The EC and the New United Nations

Rosalyn Higgins

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Professor Rosalyn Higgins *

1. Introduction

There has always been the potential for a certain structural relationship between the Community and the United Nations, but until recently this has been neither particularly great nor noticeable. Chapter Eight of the United Nations Charter envisages the possibility of the United Nations calling upon regional agencies to assist in the performance of some of its tasks, most notably those relating to the settlement of disputes. The Charter envisages that there may be certain circumstances where that would be most appropriately done by a regional agency. However, the EC is not a regional agency in the accepted sense of the Charter term. Its areas of

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competence, or at least those that before Maastricht were assumed to be its areas of competence, did not seem such that it might have been envisaged that a relationship between the United Nations and the EC under Chapter Eight would be built up. The major spheres of competence of the Community, relating to the economic and trade sectors, were not those most likely to give rise to problems relating to settlements of disputes of a character that might threaten peace. It is only in very recent times that this relationship has started to come to the fore in a rather interesting way.

Over the years, the Community has tried to widen the areas of common policy, with its very pronounced recent emphasis on foreign policy. Being built on a somewhat uncertain legal basis I note it as a political phenomenon with some interest. These developments are occurring at the same time as tremendous changes within the United Nations, prompted by the end of the Cold War. The Security Council has been afforded great possibilities in terms of what that organ may now at last possibly be able to do. These possibilities are being matched with the horrors of the disintegration of Eastern Europe and the widespread human rights abuses throughout the former Yugoslavia and also in significant areas of the former Soviet Union. There is a considerable interest in human rights abuses in other areas of the world too. These events focus the agenda at the moment on two big questions: how should the UN respond, and how in turn should the European Community respond within the United Nations?
The most pressing issues currently before the United Nations can be broken down into the following categories: First, the question of the use of force by the United Nations; secondly, the question of regional groupings and the UN; third, questions of financing; fourth, questions of human rights; and fifth, questions of restructuring, including, of course, the issue of the permanent membership of the Security Council.

Before addressing these issues, it may be useful to say a preliminary word on how the input from the EC into the United Nations actually works, because this relationship is often not very well understood outside, and indeed, it is not very visible. There is now a tremendous day by day effort to coordinate policy, and wherever possible, actually to have a common EC policy to present to the United Nations.

2. EC Representation

A central point is that the Twelve are not only members of the EC but they are also part of what is called the Western Europe and Other Group (WEOG), 'other' covering such anomalies as New Zealand and Australia, countries that are in a broad political sense thought to be comparable. Thus, the EC member states are both a separate grouping within the United Nations and also part of WEOG Group. At Geneva, both of those groups are active lobbying groups, where policy is coordinated and cleared, before any of the major issues are discussed within the UN. But, at the UN in New York there is only an EC Group, for historic reasons. Thus, on those issues that are
dealt with in New York, rather than Geneva, the EC is particularly powerful and important at the moment. Speeches are given within the UN on behalf of the EC by whoever is the presidency-country at a given moment in time, in respect of the areas of common competence. That includes all the areas covered by the Treaty, of course, and also EC areas outside of the original treaty where there is a common policy. In these cases, too, the EC Presidency will speak on behalf of the EC as a whole. Maastricht now codifies this practice in part. Of course, as the areas of common policy grow, there are within the UN more and more EC speeches which get longer and longer, and which other countries find more and more boring. There is undoubtedly also an element, it has to be said, of lowest common denominator in the putting together of these speeches, as the subject area broadens.

In the human rights area, about which more will be said later, there is a fully integrated policy across the European Community, both within the main political organs, such as the Human Rights Commission, and in the Third Committee of the United Nations.

In other areas, there are subject group meetings on all geographical and regional area topics within the UN, for example the Middle East, and also on the UN thematic issues, for example, peace-keeping. The groups meet regularly in Brussels under the chairmanship of the Presidency. They produce resolutions which go up to the Political Committee. Those are in turn approved by the political directors of the twelve, and it then becomes settled as EC policy. At that
juncture the speeches start to be drawn up for the input into the United Nations. Where there is no joint EC statement made in the UN, it has now become rather striking that there is no common view and policy. That, in itself, has become politically important, and great efforts are therefore made to try and produce joint statements. Sometimes it is found necessary for problematic parts of speeches to revert to the common language of previous years. As a result, the speeches are not always highly regarded and often attract a small audience. Nonetheless, the texts are always sought, because it is known that the will have been so formulated that they do represent a serious commitment to the policies on the part of the countries concerned.

