

CAN THE U.N. SECRETARY-GENERAL SAY ‘NO’? REVISITING THE ‘PEKING FORMULA’

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ABSTRACT

The study explores the extent to which the U.N. Secretary-General can uphold his or her own views when confronted with adverse stances from powerful States. More specifically, it analyzes a particular *modus operandi* originally developed by Dag Hammarskjöld, known as the “Peking formula”. This form of good offices is discussed in two contexts, namely the 1954-1955 Sino-American hostage crisis when it was first used and the more recent attempts of Javier Perez de Cuéllar and Kofi Annan at solving the subsequent Iraq crises. Drawing upon these two case-studies, the author offers a theoretical account of the complex interactions between law and politics underlying the good offices role of the U.N. Secretary-General.

“When a diplomat says ‘yes’, he means ‘perhaps’; when he says ‘perhaps’ he means ‘no’; and when he says ‘no’, he is no diplomat. When a lady says ‘no’, she means ‘perhaps’; when she says ‘perhaps’, she means ‘yes’; and when she says ‘yes’, she is no lady”

(Voltaire)

INTRODUCTION

Voltaire’s politically incorrect *plaisanterie* insolently depicts one of the most prominent skills usually attributed to diplomats. In the say of some less eloquent writers, a diplomat is someone who can tell you to go to hell in a way you are actually looking forward to it. Or still, a diplomat may never speak bluntly, even when things are blunt.

Aside of the oversimplification such a description purports, there is at least one diplomat who, as it has been recently claimed, cannot say no, namely the U.N. Secretary-General. This issue was indeed vividly discussed in a recent

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symposium on the role of the U.N. Secretary General¹. Many of the distinguished attendees seemed quite skeptical at the possibility that the Secretary-General oppose his or her views to those of powerful States, even when acting in perfect accordance with the provisions of Chapter XV of the U.N. Charter. Everyone recognized, for sure, that the Secretary-General's independence is of paramount importance for the office to be a relevant force in world affairs. Most States benefit from the Secretary-General's developing role as a good officer, that is as a useful resource to solve some of the most delicate political crises². Even countries reluctant to let the Secretary-General lead an active political role have at some point praised the incumbent's efforts in solving intricate crises. But such a role cannot operate, let alone flourish, unless the Secretary-General is both independent and perceived as independent.

This situation leads to something close to a dilemma, and one that seems inherent to the Office of the Secretary-General³. Within the current debate on the reform of the U.N. and with the succession of Kofi Annan approaching, it seems appropriate to reflect on how future incumbents may deal with this dilemma. The answers given to this question will indeed strongly influence the performance of the U.N. in achieving its primary goal, namely the maintenance of international peace and security. In this piece, we focus on one possible answer to the dilemma identified, an answer grown out of practice during a period of the U.N. that, albeit different in many respects, resembles the present international context in that many of the challenges ahead may arise between parties that hardly speak to each other⁴. This answer, commonly referred to as the "Peking formula", was

¹ The Role of the U.N. Secretary-General, Institute for International Law and Justice, New York University, New York, February 23 2006.

² The definition of good offices in UN practice is less restrictive than the traditional one since it also covers mediation, fact-finding missions and sometimes even operations to oversee a troop withdrawal such as the UN Good Offices Mission to Afghanistan and Pakistan, see FRANCK, Th., NOLTE, G., The Good Offices Function of the UN Secretary-General, in ROBERTS, A., KINGSBURY, B., *United Nations, Divided World*, Clarendon Press, Oxford, 1993, p. 144.

³ The contradictions implicit in the main U.N. Charter provisions dealing with the Office of the Secretary-General have long been an issue. Writing at beginning of the 1960s, Professor Jean Siotis pointed out: "Les solutions adoptées à San Francisco nous semblent contradictoires ... Les auteurs de la Charte n'ont jamais réellement opté entre les deux solutions possibles. Soit un secrétariat dominé par les grands ... mais disposant des moyens nécessaires à l'exercice des droits prévus par l'article 99, soit un secrétariat réellement indépendant ... libre de prendre des initiatives dans certains domaines, mais dont les fonctions se limiteraient essentiellement au plan administratif. La solution de compromis ... renfermait en elle-même les germes de toutes les difficultés rencontrées par le nouveau Secrétariat international sur la voie de son développement", SIOTIS, J., *Essai sur le secrétariat international*, Droz, Genève, 1963, p. 156.

⁴ One could think, for instance, to the tensions between the U.S. and Iran (particularly in the light of the current crisis in Lebanon) or North Korea, or between the People's Republic of China and Taiwan.

developed by Dag Hammarskjöld during the Sino-American hostage crisis in 1954-1955. We argue that the middle ground between a yes and a no available to the U.N. Secretary-General when exercising his/her good offices can be conceptualized using the Peking formula as its template form. In this regard, we compare the original instance where this *modus operandi* emerged with a recent case, namely the Secretary-General's efforts to prevent the Iraq crises. These two cases provide the raw materials for analyzing the extent to which the Secretary-General can say no, legally and politically, when acting as a good officer.

The study is structured into three sections. The first discusses briefly the chief provisions of the U.N. charter dealing with the office of the Secretary-General. Particular emphasis is drawn here to articles 98 and 99, which are considered as the core legal basis for the Secretary-General's political role. The second section deals *tour à tour* with the Sino-American and Iraq crises. Finally, the third section discusses specific ways in which law and politics interact in the exercise of the Secretary-General's good offices role. Overall, this piece is not to be considered as an analysis of current events, but rather as an attempt to put the role of the U.N. Secretary-General in historical and theoretical perspective.

I. THE LEGAL POSITION OF THE SECRETARY-GENERAL

A. The provisions of the Charter

The UN Secretariat as a whole was given a stronger position within the Organization than the one held by the League's Secretariat⁵. Indeed, Article 7 of the UN Charter states that: "1. There are established as the principal organs of the United Nations : a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat". This provision puts the Secretariat on an equal institutional footing with respect to the other organs. Apart from Article 7, many other provisions refer to the Secretary-General and his staff⁶. Among these, the most important are those included in Chapter XV of the Charter, namely articles 97, 98, 99, 100 and 101. Here, we will give a brief general outline of these articles serving as a basis for

⁵ Article 2 of the Covenant states: "The action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council, *with a permanent Secretariat*" (italics added). The French wording is even clearer, using the verb "assister".

⁶ Such as Articles 12.2, 20, 73(e) and 102.1 of the UN Charter as well as Articles 5.1, 7, 14, 36.4, 67 and 70 of the Court's Statute.

the more detailed analysis of articles 98 and 99 undertaken in the following sub-section.

According to Article 97: “The Secretariat shall comprise a Secretary-General and such staff as the Organization may require”. Although this formulation follows quite closely that of article 6.1 of the League’s Covenant⁷, it does not mention the “secretaries” or deputies that were the object of long debates at San Francisco. Article 97 continues: “The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council”. Again, this part of the article was also very much debated and its adoption followed the renunciation by the Great Powers to include deputy Secretaries-General⁸. The last phrase of Article 97 runs: “He (the Secretary-General) shall be the chief administrative officer of the Organization”. Although this formulation could lead us to think that the office of the Secretary-General is eminently administrative, such interpretation is not entirely consistent with Article 7 of the Charter, which, as pointed out, considers the Secretariat as a principal organ.

Articles 98 and 99 have been used as the core legal basis of the UN Secretary-General’s political action. The analysis of these two articles will be the matter of the following sub-section. However, in order to have a complete picture of the functions of the Secretariat, it can be useful to anticipate here the main possibilities given by these articles to the Secretary-General without going into detail. Article 98 mentions three executive functions: the Secretary-General shall act in that capacity in all meetings of the Assembly or the Councils; he shall perform other functions entrusted to him by these bodies ; and he shall make an annual report to the General Assembly on the work of the Organization. Article 99 mentions a crucial right of the Secretary-General that paradoxically has almost never been explicitly used, namely the right to bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

As to Articles 100 and 101, they provide for an international civil service appointed by the Secretary-General according to regulations established by the

⁷ The complete text of Article 6.1 of the Covenant states: “The permanent Secretariat shall be established at the Seat of the League. The Secretariat shall comprise a Secretary General and such secretaries and staff as may be required”.

⁸ There was some trade-off between the nomination procedure finally adopted and the “deputies” question. The acceptance of the first point by invited States, could indeed be interpreted as a concession against the dropping by the Great Powers of the idea of appointing a number of Deputy Secretaries-General. Article 97 further reflects this compromise when read in relation to Article 101 paragraph 1 according to which: “The staff shall be appointed by the Secretary-General under regulations established by the General Assembly”.

General Assembly. The importance of these two provisions resides in that they seek to ensure an impartial Secretariat, operating free from illegal State pressure.

B. Articles 98 and 99 as the primary legal basis for political action⁹

According to former UN Secretary-General Javier Perez de Cuéllar: “Anyone who has the honor to be cast Secretary General has to avoid two extremes in playing his, or her, role. On one side is the Scylla of trying to inflate the role through too liberal a reading of the text: of succumbing, that is, to vanity and wishful thinking. On the other is the Charybdis of trying to limit the role to only those responsibilities which are explicitly conferred by the Charter and are impossible to escape: that is, succumbing to modesty, to the instinct of self-effacement, and to the desire to avoid controversy. There are, thus, temptations on both sides. Both are equally damaging to the vitality of the institution. I submit that no Secretary-General should give way to either of them”¹⁰.

