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Commentary by Experts

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¶19 In 2003, Annan announced his intention to establish a commission to review challenges to the UN’s effectiveness. This became the High-Level Panel, which issued its report in December 2004.

¶20 Having discussed the importance of the Panel’s work, let me briefly identify the shortcomings of an otherwise excellent report. The report does not – not surprisingly given the Panel’s composition – address the issue of who decides whether or if to use force if the Security Council is deadlocked.

¶21 It also does not extend the principles supporting humanitarian intervention to proliferation issues, and I believe it must. The Responsibility to Protect implies a “Duty to Prevent.” This is the principle that closed societies pursuing weapons of mass destruction pose an especially grave danger, giving rise to a responsibility on the part of the international community to act early and collectively, not necessarily by force, to prevent them from going down the nuclear road.

¶22 The report’s recommendations regarding the Human Rights Commission were weak. The Panel recommended that membership on the Human Rights Commission should be universal. That would only compound the Commission’s existing credibility problem.

¶23 Finally, the report pays insufficient attention to the importance of democracy within countries, as a hallmark of good international citizenship.

JAN WOUTERS:

¶24 We will pass the floor to Ian Hurd.

IAN HURD:***

¶25 I as well want to thank you, all of the organizers from all of the organizations, and thank also the distinguished guests. It is an honor to be here, learning from you all.

¶26 I want to pick up on the theme of collective security that has been mentioned by a number of speakers and make what I guess ends up being a rather small point, but one


7 Id.

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that I think has implications that need to be made clear here about the Security Council as a collective security organization. I would like to begin by going back to 1945 and then moving forwards to what I think is a tension in many people’s interpretation of the Council between the actual law of the Charter and some states’ expectations about what the Council’s authority should be.

¶27 We could put this in a number of ways. We could categorize it as a tension between the preamble of the Charter and most of its operative paragraphs, or a tension between realism and idealism (but not in the traditional IR sense in those terms of art), or an as distinction between law and aspiration.

¶28 I want to pose this as a tension between a great power compact and a collective security system and use this to argue that many people’s expectations for collective security in the Council far outstrip the actual institutionalization of that mechanism.

¶29 How this came to be is an interesting topic for academics. We are always looking for cases where practice goes one way and the law goes the other way and then you have this odd relationship between the two.

¶30 I think that is intriguing but in practical terms the tension is very important because it is the hidden source of a lot of misunderstandings and misplaced critiquing of the Council, not least over the Iraq war in 2003, but also underlying misplaced disagreement over Council reform and about the Council’s more general relationship to human rights and to international security.

¶31 So this tension between great power compact and collective security. If you go back to 1945 and you consider the deliberations really between the great powers and the rest, which is essentially what San Francisco turns out to be, you see the great powers working very, very hard to create a security system in which all collective security obligations are subordinate to the veto.

¶32 This is what was negotiated before San Francisco and this is the recurring theme of negotiations between the great powers and everybody else in San Francisco.

¶33 Small states proposed at San Francisco different kinds of ways of reducing the veto or making certain kinds of decisions not subject to the veto and at every point the great powers, sometimes after machinations behind the scenes, came out collectively with one voice and succeeded in defeating any reductions in the veto.

¶34 What the great powers thought they were making in San Francisco was a great power compact: a bargain among themselves with an institution attached to it about how they would run the international system, and specifically at what point in their deliberations over the international system could either the small states have a voice or could the opposition of one of the great powers be enough to kill the collective plan.

¶35 This is a concert of great powers, a great power compact.

¶36 In the Charter, all of the collective obligations on security are placed under the veto so that collective action is possible by the Council but always contingent on the five agreeing.

¶37 There is no automatic institutional mechanism for making collective obligations. There are only mechanisms making collective obligations by the explicit consent of the great powers. This was designed to reduce the chance of conflict among the great powers, and this is the ultimate goal of a compact: to manage international problems so that the possibility of war between the great powers is minimized.
¶38 What you have in the Charter reflects this intention. It reflects an adamant opposition to creating a collective security institution.

¶39 The absence of collective security in the Charter was not an accident. It was the point of the veto. It is why the veto was important, and in that sense it might be why the Council was important to the whole UN. That was the purpose of the whole Council: to manage relations between the great powers with the legitimizing device of having representatives of the rest present.

¶40 The expectation that has developed in many circles is that the Council is the center of a collective security apparatus. Collective security requires two things. It requires the principle of all versus one. And it requires an automatic institutional mechanism for making that work. It must therefore apply to everybody equally. A collective security where they can opt out is not collective security, it is something else.

¶41 A real collective security system would have imposed some kind of obligations on the great powers. As it stands now, if the Council fails to pass a resolution, it is hard to see in the Charter any collective obligations on permanent members.

¶42 Those who cling to the expectation that the Security Council will implement collective security have a much more expansive view of the Council’s authority, original purpose, and operation than is reflected in the Charter.

¶43 This is important for understanding the Iraq War debates because a lot of commentary about how the Council performed relative to the Iraq War is premised on this more ambitious way of thinking. This is true not just among the critics of the American action but among many of its defenders.

¶44 On both sides you see a shared commitment to the idea that the Council is the linchpin of collective security and that there should be some Council obligations on great powers. The critics of the US argue that the war was illegal because it was not authorized by the Council. Many states took the view that they would support the invasion if it had been authorized by the Council. This puts priority on the procedure of the Council over the substance of the debate.

