

GULF WAR COMPENSATION STANDARD : CONCERNS UNDER THE CHARTER

BY

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I.

In an essay on the burning of the Kuwaiti oilfields and the doctrine of military necessity, which appeared two years ago in the pages of the *Review* (1), I alluded to a fascinating question regarding the United Nations' authority to fix war claims liability on Iraq simply because of that country's culpability in initiating the August 1990 unlawful invasion and occupation of the sheikdom of Kuwait (2). The appropriateness of returning to that question seems demonstrated by the recent literature on the newly formed post-Gulf War U.N. Compensation Commission (3). Some of that literature makes clear that paragraph 8 of Resolution 674 (4), and paragraph 16 of Resolution 687 (5), the two controlling Security Council pronouncements, are interpreted by thoughtful scholars as resting liability solely on the illegality of Iraq's invasion and occupation of its tiny neighbor to the southeast (6). As one commentator has put it, Iraqi « [l]iability ...exists even in cases where the individual act of an Iraqi agent, taken in isolation, would not constitute a violation of international law. » (7) Given that the Security Council Resolutions referenced above speak in

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(1) ZEDALIS, « Military Necessity and Iraqi Destruction of Kuwaiti Oil », 1990/2 *Revue Belge de Droit International* 333.

(2) *Id.* at 334, note 17.

(3) See GARMISE, « The Iraqi Claims Process and the Ghost of Versailles », 67 *N.Y.U. L. Rev.* 840 (1992) ; CROOK, « The United Nations Compensation Commission — A New Structure to Enforce State Responsibility », 87 *Am. J. Int'l L.* 144 (1993).

(4) SC Res. 674 (Oct. 29, 1990), reprinted in 29 *Int'l L. Mat.* 1561 (1990).

(5) SC Res. 687 (Spr. 3, 1991), reprinted in 30 *Int'l L. Mat.* 846 (1991).

(6) See CROOK, *supra* note 3 at 147 (« the key causal factor giving rise to responsibility is the unlawful invasion and occupation of Kuwait »).

(7) *Id.* On Crook's familiarity with the Iran-U.S. Claims Tribunal see CROOK, « Applicable Law in International Arbitration : The Iran-U.S. Claims Tribunal Experience », 83 *Am. J. Int'l L.* 278 (1989).

terms of liability for loss, damage, or injury « as a result of » (8) the invasion and occupation, there would seem ample support for the view that the determining standard stresses automatic liability because of Iraq's illegal aggression, not because each discrete claim involves an act or omission inconsistent with some specific principle of international law relative to armed combat.

Clearly, it would not be a radical departure from the historical practice regarding war claims to find that, simply as a result of the aggressive war against Kuwait, Iraq has been fixed with liability for the injurious consequences thereof (9). In many many cases, war claims have been settled in accordance with political, moral, or economic considerations alone (10). Occasionally, though, settlement has taken into account whether the claims have been based on individual showings of violations of precise rules of international law governing the prosecution of combat, or have been affected by the presence of legally recognized exculpatory circumstances insulating the state against which the claim is made (11). What is so intriguing about the Security Council Resolutions dealing with Iraq concerns the extent to which the UN is empowered to set to one side issues of international law in the actual conduct of the hostilities, and impose liability on the basis of nothing more than the illegality of the original invasion and occupation. Much may exist in the practice of states to suggest war claims have been settled in accordance with such an approach in the past. But do the provisions of the Charter itself envision the United Nations being vested with authority to replicate such practice and fix liability without reference to the laws governing the actual behavior of armed forces following the initiation of an illegal war of aggression ?

II.

Of the more general provisions in the UN Charter bearing upon the issue of the Security Council's power to fix war claims liability without regard to the laws and customs of warfare, points three and six of the Preamble

(8) SC Res. 674, para. 8, *supra* note 4, states it « [r]eminds Iraq that under international law it is liable for any loss, damage or injury arising in regard to Kuwait and third states, ..., as a result of the invasion and illegal occupation of Kuwait by Iraq. » SC Res. 687, para. 16, *supra* note 5, provides the Security Council « [r]eaffirms that Iraq, ..., is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury ... as a result of Iraq's unlawful invasion and occupation of Kuwait. »

(9) As to the scope of liability, para. 8 of SC Res. 674, *id.*, speaks in terms of liability for « any » loss, damage or injury, but para. 16 of SC Res. 687, *id.*, confines liability to « any direct » loss, damage, or injury.

(10) See generally YATES, « State Responsibility for Nonwealth Injuries to Aliens » in *International Law of State Responsibility for Injuries to Aliens* 211, 256 (R. Lillich ed., 1983). HANNA, « Legal Liability for War Damage », 43 *Mich. L. Rev.* 1057 (1945).

