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PEACEKEEPING AND PEACEMAKING: PROSPECTIVE ISSUES FOR THE UNITED NATIONS

OVE BRING*

[The United Nations Charter has been interpreted in a flexible way in its 50-year existence, particularly with respect to peacekeeping operations. While these are not provided for specifically in the Charter, they may be regarded as deriving from Chapter VI, or, more creatively, from 'Chapter VI½'. Interpretations and applications of peacemaking and peacekeeping vary and overlap, as is evident in an examination of the characteristics and mandates of recent peacekeeping operations. A particular issue for the UN at the moment is peace-enforcement in relation to humanitarian objectives. There are a number of proposals for the conduct of future peace operations but there is a fundamental need for the support of sovereign member states.]

THE CHARTER, PEACEKEEPING AND PEACE-ENFORCEMENT

In the last few years, we have witnessed how the UN Charter has been interpreted in a flexible and dynamic way to accommodate deeply-felt political needs in the world community. This is not a completely new development, although it has been accentuated since the end of the Cold War. The interplay between political demands and legal adaptations, and the scope for innovative solutions, is something we should be aware of and appreciate 50 years after the adoption of the UN Charter. Although many commentators feel that the Charter is an excellent document even today, it does not accommodate all aspects of peacekeeping, peace-enforcement and humanitarian action. In these areas there has been, or will be, a need for supplementary norms or modifications based upon the practice of the Organisation and its members.

In an historical perspective, we are aware of how the Korean War, for example, gave rise to a new Charter interpretation. The adoption of Security Council Resolutions 82 and 83 (1950), in the absence of a Soviet representative, was seemingly in contradiction of the wording of Article 27(3) requiring 'the concurring votes of the Permanent Members' in order to reach a valid (non-procedural) decision. By 1971 the International Court of Justice had concluded, in its advisory opinion on Namibia,¹ that the practice of abstention in the Security Council had been interpreted by the Council and member states as not preventing decisions being made.

The UN Charter was also interpreted in an unorthodox way in November 1950 when there was a political need to by-pass the Security Council, which

* Professor of Public International Law, Uppsala University, Sweden; Legal Adviser to the Swedish Ministry for Foreign Affairs.

¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Res 276 (1970)* (Adv Op) [1971] ICJ Rep 16.

was then paralysed by the veto. The General Assembly adopted the Uniting for Peace Resolution,² which extended the competence of the Assembly, contrary to the wording of Article 11 of the Charter. The new interpretation was later reversed when developing countries started to dominate the UN, but the procedural aspect of the Resolution is still applicable and valid.

Another innovation was introduced in 1956 by Secretary-General Dag Hammarskjöld and Lester Pearson of Canada: peacekeeping operations. It is true that observer missions had already been fielded in 1948 and 1949, but the deployment of *armed troops* to assist in the implementation of agreements reached between the UN and parties to a conflict added a new dimension to the emerging concept of peacekeeping. To govern these operations, Hammarskjöld laid down the principles of consent, impartiality and non-use of force (except in self-defence).

Consent from all parties to the conflict was a necessary requirement before any UN troops could be deployed. The impartiality of peacekeepers was necessary to retain the confidence of the parties concerned, since peacekeeping as a crisis management technique is based upon cooperation and not enforcement. However, the military dimension of peacekeeping was clear from the right to use force in self-defence. Hammarskjöld defined self-defence as the protection of the lives of UN soldiers and of the positions they held under the UN mandate.

Over the years, the above principles were confirmed and others were developed, including:

- that the operation is under UN command, under the authority of the Security Council, with control entrusted to the Secretary-General;
- that the operation has the backing of the international community;
- that the force is multinational in composition, selected in consultation with the parties to the conflict and traditionally excludes troops from the permanent five member states of the Security Council.

When the United Nations Emergency Force (UNEF I) was established in 1956-7 Hammarskjöld considered it a new departure. 'It is', he said, 'certainly not contrary to the Charter, but it is in a certain sense outside the explicit terms of the Charter'.³

Peacekeeping operations (PKOs) were not foreseen under either Chapter VI or Chapter VII of the Charter; they fell somewhere in between, and not surprisingly the unwritten Chapter VI½ has been suggested as their legal basis. Personally I feel that this 'VI½' perception is legally defensible and politically useful; legally defensible because PKOs are a more ambitious level of UN involvement than anything provided for in Chapter VI; politically useful because it shows that innovations, even without textual support, can be legitimised under the system of the Charter if they fulfil the purposes of the United

² GA Res 377, UN Doc A/Res/5/377 (1950).