Though primarily a metaphorical political remark, these words of a former holder of the Office show strikingly well the difficulties that are found when trying to understand the limits set by the Charter to the political action of the Secretary-General. The mythological monsters Scylla and Charybdis were in fact dangerous streams affecting navigation through the strait of Messina in Southern Italy. Comparing these streams to the forces governing international affairs, we could continue Perez de Cuéllar’s allegory saying that even if a Secretary-General is a good enough navigator to sail across these streams, his or her direction will be undoubtedly affected by their force. Whether a Secretary-General tends to enlarge his role or, on the contrary to minimize it, will heavily depend on world affairs at that time. However, the wording of the Charter as to the political powers and competences of the Secretary-General cannot easily change. One element seems thus to be missing. How can a fixed wording adapt to such changes in

⁹ Article 98: “The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization”; Article 99: “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”.

¹⁰ PEREZ DE CUELLAR, J., *The Role of the UN Secretary-General* in ROBERTS, A., KINGSBURY, B., *United Nations, Divided World*, Clarendon Press, Oxford, 1993, p. 126.

international affairs? The obvious legal answer is by interpreting the relevant provisions of the U.N. Charter in the light of their object and purpose¹¹.

Articles 98 and 99 refer to several executive functions and powers of the Secretary-General. The political influence of these functions and powers varies considerably according to different factors such as the state of world affairs, the personality of the Secretary-General, the interpretation of the article prevailing at the time, and others. As already noted, Article 98 distinguishes three functions : the Secretary General shall act in that capacity in all meetings of the Assembly or the Councils ; he shall perform other functions entrusted to him by these bodies ; and he shall make an annual report to the General Assembly on the work of the Organization.

Concerning the first function, the text is not clear when it refers to acting “in that capacity”. If we look at the last phrase of Article 97 we would tend to think that this expression points to the status of “Chief Administrative Officer” of the Organization. However, if we consider this “capacity” in the light of Articles 7 and 99 and we further take into account the *travaux préparatoires*, the administrative character becomes less salient. Such interpretation is further suggested by the regulations of the main deliberative bodies, which give a right of intervention and of proposition to the Secretary-General¹². Furthermore, the Secretary-General has the right to propose points for the Agenda of the different bodies¹³. Thus, not only does the combination of Article 98 and internal regulations represent the enlargement of Article 99 to other deliberative bodies,

¹¹ The ordinary regime of treaty interpretation is given by articles 31 and 32 of the Vienna Convention on the Law of Treaties. Although this Convention is not, as such, applicable to the Charter, it has been considered in many respects as a codification of international customary law so that the rules of interpretation included in the Convention are applicable to the Charter as customary law. See, for instance, the case concerning the Kasikili/Sedudu Island, in which the International Court of Justice considered article 31 of the Vienna Convention as the expression of the customary international law of treaty interpretation, applying these rules to a 1890 Treaty. See Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II), p. 1059, par. 18. The interpretation of the U.N. Charter follows a similar logic to constitutional interpretation. As Ress notes: “The practice of the UN organs as well as that of the member states within the framework of the UN is not only an important element for specifying and developing the material understanding of the respective Charter provisions, but also constitutes a mixture of interpretation and adaptation, if this subsequent development meets the different needs and intentions of nearly all member states, in particular also those of the member states concerned, and can thus be considered to reflect the global balance of political interests”, RESS, G., *The interpretation of the UN Charter in SIMMA*, B. (ed.), *The Charter of the United Nations. A Commentary*, Oxford University Press, Oxford, 1995, p. 29. For a useful review of how constituent instruments of international organizations are interpreted see SATO, T., *Evolving Constitution of International Organizations*, Kluwer, The Hague, 1996.

¹² Articles of the corresponding regulations are : Art. 45 for the General Assembly ; Art. 28 for the ECOSOC.

¹³ Articles of the corresponding regulations are : Art. 72 for the General Assembly ; Art. 22 for the Security Council ; and Article 44 for the ECOSOC.

but it also allows the Secretary-General to intervene within the Security Council without invoking the highly politicized Article 99. In practice, every Secretary-General has used the right of speech especially before the Security Council. The exercise of such right before the General Assembly has been less recurrent because of its unpredictable results¹⁴.

The second function is more difficult to circumscribe. In fact, it would be better to refer to as a group of functions. If on the one hand this difficulty involves a considerable degree of uncertainty, the open formulation of the phrase has, on the other hand, been essential to the development of the Secretary-General's political role. During the first years of the Organization, the resolutions of the General Assembly and the Security Council usually confined the Secretary-General to mostly administrative tasks. This does not mean that the Secretary-General himself interpreted his responsibilities as merely administrative. On the contrary, he has always tended to act as a neutral mediator among States and between States and international organs. Moreover, the scope of the tasks entrusted to him has changed over time, taking the form of extremely large and imprecise mandates issued by the General Assembly or the Councils. The bargaining inherent to any compromise has led in many cases to the adoption of vague and even apparently contradictory texts requiring the Secretary-General "to take action" without any further detail as to the nature of the action, and this even in extremely urgent situations. The large room for maneuver left to the Secretary-General by such mandates carries, by the same token, a great deal of responsibility in matters of international peace and security¹⁵. This has positive and negative aspects. It is for instance highly desirable that the direction of peacekeeping operations, where it is often indispensable to make quick decisions, be entrusted to an executive body such as the Secretary-General. However, such delegation has sometimes been used by States to get rid of their primary responsibility by sending it downstream. As Javier Perez de Cuéllar observes: "... it would gravely harm the interests of peace if the Secretary-General were ever to become a façade, behind which there was only deadlock and disagreement. He must not become an alibi for inaction"¹⁶. Furthermore, using Perez de Cuéllar's

¹⁴ See for example the case of Kurt Waldheim, UN Secretary General between 1972 and 1981, who after having demanded the inclusion on the agenda of the question of terrorism, saw this initiative degenerate when an Saudi-Arabian amendment transformed his proposition in a text that actually tended to justify more than to banish terrorism in certain cases, A/RES/3034 (XXVII), December 18th 1972, cf. SMOUTS, M.-C., *Commentaire ad article 98 in COT*, J.-P., PELLET, A. (eds.), *La Charte des Nations Unies*, 2nd edn., Economica, Paris, 1991, p. 1320.

¹⁵ For an interesting essay comparing the situation of the UN Secretary-General to parliamentary responsibility see LENTNER, H., *The Political Responsibility and Accountability of the United Nations Secretary-General in The Journal of Politics*, 27/4, 1965, pp. 839-860.

¹⁶ PEREZ DE CUELLAR, J., *op. cit.*, p. 132.

symbolism again, it is only when such extremely vague mandates are formulated that the attitude of the Secretary-General towards Scylla and Charybdis entails a political risk¹⁷. It is true that after the 1967 crisis, mandates concerning the deployment of peacekeeping operations tended to be more precise. However, vague mandates are far from having disappeared. In practice, they have become quite common in the field of dispute settlement where the UN Secretary-General, as an impartial force in international affairs, can play a major role.

The last phrase of article 98 runs as follows: “The Secretary-General shall make an annual report to the General Assembly on the work of the Organization”. This report has been the object of different interpretations and evaluations. Originally, the report on the work of the Organization, which is a rule inherited from the League of Nations, was considered as an administrative attribution. That was at least the spirit that guided the adoption of this provision. But the holders of the Office of the Secretary-General have interpreted this function in a political sense. While, admittedly, the very idea of such a report entails an interpretation of the international state of affairs, which constitutes in itself a political act¹⁸, this attribution has in practice been used as an interesting policy instrument in the hands of the Secretary-General¹⁹. Moreover, this policy approach has spilled over

¹⁷ The Congo crisis in 1960, and the 1967 retreat of UN troops from the Middle East. As noted by Smouts, in both cases, the Secretary-General acted without having the political support of a number of major States, which led to a very severe crisis of the United Nations system as a whole.

¹⁸ As Michel Virally points out : “... alors même qu’il (le rapport) doit rester impartial et objectif, il ne peut se contenter d’être une simple chronologie, ou encore une nomenclature d’actes passés par les divers organes des Nations Unies. Il se doit d’essayer de relier entre eux les événements de l’année et les réactions qu’ils ont provoquées de la part de l’Organisation, les décisions que celle-ci a - ou n’a pas - prises. Il ne peut pas davantage manquer de mettre en lumière les conséquences incluses dans les uns et les autres. En d’autres termes, il ne saurait manquer d’être une interprétation de la conjoncture internationale et du rôle qu’y ont joué les Nations Unies en tant que telles, un bilan qui se prolonge nécessairement par des perspectives d’avenir”, *Le rôle politique du Secrétaire general des Nations Unies in Annuaire français de droit international*, 1958, pp. 365-366.

