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THE SECURITY COUNCIL, THE CHARTER AND ITS
CONTROVERSIES

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The Security Council of the United Nations, because of its particular functions, membership, history and small size, is a keystone in the arch of the United Nations Organisation established by the *United Nations Charter*.¹ That *Charter* identified in its opening paragraphs a commitment to the Peoples of the member nations to prevent the ‘scourge of war’; to ‘reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and in the nations large and small’; to establish conditions under which international law might be maintained; and to promote ‘social progress and better standards of life in larger freedom’.²

In order to attain these ends, to practise tolerance and living together in peace; to unite ‘to maintain international peace and security’; and to ensure that ‘armed force shall not be used, save in the common interest’, the *Charter* established to United Nations; identified its purposes,³ defined its membership⁴ and identified its principal organs.⁵

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¹ *The United Nations Charter*, adopted 26 June 1945; 3 Bevens, 1153. Entered into force 24 October 1945. See ff Martin et al (eds) *International Human Rights Law and Practice: Cases, Treaties and Materials – Documentary Supplement* (Kluwer, The Hague, 1997, 1).

² *United Nations Charter*, opening preamble.

³ *United Nations Charter*, ch i.

⁴ *Ibid*, ch ii.

⁵ *Id*, ch iii.

One of the chief organs was declared to be “a Security Council”.⁶ The composition of the Security Council was defined by the Charter to consist of permanent and non-permanent members. The permanent members were identified as “the republic” [now the people’s republic] of China; France; the Union of Soviet Socialist Republics [now the Russian Federation]; the United Kingdom of Great Britain and Northern Ireland and the United States of America”. Initially, the Security Council was to comprise 11 member states. However, this number was later enlarged to 15 members states, 10 other than the permanent members, elected by the General Assembly by reference to their ‘contribution ... to the maintenance of international peace and security and to the other purposes of the Organisation’ and also to ‘equitable geographical distribution’.⁷ Non-permanent members are elected for a term of 2 years. At the times referred to therein, Australia was a non-permanent member. Its term ran from 1 January 2013 to 31 December 2014. At the close of 2014 its latest period of service as a non-permanent member of the Security Council was drawing to an end.

Notwithstanding the variable composition in the membership of the majority of the Security Council, the body itself is a continuous functioning one.⁸ Meetings of the Security Council are normally held in the ornate room of the Council in the United Nations Secretariat Building at the foot of 42nd Street in East Manhattan, New York. The room is elegant and impressive, exuding the concentration of geopolitical power; but apt to the high responsibilities placed on the member states serving there. In addition to the members of the Security Council, other states, members of the United Nations, are entitled to participate, without a

⁶ Id Art 7.1.

⁷ Id Art 23.1.

⁸ JG Stark, *An Introduction to International Law* (4th Ed), Butterworths, London, 1958, 448.

vote, in discussion of any questions brought before the Security Council if the Council considers the interest of that Member State are ‘specially affected’.⁹ Moreover, a member state of the United Nations, or non-Member, if a ‘party to a dispute under consideration by the Security Council’ is to be invited to participate, without vote, in the discussion relating to the dispute¹⁰ the Republic of Korea (South Korea) and the Democratic Republic People’s of Korea (DPRK) (North Korea) are both Member States of the United Nations. Each was admitted to membership on the same day 1993. At the times recounted herein, the Republic of Korea was serving as an elected non-Permanent Member of the Security Council. DPRK was not a member of the Security Council. Moreover, at no time during the meeting of the Security Council described hereunder, did DPRK seek to participate, without a vote, in the discussion that followed. This was so although undoubtedly that discussion, and the resolution that it entailed clearly ‘specially affected’ the interests of DPRK.¹¹ DPRK did participate in the earlier deliberations of the Human Rights Council of the United Nations (HRC) and the General Assembly, established by the *Charter* as a principal organ of the United Nations¹² with the composition, functions and powers and procedural provisions laid down in the *Charter*.¹³ The contrast between the large, unwieldy, sometimes chaotic circumstances of the General Assembly, meeting in its own chamber, and the Security Council reflects not only their respective sizes but also their specified functions and responsibilities. The Security Council is self-consciously a most serious place. The *Charter* anticipated this reciting in its first preamble at the purpose of the United Nations to save successive

⁹ *United Nations Charter*, Art 31.