³ Sir Brian Urquhart, *Hammarskjöld* (1973) 228.

Nations. Innovations *per se* should not be considered controversial, particularly since we may have to rely on them in the future.

I am aware that the Australian Minister for Foreign Affairs and Trade, Senator Gareth Evans, has rejected the 'VI½' perception. He has taken the view that peacekeeping should be seen as 'squarely derived from Chapter VI', more specifically as one of those 'other peaceful means' that parties to a dispute may resort to in order to solve their dispute under Article 33 of the Charter.⁴ The problem with this interpretation is that Chapter VI, according to its heading, deals with 'Pacific Settlement of Disputes', and Article 33 deals with parties 'seeking a solution' to their dispute, while *peacekeeping* has been defined as a technique that does not lead to a settlement or solution *per se*, but 'a technique that expands the possibilities for both the prevention of conflict and the making of peace.'⁵ On the other hand, the concept of peacemaking has been defined as directly solution-oriented, bringing hostile parties to agreement.

The advantages of Senator Evans' interpretation that 'there should be no such thing as a Chapter VI½ mandate',⁶ are (1) that new forms of 'expanded peacekeeping' will not be considered as radical innovations in relation to the Charter, and therefore not incompatible with state sovereignty; and (2) that the clear link to Chapter VI could be perceived as underlining the consensual character of PKOs and a guarantee of a restrictive implementation of the basic principle of non-use of force in peacekeeping. The two advantages reinforce one another, and will tend to reassure developing states that new generations of PKOs are acceptable. But again, there is nothing wrong with innovations — be they called 'Chapter VI½' or (as after the Gulf War) 'Article 41½' — as long as they are consistent with the purposes of the Charter. When the innovative Uniting for Peace Resolution was adopted in November 1950, the Swedish Foreign Minister, Mr Undén, declared in the General Assembly that this was a case where the 'letter of the Charter had ... been exceeded in practice, but this was a felicitous and happy development of the Organisation. Its Charter, like all other Constitutions, must develop so that it would not become a dead letter'.⁷

There is a wide spectrum of possible measures in the field of crisis-prevention and crisis-management, not all of which are foreseen under the UN Charter. Chapter VI is focused on existing disputes, and before having to consider the means available under that Chapter, the UN can resort to early warning systems, information gathering, fact-finding missions, preventive deployment of 'blue helmets', humanitarian assistance programmes and other forms of preventive diplomacy, none of which are mentioned in the Charter. A number of these 'pre-Chapter VI' measures can be initiated by the Secretary-General in

⁴ Gareth Evans, 'The Use of Force in Peace Operations', Address to the Stockholm International Peace Research Institute (SIPRI), Stockholm, 10 April 1995, 3.

⁵ Boutros Boutros-Ghali, *An Agenda for Peace*, UN Doc A/47/277; S/24111 (1992) para 20.

⁶ Evans, above n 4.

⁷ 5 UN GAOR (361st mtg), UN Doc A/C.1/SR361 (1950), 108.

accordance with Article 99 of the Charter, while others can be undertaken by the Security Council or the General Assembly under a less specific mandate.

Between the tasks of conflict prevention and peacekeeping lie the efforts to handle existing disputes by bringing disputing parties to agreement by peaceful means. Here Chapter VI of the Charter and the concept of peacemaking come into the picture. As parties to the UN Charter, member states are under an obligation to resolve their disputes peacefully. Article 33 (the most important Article in Chapter VI) enumerates a number of dispute settlement methods from which parties can choose — negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional arrangements, or other peaceful means — but states have to choose something in order to fulfil their obligation to settle the dispute. Should the parties fail to settle it by the means indicated in Article 33, they are under an obligation to refer it to the Security Council. And should they fail to reach a peaceful solution, with an armed conflict resulting, they are under a customary law obligation to seek to end the armed conflict as soon as possible, essentially through the methods and means described in Article 33.