(11) See generally W. BISHOP, *International Law : Cases and Materials* 797-98 (3d ed. 1971) (discussing examples where no treaty of peace was concerned).

are relevant. In expressing the world community's determination to « establish conditions under which ...respect for the obligations ...arising from ...international law can be maintained, » (12) point three evidences a high degree of focus on the connection between international standards and their observance by the UN itself. This determination is then followed by the point's indication the community therefore aims at avoiding the use of force by « ensur[ing] ...the acceptance of principles » (13) Since there is no serious dispute about the significance of the Charter's Preamble in understanding the authority possessed by the organs of the United Nations and the ways that authority can be exercised (14), the references in points three and six to « respect for ...international law » and « the acceptance of principles » could well operate to constrain the Security Council's ability to provide for war claims compensation without regard to the rules governing the conduct of armed combat. If the allusion to « international law » signifies a commitment by the UN to honor established international rules, then the drafters of the Charter may have bound the Security Council to the limitations that war claims be based on violations of the laws of war (15). Similarly, in the event the drafters' goal in point six of « ensur[ing] ...the acceptance of principles » reveals a firm dedication to actions consonant with controlling legal norms, then the Charter may oblige the organs envisioned by it to consider, and not ignore, standards which speak in terms of compensation payable for acts of combat deemed reprehensible (16). One might view the pattern of settling claims following the two world wars this century as providing some support for the interpretation suggested. Indeed, in the opening point of the Charter's Preamble the drafters specifically recalled the « scourge of war which twice in [their] lifetime ...brought untold sorrow ... » to the community of nations (17). To be sure, the settlements in

(12) See U.N. Charter, Preamble, point three, T.S. 993, 3 *Bevans* 1153, reading :
We The Peoples Of The United Nations Determined

...
to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.

(13) *Id.*, point six, reading :
And For These Ends

...
save in the common interest. ...

(14) See L. GOODRICH, E. HAMBRÖ and A. SIMONS, *Charter of the United Nations : Commentary Documents* 20-21 (3d rev. ed. 1969).

(15) See e.g., Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, article 3, 36 Stat. 2277 at 2290, 1 *Bevans* 631 at 640 (reparations to be paid for violations of annexed Regulations Respecting the Laws and Customs of War on Land).

(16) *Id.* Though it might be possible for one to maintain the reference to « international law » and « principles » include the law and principles evidenced in past war claim settlements (which basically support imposed reparations without regard to the laws of war), binding law and principles would only seem to emerge from something other than expedient, self-interested action. See C. DE VISSCHER, *Theory and Reality in Public International Law*, 48-50 (P. Corbett trans. 1957).

(17) See U.N. Charter, *supra* note 12 at Preamble, point one.

both cases envisaged the defeated powers paying reparations to the victors. Nonetheless, it is clear that what emerged from World War II was much more lenient than what had been imposed on Germany following the first World War.

World War I left 8 million soldiers killed, 22 million civilians killed or wounded, and ineffable devastation throughout the heart of Europe (18). The so-called «reparation clauses» of the 1919 Treaty of Versailles (19), the central agreement terminating the war (20), provided in articles 231-263 for German «war guilt,» reparations for all loss and damage resulting from the aggression of Germany and her allies, and the creation of a Reparation Commission to determine the exact amount of German liability. The figure initially set by the Commission was 132 billion German marks (21), then equivalent to about \$ 30 billion (22), to be paid at scheduled intervals. As one distinguished commentator has put it, the idea was to «turn [Germany] into a nation of exporters organized for the purpose of paying ...reparation claims» (23) In the end, the punitive and unrealistic nature of the reparation figure necessitated revision (24) and resulted in only a very small portion of the original amount ever being paid (25). It seems, however, Germany regarded its treatment over reparations with indignation, and such played a role in developments that led to the ascendancy of Nazism and the outbreak of World War II (26).

(18) See C. MEE, Jr., *The End of Order* xvii (1980); and *The Reparation Settlement*, World Peace Foundation, vol. XII, no. 5 at 806 (1929).

(19) See generally Treaty of Versailles, June 28, 1919, reprinted in B. BARUCH, *The Making of the Reparation and Economic Sections of the Treaty* (1970).

(20) The other relevant treaties signed by the allies with the vanquished central powers and comprising the WW I peace settlement were the Treaty of Saint Germain (Austria), Sept. 10, 1919; the Treaty of Trianon (Hungary), June 4, 1920; the Treaty of Neuilly (Bulgaria), Nov. 27, 1919; the Treaty of Sevres (Turkey), Aug. 10, 1920.

(21) See J. ANGELL, *The Recovery of Germany* 19 (1929).

(22) See R. FERRELL, *American Diplomacy: A History* 511 (2d ed. 1975) (\$33 billion). On the fact that the reparation amounts were seen as not tied to particular violations by Germany of the laws of war, see e.g., Opinion of March 25, 1924, U.S.-Germany Mixed Claims Comm'n 75-76, excerpted in W. BISHOP, *supra* note 11 at 799.

(23) See B. BARUCH, *supra* note 19 at 45.

(24) The first major revision occurred in 1923 with the Dawes Plan. See Decision No. 2720 of the Reparation Comm'n, Nov. 30, 1923, reprinted in 14 *Allied Powers Reparation Comm'n Official Documents: The Experts' Plan for Reparation Payments* 1 (1927) (on the creation of the Committee that developed the Plan) and *The Reparation Settlement*, *supra* note 18 at 811 (on the adoption of the Plan). The second occurred in 1929 with the Young Plan. See «Report of the Committee of Experts on the Settlement of the Reparation Problem», June 7, 1929, reprinted in 24 *Am. J. Int'l L. (Official Documents)* 81 (1930).

(25) See C. MEE, Jr. *supra* note 18 at 261 (suggesting that once one subtracts unpaid post-war investments in Germany from reparations actually made, the net figure of reparations is «economically negligible»).

(26) See A.J.P. TAYLOR, *The Origins of the Second World War* 50 (1961) (discussing the psycho-political effects of reparations on the German public). Curiously, Adolph Hitler himself railed against reparations in a section of *Mein Kampf* entitled «The Diktat of Versailles.» See *The Versailles Settlement: Was It Foredoomed To Failure?* 86 (I. Lederer, ed. 1960).

