

# Thinking About the Structural Context of International Dispute Resolution

John Braithwaite<sup>1</sup>

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The premise of this paper is that it is desirable to seek a world where nations regard it as always morally unacceptable and politically unwise to resolve a dispute by attacking another nation. The fondest hope of peace-loving people for the United Nations has always been that it will advance this objective by resolving international disputes through negotiation and diplomacy rather than war.

Yet, being realistic, the political capacity of the United Nations to resolve disputes is limited in a world of great power politics, a world in which it can be difficult to prevent expansionist military regimes from causing great suffering. The Secretary-General of the United Nations is very substantially, though far from totally, a servant of the great powers. She must avoid the veto of the great powers before she is elected to that office. Once elected, to be effective she must retain the support of the great powers.

Internationalists can piously hope for a "new world order" where the United Nations will act against any nation that invades another. Yet it is a fact of life that in any possible order, new or old, if a great power supports the invasion, even tacitly, as in the US attitude to the Indonesian invasion of East Timor, then effective UN action is extremely difficult. The reaction of many on the left to this political reality is to say that the only world order that is possible is one where the great powers are policemen, and at this particular point in history this means that one nation, the United States, will be the policeman. Hegemony of American interests is the only world order on offer. The Gulf War can certainly be interpreted as support for this view.

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<sup>1</sup> John Braithwaite is a Professorial Fellow in Law at the Australian National University.

## THE CONTEXT OF INTERNATIONAL DISPUTE RESOLUTION

However, the story of the Gulf War can also be read as showing how in the post-Vietnam, post-Afghanistan world, to sustain a major war a great power is dependent on a broad base of support from the international community. And most crucially it desperately wants legitimization from the United Nations.

Senator Evans made this point well in his contribution to this volume. As he says, UN legitimation of the Gulf operation was important during that close vote in the US Senate. But having relied so heavily on UN legitimation for this act of war, the United States has made an interesting bed for itself to lie in. Senator Evans thinks that invasions of other nations by clear aggressors of the Iraqi ilk cannot be expected to be a common occurrence. It was an unusual case in the context of the last fifty years of human history. What will probably not be so unusual are aggressive infringements of the territory of other nations by the United States, because this is very much a pattern of recent history — Panama, the bombing of Libya, Grenada, Cambodia.

Defenders of the Gulf War say that a positive consequence of it has been some improvement in the deterrent power of collective security arrangements against blatant aggressors of the Saddam Hussein stamp. This is true up to a point. What is also true, however, is that the Gulf War has eroded the political disincentives impinging on the United States to pursue its interests through war. If a post-Vietnam America can countenance the misguided adventures in Grenada, Libya and Panama in quick historical succession, then what is a post-Kuwait America capable of? Perhaps the answer is what pre-Vietnam America was capable of — such as the crushing of democracy in Guatemala through the force of arms when a social democratic government threatened American business interests. But then perhaps not. Having relied so heavily on UN legitimation for the war in the Gulf, perhaps the United States will find in future that its own people will be suspicious of warmongering by the United States which does not have UN support.

The next Panama will not be so easy for the US leadership. The strategic opportunity for the United Nations is to exploit the post-Gulf interdependence between the United States and the organisation to make the next Panama harder. So, it seems that the UN potential for peace-making resides in two possibilities:

## WHOSE NEW WORLD ORDER

1. When there is a consensus in the United Nations that a particular act of aggression must be dissuaded or deterred, the organisation can influence events by legitimating the actions of great powers that insist on negotiation at pain of police action.
2. Obversely, the UN can influence events by delegitimizing the threatened police action of a great power.

If the realistic way of preventing one nation from invading another is for a great power to threaten to use its might to block such an act of aggression, then the United Nations ought to be in the business of legitimating such threats. But, if a great power seeks to block another nation's act of aggression by an excessive or indefensible use of force of its own, then the United Nations should delegitimize that use of force in a way that may foment internal dissent within the great power.

The question then becomes what ought to be the philosophy in seeking to persuade the UN community to be an effective peace-maker within a realistic framework of great power authority. There is an argument to be made for the value of the United Nations legitimating superpower deterrent threats against aggressors; a pacifist United Nations would increase the frequency of wars. However, the organisation should pressure the superpowers into far greater reluctance to consummate threats of military action than has been their wont in recent history. The United Nations might achieve the latter by developing the international community's capacity to make progress with preventive measures that stop short of military options. Connie Peck in her contribution to this volume is absolutely right in thinking that the most effective preventative diplomacy occurs long before conflicts reach the point where military solutions are an option. A model used in the context of a different regulatory arena is the enforcement pyramid.<sup>2</sup>

Figure 1 is an illustrative enforcement pyramid. Illustrative because the greatest challenge is posed by the need to come up with