¹⁰ *Ibid*, Art 31.

¹¹ *Id*, Art 7.

¹² *Id*, ch iv, Arts 9-22.

¹³ *Id*, Art 24.1.

generations from war 'which twice in our lifetime has brought untold sorrow to mankind'. And edge was given to that purpose by the circumstances immediately preceding the coming into force of the *Charter* in 1945, with the detonation in August of that year, over Hiroshima and Nagasaki in Japan of 2 nuclear weapons of devastating destructiveness and symbolism. Unless the noble objectives of the United Nations, most especially the prevention of war; the attainment of fundamental human rights; and the rule of international law could be assured, the future of humanity was gravely imperilled.

It is out of recognition of that peril that the Security Council bears the 'primary responsibility for the maintenance of international peace and security'.¹⁴ The members of the United Nations that subscribe to the *Charter* 'agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'.¹⁵ In discharging its duties, the Security Council is required to 'act in accordance with the Purposes and Principles of the United Nations'.¹⁶ The Members of the United Nations 'agree to accept and carry out the decisions of the Security Council' in accordance with the *Charter*.¹⁷ Membership of the United Nations Organisation is not compulsory for the nations of the world. So much is recognised by provisions in it for certain privileges to non-members and by the procedures for joining. DPRK was not obliged to join the United Nations. Having done so, and having subscribed expressly to numerous

¹⁴ Id, Art 24.1.

¹⁵ Id, Art 24.2

¹⁶ Id, Art 25.

¹⁷ As explained in para 9 of the report of the COI on DPRK (infra), the DPRK is a state party to the *International Covenant on Civil and Political Rights* (ICCPR); the *International Covenant of Economic and Social Rights* (ICESR); the *Convention on the Rights of the Child* (CRC) and the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW). The compliance of DPRK with obligations to submit state reports on the foregoing treaties has been poor, although within the time period referred to herein, DPRK began participating in the HRC procedure of Universal Periodic Review (UPR).

international treaties on human rights adopted by the United Nations,¹⁸ DPRK is required by international law to conform to the obligations so established. In many matters the Security Council acts by a consensus. In matters where there are differences of viewpoint, the differences are resolved by voting. Each member of the Security Council has one vote.¹⁹ The *Charter* distinguishes between voting ‘on procedural matters’ and voting ‘on all other matters’. In the case of procedural matters decisions of the Security Council are made ‘by an affirmative vote of 9 members’ with no special reference made to privileged position for Permanent Members.²⁰ In making decisions on all other matters, an affirmative vote of 9 members is required ‘including the concurring votes of the Permanent Members’. The Security Council is empowered to adopt its own rules of procedure.²¹ It has done so. The rules of procedure and the conventions built up by the Security Council over the 70 years of its existence; create the established custom of the Security Council that governs its operations.²² Necessarily, over time, delegations from the Permanent Members of the Security Council gain special expertise in, and knowledge of, the custom of the Council.

The requirement for the participation of Permanent Members in voting on any non-procedural decisions was one established by a meeting of leading members of the allied powers planning the new United Nations Organisation, held at the Dumbarton Oaks mansion close to Washington D.C. From the start, the provision from the then established allied Great Powers was controversial. Fear was expressed that so called ‘veto’

¹⁸ *United Nations Charter*, Art. 27.1.

¹⁹ *Ibid*, Art. 27.2.

²⁰ *Id*, Art 27.2. Provision is there made obliging a Member State to abstain from voting on certain questions where it is party to a dispute.

²¹ *United Nations Charter*, Art. 30.