The Second World War was far more devastating than the First. The Nazis themselves exterminated close to 12 million civilians through deliberate means (27), Russia alone lost more than 6 million men (28), and the total amount of war claims against only Germany totaled nearly \$300 billion dollars (29), a figure ten times as large as that fixed on that defeated nation by the Versailles Treaty Reparation Commission (30). Yet the terms of settlement with the Axis Powers were clearly more generous than those imposed on Germany and her allies in 1919. The 1946 Paris Agreement on Reparation (31), which implemented the 1945 Potsdam Declaration (32), basically exacted German reparations from existing external assets and unnecessary internal industrial equipment (33). The idea was, in President Truman's words, to have «[r]eparations this time ...paid in physical assets ...not required for [Germany's] peacetime subsistence,» (34) and in the words of a U.S. State Department representative, to avoid a reparation program like «the World War I conception of reparation as the maximum obtainable financial compensation in fixed sums of money.» (35) Equally as generous were the 1947 Treaty of Peace with Italy (36), and the 1951 Treaty of Peace with Japan (37). Both concentrated largely on reparations from external assets, military factory and tool equipment not readily susceptible to conversion to civilian purposes, and general industrial production, to the extent not interfering with economic reconstruction or imposing further pecuniary burdens on the Allies (38).

With the pattern of comparative leniency emerging from the war claims settlements of WW II, the plausibility of reading points three and six of the Charter's Preamble as continuing to elaborate on and further this development certainly exists. As such, the references to «respect for international law» and «acceptance of principles» are capable of being seen as restricting the power of the United Nations by requiring that all of its actions be consistent with established juridical norms. In the context of war claims,

(27) See H. MORGENTHAU, *Politics Among Nations: The Struggle for Power and Peace* 364 (5th ed. 1973).

(28) See J. LUKACS, *A New History of the Cold War* 4 (3d ed. 1966).

(29) See HOWARD, «The Paris Agreement on Reparation from Germany», 14 *Dept. of State Bull.* 1023 (1946).

(30) See text accompanying *supra* note 22.

(31) See Final Act and Annex of the Paris Conference on Reparations, Jan. 14, 1946, reprinted in 40 *Am. J. Int'l L. (Official Documents)* 117 (1946).

(32) See Report of Tripartite Conference of Berlin, Reprinted in 39 *Am. J. Int'l L. (Official Documents)* 245 (1945).

(33) See DE VRIES, «The International Responsibility of the United States for Vested German Assets», 51 *Am. J. Int'l L.* 18, 20 (1957).

(34) See 13 *Dept. of State Bull.* 208, 210 (1945).

(35) HOWARD, *supra* note 29.

(36) Treaty of Peace, Feb. 10, 1947, reprinted in 42 *Am. J. Int'l L. (Official Documents)* 47 (1948).

(37) Treaty of Peace, Sept. 8, 1951, reprinted in 46 *Am. J. Int'l L.* 71 (1952).

(38) See e.g., Treaty of Peace with Italy, *supra* note 36 at Part VI, sec. I; Treaty of Peace with Japan, *supra* note 37 at Chpt. V.

this would mandate settlement for violations of the laws of war ; not for all loss, damage, or injury simply proceeding from an unlawful invasion and occupation.

A major objection to this line of reasoning exists in the fact that the UN Charter was drafted contemporaneously with the reparation settlements of the Second World War. It might be questioned how the Preamble to the Charter could be read as confining UN imposed reparations to claims involving compensation for violations of the rules of war when the nations that drew up the Charter's terms were at roughly that same time busy putting together treaties of peace calling for claims settlement without regard to transgressions of the laws and customs governing the prosecution of combat. Surely, if the language of points three and six of the Preamble have any meaning, it is the exact opposite of the restrictive one suggested above. The contemporaneity of the Charter and the settlements of WW II suggest the United Nations is not obligated to fashion a system of reparations based only on conduct inconsistent with the laws of armed warfare.

There would seem two problems with concluding that the drafting, during the same time frame, of the peace treaties of the Second World War and the Charter of the UN means the Preamble to the latter can be interpreted as authorizing United Nations reparation schemes that ignore the way war was prosecuted and focus only on whether its initiation was capable of being characterized as unlawful aggression. The first has to do with the fact the peace settlements of World War II were backward-looking, designed to address international violence which had already occurred and continued to evoke powerful emotions. The Charter, on the other hand, was intended to be forward-looking, directed at securing future world order through the articulation in peace time of principled cooperative efforts. The second problem is that the WW II peace treaties reflected the standards the individual Allies felt they were limited by after the incredible losses they had been forced to endure. But the Charter was aimed at limiting the power of a new international organ, an entity which might act in ways completely unanticipated by its prime architects. Given the apprehension associated with the creation of an organization able to act for the entire community of nations, and the forward rather than backward-looking character of its organic document, there certainly appears ample reason to believe the roughly contemporaneous nature of the Charter and the WW II settlements do not inexorably preclude interpreting the Charter's Preamble as restricting UN reparation schemes to claims arising out of particular acts violative of the laws of warfare. Thus, it may well be appropriate to find points three and six of the Preamble as establishing limitations on the Security Council's power to fashion the standards for Gulf War claims.

III.