¹⁹ In this development, it is possible to distinguish four moments. At the beginning, Secretary-General Trygvie Lie adopted the same format as that used at the times of the League, namely a short introduction of 3 or 4 pages written by him followed by the report itself, written by the Secretariat services, which described in great detail the work of the Organization. The tone of the report changed when Dag Hammarskjöld took office. The document was then divided into two parts presented separately: on the one hand, a substantial introduction of analytical nature written by the Secretary-General, including suggestions for further action; on the other hand, the report itself which was nothing but a descriptive summary constituting a mere supplement to the introduction. In 1977, at the 32nd session of the General Assembly, the report itself was reduced to a short chronology of dates and facts, before disappearing at the 33rd session. Thus, the report referred to in article 98 was considered to be only the Secretary-General’s introduction, in which he gave his point of view on the functioning of the Organization. This evolution was not resisted by States. On the contrary, it was explicitly acknowledged by the General Assembly in

to other reports of the Secretary-General as well, such as illustrated by Kofi Annan's Millennium Report setting an Agenda for the 21st Century²⁰. Thus, the political character of the Secretary-General's reports is now openly accepted, which does not necessary mean that, in practice, its conclusions are followed by Member States.

With regard to Article 99 of the Charter, it has been considered as the fundamental basis of the Secretary-General's political role. Paradoxically, it has almost never been explicitly used. The interest of vesting in the Secretary-General a right "to bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security" was originally intended to avoid that national considerations prevent a matter from being considered by the Security Council because of the absence of an initiative stemming from Member States²¹. More precisely, the authority given by Article 99 to the UN Secretary-General can be interpreted as including three main elements²², namely right, responsibility and discretion. The first element was clear since the San Francisco Conference and has never been contested. The other two elements are closely interrelated since discretion must be backed up by responsibility. Whether the Secretary-General uses his right or not, is a matter falling within his discretion. But wherever there is an alternative, there is also the responsibility to choose one of the options offered. According to Perez de Cuéllar: "Before invoking the Article, the Secretary-General has to consider carefully how his initiative will fare, given the agreement or lack thereof among the Permanent Members and also the positions of the Non-permanent Members. A situation may in certain cases be aggravated and not eased if the Secretary-General draws attention, under Article 99, and the Security Council then does nothing"²³. The invocation of this article would represent for the Secretary-General something similar to a Prime Minister asking a vote of confidence in a parliamentary regime, since what is at stake is the trust placed on him by the deliberative organ²⁴. Such

1982, when Javier Perez de Cuéllar presented his first report. See SMOUTS, M.-C., *op. cit.*, pp. 1324-1325.

²⁰ *We the Peoples. The Role of the U.N. in the 21st Century* (3 April 2000).

²¹ We should recall here that Article 11 paragraph 1 of the League's Covenant stated : "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary General shall *on the request of any Member of the League forthwith* summon a meeting of the Council" (italics added).

²² PEREZ DE CUELLAR, J., *op. cit.*, p. 129.

²³ *Ibid.*, p. 130.

²⁴ "... en invoquant l'article 99, le Secrétaire général décide que telle affaire intéresse la sécurité internationale et qu'elle est susceptible d'être portée devant l'Organisation. Par là même il préjuge de la réponse favorable du Conseil de sécurité. L'initiative est lourde de conséquences car

difficulties have made the explicit invocation of Article 99 extremely rare²⁵ fostering, by the same token, the development of a parallel practice based on the “spirit” of this provision. Indeed, the spirit of Article 99 has been largely invoked and used to assert the political role of the Secretary-General, especially after Dag Hammarskjöld took office. It was him who developed a refined theory as to the role of the Organization and of his Secretary-General²⁶, focusing on the notion of discrete and preventive diplomacy of this latter. This doctrine has been followed by his successors to the Office and is essential to understand the legal foundation of the political role of the Secretary-General.

Indeed, in many respects, the shadow of Hammarskjöld still appears to haunt the 38th floor of the U.N. Plaza. Speaking at the aforesaid recent Conference on the U.N. Secretary-General, Sir Brian Urquhart, a former top U.N. official who has worked for the organization since its inception, submitted that Hammarskjöld’s legacy should serve as a benchmark for choosing the next Secretary-General²⁷. As we will see next, the part of this legacy embodied in the “Peking formula” well represents what Thomas Franck suggested in his recent intervention. The Secretary-General can by no means become partisan. This is true even when he/she may face open opposition from a powerful State. How, in this context, is it possible to address what may well be perhaps the most daunting challenge inherent to the office of the Secretary-General?

II. SQUARING THE CIRCLE: THE “PEKING FORMULA”²⁸

on peut très bien imaginer un Secrétaire général surestimant le poids de son influence auprès du Conseil et portant sur le bureau de celui-ci une affaire dont un des membres permanents refuse de connaître”, SMOUTS, M.-C. Commentaire *ad art. 99* in COT, J.-P., PELLET, A., (eds.), *La Charte des Nations Unies*, 2nd edn., Economica, Paris, 1991, p. 1329.

²⁵ To our knowledge, Article 99 has so far been explicitly invoked only in three cases : in the Congo crisis of 1960, in the occupation of the American embassy in Tehran in 1979 and in the 1989 Lebanon crisis. In other occasions the Secretary-General has brought a matter to the attention of the Security Council without explicitly invoking Article 99. It is sometimes difficult to determine whether Article 99 has been actually invoked or not. In this respect, see for example the Korean crisis of 1950 where, although Trygve Lie presupposed that he had overtly invoked article 99, the Security Council became active rather as a result of a previous initiative of the US.

²⁶ This doctrine can be found in his *Introductions to the Annual Report* and in his speeches. See FOOTE, W. (ed.), *The Servant of Peace: A Selection of the Speeches and Statements of Dag Hammarskjöld*, Bodly Head, London, 1962.

²⁷ On Hammarskjöld legacy see, among others: URQUHART, B., *Hammarskjöld*, Alfred A. Knopf, New York, 1972; VIRALLY, M., Le testament politique du Secrétaire général des Nations Unies in *Annuaire français de droit international*, 1961, pp. 355-380.

²⁸ This section draws upon and expands the discussion provided in VINUALES, J.E., *The U.N. Secretary-General between Law and Politics: Towards an Analytical Framework for Interdisciplinary Research*, Graduate Institute of International Studies (collection *Etudes et travaux*), Geneva, 2005.

A. The original context

Apart from some rather moderate initiatives by Trygve Lie to assert an independent role in solving political crises, such as his intervention before the Security Council regarding the alleged communist infiltration in Greece's northern frontiers or his initiatives in the Berlin crisis and the Korean war²⁹, it was Dag Hammarskjold who actually made the decisive steps in this direction.

The diplomatic technique that came to be known as the "Peking formula" was first developed by Hammarskjold as a way to solve the 1954-55 Sino-American crisis. Considering that the mandate entrusted to him by the General Assembly was too judgmental to serve as the basis for political solution to the crisis, Hammarskjold claimed to be acting in his own authority when asking the government of the People's Republic of China (PRC) for the release of several American prisoners. General Assembly Resolution 906 (1954), condemned indeed: "as contrary to the Korean Armistice Agreement, the trial and conviction of prisoners of war illegally detained after 25 September 1953" before requesting the Secretary-General: "... in the name of the United Nations, to seek the release, in accordance with the Korean Armistice Agreement, of these eleven United Nations Command personnel, and all other captured personnel of the United Nations Command still detained" and "... to make, by the means most appropriate in his judgement, continuing and unremitting efforts to this end"³⁰. The Chinese foreign affairs minister, Chou En-lai, had strongly reacted against this resolution, declaring that: "no amount of clamor on the part of the United States can shake China's just stand of exercising its own sovereign right in convicting the United States spies"³¹. Hammarskjold was perceptive enough to understand that any solution to the crisis would require a face-saving exit for the Chinese communist government. Although nothing in the U.N. Charter explicitly vested in the Secretary-General the authority to dissociate himself from a mandate entrusted to him, claiming an independent say in matters of international peace and security,

²⁹ In the Greek affair, in September 1946, Trygve Lie claimed an independent power of investigation separate from that of the Council: "I hope the Council will understand that the Secretary-General must reserve his rights to make such enquiries or investigations as he may think necessary, in order to determine whether or not he should consider bringing any aspect of this matter up to the attention of the Council under the provisions of the Charter", *Security Council Official Records*, 70th meeting, 20 September 1946, p. 404, cited in FRANCK, Th., NOLTE, G., *op. cit.*, p. 144. It is interesting to mention that the Secretary-General's claim was encouraged by the representative of the Soviet Union, in part perhaps because of Lie's leftist background.

³⁰ Cf. *General Assembly Official Records*, 509th plenary meeting, 10th December 1954.

³¹ UN Doc. A/2889 cited in URQUHART, B., *Hammarskjold*, Alfred A. Knopf, New York, 1972, pp. 102-103.

Hammaraskjold took a gamble based on his perception of the political room for maneuver left to him both by the PRC and especially by the US attitude.

