The Role of the UN Secretary-General: The Power of Persuasion Based on Law

Summary

The article’s starting point is the observation that the UN Secretary-General, in addition to being the chief administrative officer of the Organization and the world’s top diplomat, is also an influential participant in the legal discourse that infuses much of global politics. With little formal authority and no material power, the SG’s influence depends largely on his persuasive powers and is wielded within an institutional and normative context that he helps shape. The author attempts to shed light on the sources of those persuasive powers that the SG possesses as a legal actor. Johnstone argues that the political and legal roles of the SG are intertwined, and that his political influence is reinforced by his ability to draw upon values and principles embodied in the UN Charter.

The legal basis of the SG’s authority lies in Articles 7 and 97 through 101 of the UN Charter. Article 7 designates the Secretariat as a principal organ of the UN and Article 99 offers the constitutional basis for an independent political role for the SG. More important than the words of the Charter, the author argues, is the manner in which those words have been interpreted by successive SGs. Some more vigorously than others, the SGs have interpreted, implicitly or explicitly, the Charter on their own powers – something that could be considered the prerogative of the deliberative bodies like the General Assembly and the Security Council – and assumed the mantle of “guardian of the Charter”, by referring to the Charter’s principles. The author notes that SG Annan amplified the words of his predecessors in reflecting on his visit to Iraq in February 1998, where he signed an MOU with Saddam Hussein, allowing the return of the weapons inspectors. SG Annan made clear his belief that he had the “constitutional right” to travel to Baghdad without a formal Security Council mandate. Following the MOU’s abrogation by Saddam Hussein, Mr. Annan described the SG as “an instrument of the larger interest, beyond national rivalries and regional concerts”, especially in the post-Cold War era.

Johnstone asserts that the SG, though he has no formal authority as interpreter of international law, is a key member of the interpretive community associated with the UN and therefore an influential participant in that discourse. In the constantly evolving normative framework provided by the Charter and Charter-based law, the SG has a more solid foundation for asserting and assessing legal claims the greater the concordance on the Charter values is. The invitation to the SG to refer violations of human rights and humanitarian law to the Security Council may be seen as the latest manifestation of this evolving normative climate.
The author examines in more detail the forms SG interventions in international legal discourse on peace and security matters have taken, varying from explicit legal findings to implicit interpretations in the form of international decisions to even telling silence on a contested point. He considers that SG Annan's most important legal interventions have been in two areas: the exercise of his good offices and his statements on human rights. On good offices he cites the examples of Mr. Annan's trip to Nigeria in 1998, meant to bring Nigeria out of international isolation and promote democracy, as well as his handling of the Israeli withdrawal from Southern Lebanon in April 2000. On Mr. Annan's statements on human rights, the author says this may well go down as the hallmark of Mr. Annan's secretary-generalship. He cites the SG's stance vis-à-vis the US position on the International Criminal Court; his actions on East Timor in 1999; and the Kosovo crisis. Regarding the latter, he quotes the then NATO Secretary-General and British Defence Secretary to the effect that these and other statements provided "the moral imperative" from which "flowed the legal justification" for the air war. Johnstone also notes that SG Annan contributed to the more general discourse on humanitarian intervention by launching a debate at the start of the 1999 GA session and through the establishment of the two blue-ribbon panels on Kosovo and intervention and state sovereignty. He adds that in the aftermath of September 11, 2001, the SG has made a number of legally significant statements.

Johnstone concludes that the SG's persuasiveness – his ability to get others to defer to his judgement – depends in part on the formal authority of the office and in part on the normative acceptability of positions he takes. Legal positions taken by the SG are in no way determinative but they do lend political comfort to those on whose side the SG comes down and can complicate the efforts of those he goes against. Within the interpretive community that surrounds the Security Council, the opinion of the SG carries weight. The normative authority of the SG is exercised through the use of three sources of leverage: the first is "diplomacy backed by force", the force part contributed by the Security Council (see 1998 MOU with Iraq, which was due in part to the US/UK threat of airstrikes); then the SG's authority to mobilize shame and threat privately to expose intransigence (see SG's dealings with Indonesian President Habibie over East Timor); and the SG's credibility that comes with being an insider to high-level consultations on international crises (often by telephone) and his function as channel of communication and conveyor of signals of an emerging consensus on the right and wrong of a situation (the SG used this tool in both East Timor and Indonesia).

Finally, Johnstone says that, in the post-Cold War era, the SG is at the same time more constrained and more empowered by the broader networks of interested officials, experts and citizens who constitute the interpretive community associated with UN law. He is constrained by the terms set for the discourse, within which terms he and all other international actors must operate. But he is empowered by the new channels of influence created, which enable the SG to project the values and norms that emerge from the UN-centred process of global governance.

Summary

The starting point for this article is the observation that legal arguments, although never decisive in Security Council deliberations, are used by the Council membership and others involved in the relevant debates to explain and justify positions. Such arguments, the author maintains, do shape the debates and often have an impact on positions taken, at least indirectly. The article’s stated purpose is to explore why that is the case, by examining theoretical arguments and their application in the Council debate over the intervention in Kosovo.

The author examines the nature of legal discourse within an “interpretive community”, composed of the participants in a field of practice who set the parameters of what constitutes reasoned argumentation for that practice. He outlines a conception of international law as operating largely through a process of “justificatory discourse”, within and constrained by such an interpretive community. The level of agreement among the community’s members is sufficient to make possible rational discourse and collective distinguishing between good and bad legal arguments.