Aside from the terms of the Preamble, articles 1 and 2 of the Charter, stating the purposes and principles of the UN, contain language of relevance to the question of the Security Council's power to establish a compensation plan imposing liability for claims arising from international conflict. Those articles enter the equation by virtue of article 24, paragraph 2's reference to the UN's « Purposes and Principles. » (39) It will be recalled that article 24 is part of that chapter in the Charter setting forth the Security Council's functions and powers. The opening paragraph of the article indicates that the primary responsibility of the Council is the maintenance of peace and security (40). It provides further that the Council « in carrying out its duties under this responsibility » acts on behalf of the members of the UN (41). Then 24(2) follows by providing that in discharging these duties the Council « shall act in accordance with the Purposes and Principles of the United Nations. » (42)

Since it is incontrovertible that the Security Council in carrying out its duties is thus required to act in accordance with the purposes and principles of articles 1 and 2, what exists in the terms of those provisions to suggest a limitation on the Council's power in fashioning a war compensation plan? Initially there is the language of article 1, paragraph 1, referencing the fact that a major purpose of the UN is the maintenance of peace and security, and that purpose is to be secured by bringing about through peaceful means the settlement of international disputes or situations « in conformity with the principles of justice and international law. » (43) Then there is article 2, paragraph 3's reference to the fact that in pursuing this, and other, purposes the UN is to act in accordance with the principle of settling disputes so that « peace, security, and justice, are not endangered. » (44) Again, as with the Preamble, the terms international law, principles, and justice appear, this time in connection with 24(2)'s specific limitation on the Security Council's power of action.

The significance and import of these references in terms of a check on the Security Council is implied by several things. First, no similar sort of restraint seems to have been imposed on the Security Council's predecessor, the Council of The League of Nations. Articles 11, 15, and 17 of the League Covenant provided that war or threat of war was a concern of the League, disputes likely to lead to a rupture between League members fell within the jurisdiction of the Council, and disputes involving non-members could be

(39) U.N. Charter, *supra* note 12, art. 24(2).

(40) *Id.* at art. 24(1).

(41) *Id.*

(42) *Id.* at art. 24(2).

(43) *Id.* at art 1(1).

(44) *Id.* at art. 2(3).

brought within the Council's jurisdiction by non-member acceptance of the obligations of the Covenant (45). In each of these cases, the Council was empowered to act. As the governing language of the provisions spoke only of actions the Council deemed appropriate, it would appear its powers were in theory quite vast (46). The use of the term «just» in paragraph 4 of article 15 does not depart from this understanding since, unlike with the Charter's use of similar terms, it is clear the Covenant did not view justice as an external limit on the power of the Council, but as a factor that was

(45) See The Covenant of the League of Nations, as amended (1924), League of Nations Doc. No. C.L. 102.1926.V., arts. 11, 15, 17. Article 11 provided in relevant part :

1. 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.

Article 15 stated in part :

1. If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or *judicial settlement* in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary General, who will make all necessary arrangements for a full investigation and consideration thereof.

...

3. The Council shall endeavour to effect a settlement of the dispute, and if such efforts are successful, a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may seem appropriate.

4. If the dispute is not thus settled, the Council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.

Article 17 noted :

1. In the event of a dispute between a Member of the League and a State which is not a member of the League or between States not members of the League, the State or States not members of the League shall be invited to accept the obligations of membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just. If such invitation is accepted, the provisions of Articles 12 to 16 inclusive shall be applied with such modifications as may be deemed necessary by the Council.

2. Upon such invitation being given, the Council shall immediately institute an enquiry into the circumstances of the dispute and recommend such action as may seem best and most effectual in the circumstances.

3. If a State so invited shall refuse to accept the obligations of membership in the League for the purposes of such dispute, and shall resort to war against a Member of the League, the provisions of Article 16 shall be applicable as against the State taking such action.

4. If both parties to the dispute when so invited refuse to accept the obligations of membership in the League for the purposes of such dispute, the Council may take such measures and make such recommendations as will prevent hostilities and will result in the settlement of the dispute.

(46) *Id.* Article 11(1) speaks of «any action that may be deemed wise and effectual»; article 15(3) of «terms of settlement ...the Council may deem appropriate» and 15(4) of «recommendations ...deemed just and proper»; article 17(2) of «action as may seem best and most effectual» and 17(4) of «recommendations as will prevent hostilities and will result in the settlement of the dispute.»

to be reflected in recommendations emerging from the Council's exercise of power under article 15 (47).

The second item indicating that the UN Charter's references in articles 1 and 2 to international law, principles, and justice are significant in suggesting a check or limit on the power of the Security Council comes from the Charter's early draft, the Dumbarton Oaks proposal (48). Nowhere in chapter I, paragraph 1, the predecessor of Charter article 1(1), nor chapter II, paragraph 3, the predecessor of article 2(3), do any of these terms appear (49). In addressing the discharge by the Security Council of its responsibilities, chapter VI, section B, paragraph 2 (50), the predecessor of article 24(2), alludes to the Council being restricted by the purposes and principles of the organization. But as those purposes and principles make no reference of the sort incorporated in articles 1(1) and 2(3) of the Charter, what seems to have been envisioned, at least in this respect, is an international body more akin to the League than to today's United Nations.