Putting aside a General Assembly mandate was quite an overstretch from the legal point of view, something of which Hammaraskjold was very much aware³². From a political perspective, however, the Secretary-General intended to carefully prepare the ground. For instance, aware that the US would require, for reasons related to its domestic politics, a resolution making it clear that the PRC was in fault, he proceeded to a first test of the American bottom line by informing Cabot Lodge, on December 8th, of the way he understood the mandate the Assembly was likely to give him. Brian Urquhart notes that: “He did this in order to give the United States the chance to back down if it wanted to”³³. He then made arrangements for having some Western European delegations introduce a phrase into the final wording of the resolution granting him some discretion to deal with the situation. In order to legitimize his action before both the UN organs and Chou En-lai, Hammaraskjold emphasized that the phrase “by the means most appropriate in his (Secretary-General’s) judgement” included in the final resolution applied to his mission in general³⁴.

Then, in his first meeting with the Chinese official, Hammaraskjold took great pains to clarify his legal (and thus political) authority. The account given by Brian Urquhart of how Hammaraskjold handled this delicate position is instructive in this respect: “(Hammaraskjold) explained that in fulfilling his obligation to try to reduce international tensions anywhere in the world, the Secretary-General did not work for any one nation or even for a majority of nations as expressed in a vote in the General Assembly but under his constitutional responsibility for the general purposes set out in the Charter, which were applicable to members and non-members of the United Nations alike. It was on this basis that he had come to Peking. The General Assembly resolution had brought to the fore a case where Hammaraskjold had both the right and the duty to act as Secretary-General, but the Charter of the United Nations, not the condemnation of the General Assembly in its resolution of December 10, formed the legal basis for his present visit”³⁵.

³² Replying to a letter of Henry Cabot Lodge Jr. asking him to get personally involved, Hammaraskjold had indeed acknowledged that if he was requested by the Assembly to undertake a negotiation under Article 98 of the Charter he “clearly could not refuse”, *Ibid.*, p. 99.

³³ *Ibid.*, p. 100.

³⁴ *Ibid.*, p. 101.

³⁵ *Ibid.*, p. 105. Interestingly enough, this conception of the U.N. as the embodiment of international legality has more recently been used by the Swiss authorities to become part of the U.N. without renouncing to its neutrality. However, if this may be case now that the U.N. includes almost all the sovereign states of the world, back in the 1950s only some 50 countries were actually members of the organization. Moreover, the organization was still strongly perceived as

The results of this first visit to Peking were however ambiguous. Beyond any concrete agreement, perhaps the most important outcome of this initiative was to get Hammarskjold and Chou En-lai to know each other as well as to establish a sort of mutual respect. As we shall see next, this implicit understanding was a critical aspect in the way the crisis unfolded in the following months. It was also during this period that the American administration came to realize that a face-saving strategy was the most plausible alternative to military intervention. Hammarskjold's name has often been associated with the idea of "quiet diplomacy", which share many features with diplomacy in its old secret vintage. Reducing the public pressure to the minimum, while increasing the private pressure to the maximum, that was the way to proceed. Moreover, the very "quietness" of Hammarskjold's initiative would also serve to play down any criticism on the way the provisions of the U.N. Charter on the Secretary-General were not only being interpreted but also directly applied.

This turned out to be a successful gamble. As soon as public pressure went down, the face-saving dimension of Hammarskjold's initiative yielded its expected results, as suggested by the wording of the confidential cable sent by Cho En-lai to Hammarskjold, through the Swedish Embassy in Switzerland, to announce the release of ten more prisoners. The cable reads in its relevant part: "... 2. The Chinese Government has decided to release the imprisoned U.S. fliers. This release from serving their full term takes place in order to maintain friendship with Hammarskjold and has no connection with the UN resolution. Chou En-lai expresses the hope that Hammarskjold will take note of this point. 3. The Chinese Government hopes to continue the contact established with Hammarskjold. 4. Chou En-lai congratulates Hammarskjold on his 50th birthday"³⁶. It is quite curious the extent to which the cable is personalized. The very concession sought by the Secretary-General appears as a symbolic gesture to the person of Hammarskjold, thereby emphasizing the purported indifference of the PRC regarding the U.N. and its member States³⁷. The Secretary-General considered it appropriate to keep the message confidential, probably because he foresaw how valuable a relation with Chou En-lai could be in the future³⁸. After

the creature of the victorious powers of World War II. This digression shows the extent of Hammarskjold inventiveness and political skill.

³⁶ Unpublished document, cited in URQUHART, B., *op. cit.*, p. 126.

³⁷ This "indifference" should not be carried too far. Indeed, it seems quite clear that at the time, the PRC was strongly interested in becoming "the China" represented in the United Nations. It is plausible that Chou En-lai may have been seeking to develop a close relationship with Hammarskjold in the hope this would somewhat facilitate the PRC's accession to the U.N. system.

³⁸ In his September 9th report to the General Assembly on the mission, we find only a short review of major facts, See UN Doc. A/2954, September 9th, 1954.

all, the Peking mission had been a clear political success, and as such, no one would seriously question the details of its legality. The Secretary-General thus conquered an independent standing in political affairs³⁹ that, only six years later would cost Hammarskjold his own life⁴⁰.

B. The new context

Among the conditions that made possible the development of the U.N. Secretary-General throughout the decades of the office, one must not overlook the influence of the Cold War on the functioning of the Security Council. To a given extent, it was the failure of the Council that fostered the success of the Secretariat. Indeed, the inability of the deadlocked Council to address urgent matters related to peace and security provided the Secretary-General with enough leeway to assert his role in world politics⁴¹.

With the end of the Cold War, the prospects of this role became more uncertain, as did the prospects of the U.N. overall. As noted by Oscar Schachter in the early 1990s in the context of the Gulf crisis: “The collective action taken under the aegis of the United Nations has been hailed as a vindication of international law and of the principle of collective security. At the same time, it

³⁹ The first formal acknowledgement of this independent good offices role came later following U Thant’s involvement in the Bahrain crisis. For the first time, the Security Council acknowledged a good offices initiative that U Thant had undertaken, based on the spirit of Article 99, without previously consulting it. Despite some previous Soviet criticism, on May 11th 1970, the Security Council unanimously adopted Resolution 278(1970) endorsing “the report of the Personal Representative of the Secretary-General” and welcoming “the conclusions and findings of the report”, *Security Council Official Records*, 1736th meeting, 11th May 1970. On the Bahrain case see JENSEN, E., *The Secretary-General’s use of good offices and the question of Bahrain in Millennium*, 14/3, 1985, pp. 335-348.

⁴⁰ This assertion is only meant to suggest that Hammarskjold’s involvement in solving security crises, as the one in Congo, put him at far higher risk. There is however some controversy as to the specific circumstances that led to Hammarskjold’s death, a controversy we do not wish to raise here.

⁴¹ A good illustration of this dynamics is provided by Hammarskjold’s decision to increase, on his own authority, the UN Observer Group in Lebanon. Facing a deadlocked Security Council, Hammarskjold declared to the members of the Council: “Where you to disapprove ... I would of course accept the consequences of your judgement”, *Security Council Official Records*, 837th mtg., 22 July 1958, p. 4, cited in FRANCK, Th., NOLTE, G., *op. cit.*, p. 145. This remark has a two-fold interest. First, as Franck and Nolte note, the Secretary General asserts a competence of principle to act in the interest of the world peace when the political organs are deadlocked. This competence, although subject to disapproval of the organs, would then seem to be the rule whereas the disapproval would be a sort of exception. Second, if the Security Council was deadlocked, how could it suddenly take a decision disapproving the Secretary General’s action? Such decision would be at least quite unlikely. In the meantime, the Secretary General would find the political space to act in the interest of world peace according to the principles of the Charter.

has also been perceived by many as still another example of the dominant role of power and national self-interest in international relations. A plausible case can be made for each of these views⁴². A few years later, Franck and Nolte welcomed the: "... remarkable blossoming of the United Nations ... reflected in the growth of peacekeeping operations, and in the stream of mandatory resolutions from the Security Council" adding that "the political role of the Secretary-General, including the good offices function, also appeared to be expanding"⁴³. Whereas one may argue that the trend towards increased multilateralism has been left behind, as suggested by the recent conflicts in Afghanistan and Iraq, the role of the Secretary-General in helping solve international conflicts continues to be perceived as perhaps the main attribute of the office. Moreover, even if we admit that unilateralism has predominated, this trend may now be reversing as the EU, China and Russia start to counterbalance American predominance. In all events, what matters for our specific purpose is to understand how much leeway is currently left to the Secretary-General to act as an independent force in international peace and security.

Perhaps the best illustration of both the underlying dynamics of the international system and the role of the U.N. Secretary-General in it is given by the case of Iraq. When Iraq invaded Kuwait in August 1990, the Security Council was in a very different position than the one it had undergone throughout the Cold War⁴⁴. Contrary to what Saddam may have originally expected, the new environment allowed the Security Council to adopt Resolution 678 (1990), authorizing Member States to use all necessary means to force Iraq back from its position⁴⁵. The wide participation in the military effort, which was heralded as the rebirth of multilateralism, should not prevent us from seeing the underlying forces driving the whole operation. Indeed, the United States and the United Kingdom had tried to launch an armed intervention on the sole basis of the right of collective self-defense, a right that Security Council Resolution 661(1990) had, for the first time, explicitly recognized as applicable in a particular situation⁴⁶. In

⁴² SCHACHTER, O., United Nations in the Gulf Conflict in *American Journal of International Law*, 85/3, 1991, p. 452.