3. The Use of Force by the UN

Against that background, it is possible to address the question of the use of force by the UN, one of the big issues under discussion today. It would be useful to begin with a word about peace-keeping. Chapter Seven of the Charter provides for the application of enforcement measures, including the military use of force under Article 42. It also provides that standing arrangements for such measures were to have been concluded between the Security Council and UN members under Article 43, but because of the Cold War, it was never possible to proceed to those Article 43 arrangements. Instead, the UN proceeded over Soviet opposition to a different type of military action, namely one that was not dependent
upon those agreements. It was thus that the concept of peace-keeping was born, first employed in its current form after the UK-French intervention in Suez in 1956.¹ That type of deployment, the deployment of peace-keeping forces, has two key elements: one is that forces are sent at the consent of the recipient state; and the second key element is that states volunteer, but may not be compelled, to contribute forces. No state can be made to participate in a peace-keeping action. Over the years there have been many such peace-keeping activities, some more successful than others.

In the earlier years, it was axiomatic that the big powers should not participate. Indeed, the whole purpose of peace-keeping was to remove the big powers from the arena. Thus, UNEF in the Middle East, or ONUC in the Congo, or UNOGIL in Lebanon, were exactly directed to insulate those areas from big power intervention.² In later years, some flexibility was introduced, allowing the UK to play an important part in UNFICYP in Cyprus,³ and France to contribute to the new UN force in Lebanon.⁴ Many EC countries have participated in UN peace-keeping activities over the years, with some countries, including Italy and the Netherlands somewhat more recently,

² For enabling resolutions see General Assembly Resolution 1000 (ES-I) (1956) and Security Council Resolutions S/4387 (1960) and S/4022 (1958).
playing very important parts. It is important to remember that the basic task of the peace-keeping force is to secure a cease-fire with the agreement of the contending parties and to oversee their withdrawal to the line ordered by the Security Council. Other subsequent events often do require that additional tasks are then added to the original mandate. Humanitarian functions have been added, helping convoys pass safely through and making sure that crops can be cultivated, medicine be distributed etc. Securing an agreed cease-fire, with some humanitarian tasks added, would describe the classic peace-keeping operation still in existence today: UNJSO in Jerusalem, UNMOGIP in India-Pakistan, UNFICYP in Cyprus, UNDOF in Israel-Syria demarcation area, INIFIL in Lebanon.5 However, in many of the newer paramilitary activities, the basic prerequisite of securing an agreed ceasefire seems to have been lost sight of. It appears that the ancillary functions have become predominant, or indeed, even the sole function. Thus the securing of human rights was integral to the maintenance of the ceasefire by the UN operation in El Salvador. The purpose of the operation UNTAC in Cambodia6 was to support nation building. In the former Yugoslavia, where the members of the Security Council have simply accepted the violence and the unlawfulness of the various parties as a fact to be lived with, the peace-keeping provided there has been limited to the provision of

humanitarian aid without a ceasefire being either agreed or seriously sought. This will be addressed later, but it is important to note that the EC has accepted this degradation of the peace-keeping role of the United Nations.

So far as the contributions to the peace-keeping are concerned, the United Kingdom particularly recently has explained a great deal of its policy on the ground that one or two nations are really carrying all the burden in international peace today, and cannot be expected to do everything. I believe that image is one that is very far from reality. Using UNPROFOR,\(^7\) the UN force in Bosnia Herzegovina as an example, there were in April 1993 22,600 persons serving there. The United States has only 390 persons committed there, outside of those especially assigned to the airdrop activities, which increases the number somewhat. The United Kingdom has just under 3,000 persons committed. France has 4,700; those are heavy and impressive commitments. However, it is less well known that Canada has 2,300 persons serving there; Denmark over 1,000; the Russian Federation 900; Jordan, Nepal, Poland, Spain, Belgium all contributions of about the same size. Large contributions come also from the Netherlands and Nigeria. In fact, there are some 32 states participating in that operation. The EC countries make a significant contribution to the thirteen UN peacekeeping operations currently under way. But many other states, one would have thought less well able to contribute, manage to do so as well.

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Bangladesh has 1,100 persons helping in Cambodia, Ghana has 2,000 split over two operations, Malaysia and India both have large contributions. Thus the arguments of burden sharing which one hears about are not very impressive.