Chapter VI gives a prominent role to the Security Council in seeking solutions to international disputes. The Council shall, when it deems necessary, call upon the parties to settle their dispute by the means referred to in Article 33. The obligation of Article 33 would thereby be reinforced and the corresponding demand of the Security Council would be of no less binding a nature than Article 33 itself. The Council may also *recommend* appropriate procedures or methods of adjustment. If the Council deems that the continuance of the dispute is likely to endanger the maintenance of international peace and security, it may recommend specific *terms* of settlement. In practice, however, only those means and methods of dispute settlement which are accepted by the parties stand a chance of being successful. Although Chapter VI contains legal obligations for states, its peacemaking strategy is based upon the consent of parties to a dispute to the settlement efforts.

Peacemaking, which in the words of Marrack Goulding is 'the fashioning of a political settlement',⁸ goes beyond Chapter VI. According to Article 99 of the Charter the Secretary-General may bring to the attention of the Security Council any matter which in his or her opinion may threaten the maintenance of international peace and security. Chapter VIII of the Charter is devoted to regional arrangements and agencies dealing with maintenance of peace and security. The present Secretary-General, in *An Agenda for Peace*, pointed out that regional arrangements 'in many cases possess a potential that should be utilised' in peacemaking, and also in preventive diplomacy, peacekeeping and post-conflict peace-building.⁹ The Carlsson-Ramphal Report on Global Governance notes that there has been an increase in the number of organisa-

⁸ Marrack Goulding, 'The Evolution of United Nations Peacekeeping' (1993) 69 *International Affairs* 451, 459.

⁹ Boutros-Ghali, above n 5, para 64.

tions willing to offer their good offices in bringing together parties to disputes, or to work with others to look for solutions.¹⁰ When 'parties to disputes are locked in frozen positions and movement is restricted by political considerations, a move by the international community may be welcome.'¹¹

Peacemaking, as a concept, can be defined in two ways: robustly or restrictively. Either (and this is my own view) it should be looked upon as covering peaceful settlement efforts in *all* situations — that is, before, during and after an armed conflict — or (and this is the view of Senator Gareth Evans put forward in his book *Cooperating for Peace*¹²), the concept of peacemaking should be limited to efforts following the outbreak of armed hostilities. This view excludes preventive diplomacy but presumes that peacemaking initiated during an armed conflict (to separate belligerents, reduce conflict intensity and achieve cease-fire agreements) should be followed by comprehensive negotiations after the cessation of hostilities in order to arrive at a durable solution.¹³

Admittedly this is only a matter of definition, but in the public mind peace-making has for a long time been perceived as a process including both peace-maintenance before, and peace-restoration after, the outbreak of hostilities. It may not be advisable for diplomats, lawyers and conference delegates to distance themselves from the general public and introduce distinctions between pre-conflict and post-conflict action. Legally, it would also make sense to let the concept of peacemaking correspond to the content of Charter law and customary law. This implies a continuous obligation to settle disputes: the basic provision of Chapter VI (Article 33) does not cease to have normative force after the outbreak of hostilities.

Leaving the normative area of Chapter VI and entering the grey area of Chapter VI½, something should be said about recent developments with regard to peacekeeping. Up until 1988 what we now call *traditional peacekeeping* dominated the scene. The traditional function of PKOs was to 'support peace-making efforts by helping to create conditions in which political negotiation can proceed.'¹⁴ Obvious examples are the monitoring of cease-fires, the controlling of buffer-zones, and so on.

There are at least two sub-types of traditional PKOs: unarmed military observer groups (such as the United Nations Truce Supervision Organisation (UNTSO) since 1948), and armed infantry-based forces with the task of controlling territory in order to achieve effects conducive to peacemaking (for example the United Nations Peacekeeping Force in Cyprus (UNFICYP) and UNEF II with regard to the Suez Canal and Sinai).

¹⁰ Carlsson/Ramphal Commission Report, *Global Governance* (January 1995) 101ff.

¹¹ Ibid 101.

¹² Gareth Evans, *Cooperating for Peace: The Global Agenda for the 1990s and Beyond* (1993).

¹³ Ibid 89.

¹⁴ Goulding, above n 8, 457.