The third and final thing suggesting that articles 1 and 2 really are significant as a check on how the Security Council exercises its powers, concerns the history behind the inclusion in paragraphs 1 and 3 of these respective provisions of the Charter to the references to international law, principles, and justice. On several occasions during the 1945 San Francisco Conference on International Organization, proposals to include in article 1, para-

(47) There seems a qualitative difference between saying, as article 15(4) of the Covenant does, that the League Council is to recommend dispute settlements « which are deemed just ... », and saying, as articles 1(1) and 24(2) of the Charter do, that the Security Council is to act in accordance with the purpose of maintaining peace and security, and to that end is to bring about peaceful settlements « in conformity with the principles of justice and international law. » While both indicate the settlement is to reflect justice (and international law), the Charter appears to go further and establish justice (and international law) as a reflected condition, external to the Security Council, which actually serves to set the bounds of its authority. After all, the Covenant leaves it up to the Council to determine if its settlement is just. The Charter sets a much more objective tone.

(48) See Proposals for the Establishment of a General International Organization (Dumbarton Oaks Proposal), Oct. 7, 1944, reprinted in 39 *Am. J. Int'l L.* (Official Documents) 42, 46 (1945).

(49) *Id.*, at Chpt. I, para. 1, and Chpt. II, para. 3, reading, respectively :

The purposes of the Organization should be :

1. To maintain international peace and security ; and to that end to take effective collective measures for the prevention and removal of threats to the peace and the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means adjustment or settlement of international disputes which may lead to a breach of the peace ;

...

In pursuit of the purposes mentioned in Chapter I the Organization and its members should act in accordance with the following principles :

...

3. All members of the Organization shall settle their disputes by peaceful means in such a manner that international peace and security are not endangered.

(50) *Id.* at Chpt. VI, sec. B, para. 2.

graph 1, reference to justice and international law were rejected (51). The rejected proposals all focused on inserting these terms in the opening phraseology of 1(1). This would have altered the basic purpose of the UN by predicating the maintenance of peace and security on the concepts of justice and international law. As that phraseology stands, the maintenance of peace and security is of sufficiently grave importance to remain free of any encumbering condition. Had it been any other way, there is the possibility the Charter may have admitted of interpretations increasing the freedom of states to employ force to resolve acute differences of policy (52). In the end, justice and international law were incorporated in the language of article 1(1) to guard against accommodations sacrificing the rights of small states in the interest of peace (53). The exact spot where the terms were ultimately placed, however, relegated them to the status of a limitation on the power of the organs of the UN, most importantly the Security Council, to adjust or settle perilous disputes or situations of concern to the international community. The overarching preeminence of maintaining peace and security was left unaffected.

The story behind the inclusion of the term « justice » in article 2, paragraph 3, is closely tied to that of article 1(1). The former provision is the statement of the Charter's Principle on dispute settlement, and thus provides an articulated standard for evaluating actions taken to peacefully resolve international disputes. It is therefore understandable 2(3)'s development is connected with that of the Purpose provision it serves to flesh-out. From all indications, « justice » found its way into the terminology of article 2, paragraph 3, as a deliberate attempt to limit the power of the UN's organs. Though as with article 1(1), the generative concern for the check stemmed from a desire to foreclose the possibility of the international organization engaging in Munich-like appeasement at the expense of small states (54). There seems ample reason to accept the notion that 2(3) and 1(1) are to be understood as limitations on the Security Council's power nonetheless. Irrespective of the apprehensions precipitating efforts by drafters of an organic document to restrict the authorities conferred upon entities of power created, the restrictions fashioned remain restrictions capable of affecting all cases.

(51) See Doc. 742, I/1/23, 6 U.N.C.I.O. Doc. 318 (1945); Doc. 885, I/1/34, 6 U.N.C.I.O. Docs. 393-95 (1945); Doc. 926, I/1/36, 6 U.N.C.I.O. Docs. 422-23 (1945); Doc. 944, I/1/34/(1), 6 U.N.C.I.O. Doc. 453 (1945); Doc. 1179, I/9(1), 6 U.N.C.I.O. 245-46 (1945); Doc. 1187, I/13, 6 U.N.C.I.O. Doc. 203 (1945).

(52) See e.g., ZEDALIS, « Protection of Nationals Abroad : Is Consent the Basis of Legal Obligation ? », 25 *Texas Int'l L.J.* 209, 233 (1990).

(53) See L. GOODRICH, E. HAMBRO, and A. SIMONS, *supra* note 14 at 28.

(54) *Id.* at 41.

IV.

As alluded to above, article 24(1) provides the Security Council has the « primary responsibility for the maintenance of international peace and security. » (55) As just discussed, in carrying out its responsibility the Security Council's duties must be discharged in accordance with Charter articles 1 and 2, which limit the powers possessed by the Council. The second sentence of article 24(2), in referencing the specific chapters of the Charter laying down the particular powers the Council has to discharge its duties with regard to peace and security (56), implicates another source for questioning the propriety of establishing war claim resolution plans that do not contain settlement based on violations of the rules of armed combat. The reason this seems so is because nothing in the language of the individual provisions of the relevant chapters referenced contain anything explicitly indicating the Security Council operates without restriction.

The chapters most directly involved are VI and VII. Chapter VI essentially deals with the peaceful settlement of disputes. Pursuant to the system it creates, disputes likely to endanger international peace and security (57), or situations which might lead to international friction or give rise to a dispute (58), trigger Security Council investigative authority (59), and, in the appropriate case, authority to call for settlement (60) or entertain submissions from members or non-members of the United Nations (61). Article 36 declares that disputes or situations likely to endanger international security authorize the Council to recommend settlement procedures or methods of adjustment (62). Article 37 follows this by authorizing the Council to recommend terms of settlement in a case where it has decided a dispute referred to it by parties unable to develop their own resolution is one that is in fact likely to endanger international peace and security (63). Chapter VII focuses on more exigent situations involving actual or imminent ruptures of international peace. It empowers the Security Council to make determinations with regard to the existence of threats to

(55) See U.N. Charter, *supra* note 12, art. 24(1).