4. Enforcing the Peace

It would now be appropriate to address enforcing the peace, which of course is different from peace-keeping. The collapse of communism has made it possible, at least in theory, for the United Nations to move towards the collective security system envisaged under the Charter, whereby military sanctions can, if necessary, be ordered against an aggressor state. There have, however, turned out to be prodigious problems in achieving this. The major contributors, the United States, the United Kingdom and France, believe that militarily a single national command under UN authorisation, that is to say, the model that we saw in the Gulf, is preferable to an integrated United Nations command. They believe that political control is better retained by a general authorisation by the Security Council to take necessary measures to secure a specified end, with a limited number of like-minded states participating. That was the pattern set by the coalition forces in the Gulf authorised by the Security Council, but carried out

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8 For a useful compendium of statistical information, see Memorandum submitted by the Foreign and Commonwealth Office to the Foreign Affairs Committee, 27 Oct. 1992, Minutes of Evidence, Annex A.
under US command. This model undoubtedly has its advantages, but it has its limitations too. It necessarily entails the responsibility heavily falling upon a few states, and because states are now beginning to feel so heavily stretched, they are very reluctant to fill that role. They insist that they should not get sucked into military activities that they cannot foresee with any certainty, which may endanger their forces and which do not represent a major national interest. However, the wider community interests in maintaining peace, and not rewarding violent breaches of international law, would seem to require that the ability of the United Nations to respond is decoupled from short-term considerations of national interest. Collective security under Chapter Seven of the UN Charter was never meant to be dependent upon states' perceptions of where their national interests lie, and it is only by ensuring that forces are pre-committed to such action, if and when the Security Council determines the need for it, that there can be effective collective security through military enforcement.9 The burden needs here too to be shared, although the permanent members, and of course, the sole super power at the present time, will necessarily have a major responsibility. Logic points to serious examination of moving to put into place the standby and pre-commitment arrangements, which the UN was intended at the outset to have through Article 43. Again, there would not seem to be

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9 See more detailed commentary on collective security in Memorandum submitted by Professor Rosalyn Higgins QC to the Foreign Affairs Committee, 17 Feb. 1993, Minutes of Evidence, p.178.
enthusiasm for that within the EC. The reality is that to lessen and share the burden is also to lose the ability to control.

A further point meriting attention is the great debate going on within the United Nations about the circumstances in which sanctions should be used in the future. Should they only be used for massive incursions across state boundaries, as occurred in the Iraqi invasion of Kuwait, or should they be used more broadly for violations of international law? How appropriate is it, for example, to engage UN sanctions for actions like the refusal of Libya to give up the persons said to have been engaged in terrorism against the French UTA aircraft, and the Pan-Am American flight which was blown up over Scotland?

A finding of a threat to the peace, or a breach of the peace, or an act of aggression, is a pre-requisite for sanctions under Chapter Seven. Should the finding of a threat to the peace be used in such situations as the Lockerbie case in order to trigger the possibility of mounting sanctions, or should it be reserved just for these trans-state boundary invasions, something that we can clearly recognise as an invasion?

It would be cleaner and simpler to maintain that economic and military enforcement should only be taken against trans-frontier aggression. My view is that nonetheless that is not what the Charter provides. It does envisage sanctions to

restore international peace and it gives the Security Council a non-reviewable competence to decide what constitutes disturbing international peace. I think the Security Council should maintain that competence, but the important thing is for it to be used carefully and even-handedly.

5. The "New" Security Council

The Security Council now, in the new era at the United Nations, has moved away from the old practice of long public sessions in which states harangued each other, exchanging accusations and counter-charges. The new practice is for the permanent members of meet in private, quite often even away from the UN building, and to exchange views and to begin to identify the possible ways forward. Draft resolutions will follow, and then the non-permanent members are brought into the dialogue to see what would be acceptable to them, and eventually there emerges a resolution acceptable to all, or nearly all. This new practice seems in almost every way better than what went before, the 45 often sterile years. But there is undoubtedly a groundswell of unease within the United Nations, which goes to procedure and to substance. States complain that the Security Council is in effect being by-passed and that the decisions are really those of the United States, France and the United Kingdom, creating a problem about how the Security Council functions, what it chooses to address, and what problems it does not choose to concern itself with. Third World countries feel that they are excluded significantly from
the decision-making process, and it seems that the rest of the EC feels this as well. Within the Security Council, the United Kingdom and France do not speak for the EC as a whole. There have been attempts to use the permanent member seats as an opportunity to speak for the EC as a whole, but that has for the moment been resisted by France and the United Kingdom, which assert that they sit in the Security Council as individual permanent members, and that it is not the appropriate place or location for them to speak for the Twelve. There is thus a bifurcation of EC policy, as it affects issues within the Security Council, with the United Kingdom and France being perceived as being rather close to the United States, for good or bad.