Following the end of the Cold War, a second generation of PKOs with extended and more ambitious mandates has been instituted.¹⁵ Operations have been set up to support the implementation of comprehensive agreements between the UN and/or the parties to a conflict. The tasks of peacekeepers now include:

- organising and supervising free and fair elections (Namibia, Mozambique);
- monitoring arms flows and demobilising troops (Central America);
- supervising government functions, rehabilitation of refugees and disarmament (Cambodia);
- monitoring human rights obligations (El Salvador, Cambodia); and
- assisting in the delivery of humanitarian relief (former Yugoslavia, Somalia, Mozambique).

Although these 'expanded' PKOs amount to an involvement in the domestic affairs of host states, they were not based upon any sort of enforcement mandate; rather, they were in keeping with the traditional order of peacekeeping where consent remained the basic requirement. It was therefore noted with some interest that the Secretary-General, in his *Agenda for Peace*, referred to PKOs as a practice that had so far ('hitherto') been conducted with the consent of the parties concerned.¹⁶ The 'window of opportunity' that this appeared to open for more ambitious and less sovereignty-focussed peace operations does not, however, seem to have been retained in the Secretary-General's more recent *Supplement to an Agenda for Peace*.¹⁷

A third generation of PKOs could be said to have emerged in Bosnia and Somalia, namely operations that started as peacekeeping but were later mixed with elements of peace-enforcement (UNPROFOR) or transformed into peace-enforcement in support of humanitarian actions (UNOSOM II). In 1992 the UNPROFOR peacekeeping operation in Bosnia was given some specific Chapter VII authority to assist in the delivery of humanitarian relief and the protection of 'safe areas'. Again in February 1993, the Security Council decided to give UNPROFOR some additional enforcement authority, this time in the context of the protection of its own personnel.

To the extent that mandates for enforcement are given under Chapter VII of the Charter, the operations by definition do not require the consent of the parties concerned. Since Chapter VI is consent-based and Chapter VII is not, mixed operations will run into difficulties due to the loss of real or perceived impartiality — an essential requirement for obtaining the cooperation of the parties to a conflict.

This does not mean that enforcement measures in support of humanitarian objectives, or to protect the mission or its personnel, should always be avoided.

¹⁵ See Sally Morphet, 'UN Peacekeeping and Election-Monitoring' in Adam Roberts and Benedict Kingsbury (eds), *United Nations, Divided World, The UN's Role in International Relations* (2nd ed, 1993) 183 ff.

¹⁶ Boutros-Ghali, above n 5.

¹⁷ Boutros Boutros-Ghali, *Supplement to an Agenda for Peace* UN Doc A/50/60, S/1995/1 (1995).

But such action has to be conducted as a separate Chapter VII operation in order not to risk the lives of peacekeepers who, as a rule will, not be equipped or otherwise prepared to deal with a situation that escalates into violent conflict. Mixed operations are only advisable if, at the time of establishing the peacekeeping operation, peace-enforcement needs were foreseen and a decision was taken to grant the force commander the necessary military resources. But even so, the original purpose of the PKO — to initiate a process of cooperation through peaceful measures — would have to be abandoned. The introduction of enforcement measures would create a new situation, and the efforts of peace-makers would probably have to be started from scratch.

Only two years ago Marrack Goulding talked about 'the current trend from peacekeeping to peace-enforcement'.¹⁸ Today the UN and its member states are more cautious and selective with regard to collective action. The trend is now reversed, from peace-enforcement back to peacekeeping.

One argument repeatedly put forward in this context is one related to *impartiality*. In my view this argument has been overstated. It is true that the UN image of impartiality in the eyes of the local population is essential for any peacekeeping operation. Success requires local support. But impartiality is only an argument for continuously linking an ongoing peacekeeping operation to consent. Impartiality is thus an argument against mixed operations. It is not an argument against completely moving an operation from Chapter VI (or VI½) to Chapter VII of the Charter. Chapter VII is not at all based upon impartiality; it is based upon the need for the Organisation to be able to take a position and to enforce that position (against any member state or other international actor) if this is necessary for the maintenance of international peace and security. The Organisation shall also, under its own Charter, promote and defend certain values like human rights. This may imply a stand *against* those groups or governments that violate human rights standards. Should violations of human rights and humanitarian law be of such a serious and massive nature that they — under an innovative but reasonable interpretation of Article 39 of the Charter — constitute a threat to international peace and security, enforcement action could be taken to remove that threat. In such situations the Organisation would not be impartial, and nor would its member states as they are obliged under Article 2(5) of the Charter to give the UN 'every assistance in any action it takes' in accordance with the Charter.

