcement powers of the Security Council.[79] However, peacekeeping subsequently crossed into the domain of the Security Council as part of its primary responsibility for peace and security under Article 24 of the UN Charter. This has led to the possibility of a more coercive version of peacekeeping empowered, in whole or in part, under Chapter VII of the UN Charter. It also led to the possibility of the Security Council combining peacekeeping with peaceful settlement, which had the potential to erode the image of a UN peacekeeping force as an impartial actor facilitating, but not imposing, peaceful solutions.

Peacekeeping facilitated the creation of peaceful conditions between the parties, enabling the pursuit of settlement based on equality and impartiality. This meant that it was normal for peaceful settlement efforts to be kept separate from peacekeeping in inter-state disputes such as Suez in 1956, and even in intra-state disputes where clear cease-fire lines could be patrolled as in Cyprus in 1964, when a peacekeeping force was mandated by the Security Council. In that dispute the Security Council recommended

> …that the Secretary-General designate, in agreement with the Government of Cyprus and the Governments of Greece, Turkey and the United Kingdom, a mediator, who shall use his best endeavours with the representatives of the communities and also with the aforesaid four Governments, for the purpose of promoting a peaceful solution and an agreed settlement of the problem confronting Cyprus, in accordance with the Charter of the United Nations, having in mind the well-being of the people of Cyprus as a whole and the preservation of international peace and security.[80]

The Council was acting as an impartial promotor of peaceful settlement by encouraging the parties towards agreement by means of mediation utilising its powers under Article 33(2). Peacekeeping in this guise is clearly created within the confines of Chapter VI, as an appropriate procedure or

[79] *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep. 151 at pp. 163–4, 177.
[80] UNSC Res. 186 (4 March 1964) UN Doc. S/RES/186, para. 7.

method of adjustment under Article 36(1). The Council was careful not to impose a solution to the Cyprus problem, but this might lead to protracted and inconclusive settlement efforts as borne out by subsequent events. However, the Congo crisis of the early 1960s saw the Security Council's deployment of a more forceful form of peacekeeping by mandating a force to achieve a solution based on preventing the break-up of the country.[81] The Council's array of powers, of peaceful settlement and peace enforcement, signifies that it can take a range of approaches to settlement. At one end of the spectrum settlement is left to the parties with impartial guidance from the Council, while at the other end a solution can be imposed with the danger of erosion to the Council's impartiality.

The aftermath of the Cold War provided a brief period of creative peaceful settlement due to the massive shift in geopolitics. This took the form of UN-supported elections within broader peace operations, producing some successes to bring an end to internationalised civil conflicts in Central America, Cambodia, and Africa,[82] as well as failures.[83] This was not, as it turns out, neither the end of history,[84] nor the emergence of a right to democracy,[85] but a brief opportunity for the UN to fill the space vacated by the global confrontation between the superpowers. Although sponsoring elections proved to be too superficial a solution for an enduring settlement in several situations, peacekeeping forces in this period respected the principles of impartiality, consent, and limited use of force in that their aim was to support the peace settlement agreed to by the parties to the intra-state conflict. However, in a number of instances the peacekeeping force became embroiled in

[81] UNSC Res. 161 (21 February 1961) UN Doc. S/RES/161; UNSC Res. 169 (24 November 1961) UN Doc. S/RES/169.
[82] See, for example, Joachim A. Koops, 'United Nations Observer Group in Central America (ONUCA)', in Joachim A. Koops, Norrie MacQueen and Paul D. Williams (eds.), *The Oxford Handbook of United Nations Peacekeeping Operations* (Oxford: Oxford University Press, 2015), p. 306.
[83] See, for example, Caroline Guyot and Alex Vines, 'United Nations Angola Verification Missions II and III (UNAVEM II and III)', in Joachim A. Koops, Norrie MacQueen and Paul D. Williams (eds.), *The Oxford Handbook of United Nations Peacekeeping Operations* (Oxford: Oxford University Press, 2015), p. 338.
[84] Francis Fukuyama, *The End of History and the Last Man* (London: Penguin, 1993).
[85] Thomas M. Franck, 'Legitimacy and the democratic entitlement', in Gregory H. Fox and Brad R. Roth (eds.), *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000), p. 25.

supporting the elected government in establishing its authority over a State fractured by civil war.[86] This was recognised in the UN's Capstone document on peacekeeping: '[i]n order to generate revenue and provide basic services to the population, the State must be able to exert control over its territory' and UN peacekeeping operations 'may support the restoration and extension of State authority by creating an enabling environment, providing political leadership or coordinating the efforts of other actors'.[87]