6. Former Yugoslavia

It would be useful to consider the situation in the former Yugoslavia, following on from these comments. Faced with the events there, the United Nations has really had an option as to which type of response it should mount, and so far it has clearly selected peacekeeping over enforcement. I have been convinced from the outset that this is an inappropriate selection of instrumentality and doomed to failure. I believe that the mandate and functions given to UNPROFOR in Bosnia Herzegovina are fundamentally flawed for two reasons.\textsuperscript{11} I do

not speak of UNPROFOR’s functions in Macedonia and Croatia, by the way, which are rooted in proper peacekeeping.

It is being required to engage in tasks that, as mentioned earlier, have sometimes been ancillary to peacekeeping, but have never been demanded of a UN force in the absence of peacekeeping. Furthermore, UNPROFOR has been given a totally unrealistic mandate. In Resolution 743 it was given patrolling functions, then in 761 there was added the securing of Sarajevo airport, and the safe movement of humanitarian aid, and later still, in 776, it was authorised to support the efforts of the High Commissioner for Refugees in the delivering of humanitarian relief. The only true peacekeeping function assigned to it has been the call in Resolution 781 to monitor compliance on the ban on military flights. That was given to it in October 1992 and it is only now beginning to act upon that. All that time it has been doing other things. Not only is there no cease-fire in place, but the illegal hostilities continue to rage, and the reality is that the UN has chosen to respond to major unlawful violence, not by stopping the violence, but by trying to provide relief to the suffering. The limitations on the UNPROFOR force are an incentive for certain elements to block even that limited objective of its humanitarian mandate. For the first time in UN history, we now see UN forces being deliberately fired on and relief supplies being stopped. What was unthinkable five years ago is now a commonplace. The fighting which brings all the suffering continues unabated. The need for humanitarian assistance will thus continue indefinitely. The cause of the suffering is not addressed, which fact encourages Bosnian-Serb resistance even to the palliative
measures. The EC countries along with most of the rest of the UN community has supported this policy. It has been said that military enforcement would jeopardise the lives of those serving UNPROFOR. I find it hard to believe that it is a serious response to say that enforcement measures may not be undertaken because that would put at risk another form of action that, in any event, was the wrong one for the job. It is also asserted that this is essentially a civil war, in which we should not get involved. If it is essentially a civil war, the UN would not normally be involved at all, whether through peacekeeping or enforcement. However, by recognising Croatia prematurely, under a certain German pressure, the EC countries have actively assisted in transforming the matter from an internal war to an international war. Croatia, and in turn Bosnia, were recognised as independent at times when they manifestly did not fulfil the criteria of statehood, criteria that the EC countries previously have always insisted upon for recognition. They were not at that time in effective control of their own territory, and that premature recognition has been an unfortunate exemplar for a common EC foreign policy. But that having been done, it ill behoves us to characterise the ensuing events as civil strife.

The way in which the action has been handled as a matter of decision making has also been extremely unfortunate. When the federal army moved into Slovenia in 1991 to assert federal authority, there was an immediate response from the European Community. Many reasons were suggested for this. The Community wished to exorcise the ghost of EC indecision and EC inaction during the Gulf conflict, and it wished to show
its independence of decision making. The Italian foreign minister, De Michelis, was at pains to tell the press that Washington and Moscow were informed but not consulted about the mission to Yugoslavia of three EC foreign ministers, and he suggested that this demonstrated that the EC has "its own rapid reaction force". The events offered some members the vehicle for a desired common foreign policy. Further, Germany, its two parts having recently been reunited, supported those such as Croatia claiming the right to self-determination, and the Community wanted to offer itself to the various parties in the new integrated wider Europe that it saw on the horizon.¹² Now, all of these reasons are understandable, but nearly all of them are based on the considerations of the internal politics of the EC, or its member states, rather than on an objective and rational appreciation of what tasks are best performed by which institution.

The United Nations certainly anticipates a possible role for regional organisations, and from the perspective of the UN, the parties to the conflict could certainly have turned to the EC as a regional arrangement.¹³ But in fact, the initial EC conditions for a solution were attractive to none of the parties. It stipulated federal unity and democracy. Serbia wished for


¹³ See Article 33 of the Charter which deals with peaceful settlement of disputes and includes in its list of methods 'resort to regional agencies or arrangements'.