⁴³ FRANCK, Th., NOLTE, G., *op. cit.*, p. 143.

⁴⁴ For an illuminating review of the Security Council's practice see KIRGIS, F.L., The Security Council's First Fifty Years, in *American Journal of International Law*, 89/3, July 1995, pp. 506-539.

⁴⁵ The resolution was adopted by 12 votes to 2 (Cuba and Yemen) with one abstention (China). For an interesting analysis of the basis of this resolution see WESTON, B.H., Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy, in *American Journal of International Law*, 85/3, 1991, pp. 516-535.

⁴⁶ SCHACHTER, O., *op. cit.*, p. 457. Some authors challenged the consistence of this position on the basis of the wording of Article 51 of the UN Charter, according to which the right

such circumstances, the two activist States had a powerful argument to undertake military action on the request of Kuwait.

This is the context in which the then U.N. Secretary-General, Javier Perez de Cuéllar, sought to intervene. His efforts in this crisis have been the object of controversy. For some, the Secretary-General was too shy. He could and should have played a more active role, instead of succumbing to what could be called, using the very words of Perez de Cuéllar, the “Charybdis” of self-effacement. Some five years later, Perez de Cuéllar recalled that, at the time, he had no doubt that the United States would have acted unilaterally if necessary⁴⁷. Could the Secretary-General have gone against the interests of the two activist powers to any given extent? The case is all the more relevant that the interests of two major powers, including the current first military power in the world, were at issue. If it could be established that some room for maneuver was left to the Secretary-General, then one may conclude that Perez de Cuéllar could in fact have said a sort of diplomatic ‘no’, pursuing to some extent what he thought the U.N. Charter required. Broadly speaking, if one judges by the views expressed by most State and U.N. officials at the aforementioned conference on the Secretary-General, the conclusion would be that, as a rule, the Secretary-General can under no circumstances oppose the explicit interests of major powers. In order to assess whether this was the case in the Gulf crisis, let us go into some more detail as to the circumstances of this particular conflict.

to self-defence exists only: “until the Council has taken measures necessary to maintain international peace and security”. In this regard, the adoption by Resolution 661 (1990) of economic sanctions against Iraq would suspend the right to self-defence both individual and collective. Though the wording of the Charter is extremely clear, the Schachter’s argumentation keeps a great deal of relevance if we take into account that the Security Council asserted the right of collective-self defence in the preamble of Resolution 661 itself. In other words, if both terms, namely collective self-defence and economic sanctions, were asserted simultaneously, one could hardly consider them inconsistent with one another. Though persuasive, Schachter’s interpretation is not the only plausible one. There is no assurance that the Security Council acts always in conformity with the Charter, including Article 51. Although the issue is highly controversial, the case of Lockerbie had already shown how the Council might serve the interests of particular States, even in violation of the Charter principles. For three detailed studies on the “constitutionality” of Security Council’s action see: GOWLLAND-DEBBAS, V., *op. cit.*; ALVAREZ, J.E., Judging the Security Council in *American Journal of International Law*, 90/1, 1996, pp. 1-39; AKANDE, D., The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations, in *International and Comparative Law Quarterly*, 46/2, April 1997, pp. 309-343. In any case, the ineffectiveness of the economic sanctions taken led, few weeks after, to the adoption of Resolution 678 (1990) authorizing Member States to use all necessary means to obtain the withdrawal of Iraqi troops from Kuwait. For further details see WESTON, B.H., Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy, in *American Journal of International Law*, 85/3, 1991, pp. 516-535.

⁴⁷ PEREZ DE CUELLAR, J., Reflecting on the Past and Contemplating the Future in *Global Governance*, 1/2, 1995, p. 164.

The Security Council referred for the first time to the Secretary-General's good offices role in the preamble of Resolution 664 of August 18th 1990: "Welcoming the efforts of the Secretary-General to pursue urgent consultations with the Government of Iraq following the concern and anxiety expressed by the members of the Council on 17 August 1990"⁴⁸. Less than two weeks after this resolution was passed, Perez de Cuéllar declared in a news conference in Bogotá that: "the moment ha(d) arrived for the Secretary-General of the United Nations to start diplomatic efforts aimed to solve in all its aspects the critical situation in the gulf area", adding that he had "invited ... the Minister of Foreign Affairs of Iraq, Mr. Tariq Aziz, to urgently meet with (him) ... in New York or Geneva, in order to engage ... in a full exchange of views on the crisis"⁴⁹. He further noted that he was acting on his own initiative, not at the behest of the Security Council, thus trying to dissociate himself of the strong terms in which the Council had condemned the annexation of Kuwait.

Perez de Cuéllar's attempt to use the "Peking formula" intervened however in a different environment than the one faced by Hammarskjöld in 1955 or by Hammarskjöld's successors in some other cases. The United States was the only superpower and had adopted a tough stance. Brent Scowcroft, the American National Security Adviser, had made it clear that the United States would not "talk about anything" until a total and complete withdrawal of the Iraqi troops from Kuwait took place⁵⁰. And even if the United States had adopted a less rigid stance, the circumstances of the Iraqi attack were so blatant a violation of the U.N. Charter itself that the Secretary-General would have been unable to reach any face-saving solution for Iraq without compromising the very principles of the Charter. One should not be misled, in this respect, by the terms of the mandate entrusted to the Secretary-General by paragraph 12 of Resolution 674 (1990)⁵¹, which may be seen as a tactical move of the activist States to give the appearance of having exhausted all peaceful channels⁵². The room for maneuvering left to the Secretary-General in this circumstances was purely formal. As noted when

⁴⁸ *Security Council Official Records*, 2937th meeting, 18th August 1990.

⁴⁹ Cited in PACE, E., U.N. Leader to Meet With Iraqi Minister in *The New York Times*, August 27th 1990.

⁵⁰ *Idem*.

⁵¹ The Security Council "Reposes its trust in the Secretary-General to make available his offices and, as he considers appropriate, to pursue them and to undertake diplomatic efforts in order to reach a peaceful solution to the crisis caused by the Iraqi invasion and occupation of Kuwait, on the basis of resolutions 660 (1990), 662 (1990) and 664 (1990), and calls upon all States, both those in the region and others, to pursue on this basis their efforts to this end, in conformity with the Charter, in order to improve the situation and restore peace, security and stability", adopted by 13 votes to none, with 2 abstentions (Cuba and Yemen), *Security Council Official Records*, 2951st meeting, 29th October 1990.

⁵² Cf. NEUMAN, E., *op. cit.*, p. 102.

discussing Article 98 of the Charter, some mandates are only political façades used to either cover inaction by the deliberative bodies or, as in this case, to cover an apparently set course of action.

A comparable pattern can be discerned in Kofi Annan's good offices initiative in Iraq in February 1998. In this case, however, the contours of the legitimacy issue were different. Bluntly stated, the illusion of a rebirth of collective security had, by this time, faded away. This may explain in part why the Secretary-General was successful in at least postponing the crisis. The context was alarmingly similar to the present tensions arising out of Iran's nuclear program. The Iraqi government was said to be developing weapons of mass destruction. After UN inspectors were refused access to several presidential sites, the US and the UK threatened to use force to ensure full access to these sites. As in the early 1990s, the Secretary-General sought to dissociate himself from the hostile stance adopted by the US and the UK in order to reach a face-saving solution for Iraq. This time, however, the situation was somewhat different from that during the Gulf crisis, for the behavior of the Iraqi government was not blatantly inconsistent with the principles of the U.N. Charter⁵³. There are of course many variables affecting the concrete impact of the Secretary-General's action in a given case. Here, we focus only on the extent to which he was able to gain some room for political maneuvering.

Beginning of February 1998, the Secretary-General expressed his regret as to the insistence with which Saddam Hussein was being humiliated appealing: "for that kind of wisdom that will allow us to make the kinds of judgments that will allow us to get out of this"⁵⁴. This was only possible because, as we have just noted, the legitimacy issue presented in this case different contours. Indeed, one could have hardly imagined Perez de Cuéllar expressing such a view during the Gulf crisis. Mr Annan then sought at least some minimal support from the permanent members of the Security Council for an eventual trip to Baghdad. The American position at this point remained firm. If the Secretary-General was going to attempt a good offices mission, he should keep in mind the American bottom line, expressed in a number of written "talking points" intended to govern Annan's negotiations with Saddam Hussein. The reaction of the Secretary-General provides an example of the form and extent to which he was able to say a diplomatic 'no'. In resisting to see his negotiations subject to governmental

⁵³ This was, of course, a major line of controversy. From a legal perspective, the arguments of Iraq had in this case more substance than its previous attempts at justifying the invasion of a sovereign country.