Gilder identifies a deepening of peacekeeping support for establishing State authority through the development by the Security Council of 'stabilisation' mandates, which not only include 'robust posture' and 'active patrolling within their terms, but also witness 'increased logistical capabilities from Western military hardware, the encroachment of a counter-terrorism rhetoric, operations alongside host State forces, and an emphasis on (re)establishing the rule of law',[88] citing missions in the DR Congo, Mali, and the Central African Republic. In the case of the UN Multidimensional Integrated Stabilisation Mission in Mali (MINUSMA) for example: 'the mission has contingents of forces from Western countries and sophisticated military hardware including short range drones, and attack and transport helicopters'.[89] According to the Secretary-General MINUSMA has attempted to 'progressively dominate areas adjacent to population centres' in order to 'prevent incursion by criminals and terrorist groups',[90] and the Security Council has called on MINUSMA to engage in direct operations against asymmetric threats, while claiming continued allegiance to the principles of peacekeeping.[91] Despite this claim, the principles of peacekeeping – of impartiality and of the limited use of force – which are based on basic principles of international law, have

[86] See, for example, Alan Doss, 'United Nations Organization Mission in the Democratic Republic of the Congo (MONUC)', in Joachim A. Koops, Norrie MacQueen and Paul D. Williams (eds.), *The Oxford Handbook of United Nations Peacekeeping Operations* (Oxford: Oxford University Press, 2015), p. 656.
[87] UNDKPO, 'United Nations peacekeeping operations: principles and guidelines', 2008, www.un.org/ruleoflaw/files/Capstone_Doctrine_ENG.pdf accessed 8 July 2022, pp. 27–8.
[88] Alexander Gilder, 'The effect of "stabilization" in the mandates and practice of UN peace operations' (2019) 66 NILR 47–73 at 47.
[89] Ibid., 51.
[90] UNSC, 'Report of the Secretary-General on the situation in Mali' (9 June 2014) UN Doc. S/2014/403, para. 66.
[91] UNSC Res. 2295 (29 June 2016) UN Doc. S/RES/2295.

been reinterpreted to allow for proactive force in support of the government. As Gilder states: 'the position of the UN as an impartial actor becomes tenuous when the mandates of MINUSCA [UN Multidimensional Stabilisation Mission in the Central African Republic] and MINUSMA expressly call for the missions to assist with the extension of state authority, assist with the redeployment of host state forces, and to conduct joint operations and share intelligence'.[92] Furthermore, stabilisation involves 'peacebuilding in the power vacuum left behind after displacing armed groups' and is based on the peacekeeping mission establishing the rule of law by helping the host State rebuild its criminal justice system.[93] It may also entail peacekeepers using force as an exceptional and temporary measure to maintain law and order and to fight impunity.[94]

The desire to achieve an enduring peace in an intra-state situation has led to the Security Council blurring its Chapter VI and VII powers in mandating peacekeeping forces, effectively placing itself on the side of the government so that it is not an impartial actor, and neither is the peacekeeping force. The settlement of intra-state disputes remains skewed towards the government, meaning that impartiality is understood as the impartial defence of the peace process, rather than impartiality between the parties. Having said that, given that the UN sponsored peace agreements are based on understandings of international law including 'democratic access to power (including minority rights where relevant), with a human rights framework including measures such as bills of rights, constitutional courts, human rights commissions, reforms of policing and criminal justice, and mechanisms to address past human rights violations',[95] it could be argued that the focus of impartiality has been shifted, or at least shifts in time, from impartiality between the parties to a dispute to the impartial upholding of agreements based on international law. According to the UN's Capstone doctrine on peacekeeping: '[t]he need for even-handedness towards the parties

[92] Gilder, 'Effect of "stabilization"', 64.
[93] Ibid.
[94] See, for example, UNSC Res. 2149 (10 April 2014) UN Doc. S/RES/2149 re MINUSCA.
[95] Christine Bell, *Peace Agreements and Human Rights* (Oxford: Oxford University Press, 2000), p. 1.

should not become an excuse for inaction in the face of behavior that clearly works against the peace process. Just as a good referee is impartial, but will penalize infractions, so a peacekeeping operation should not condone actions by the parties that violate the undertakings of the peace process or the international norms and principles that a United Nations peacekeeping operation upholds'.[96] Despite this declaration of impartiality between the parties, in practice forceful measures by peacekeeping forces are taken against non-state armed groups and not against the government. Indeed, in the *Expenses* case the ICJ was of the opinion that forceful action against the government would change the nature of the military intervention from peacekeeping to peace enforcement.[97] Although the peace process leads to an elected government in elections supervised and legitimated by the UN according to the peace agreement, the peace operation is then committed to supporting that government even though it might be ineffective or become corrupt or unrepresentative; moreover, peace is seen as being achievable through force as opposed to ongoing peaceful settlement efforts to ensure that the peace agreement is implemented in a sustainable and representative way.