In the case of international law the author suggests that an interpretive community can be easiest imagined as composed of two concentric circles: The inner circle consists of all individuals directly or indirectly responsible for the formulation, negotiation, conclusion, implementation and application of a particular legal norm. It is surrounded by an outer circle of experts, international civil servants, scholars and non-governmental experts who participate in some way in the particular field of international law or practice in which the interpretive dispute arises. He notes that the line between the inner and outer circle is blurred.

The author then turns to the Security Council as an interpretive community in the field of international law and examines its deliberations in a generic way, drawing on the theory of communicative action. He argues that legal discourse within an interpretive community occurs even in that highly political setting. Moreover, he notes that in a setting like that of the Security Council, it may be impossible to know whether the legal arguments in a given case are strategic or sincere, but it is not necessary to make that distinction to support the case that arguments do matter. The end of the Cold War has arguably led to some convergence of values, or at least wider concordance on the rules of coexistence and cooperation, in a pluralistic international environment, arguably indicating the emergence of a minimal sense of international community, which is likely to enhance the prospects of cooperation based on law. Inter alia, the P5 have become an exclusive club with a shared history and set of experiences, they have learned about each other from working together and have developed shared understandings. Although the recent Iraq crisis marked a significant setback in Council unity, it did not take away from the impressive level of Council
activity since the end of the Cold War, which has had an impact on how the P5 view their rights and responsibilities in the field of peace and security.

Although relationships of power and coercion are certainly present in the Council, there are features of its deliberations that suggest raw material power is not the only thing that matters. The author concludes that the Security Council is not a sealed chamber, deaf to voices and immune to pressure from beyond its walls. Because arguments based on self-interest are less persuasive in public, the language of reason is more likely to be used. At a minimum, “the civilizing force of hypocrisy” comes into play and, even if the final outcome is the result of bargaining rather than reasoned discourse, any deals struck must be capable of withstanding the glare of publicity.

The author notes that concessions to demands for greater access to and openness in the Security Council reflect an implicit understanding that, for credible deliberation to take place among States of vastly different size and capabilities, some preconditions must be met. That the concessions themselves may be designed to relieve pressure for expansion of the Council does not lessen the force of the argument. He suggests additional steps that could enhance the process of justificatory discourse within the Council, such as demanding written justification for the exercise of a veto, thus forcing permanent members to exercise their right more responsibly. Allowing more opportunity for the voice of civil society to be heard, through participation of particular NGOs with special knowledge or insight in Arria formula meetings or troop contributor consultations, would also serve that purpose.

The author validates the framework presented above by analyzing the debates in and around the Security Council over NATO’s intervention in Kosovo in March 1999. He concludes that, although the international community was not unified on the norm of humanitarian intervention at the time of the Kosovo crisis, legal arguments were advanced by all members, including the most powerful, thus suggesting that the normative framework provided by the Charter and subsequent developments is sufficiently robust to warrant an effort to justify positions on legal grounds. He adds that, because there is an interpretive community to guard in effect that normative framework, the legal arguments were nuanced and with an eye on preserving the credibility of those that propounded them. While legal discourse did not directly affect the decision to intervene, it did affect subsequent developments, such as the enunciation by NATO of a new strategic concept reaffirming the role of the Security Council in authorizing interventions and implicitly treating the Kosovo case as an exception. Also it led to the return to the Security Council for a long-term solution at the end of the bombing and in an effort to secure peace (resolution 1244). This reinforced the sense that institutions are an important check on the unilateral exercise of power in the name of collective values.

The author concludes that the Security Council is a valued institution to the extent that all but a few States believe it serves a useful purpose for the maintenance of peace and security, despite deep reservations about its unrepresentative composition and unequal distribution of voting power. Because it is a valued institution, reputations count there, as does a sense of fidelity to UN Charter-based rules. Power and short-term calculations of
interest count more, but the impact of those factors is mitigated by norms and discourse. The author believes that this became once again evident in the recent debate over Iraq, shifting the arguments of the US for the legal justification of the intervention from terrorism, self-defense or the controversial doctrine of preemption to the enforcement of existing Security Council resolutions relating to Iraq’s weapons of mass destruction.

The author expects that, when the dust finally settles, it is conceivable that a consensus about humanitarian intervention will emerge, along the following lines: first, that such intervention is lawful with Security Council approval; second that, as a general matter, it is unlawful without Security Council authorizations; and third – and this is where evidence of a consensus is slimmest – there may be rare cases in which intervention without Council authorization will be deemed excusable. He notes that the Report of the International Commission on Intervention and State Sovereignty represents an effort to crystallize this emerging consensus on humanitarian intervention. He finally suggests that the apparent consensus on the legitimacy of intervention with Security Council authorization may be institutionalized through the adoption by the Council (or the General Assembly) of a set of considerations (not hard and fast criteria) to be taken in account in such deliberations. These considerations could include the magnitude of the emergency, the degree of systematicity of the violations, the quality of evidence, the availability of alternatives, the attitude of the people at risk, the degree of international support, and the prospects of success. Such guidelines would not provide a single “right answer” nor would they do away with power-politics considerations, but could stimulate discourse that would enhance the power of persuasion based on law and give “the better argument” a fighting chance in Security Council decision-making.

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