⁵⁴ WREN, C.S., No Need to Humiliate Iraq, the Secretary-General Says in *The New York Times*, February 11, 1998.

instructions, the Secretary-General was upholding the underlying principles of his Office while greatly contributing to his appearance of independence.

But such an attitude can only operate in narrowly defined limits. Indeed, the US government was nevertheless able to suggest a number of guidelines, to some extent agreed upon by the other permanent members of the Security Council, to be “kept in mind” by the Secretary-General⁵⁵. This *modus operandi* is interesting in many respects. First, it suggests that unilateralism has discernable limits, since what the US government could not fully impose by itself made later its way through the endorsement of the other permanent members. Second, it also illustrates the obvious point that the Secretary-General may receive “instructions” regardless of any formal mandate under Article 98 of the Charter⁵⁶. In this respect, the case provides the conceptual contours of a second variant of the “Peking formula” characterized by the fact that the Secretary-General seeks to dissociate his authority not from a formal mandate of a deliberative body⁵⁷ but from informal instructions of the most powerful countries. Whether the arguable illegality⁵⁸ of such informal instructions leaves the Secretary-General more room for maneuver than what a formal mandate would is not an easy question. From a purely communicational perspective, however, the Secretary-General could more easily dissociate his image from the instructions (while giving private assurances) than in the case of a formal mandate from the Security Council. This may be a subtle twist, but it did make a difference in the this particular case. This can also be viewed as a very concrete way in which the legal powers of the Secretary-General may push, albeit to a very limited extent, the boundaries of his political

⁵⁵ As noted by a senior American official: “What’s vital is that Mr. Annan understand where our lines are ... We want him to have no ambiguity about it. It’s not of concern to us if he gets the Russians to think this is the right proposal, so long as the proposal is consistent with the relevant Security Council resolutions, provides full access for Unscop and gives us some confidence this won’t be endlessly repeated”, ERLANGER, S., U.S. Seeks to Limit the Role of U.N. Chief during Iraq Talks in *The New York Times*, February 17, 1998.

⁵⁶ The unsuccessful experience of Javier Perez de Cuéllar, who had undertaken his mediation effort in 1991 without the prior support of the Security Council, represented a clear benchmark for the action of Kofi Annan, who wisely considered that such endorsement was an indispensable condition for his mission to be successful: “If the trip is going to be successful, it has to be carefully prepared, both here and in Baghdad”, See *Idem*.

⁵⁷ The Secretary-General received some formal support from the Security Council but only in the form of a vague oral statement by its President: “The Security Council gives its full support to the Secretary General’s mission because it would have real impact on the implementation of United Nations resolutions”, cited in SCIOLINO, E., For U.N. Chief, Scarcely Room for Negotiating in *The New York Times*, February 19, 1998.

⁵⁸ Article 100 paragraph 2 of the UN Charter states indeed that: “Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities”.

room for maneuver⁵⁹. Whereas in 1955 the main source of pressure, namely the General Assembly Resolution, was perfectly legal, which made in fact Hammarskjold's initiative legally dubious, in 1998, it was the source of pressure that was legally dubious, not Kofi Annan's initiative.

The Secretary-General eventually reached a peaceful solution, in the form of a Memorandum of Understanding⁶⁰. However, as we all know, this arrangement did not last long, the situation leading to the use of force by an American-led coalition in March 2003⁶¹.

III. THEORETICAL CONSIDERATIONS

A. Legal Scope vs. Political Scope

The political role of the U.N. Secretary-General has been the object of a prolific literature since the 1960s⁶². Curiously enough, although the "Peking formula" is mentioned in many of these writings, no single study has been specifically devoted to this *modus operandi*. In the present section we would like to spell out what we consider as the main theoretical implication of this form of action, namely the interactions between the legal and political scopes of action of the

⁵⁹ There were other important elements suggesting that these boundaries were permeable, including the rather moderate stances adopted by China, France and Russia as well as the passing of Resolution 1153 (1998) renewing the "oil-for-food" program. See *Security Council Official Records*, 3855th meeting, 20th February 1998. Paragraph 2 of this resolution allows Iraqi oil pumping to attain a sum of US\$ 5.256 billion, which is more than before. Annan was reported to having said, reacting to the sarcasm showed during the negotiation by Taha Yassin Ramadan, the Iraqi Vice-President: "I was so surprised and even frankly disappointed at the note which came after approval of the \$5.2 billion ... After the discussions that we had gone through, I would have expected at least a little thank-you for those people here who worked and helped make it happen", cf. TRAUB, J., Kofi Annan's Biggest Headache in *New York Times Magazine*, April 5, 1998. The oil-for-food program, which has become so controversial in the last years, was originally established by Resolution 986 (1995), *Security Council Official Records*, 3519th meeting, 14 April 1995.

⁶⁰ UN Doc. S/1998/166. On March 2, 1998, the Security Council, acting under Chapter VII of the Charter: "1. Commend(ed) the initiative by the Secretary-General to secure commitments from the Government of Iraq on compliance with its obligations under the relevant resolutions, and in this regard endor(ed) the memorandum of understanding signed by the Deputy Prime Minister of Iraq and the Secretary-General on 23 February 1998 ...", Resolution 1154, *Security Council Official Records*, 3858th meeting, 2nd March 1998, paragraph 1.

⁶¹ For an analysis of the present situation see : FRANCK, T., What Happens Now? The United Nations after Iraq in *American Journal of International Law*, 97/3, 2003, pp. 607-620.

⁶² See in this regard the bibliography compiled by the organizers of the aforesaid symposium on the Secretary-General at the New York University School of Law, available at: http://www.iilj.org/research/documents/UNSec-GenBibliography_001.XLS

U.N. Secretary-General. Although the distinction between these two spheres is implicit in the works of many prominent scholars⁶³, it has yet to be spelled out⁶⁴.

Concerning what we mean by *legal scope of action* of the Secretary-General, practically speaking, a first approximation to this concept was given in section one of this study, where we discussed the main provisions of the U.N. Charter dealing with the Secretariat as well as the contours they took over the years. From a purely legal perspective, such a characterization would suffice to give a broad idea of what the Secretary-General can and cannot do. However, if we stay at this level, at least two major questions remain unanswered. First, how have these provisions come to legally justify certain initiatives by the Secretary-General and not others? Second, can this expansion of the Secretary-General's legal powers provide him/her with the necessary political leverage to uphold, at least to some extent, his/her independence when facing adverse stances by major powers?

Let us deal with the second question first. Our discussion is based on the quite obvious assumption that the provisions of the U.N. Charter are the result of a given political configuration present when the Charter was adopted. This does not necessarily mean that the underlying political compromise leading to the wording of a given provision reflects a common view on a particular point. The wording of a provision can indeed represent an "agreement to disagree", as would be the case of an extremely vague mandate entrusted to the Secretary-General in a situation where there is no political consensus among the major powers to follow a defined

⁶³ See for instance the already cited work of Franck and Nolte, where the authors note: "Aside from these explicit or implicit authorizations, the Secretary-General, in order to perform his good offices functions, must retain the confidence of the principal organs and the major countries and regional groupings which constitute the organization. Thus the Secretary-General is constantly involved in informal consultations with the Security Council and with individual states. *As a result, his discretion as to how to proceed in a given case may, in fact, be narrower than it appears on paper.* Once a political organ begins to exercise its power in respect of a situation, the Secretary-General's inherent powers, while not repealed, may need to be exercised in compliance with the specified – and perhaps even the implied – limits, directions, and parameters established by the political organ. This is especially so when the political organ involved is the Security Council" FRANCK, Th., NOLTE, G., *The Good Offices Function of the UN Secretary-General ...*, p. 174 (italics added). Many years before, the late Michel Virally, discussing the action of Tryve Lie with regard to the representation of China before the UN, had pointed out: "Ainsi s'affirme, dès les premières années de fonctionnement de l'Organisation et dans des conditions difficiles, la compétence politique très étendue du Secrétaire général aussi bien devant l'Assemblée générale que devant le Conseil de sécurité. Ses manifestations dans des affaires où s'affrontent âprement les Etats membres ont pu être critiquées, voire contestées, leur régularité constitutionnelle a finalement été confirmée par la pratique. *On voit mal à quelles limites juridiques l'exercice de cette compétence pourrait se heurter. En tout état de cause, elle rencontrera beaucoup plus tôt des limites politiques*", VIRALLY, M., *Le rôle politique du Secrétaire général des Nations-Unies ...*, p. 372 (italics added).

⁶⁴ We have tried to provide a first conceptualization of these interactions elsewhere. See VINUALES, J.E., *The U.N. Secretary-General between Law and Politics*, cited *supra* footnote 28.

course of action⁶⁵. Conversely, if the meaning of legal rules is to a considerable extent open, this should not lead us to conclude that the wording is utterly irrelevant. Consenting to a particular meaning has at least two main effects. First, it narrows down the scope of activities that can be claimed to be legal introducing a distinction between “fair” interpretations and “overstretched” ones. Second, this latter distinction is relevant with respect to the political legitimacy that can be derived from a particular wording. Indeed, while overstretched interpretations may still be advanced, they may not have the same legitimising effect than “fair” or “settled” interpretations, as one could argue from our preceding discussion of the case of Iraq. However, one cannot simply assume that legal provisions derive their legitimacy once and for all from the political configuration underlying their adoption. Such a simplification would be all the more inaccurate that the U.N. Charter can be seen as a constitutional instrument. This point leads us to the question of how the meaning of a given wording fluctuates over time.