7. Conclusion: A (Re)turn to Impartiality?

In its role as a key actor in the peaceful settlement of disputes, the Security Council has moved a long way from the premises underlying Chapter VI, namely that it should be an impartial third party objectively utilising the principles of international law to recommend peaceful settlement and help implement peace agreements. Some of its practice evidenced such an understanding of its powers, both in identifying disputes or situations that should be dealt with under Chapter VI, and in extending its practice on inter-state dispute settlement to situations of decolonisation. The Council demonstrated that it could act as an impartial third party, treating disputants equally,

[96] UNDKPO, 'UN peacekeeping operations', p. 33.
[97] *Certain Expenses of the United Nations* (Advisory Opinion), p. 177.

promoting settlement based on international law, supported where possible by traditional and wholly impartial peacekeeping forces.

However, impartiality can only be assured if any member of the Security Council, including a permanent member who is a party to a dispute, respects its obligation to abstain from voting against any Chapter VI proposal. This obligation should be triggered: if a dispute and disputants have been identified by the parties or the Security Council under Article 33; or if an investigation commissioned by the Security Council under Article 34 identifies a dispute and the disputants; or if the Secretary General identifies a dispute and disputants using implied fact-finding powers under Article 99. In order to prevent a permanent member from blocking any of the above steps at an early stage, the Security Council needs to develop the provisions of Chapter VI to ensure that an investigation under Article 34 should be the norm, and that the investigation's findings regarding a dispute and disputants will trigger the obligation to abstain. The Covenant of the League of Nations is illuminating in this regard.

If a permanent member is identified as a party to a dispute but persists in exercising its veto to block Chapter VI resolutions then, as in the League system, its vote should be ignored because the veto is being exercised unconstitutionally.[98] This would amount to developing an understanding of the veto found in the advisory opinion of the International Court of Justice in 1948, when it made it clear that there were definite Charter limitations upon its exercise in the case of membership applications under Article 4 of the Charter, otherwise this 'would lead to conferring upon Members an indefinite and practically unlimited power of discretion'.[99] The same argument must apply to the issue of abstention under Chapter VI proposals where replacing the obligation to abstain under Article 27(3) with a practice of voluntary abstention has conferred on permanent

[98] Kelsen, *Law of the UN*, p. 264.
[99] *Conditions of Admission of a State to Membership in the United Nations* (Advisory Opinion) [1948] ICJ Rep. 57 at p. 63.

members such an 'unlimited power of discretion'. The implementation of the obligation to abstain contained in Article 27(3) would not necessarily address the problem of a permanent member exercising its veto to protect a client State, which is a party to a dispute, but it would wrest the current complete control of the Council's agenda away from each permanent member. Chapter VI resolutions would be possible in a dispute where, for example, the forces of a permanent member were involved given that it must be seen as a 'party' in those circumstances.

A law-making resolution along the lines of the Assembly's Declaration of Friendly Relations of 1970 needs to be adopted by the General Assembly establishing a normative framework for the peaceful settlement of intra-state disputes and situations. This declaration could contain the principles of international law and justice upon which peaceful settlement is to be achieved involving the normative development of 'peace' and 'security' to reflect sub-norms of international law including territorial integrity, political independence, self-determination, and human rights (core civil-political and socio-economic rights) with positive commitments to gender and racial equality. This should be combined with a clear recognition that all the internal parties to the dispute or conflict have an equal right of participation in the peace process, subject to certain qualifying criteria based on a combination of control and willingness to respect the rule of law, including accountability for past abuses.

The creation of a peacekeeping force to assist the parties to implement any peace agreement should be premised on the basis of the consent of all the parties and implemented impartially between the parties, rather than the current trend towards impartiality in the implementation of the mandate and restricting consent to the government, no matter if interim, ineffectual, or corrupt. Peacekeeping forces cannot impose the peace. Peacekeepers' use of force should again be restricted to self-defence, including the defence of unarmed civilians. This would require the re-evaluation and resetting of the principles of peacekeeping. It would also amount to a rediscovery

of the origins of peacekeeping in Chapter VI but also, more broadly, in the fundamental idea of the UN as an impartial third party operating within the framework of the Charter and the broader international legal order to help achieve the peaceful settlement of disputes based on international law and justice.