(56) *Id.*, art. 24(2). The second sentence states : « The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII. »

(57) See *id.*, art. 33(1).

(58) See *id.*, art. 34.

(59) *Id.*

(60) See *id.*, art. 33(2).

(61) See *id.*, art. 35.

(62) See *id.*, art. 36, providing in paragraph 1^{er} :

The Security Council may, at any stage of a dispute of the nature referred to in Article 33 [[likely to endanger international peace and security]] or of a situation of like nature recommend appropriate procedures or methods of adjustment.

(63) See *id.*, art. 37(2) stating :

If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

the peace, breaches of the peace, or acts of aggression, and adopt recommendations or make decisions concerning measures to be taken to restore peace and security (64). Such measures may consist of the use of armed force (65) or devices short of such (66). Article 40 authorizes the Council to prevent the aggravation of relevant situations by calling upon the parties involved to comply with provisional measures pending the adoption of Council recommendations or decisions (67).

The authority of the Security Council to make recommendations under article 36 is not unlimited. By its very terms, it concerns only « procedures or methods of adjustment. » (68) Thus, it would appear difficult to argue that the reference to « appropriate » procedures or methods of adjustment suggests an expansion of the Council's substantive powers vesting it with authority to act outside the purposes and principles of the Charter invoked by the opening sentence of article 24, paragraph 2. Article 37 of chapter VI also references recommendations that are « appropriate. » (69) However, it deals not with procedural matters, but the actual « terms of settlement » of disputes addressed by the Security Council (70). This presents the possibility of a construction expanding the Council's substantive powers so as to permit things like reparation schemes not dependent on the laws of war. Indeed, the term « appropriate » itself is not used alone in 37, as in article 36, but in the phrase « as it [the Council] may consider appropriate, » (71) further suggesting great breadth. The same kind of terminology appears in article 40, chapter VII, referencing provisional measures « it [the Council] deems necessary or desirable. » (72) What makes it difficult to accept that the language of either article 37 or article 40 empowers the Council to act in a way envisioning the adoption of a war claims settlement plan which sets controlling rules for prosecuting war to one side is the very fact that article 24(2) unequivocally declares that the Council, in discharging its duties under chapters VI and VII, shall act in accordance with the purposes and principles of the UN. Unless we ascribe more significance to open-ended references to « appropriate » and « necessary or desirable » than we do to unequivocal declarations, like that in 24(2), it would seem hard

(64) See *id.*, art. 39.

(65) See *id.*, art. 42.

(66) See *id.*, art. 41.

(67) See *id.*, art. 40 declares in part :

In order to prevent the aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable.

(68) See *supra* note 62.

(69) See *supra* note 63.

(70) On the substantive nature of « terms of settlements » see, L. GOODRICH, E. HAMBRO, and A. SIMONS, *supra* note 14 at 284.

(71) See *id.*

(72) See *supra* note 67.

to accept that the Council is not restricted by the international law of armed warfare when devising a settlement plan.

Adding to the concern generated by the provision just looked at is the fact that the Dumbarton Oaks proposal differed in regard to Charter chapters VI and VII in a couple of important respects. As observed above, article 36 empowered the Council to recommend procedural strategies for resolving disputes, and 37 substantive settlements in the event the parties were unable to successfully put such together. Article 40 dealt with provisional measures involving threats to or breaches of the peace. Chapter VIII, section A, of the Dumbarton Oaks proposal contained a provision replicating Charter article 36, but no parallel to article 37. Paragraph 5 of section A authorized Council recommendations of « appropriate procedures or methods of adjustment. » (73) Paragraph 4, however, predecessor to article 37, simply provided that if the Security Council determined a dispute referred to it by the parties thereto was in fact likely to endanger peace and security, then it was to decide whether to take action under paragraph 5. The Council was given no power to make recommendations on substantive terms of settlement (74). Similarly, section B of chapter VIII contained no grant of power to the Security Council to call upon parties to a threat to or breach of the peace to follow certain provisional measures directed at preventing aggravation of the extant situation. Basically, the proposals contained in section B focused on Council determinations, recommendations, and decisions regarding threats to the peace, breaches of the peace, or acts of aggression (75), and military and nonmilitary measures necessary to maintain or restore peace and security (76).

The absence from the Dumbarton Oaks proposal of Security Council authorization in regard to substantive terms of settlement and provisional measures certainly supports the idea that the inclusion of such in the UN Charter must be accorded significance. Two things, however, prove distur-

(73) See Dumbarton Oaks proposal, *supra* note 48 at 51, Chpt. VIII, sec. A, para. 5.

(74) See *id.*, Chpt. VIII, sec. A, para. 4. To a large extent this may have reflected U.S. opposition to having the Council serve as the « judge », rather than a « policeman », of international peace and security. See L. GOODRICH, E. HAMBRO, and A. SIMONS, *supra* note 14 at 284.

(75) See *id.*, Chpt. VIII, sec. B, para. 2 reading :

2. In general the Security Council should determine the existence of any threat to the peace, breach of the peace or act of aggression and should make recommendations or decide upon the measures to be taken to maintain or restore peace and security.