²² Liang Yuen-Li (1947) *A British Yearbook of International Law* at 357 – 359.

thereby afforded to the Permanent Members would be abused.²³ The theoretical ground advanced for the provision was that the main responsibility for maintaining peace and security would fall upon the Permanent Members. The pragmatic ground for the provision of unequal voting rights and entitlements was that, without it, it would be likely that the United States Senate, whose agreement was required under the Constitution of that country, would withhold its consent to United States ratification of the *Charter*. Moreover, it was far from certain in 1945 that the Soviet Union or, perhaps, the United Kingdom, would join the United Nations without the so called 'veto' power. If this recognition of the reality is of international relations obliged the provision of the veto, it was a price worth paying and justified by subsequent practice. Although the original doubts concerning use of the veto power have been vindicated by some later practice, more recent experience has indicated a declining use of the power. China, for example, has only 10 instances, since its seat was taken by the People's Republic of China, on which a veto has been exercised. This may reflect changes of strategy. But it may reflect a custom of the Council that, where a Permanent Member indicates clearly its intention to vote against a 'non-procedural' decision, proponents will often withdraw the proposal in the face of the prospect of inevitable defeat. Some commentators, including the most recently retired United Nations High Commissioner for Human Rights (Ms Navanethem Pillay) have suggested that, in the particular case of decisions of the Security Council that may be concerned with universal human rights (especially in instances of genocide, crimes against humanity and war crimes) the nature of the subject matter argues against the existence of the veto power.²⁴

²³ H.V. Evatt, *The United Nations* (1948), 55.

²⁴ N. Pillay, interview, *International Bar Association Journal* (2014).

Various controversies have arisen over the years concerning aspects of the functions and voting procedures of the Security Council. Thus, questions have arisen as to whether the Security Council has a general overriding power for maintaining peace and security or whether its powers are limited to the specific express powers stated in chapters vi and vii of the *Charter*. The ambit of any implied powers that belong to the Council, as necessary and requisite for the proper performance of its functions, is a matter of debate.²⁵ In this respect, differences about the powers and functions of the Security Council reflect parallel disputes that can arise in municipal jurisdiction.²⁶ Many hotly contested issues arose during and after the Korean conflict of 1950-53. At the time of the commencement of that conflict in June 1950, the USSR was absent from its seat in the Security Council. The China seat was still occupied by the Government of the Republic of China (Nationalist) to whose credentials the USSR objected. In the absence of the USSR from the Council, it found a 'breach of the peace' had been committed and 'recommended' assistance by United Nations member states to the authorities of ROK. It also provided for a unified United Nations Command to defend ROK and to repel the forces [of DPRK] that had invaded it. The USSR returned to the Security Council and immediately challenged the validity of the resolutions. One ground of challenge was participation in the decision in the Council of the Republic of China. But another concerned the power of the Council to make "recommendations" as it had purported to do. A further ground was the lack of the affirmative participation in the decision of the USSR, a Permanent Member. A practice had developed before that time by which a formal abstention by a Permanent Member

²⁵ International Court of Justice, advisory opinion on reparation for injuries suffered in the service of the United Nations (1949) *ICJ Reports*, 182.

²⁶ For example, the principle of constitutional necessity is recognised by the High Court of Australia in...

was viewed as a sufficient exercise of its voting power. This was a contestable interpretation given the use by the *Charter* of the adjective “concurring” and the presumed purpose of so requiring.²⁷ This is not the occasion to revisit these controversies of long ago. It is sufficient to note that they arose, have never been finally resolved and exist in a context occasioned by the post-war division of the Korea Peninsula which from 1911 to 1945 had been ruled by one of the defeated axis powers, Japan. Against this background of history, international law and practice concerning the powers and functions of the Security Council, I turn to a description of my own engagement in the activities of the United Nations, as that engagement enlivens functions of the Security Council. The engagement attracted the participation of the Security Council in most recent attention it has given to the affairs of the Korean Peninsula. I will describe and explore how the engagement originated; how it was played out in the Security Council; and how it raises still contested questions about responsibility of the Security Council for grave violations of human rights, happening in a Member state of the United Nations, as those violations may endanger the maintenance of peace and security.

²⁷ J. Stone, *Legal Controls of International Conflict* (Maitland, Sydney, 1954), 228. See also Starke, above n. 8 at 458.