Here, it must be noted is that a provision has no clear meaning unless it is linked to a particular situation that would fall under this provision, either hypothetical or concrete. Indeed, when there is no practice regarding a legal provision, the understanding of the wording is derived from what the Drafters anticipated. Thus, if we read the 1946 commentary of the UN Charter written by Goodrich and Hambro⁶⁶, the meaning of Chapter XV provisions draws almost exclusively on the *travaux préparatoires*. Beyond what international law says about interpretation, the very hermeneutical operation at play would seem to require implementation as a condition for the existence of a particular meaning. Somewhat like a Beethoven *Sonata*, it has no existence if it is not played, either in a piano or in the head of its composer⁶⁷. The legal scope is therefore given not

⁶⁵ A good illustration is given by the mandate entrusted to Hammarskjöld at the beginning of the Congo crisis in 1960. As noted by Brian Urquhart, who served under Hammarskjöld’s leadership during the crisis: “The terms of the original Security Council resolution on the Congo were clear in one respect only, namely that the Secretary-General had the responsibility for doing something about the Congo crisis. *Precisely what, the resolution did not and could not say ...* In this expedient vagueness, *which had for the time being papered over the real differences among the members of the Council, lay the seeds of many future problems.* Moreover, in directing the Secretary-General to eliminate any justification for foreign intervention by restoring law and order, as far as possible with the help of the Congo government but without using force or interfering in internal affairs, the Council from the start injected an inherent contradiction into the Congo operation”, URQUHART, B., *op. cit.*, pp. 403-404 (italics added).

⁶⁶ GOODRICH, L., HAMBRO, E., *Commentaire de la Charte des Nations Unies*, Editions de la Baconnière, Neuchâtel, 1946, in particular commentaries *ad* Articles 98 and 99.

⁶⁷ “In both legal and theological hermeneutics there is an essential tension between the fixed text – the law or the gospel – on the one hand and, on the other, the sense arrived at by applying it at the concrete moment of interpretation, either in judgement or in preaching. A law does not exist in order to be understood historically, but to be concretised in its legal validity by being interpreted. Similarly, the gospel does not exist in order to be understood as a merely historical document, but to be taken in such a way that it exercises its saving effect. This implies that the text, whether law or gospel, if it is to be understood properly – i.e. according to the claim it makes

only by the formal wording of a provision (the *state of the law*) but also by the main real or hypothetical cases that are identified as falling under this wording, as giving meaning to this wording (the *state of the meaning*). Of the whole set of cases that could be argued to fall under a particular wording, some will be more easily subsumed than others, and some will simply be excluded. At this point the question arises of how this process of selection unfolds in the practice of the U.N. Secretary-General? Although this question may seem utterly theoretical, it all comes down to a very practical matter. To what extent can the U.N. Secretary-General claim that he/she is acting according to the U.N. Charter to justify an action in a given case?

This question must be addressed at three main levels. First, the initial gate-keeper of the state of the meaning of a particular wording is the legal system itself. International law has sophisticated methods of interpretation now stated in Articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties, which reflects international customary law. Any interpretation disrespectful of these methods is thus unable to ensure the “legality” of the meaning derived. But who will ultimately decide whether a particular case has been subsumed following a correct application of these interpretation methods? No lawyer would in good faith deny that interpretation is not an exact procedure. This leads us to the second level mentioned above. International law does not only supply a methodology for its own interpretation but in some cases it also identifies an entity that will have the final word in determining the meaning of a particular provision. In the U.N. context, there is however no instance competent to issue authoritative interpretations, so the U.N. Secretary-General could not claim, for instance, that his/her interpretation of the relevant provisions of the U.N. Charter is the definitive one. And even if he/she could, as would be the case of the International Court of Justice in a dispute submitted to it according to Article 36 of the Court’s Statute, such a claim would still depend to a large extent upon the overall perception of this interpretation. At this third level, the state of the meaning is viewed as an inter-subjective construction of the main actors involved. It is the political configuration prevailing at the time, which will largely determine whether a given action of the Secretary-General falls under his/her legal scope of action. At this point one may ask whether we are not conducting a circular reasoning. Such a conclusion would disregard the very idea of precedent.

Two types of precedents can be identified, The first type would cover those cases that can be easily subsumed under a particular wording. They are precedents only in that they give a fuller meaning to the wording, without necessarily pushing its boundaries. The second type refers to borderline cases, i.e. those cases that are not easily subsumed. A given political configuration may provide the political

– must be understood at every moment, in every concrete situation, in a new and different way. Understanding here is always application”, GADAMER, H.-G., *Truth and Method*, 2nd edn., Continuum, New York, 2002 [1960], pp. 308-309.

support for such a borderline case to be considered as a legitimate exercise of a given power. Political convenience can thus lead to enlarge the state of the meaning and thus also the legal scope. But precedents are sticky. Once this enlargement has been produced it may be difficult, in similar circumstances, to contend that such course of action is not authorized by the same legal provision. Thus, when the political circumstances encourage the Secretary-General to take a gamble, as was the case of Hammarskjöld during the Sino-American crisis, and this gamble is successful, then this may translate into an expansion of his legal scope of action.

This latter point also suggests a first characterization of what can be called the *political scope of action*. Political gambles are by definition legally dubious until they are accepted and therefore retrospectively legitimised, which is not always so. Politics have thus both an initial and an ongoing impact on the legal scope of action of the Secretary-General. In some cases, as illustrated by Kofi Annan's initiative in the case of Iraq, the initial political configuration that led to the development of a well-established good offices role for the Secretary-General, counterbalanced to some extent the adverse impact of the ongoing political configuration. Of course, it is all a matter of how far can the Secretary-General go in saying 'no' in a particular circumstance. As Voltaire suggested, such a 'no' will never look like a 'no' if the incumbent has enough diplomatic skill. But there may be situations, such as the one faced by Perez de Cuéllar during the Gulf crisis, in which no space is left even for the most diplomatic 'no'. The interactions between the legal and political scopes of action of the Secretary-General are thus ambiguous. The more the Secretary-General bases his/her action on a controversial interpretation of the relevant provisions, the less it will deploy its legitimising effect. But the legitimacy the Secretary-General lacks when acting *ultra vires* may be compensated, in the particular case, by *ad hoc* political support, which in turn may permanently enlarge his legal scope of action. Conversely, the political configuration at a given moment may not allow the Secretary-General to exercise a well-established legal power, or at least not to use it fully. This latter hypothesis is very frequent in the field of good offices.

B. Good Offices as an Expansion of the Secretary-General's Legal Scope

The preceding analysis of the mechanisms underlying the "Peking Formula" provides a broad conceptualisation of the complex interactions between the legal and political considerations shaping the action of the Secretary-General. As far as good offices are concerned, the trend has clearly been towards the enlargement of the Secretary-General's legal powers. A clear acknowledgement of this role as part of the Secretary-General's legal powers appears in General Assembly Resolution 43/51 (1988) of 5 December 1988. This *Declaration on the Prevention*

and Removal of Disputes and Situations which may Threaten International Peace and Security and on the Role of the United Nations in this Field states in its relevant paragraphs: “20. The Secretary-General, if approached by a State or States directly concerned with a dispute or situation, should respond swiftly by urging the States to seek a solution or adjustment by peaceful means of their own choice under the Charter *and by offering his good offices or other means at his disposal, as he deems appropriate*; 21. *The Secretary-General should consider approaching the States directly concerned with a dispute or situation in an effort to prevent it from becoming a threat to the maintenance of international peace and security*”⁶⁸. Although nothing in the preceding wording deals specifically with the powers of the Secretary-General when he has been entrusted a mandate by a deliberative body according to Article 98 of the Charter, the wording nonetheless acknowledges that the Secretary-General may intervene “as he deems appropriate”. Moreover, paragraph 21 could be approached as a general good offices mandate entrusted to the Secretary-General. In other words, although the resolution does not expressly recognize the “Peking formula” modus operandi, such technique can be easily subsumed under the wording of paragraphs 20 and 21.

In the aftermath of the Cold War it has become increasingly natural to see the Secretary-General offer his good offices *proprio motu*. The legal enlargement that has resulted from this practice is, however, not as obvious as it may now seem. This point can be better appraised by recalling, for instance, how unnatural such an enlargement appeared to be to the eyes of the USSR during the Bahrain crisis. In a letter of 3 April 1970⁶⁹, the Soviet Permanent Representative emphasized, recalling two other letters dated 27 August 1966⁷⁰ and 19 March 1969⁷¹, that initiatives such as the one undertaken by U Thant went against the provisions of the Charter, according to which all matters connected with the maintenance of international peace and security had to be decided by the Security Council. U Thant’s reply to this criticism anticipates the wording of the aforementioned 1988 resolution showing the extent to which the now apparently obvious conception of the UN Secretary-General’s political role was far from being so at the time. U Thant noted indeed that from time to time States required the Secretary-General to provide his good offices considering that an amicable

⁶⁸ *General Assembly Official Records*, 68th plenary meeting, 5th December 1988. On this resolution see LAVALLE, R., The ‘Inherent’ Powers of the UN Secretary-General in the Political Sphere: A Legal Analysis in *Netherlands International Law Review*, 37/1, 1990, pp. 22-36. More recently, the Report of the High-level Panel on Threats, Challenges, and Change convened by the Secretary-General also drew attention to: “... the enormous increase in the workload of the Secretary-General in the area of peace and security in the 1990s”, *A More Secure World: Our Shared Responsibility*, December 2 2004 (A/59/565), par. 293.