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federal unity without democracy; Slovenia and Croatia, democracy outside of a federal Yugoslavia, and Germany led the move away from an attempt to hold the disintegrating state together. The EC imposed an embargo on arms and military equipment to the entirety of Yugoslavia,\textsuperscript{14} and then itself began to act within the wider CSCE framework. At this point it is less clear under what constitutional authority of its own the EC was now in fact acting. When it was apparent that monitoring on the ground would be essential, the EC turned to the CSCE, and some success was achieved by the EC and the CSCE in establishing peace in Slovenia. The CSCE had some capacity within its conflict prevention centre to provide outside observers, and there began an extraordinary period whereby an observer mission was established by the EC and ratified by the CSCE. That mission was to implement a cease-fire in Slovenia, but was later enlarged to monitor the cease-fire being brokered in Croatia.

Still looking for a non-UN solution, there began the extraordinary talk of an EC 'intervention force'. Again, it is unclear on what basis it was thought appropriate for the EC to contemplate so acting. If its purported common foreign policy was of uncertain status, it is clear that it had no defence structures. Driven, in my view, by pretensions in the areas of foreign policy and defence, it began to be suggested that this intervention capacity would be provided by the Western European Union (WEU). France spoke of the WEU as the

\textsuperscript{14} Gow and Freedman, supra, p.103.
"military arm" of the Community, ready to move in when ordered, but the WEU had no forces and no command structure.\textsuperscript{15} This posturing by agencies without the constitutional mandate or experience or structure to address the problems at hand has been deeply damaging, and has encouraged Serbia to believe, rightly, that it could do exactly as it wished, including bombardment along the Croatian coast. In due course, of course, there have been tremendous and sustained efforts at peace brokering. These have been pursued by Lord Owen, succeeding Lord Carrington, on behalf of the Community, working hand in hand with Cyrus Vance, in turn succeeded by Thomas Stoltenberg, on behalf of the United Nations.\textsuperscript{16} EC policy making, and possible NATO involvement, may add yet more to the fragmentation on decision making in this area. The Owen-Vance/Stoltenberg proposals have faced endless difficulties.

7. Permanent Membership of the Security Council

It would be useful to conclude with a few words about the question of permanent membership of the Security Council. The United Kingdom and France now feel under pressure in a way that they never have done before. Almost the first thing President Clinton said on becoming president was that the

\textsuperscript{15} Ibid., p.113.

question of the permanent membership of the Security Council might need to be reviewed. As I have said before, the UK and France speak in that body on behalf of themselves, and not the EC. In addition the Security Council usually has on it a further European non-permanent member at any given moment of time. Were Germany now to come in as a new permanent member, which is widely spoken about, the result would be a very Western European-heavy Security Council. The only way in which such an imbalance could be avoided would be by significantly enlarging the Security Council. It is felt by many, probably correctly, that the new efficacy of the Security Council would be significantly diminished as a result. Of course, there are other possible scenarios. One of those envisages a rotating EC permanent member seat. The other provides that Germany would replace, and not be added to the United Kingdom and France.

The matter will not be resolved by the use of the veto by the United Kingdom and France. At the end of the day, having the formal power to veto is unlikely to be what determines the issue. There are many examples in today's world of prodigious power becoming incapacitated because of the psychological and political inability to use it. One could certainly envisage over the next five years or so the United Kingdom and France being unable to cast a veto for proposed changes if, for example, the United States lined up with others to encourage them in urging that their own position should be reconsidered. There are many possible variables. Japan is also widely spoken of as an appropriate candidate, and Japan and Germany share two common elements. One is that they both have been extremely
important economic powers whose moment is likely to come again in that field rather soon, but each of whom is going through certain difficulties in the economic sector. The other aspect they have in common are the constitutional limitations on the use of force outside of their own boundaries. It is greatly debated as to whether, although powerful and important, it is appropriate for them to be on the Security Council if they are not able to play their part and commit themselves in the way that other EC and, indeed, Third World countries have done, to either the UN peacekeeping or military operations. The Constitutional Court in Germany has recently indicated that it is acceptable for German personnel to serve on the monitoring planes in the no-fly zones. That is a significant point of departure, and there are obviously major political and constitutional debates going on in both countries. There is a general desire in the UN (which I do not share) that the necessary changes should be made to the German and Japanese constitutions, to allow them to participate more fully in burden sharing and a restructured Security Council.17

While I can understand the pressures for a restructured Security Council I retain certain anxieties about the resumption of military power by such preponderantly economically powerful states, at a time when the economic power of the United States is declining. There are very significant implications in such a policy.

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