(76) See *id.*, at paras. 3 and 4 providing, respectively :

3. The Security Council should be empowered to determine what diplomatic, economic, or other measures not involving the use of armed force should be employed to give effect to its decisions, and to call upon members of the Organization to apply such measures. Such measures may include complete or partial interruption of rail, sea, air, postal, telegraphic, radio and other means of communication and the severance of diplomatic and economic relations.

4. Should the Security Council consider such measures to be inadequate, it should be empowered to take such action by air, naval or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade and other operations by air, sea or land forces of members of the Organization.

bing about conceiving of this significance as an expansion of power which allows the Council to adopt reparation systems ignoring the laws of armed combat.

First, the inclusions contained in articles 37 and 40 on substantive terms of settlement and provisional measures may be seen as directed simply at giving the Council power in *areas* not addressed by the Dumbarton Oaks proposal. They need not be viewed as suggestive of the *manner* in which power possessed by the Council may be exercised. Evidence corroborating this understanding can be gleaned especially from the records of the 1945 San Francisco Conference that relate to the adoption of article 40. As best as can be determined, that provision found its way into the Charter as part of the arrangement that led to the refusal to adopt paragraph 1, section B, chapter VIII of the Dumbarton Oaks proposal. That paragraph would have allowed the Security Council to deem the failure of parties to settle a dispute likely to endanger international peace and security as a threat to the peace, thereby activating Council powers to take diplomatic, economic, or military measures (77). The delegates objected to Charter incorporation of any such provision, while endorsing the inclusion of article 40's power of provisional measures (78). The idea could appear as one aimed predominantly at emphasizing the limits on the Council, yet accepting the reality that action anticipating Council recommendations or decisions may be necessary to prevent aggravation of tense international situations. This would suggest the areas of power given the Council have been increased, but the Charter restrictions on the exercise of that power remain intact.

Secondly, paragraph 1 of section B, chapter VIII of the Dumbarton Oaks proposal also provided in its final clause that measures taken thereunder by the Security Council were to be « in accordance with the purposes and principles of the Organization. » (79) Despite the fact paragraph 1 was never incorporated in the Charter, the Council would still seem subject to limitations when acting under the authorities it possesses, since the fundamental reason for the paragraph's rejection related to concern about the Council deciding the failure of dispute settlement meant a threat to the peace existed (80). Furthermore, both paragraph 3, section B, chapter VI of the Dumbarton Oaks proposal (81) and article 24(2) of the Charter subject

(77) See para. 1, sec. B, Chapter VIII, stating :

Should the Security Council deem that a failure to settle a dispute in accordance with procedures indicated in paragraph 3 or Section A, or in accordance with its recommendations made under paragraph 5 of Section A, constitutes a threat to the maintenance of international peace and security, it should take any measures necessary for the maintenance of international peace and security in accordance with the purposes and principles of the Organization.

(78) See « Report of Rapporteur of Commission III, Committee III, on Chapter VIII, Section B », Doc. 881, III/3/46 at 4-7, 12 U.N.C.I.O. 505-508 (1945).

(79) See *supra* note 77.

(80) See L. GOODRICH and A. SIMONS, *The United Nations and the Maintenance of International Peace and Security* 368 (1955).

(81) See Dumbarton Oaks proposal, *supra* note 48, at paragraph 1, sec. B, Chpt. VI.

the powers enumerated for peacefully settling disputes, and dealing with threats to the peace, breaches of the peace, and acts of aggression, to the purposes and principles of the organization. Therefore, some of the opposition at the San Francisco Conference to the final clause of paragraph 1 may have been founded on little more than the fact that it was a redundant reiteration (82). If that is so, it hardly supports the argument that the elaborations on the Council's powers under chapters VI and VII suggest the ability to act beyond the limits of Charter articles 1 and 2.

V.

Though the UN Charter appears to present some problems with concluding the Security Council has incontestable power to establish a war claims settlement plan ignoring the laws of military engagement, what about conceiving of the Resolutions establishing the plan as treaties between the relevant parties? As noted earlier, the accepted post-war practice of states has involved reparation agreements that impose on the defeated nation(s) an obligation to pay claims without regard to violations of the laws of war. Thus, if the Resolutions concerning Iraq are seen as treaties, the fact they fix liability for loss, damage, or injury simply because of the unlawful invasion and occupation is irrelevant. In any case, the recovery standard articulated by the Security Council for application by the Compensation Commission is perfectly consonant with governing norms.

Surely it is accurate to state that there is less than total agreement among scholars and governments on the matter of the treaty-making capacity of international organizations. Thus, even leaving aside the issue of whether Resolutions 674 and 687 are framed in a way satisfying expectations about the form of an actual international agreement, there are some who would insist that no international organization is capable of making a binding treaty commitment with another (83), and others who would conclude the exact opposite (84). Assuming the more liberal approach is understood as the accurate position, it is one thing to argue that international organizations have treaty-making capacity, and something entirely different to argue the organization with which one is concerned has entered into a treaty within the ambit of its competence. In the context of the United Nations Resolutions of concern here, this distinction between treaty-making capacity and competence is essential. The same distinction exists with regard to individual states as well. Though it is beyond doubt that

(82) See « Report of Rapporteur », *supra* note 78, Doc. 881, III/3/46 at 4, 12 U.N.C.I.O. 505 (1945).

(83) See I. BROWNIE, *Principles of Public International Law* 660-61 (1973).