⁶⁹ UN Doc. S/9737, April 3rd 1970.

⁷⁰ *United Nations Yearbook*, 1966, p. 163.

⁷¹ *United Nations Yearbook*, 1969, p. 146.

solution can thus be reached, and that, in these circumstances, the Secretary-General felt: “obligated to assist Member States in the manner requested, for to do otherwise would be to thwart a commendable effort by Member States to abide by a cardinal principle of the Organization, namely, the peaceful settlement of disputes”⁷². This opposition was eventually overcome, mainly on the basis of *ad hoc* political support.

Such support is, however, not sufficient in itself to operate a permanent extension of the Secretary-General’s legal scope of action, as one could conclude from the different fate undergone by the attempts at vesting military powers in the Secretary-General. The paroxysm of such attempts can be found in the wording of Security Council Resolution 794 of 3 December 1992⁷³, and especially in paragraphs 6, 7 and 10, where the Council: “Decides that the operations and the further deployment of the 3’500 personnel of the United Nations Operation in Somalia (UNOSOM) ... should proceed at the *discretion of the Secretary-General in the light of his assessment of conditions on the ground*”, then adding that it: “*Endorses the recommendation by the Secretary-General ... that action under Chapter VII of the Charter of the United Nations should be taken in order to establish a secure environment for humanitarian relief operations in Somalia as soon as possible*” and authorizing: “Acting under Chapter VII ... *the Secretary-General and Member States cooperating to implement the offer referred in paragraph 8 above to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia*”. This resolution is especially significant if we take into account that even the United States appeared to put peace-enforcement decisions in the Secretary-General’s hands⁷⁴.

Moreover, such *ad hoc* support may be extremely ambiguous. The case of Somalia is also useful to illustrate this point. There was a substantial misunderstanding between the ambitious aims of the UN Secretary-General and the extent to which the US administration was ready to maintain its political endorsement. President Bush’s original approach, manifested by the action of US envoy Robert Oakley, was that the US backing of UNOSOM would be limited and serve specifically to allow the delivering of humanitarian relief, within a framework of realistic dialogue open to all factions. In contrast to this view, Boutros Ghali’s approach was increasingly perceived as partial as well as far too ambitious for a country where the US had no special interest. Later, despite the Clinton administration initial support of Boutros Ghali’s far-reaching “nation-

⁷² Letter of 6 April 1970 from the Secretary-General, transmitting to the Security Council the reply dated 4 April 1970 to Permanent Mission of USSR, UN Doc S/9738, cited in *United Nations Yearbook*, 1970, p. 285.

⁷³ *Security Council Official Records*, 3145th meeting. Italics are added.

⁷⁴ Newman points out that Acting US Secretary of State, Lawrence Eagleburger, stressed that: “the United States would not proceed if the Secretary-General opposed the plan”, NEWMAN, E., *op. cit.*, p. 137.

building” project⁷⁵, through the endorsement of Security Council Resolutions 814⁷⁶, 837⁷⁷ and 865⁷⁸, the American casualties in October 1993 brought about a radical policy change with the regard to the US involvement in the conflict. Boutros Ghali suddenly appeared as having gone too far. Leaving aside the defiant way in which Boutros Ghali reacted to subsequent American criticism⁷⁹, what matters above all is that while Boutros Ghali’s initiatives might have constituted, initially, an enlargement of the Secretary-General’s role in peace and security matters, as the political space gained by US endorsement was legally dressed up through a number of audacious Security Council resolutions, subsequent practice has showed that such legal clothe is no longer fashionable⁸⁰.

⁷⁵ Newman cites the US Ambassador before the UN, Madeleine Albright, saying that the objective was: “nothing less than the restoration of an entire country”, *Ibid.*, p. 139.

⁷⁶ In particular paragraphs B.5 and B.14, where “Acting under Chapter VII of the Charter” the council: “5. Decides to expand the size of the UNOSOM force and its mandate *in accordance with the recommendations contained in paragraphs 56-88 of the report of the Secretary-General of 3 March 1993 ...*” and “14. Requests the Secretary-General, through his Special Representative, to direct the Force Commander of UNOSOM II to assume responsibility for the consolidation, expansion and maintenance of a secure environment throughout Somalia, taking account of the particular circumstances in each locality, on an expedited basis *in accordance with the recommendations contained in his report of 3 March 1993 ...*”, *Security Council Official Records*, 3188th meeting, 26 March 1993 (italics added).

⁷⁷ In particular paragraphs 5 and 7, where again “Acting under Chapter VII of the Charter” the council: “5. *Reaffirms that the Secretary-General is authorized under resolution 814 (1993) to take all necessary measures* against all those responsible for the armed attacks referred to in paragraph 1 above ... *to establish the effective authority of UNOSOM II throughout Somalia, including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment*”, “7. Encourages the rapid and accelerated deployment of all UNOSOM II contingents to meet the full requirements of 28’000 men, all ranks, as well as equipment, *as indicated in the Secretary-General’s report of 3 March 1993*”, *Security Council Official Records*, 3229th meeting, 6 June 1993 (italics added).

⁷⁸ *Security Council Official Records*, 3280th meeting, 22 September 1993, where the Security Council acknowledges the reconstruction plans of Boutros Ghali.

⁷⁹ Boutros Ghali seemed to take criticism personally when he pointed out: “the United Nations exists to help countries solve their problems. If it helps the Americans solve theirs by blaming me, I’ll be a scapegoat” *New York Times*, 16 October 1993, p. 1, cited in NEWMAN, E., *op. cit.*, p. 141.

⁸⁰ The “post-Somalia syndrome”, to quote the then Under Secretary-General for Peacekeeping, Kofi Annan, had a strong impact in subsequent crises such as those in Angola, Burundi and Rwanda. For instance, as Christopher Pycroft observes, qualifying Angola of “Forgotten Tragedy”: “The end of the Cold War, and the reduction in South Africa’s destabilising influence in Angola, increased optimism that a peaceful transition could be achieved in a country that had endured over 30 years of conflict, and has had no experience of democracy. This optimism was increased by the success of the independence process in Namibia, and by the transition to democracy in South Africa. In the event, this optimism was misplaced, and the international community, particularly the UN, was guilty of, in the words of US Assistant Secretary of State for African Affairs, George Moore, trying to get an agreement on the cheap where the preoccupation with the cost of a UN operation outweighed a whole range of other considerations” then adding that “UN policy towards Angola has been influenced more by the experience in Somalia, where the UN forces suffered losses and alienated considerable sections of the community while attempting to ensure humanitarian aid. The UN reluctance to become similarly embroiled may have been the guiding principle in determining policy towards Angola”,

CONCLUDING REMARKS

The different legal fates of, on the one hand, the Secretary-General's good offices role, and, on the other hand, his military powers, offer a concrete illustration of how the broad categories outlined before could help analyze the past evolution of the office and perhaps also the ways in which it could be developed in the future. It is, of course, not easy to explain why the good offices practice has followed what could be called a "cumulative" or "constructive" pattern whereas the involvement of the Secretary-General in military determinations has instead been characterized by a "boom-bust" pattern.

A first possible explanation of such different fates can be sought in the actual characteristics of the two practices. The good offices practice may, in this respect, be less dependent upon the particular personality traits of the incumbent than the exercise of military powers, or, viewed from a different angle, the personalities selected to become Secretary-General may all have at least *modicum* of experience and skill in handling international negotiations, a minimum that may be, of course, higher in some cases but never too low. Good offices may also benefit from a more constant "demand" on the part of States. A second possible explanation, related to the first, would look at the very features of legal reception methods. Constant and regular practices such as good offices may be easier to translate into legal terms than actions characterized by their exceptionality. After all, precedents need confirmation to become new standards. These are but suggestions as to what a strategy to enlarge the Secretary-General's legal scope of political action could be concerned with.

In any case, it is safe to say that the Peking formula has indeed made it into the legal realm governing the Secretary-General's action. As we have tried to show, this does not necessarily mean that the Secretary-General will always, or even often, be able to say 'no'. Recalling the metaphor used by Javier Perez de Cuéllar as to the Scylla and Charybdis, the dangerous streams, the Secretary-General must always keep in mind, let us conclude by saying that, whatever the strength or the direction of such streams, any future incumbent will have to know or learn how to navigate through very stormy conditions. In doing so, he or she may find Hammarskjöld's navigating formula a pragmatic and time-proven technique to reach the desired harbours.

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