¶45 Similarly, among the defenders of the war you get the same kind of spirit, those who say that the Council failed because it did not enforce its resolutions by authorizing the US action or failed because it simply did not realize the realities of power as distributed in the system are taking the same kind of view. They see the function of the Council as enacting the collective security principle which might well be a nice thing to do but it is not what is in the Charter.

¶46 The distinction is important, I think, for a number of reasons.

¶47 First, it matters for how you interpret the existence of disagreement in the Council. The collective security view sees disagreement in the Council as a problem that needs to be solved or as an obstacle to the smooth functioning of the Council; in other words, a sign of failure.

¶48 The concert view sees great power disagreement as the main reason for having the Council in the first place. The Council was an institution in which great power disagreements could be aired and where great powers could stop collective action whenever they wanted to. (I am treating here the permanent five as each a great power. This convenience masks significant problems, both now and in 1945, which we could talk about.) The concert view sees disagreement among the great powers in the Council
as normal politics. This is what happens in international politics and is proving the need for the Council itself rather than as an aberration or a problem.

¶49 The second reason that it is important not to mistake the Council for a collective security system is that you get a different sense of what is a success and what is a failure of the Council. Inaction is not necessarily a failure of the Council. It may be the Council operating exactly as intended. We can have success and failure on substantive problems, so a failure to resolve a particular crisis may be of concern to us.

¶50 But, I think that needs to be kept distinct from our assessment of success and failure of the Council in its operation as designed in the Charter. In other words, we need to lower our expectations to accurately recognize the powers and limits of the Council. And most generally then, this affects how you think about what to expect.

¶51 We cannot expect the Council to regulate the great powers. That is the key difference between the collective security and the compact images of the Council; when the matter is pushed to its limit, the Council does not regulate great powers. It is instead a hierarchical security system that binds the small states, but only binds the great powers when they consent. It is fundamentally unequal.

¶52 In thinking about the High-Level Panel Report, there is nothing in there that would change this basic structure. That is neither praise nor criticism, but it is worth noting that the ability to protect remains subordinate to the veto and therefore to the great power compact nature of the whole operation.

¶53 So what are we to make then of the behavior of a number of states and the writing of a number of publicists who subscribe to this grander but mistaken expectation of what the council is for? They may be legally unfounded but the Iraq episode shows that they are quite widespread in the system. For that reason their influence must be taken into account when assessing the role of the Council. Some of the more famous critics of the Council over Iraq suggested that the Council failed because it did not support the US action and therefore, that the Council demonstrated its irrelevance.

¶54 I do not want to be mistaken to be saying that the Council is irrelevant because it is not legally binding on great powers. The latter is true, but the former is not. The Iraq episode demonstrated the degree to which a number of states are willing to act on these legally unfounded expectations for collective security. The smart hegemon, the prudent great power, needs to take into account these higher expectations because they will affect how other states react to hegemonic behavior. This is an informal kind of power. It may be an indirect route by which you get to the legally unfounded higher expectations. It is not part of the Charter but it is part of practice.

¶55 So where do we go from here? I suggest two possible paths.

¶56 First, we could decide that we really do want collective security and we are willing to make new international organizations to enact it. This would not be an evolution of the Council; it would be directly counter to what the Council has always been. We may well still want to do it. It would be instructive of course to remember the history of negotiating the Charter in order to appreciate the difficulties in taking that path.

¶57 The other way to go is simply accept what the Charter has created and lower our expectations about what the Council is for. This does not mean abandoning the effort to use the Council to influence great powers but it does mean thinking more about indirect ways of doing so.

¶58 So I am not suggesting that this is in any sense a critique of the Council.
Rather, if we are interested in a rules-based system, we should pay serious attention to what the rules actually are. What are the legal obligations on the great powers in the Charter? We might be able to rescue the Council from some unrealistic expectations and, therefore, from some unfounded criticism.

And it gives us a new appreciation, I think, for the informal legitimizing power of these norms percolating below the surface. Thanks.

**JAN WOUTERS:**

Ladies and gentlemen, we had interesting reflections and comments from an international law from the political science perspective.

We are looking forward to the comments of our third panel member, Joshua Muravchik, who is the resident scholar at the American Enterprise Institute and whose recent essay in the case against the United Nations has not gone unnoticed.

**JOSHUA MURAVCHIK:**

Thank you very much.

First, especially I would like to express my thanks to Doug Cassel and his assistant Dhana-Marie Branton and the others. I found this to be as well and carefully prepared a conference as I have participated in in some time and it makes it a special pleasure to be here.

I want to, however, take exception to one point in Doug’s setting of the framework this morning. The intellectual framework for our discourse in which he said we are meeting at a time of America’s maximum power. I find that unduly pessimistic.

I think that the High-Level Panel deserves to be saluted for facing up to several of the troubling aspects of the record of the UN and I am going to talk about four in particular.

The first is the UN’s rather notorious bureaucratic inefficiency. This is present in more subtle statements in the section of the report that deals with the Secretariat. When briefing the press, Panel members, without allowing their names to be used, referred to deadwood as a problem for the UN, and the report contains a proposal for a one-time buy-out of the contracts or tenure of this deadwood.

The second area to which the report faced up boldly was the record of the Commission on Human Rights, which it said has become an embarrassment to the UN, which is amply true. The Commission on Human Rights, as the report noted without

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Article 47 and the accompanying articles is a real failure of responsibility on the part of the Panel.

**JAN WOUTERS:**

Thank you. Thank you very much. Ladies and gentlemen we have, I think, a rich variety of comments from experts. I would like to thank our distinguished panel members for the insights they have shared with us.