(84)] See FITZMAURICE, « THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE », [1953] *Brit. Yb. Int'l L.* 2.

states possess the capacity to enter into treaties (85), questions may arise concerning whether they are competent to draw on that capacity in particular instances (86).

The matter of competency, as it relates to individual states, has in large measure been held to deal with situations in which it is « manifest » that constitutional limits do not authorize the conclusion of particular treaty commitment (87). As that same principle is applied to the United Nations (88), it would necessitate examination of the provisions of the Charter to ascertain the limits on the powers of the various organs which might purport to act for it. As already discussed, there is much room for suspecting the Security Council lacks the power to adopt Resolutions setting forth the type of reparation standard it has applied to Iraq in the wake of the Gulf War. Whether the level of suspicion is substantial enough to admit of the view it is « manifest » the Council has acted *ultra vires* is an intriguing question. The typical notion is that it is the violation of a constitutional or organic document that must be « manifest. » Yet it would seem that such violations can be manifest not only when it is obviously plain and clear no authority exists for the treaty entered into, but also when it is just as plain and clear that serious reservations present themselves regarding the existence of needed authority (89). Were the former alone to be considered as satisfying the test that a violation be « manifest, » the only occasion on which the rule might apply would involve the extremely improbable case of a constitutional document explicitly reciting that some specific treaty-making power is denied the body acting to exercise such. Cases plainly raising genuine concerns about the possession of such a power would be treated as those involving unequivocal constitutional language granting authority to make the treaty actually made. Silence alone should not be taken as meaning that a « manifest » violation of a constitutional limitation is present. But there are certainly some situations when it is so plain and clear serious questions exist with regard to the power to make a particular treaty, that it would be inappropriate to conceive of the

(85) See *e.g.*, Vienna Convention on the Law of Treaties, art. 6, U.N. Doc. A/CONF. 39/27 (1969).

(86) See arts. 46 and 8.

(87) See *id.*, art. 46. For cases of the Permanent Court of International Justice concluding the limits were not « manifest », see Legal Status of Eastern Greenland, *P.C.I.J.* ser. A/B, No. 53 at 71 (1933), and Free Zones of Upper Savoy and the District of Gex, *P.C.I.J.* ser. A/B, No. 46 (1932).

(88) On this principle being applied to international organizations, see UN Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, art. 46 (2)-(3), reprinted in 25 *Int'l Leg. Mat.* 543, 570 (1986).

(89) Thus, in commenting on the situation of the President's power under the U.S. Constitution to enter into international agreements, comment c, § 311, *Restatement (Revised) of the Law of Foreign Relations of the United States* (1986), indicates that, despite the general uncertainty surrounding the extent of the power, « some agreements ... are of sufficient formality, dignity and importance that in the unlikely event of the President's attempting to make such an agreement on his own authority his lack of authority might be regarded as 'manifest' ».

absence of language of express denial as tantamount to that of express grant.

As to the matter of Iraq raising the claim of the Security Council exceeding its powers, problems certainly exist. International law would support such a claim raised by the United Nations itself (90). The rationale being that the absence of competence to enter into the commitment vitiates the consent given thereto. Governing legal principles, however, say nothing about the claim of *ultra vires* being raised by states situated like Iraq — states signing on to an international agreement with another entity which has exceeded its powers in entering the commitment (91). One might suggest the rationale for depriving these states of the opportunity to raise the claim derives from the unclean hands had in entering a commitment with another entity « manifestly » lacking the power to enter such, then later attempting to escape from the commitment's obligations when it appears agreement had been ill-considered and too hastily undertaken. It seems that equally convincing reasons exist, however, for reaching the exact opposite conclusion. Specifically, since no one is likely to understand the ambiguities of a particular constitutional document better than the entity operating under it, commitments taken on by that entity should not later be subject to avoidance by it when the unwise or burdensome nature of the commitments becomes apparent. To allow such promotes extravagant claims to treaty-making power, because states assiduously acting within their power cannot raise objections to the validity of commitments made by others who do not follow such a disciplined approach, and those who claim power they do not possess can decide to observe commitments that turn out to be beneficial and escape those that prove onerous. Furthermore, in order to encourage the negotiation and making of treaties that are within the constitutional power of the parties involved, the party that is not suspected of exceeding its authority should have the opportunity to contest, if needed, the validity of a treaty on the grounds that the other party committed has exceeded its own constitutional power. By recognizing the existence of such an opportunity, international law discourages parties inclined to push the limits of their power from shopping for agreements that prove advantageous and abandoning those that do not.

Without attempting to prejudge the situation concerning Iraq, what has been said suggests the possibility it could appropriately question the argument that the Security Council Resolutions addressing Gulf War compensation can be viewed as tantamount to treaty commitments. Though it grudgingly accepted the Resolutions (92), problems exist with regard to whether

(90) See Vienna Convention, *supra* note 88, art. 46(2).

(91) *Id.*

(92) See « War in Persian Gulf Ends ; Iraq Accepts U.N. Cease-Fire Demand for Reparations, But Calls Council 'Unjust' », *U.N. Chronicle*, June 1991, at 6 (Resolution 687).

the Council exceeded its power in a « manifest » way, and whether Iraq, as well as the United Nations, is capable of raising such a challenge. These are difficult and complex matters. What is straightforward and crystal clear, however, is that one should be incredibly reluctant to simply accept bald statements about Iraq's Gulf War liability being determined by nothing more than the fact its invasion and occupation of Kuwait were illegal.