Any decision to cross the line from peacekeeping to peace-enforcement should, therefore, be made only after all relevant factors have been considered and balanced. Consent and impartiality will form a part of such a decision but should not be determinative of it.

Incidentally, I do not agree with the Secretary-General's argument in his *Supplement to an Agenda for Peace*, that the use of force in the Bosnia operation — although authorised under Chapter VII — allows the UN to remain

¹⁸ Goulding, above n 8, 451.

'neutral and impartial between the warring parties', since there is no mandate 'to stop the aggressor (if one can be identified) or impose a cessation of hostilities'.¹⁹ In reality, as evident in this situation, any use of force will be directed against one or more parties to the conflict. As the Secretary-General himself points out in the preceding paragraph of the *Supplement*, more often than not 'the relief of a particular population is contrary to the war aims of one or other of the parties'.²⁰ Any operational tasks of protecting humanitarian assistance during warfare, protecting civilian populations in 'safe areas', or protecting the mission against armed interference, will conflict with the principle of impartiality if and when force is actually used.

In paragraph 35 of the *Supplement*, the Secretary-General makes the following important remark:

In reality, nothing is more dangerous for a peacekeeping operation than to ask it to use force when its existing composition, armament, logistic support and deployment deny it the capacity to do so. The logic of peacekeeping flows from political and military premises that are quite distant from those of enforcement; and the dynamics of the latter are incompatible with the political process that peacekeeping is intended to facilitate. To blur the distinction between the two can undermine the viability of the peacekeeping operation and endanger its personnel.²¹

This is not to say, however, that mixed operations are impossible from either a legal or a military point of view — if the Security Council decides that such an operation is appropriate and the new mandate is matched with the appropriate military resources. Nor is it to say that peacekeeping operations should never be transformed into peace-enforcement operations. But as the Secretary-General points out, peacekeeping and peace-enforcement can never be seen as adjacent strategies 'on a continuum, permitting easy transition from one to the other'.²²

At this point, we should note that Senator Gareth Evans' book, *Cooperating for Peace*,²³ offers some very useful guidance. A peacekeeping force may come to a point where the UN has to reassess the whole situation. The basic options would then be to:

1. 'soldier on' in a peacekeeping role;
2. change the peacekeeping nature of the force's mandate to peace-enforcement; or
3. withdraw.²⁴

The two latter options would have to be combined in a situation where a new mandate is actually given but is not accompanied by adequate resources. Withdrawal would then be followed by redeployment. But there may come a

¹⁹ Boutros-Ghali, above n 17, para 19.

²⁰ Ibid para 18.

²¹ Ibid para 35.

²² Ibid para 36.

²³ Evans, above n 12.

²⁴ Ibid 112, 151.

time when the UN, 'to preserve its credibility and conserve its resources, may simply have to acknowledge failure and withdraw.'²⁵

HUMANITARIAN INTERVENTION

With regard to peace-enforcement in support of humanitarian objectives ('humanitarian intervention'), it is important to note the precedents established by Security Council Resolution 794 authorising *Operation Restore Hope* in Somalia,²⁶ the follow-up Resolution 814 establishing UNOSOM II,²⁷ and various humanitarian enforcement mandates given to UNPROFOR in Bosnia during 1992 and 1993.²⁸ We should also note the more shaky precedent of Resolution 688 leading to *Operation Provide Comfort* in northern Iraq (in this case no enforcement was authorised, although the repression of Kurds was seen as a threat to international peace and security).²⁹

Gareth Evans does not exclude collective humanitarian intervention for the future, but he lists a number of 'threshold criteria' that should be satisfied before any operation is set in train,³⁰ as well as a set of guidelines for this type of intervention.³¹

In my view, the further development of a legal regime on collective humanitarian intervention should not be halted due to political difficulties linked to state sovereignty. The innovative interpretations of the UN Charter that have been advanced in this respect — emphasising the Chapter VII reference in Article 2(7) and widening the concept of 'threat to peace and security' in Article 39 — need to be strengthened.

The Commission on Global Governance, co-chaired by the Swedish Prime Minister, Ingvar Carlsson, and the Guyanan former Secretary-General of the Commonwealth, Shridath Ramphal, recently suggested in its Report that the mandate for humanitarian intervention should be clearly stated in the Charter in order not to stretch the existing provisions through politically sensitive interpretations. The Commission thus proposed a Charter amendment 'permitting such intervention but restricting it to cases that constitute a violation of the security of people so gross and extreme that it requires an international response on humanitarian grounds.'³² The proposal merits serious consideration, although many would argue that the political difficulties involved in such a formal amendment would be overwhelming.

The Carlsson-Ramphal Commission rejects the view that the five permanent members of the Security Council should not play an active part in peace

²⁵ Ibid 112.

²⁶ SC Res 794, 47 UN SCOR (3145th mtg), UN Doc S/Res/794 (1992).

²⁷ SC Res 814, 48 UN SCOR (3188th mtg), UN Doc S/Res/814 (1993).

²⁸ See, eg, SC Res 770, 47 UN SCOR (3106th mtg), UN Doc S/Res/770 (1992).

²⁹ SC Res 688, 46 UN SCOR (2982nd mtg), UN Doc S/Res/688 (1991).

³⁰ Evans, above n 12, 155-7.

³¹ Ibid 157ff.

³² The Carlsson/Ramphal Commission Report, above n 10, 90.

operations. 'Indeed, logistical support by major powers for UN operations (air transport, satellite communications, and so on) is not only appropriate, it will often be essential for effectiveness and the UN's own command-and-control.'³³

CONCLUSION

In conclusion, some other suggestions and proposals for the future that have been put forward in the debate may be outlined as follows:

1. that *regional organisations* and arrangements should be more actively used in peace operations;
2. that a *rapid reaction force* from a number of countries should be established under the Security Council, with troops being stationed in their home countries but maintained at a high state of alert;
3. that PKOs be provided with a *broadcasting capacity* in order to give the local population reliable information on the PKO mandate and the situation in the country;
4. that the UN Secretariat in New York be provided with more advanced *communications systems* in order to improve gathering of information and analysis;
5. that every PKO mandate should have a clearly designated *termination point* — in Gareth Evans' words: 'the UN has to know not only when and how to get into peace operations, but when and how to get out of them';³⁴
6. that *preventive deployment* (early positioning of UN troops) should be effected in cases of emerging threats of conflict, thus obviating any later need for peacekeeping, humanitarian intervention or regular peace-enforcement;
7. that a capacity for *naval* peacekeeping be developed, as suggested by developments during the Iran-Iraq war, and that a PKO role for *air-units* be considered; and
8. that countries with collapsed institutions, collapsed civil authority and a breakdown of law and order ('failed states') could be stabilised and reconstructed under some form of UN trusteeship, conveniently using the under-utilised (almost defunct) Trusteeship Council for this purpose.

Additional proposals relating to budgetary matters, institutional reform and peace-enforcement in response to aggression have been put forward, but will not be taken up here. Many of them are beyond the scope of this paper.

Let me finally say that today, when there is a marked discrepancy between the urgent tasks that the UN is called upon to address and its available resources, support is needed from all member states. My own country, Sweden, will

³³ Ibid 104.

³⁴ Evans, above n 12, 113.

probably join the other Nordic countries in some arrangement to reinforce the UN's 'rapid reaction capability', notably in the form of an improved system of stand-by forces. Other countries may also find it useful to look into the possibility of regional cooperation in this context. Something has to be done. There is today a disturbing pessimism and low-key attitude with regard to what the UN can do. Brian Urquhart has spoken about 'the present crisis of confidence'³⁵ and the word 'backlash' has been used several times in this context. National sovereignty is again approached very cautiously and looked upon as an obstacle to reform and development. But sovereignty should more frequently be looked upon as a dual and dynamic concept. Sovereignty should be protected, and it should continuously be *used*. That is the way international law develops. States identify their self-interest and use their sovereignty to pay a certain price for solutions that will give them advantages in the field of international cooperation. It is in this way that states must now respond to the needs of the international community, and develop and strengthen the UN system.

³⁵ Brian Urquhart, Louis Henkin and Richard Butler, 'Yesterday's Politics, Tomorrow's Problems: A World Without the United Nations?' (1995) 20 *MULR* 16, 17-8.