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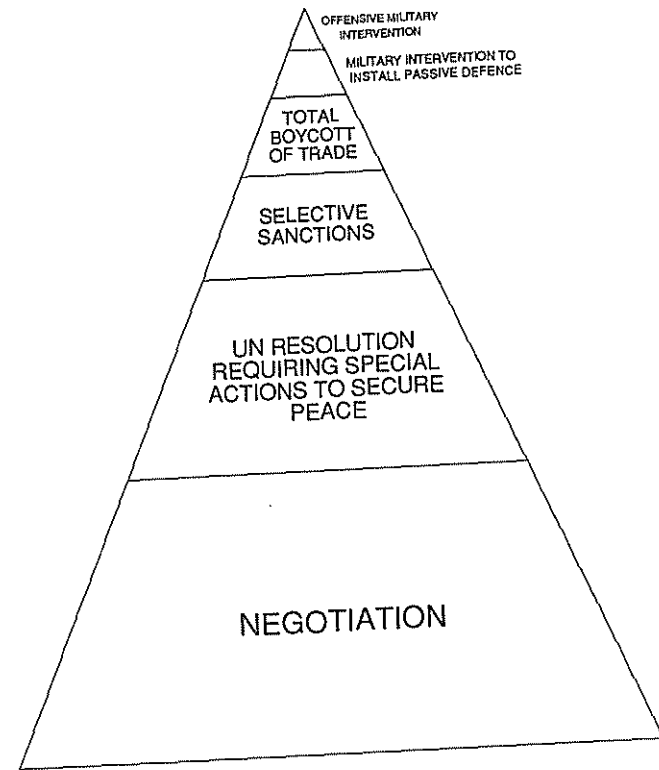


Figure 1: Illustration of an enforcement pyramid the UN Secretary General might display to one nation that is contemplating the invasion of another.

more sophisticated pyramids than this rather simple one. The real challenge is to elaborate a hierarchy of negotiation strategies at the bottom end of such a pyramid. This is the context within which to locate Connie Peck's analysis. For the moment, however, the focus should be on the form of the pyramid rather than its content. The idea is that the clear signalling of the willingness to escalate intervention if negotiation fails improves the likelihood that negotiation will succeed. The superpower operating within this imaginary pyramid signals that its preference is for a negotiated solution and that all its energies will be initially directed at a negotiated settlement to avoid war. However, if this fails, it will seek support for UN condemnation of the aggressor. If this fails, it will seek support for selective UN sanctions, and so on up to UN support for offensive military intervention.

<sup>2</sup> I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*. (New York and Oxford, Oxford University Press, forthcoming).

The theory of the enforcement pyramid is that the clear signalling of willingness to escalate international intervention, should lesser interventions fail, will motivate the parties to make diplomacy work at the base of the pyramid. The policy objective, according to this model, is to strive to broaden the base of the pyramid by having a higher and higher proportion of international disputes dealt with by negotiation at the base of the pyramid; it is not the unrealistic objective of having all of the action occur at the base of the pyramid. The paradox of pacifism is that if the top of the enforcement pyramid is lopped off, if the attempt is to negotiate from a position of weakness, then there is actually a lessened capacity to channel dispute settlement into the diplomatic arena at the base of the pyramid. Lop the top off the enforcement pyramid and the world is left exposed to the predations of a twenty-first century Hitler.

The ideas in Connie Peck's paper represent precisely the sort of work that should be given the highest priority. However, she may not be completely right in thinking that power-based negotiation destroys the climate for the interest-based reconciliation she favours. And even if she is right, reconciliation of major international disputes divorced from a realistic analysis of great power hegemony is a dim prospect, as Senator Evans clearly implied in his analysis. I would hypothesise that in those cases where the United Nations could credibly threaten, with the support of great powers (or great powers, with the support of the United Nations), an enforcement pyramid like Figure 1, nations will almost invariably choose to head off escalation up the pyramid by engaging in interest-based negotiation. Far from power politics destroying the climate for interest-based negotiation, it can create that climate through a pyramid which channels disputes downwards to the base where negotiated reconciliation prevails. A United Nations that carries a big stick, or has others carry the stick for it, can speak more softly.<sup>3</sup> Furthermore, through orchestrating a credible semblance of collective security, the United Nations might replace an imbalance of power with a balance that motivates the sort of interest-based negotiation that Peck favours.

It is pie-in-the-sky to think that interest-based negotiation can occur in any structural context other than that framed by great power hegemony. Indeed, the very fact of who gets a seat at the negotiating

<sup>3</sup> "Speak softly and carry a big stick", Theodore Roosevelt, Speech at Minnesota State Fair, 2 September 1901.

table is a function of political power. However, having used an enforcement pyramid and/or the capacity of collective security to replace an imbalance with a balance of power, the business of structuring actual negotiating sessions around the interest-based negotiation principles advocated by Peck can go on. That is, professional conciliators are enabled to structure negotiation in ways that prevent power assertion tactics from destroying the social conditions for successful interest-based negotiation. Indeed it could be argued in the domain of business regulation that negotiation in the shadow of big guns may be more productive than either negotiation where the parties are threatening each other with their guns or negotiations where their guns cast no shadow.<sup>4</sup> The trick is to keep deterrent threats right out of the foreground of negotiation to ensure that the parties work constructively on how to satisfy each others' interests, yet to have deterrence in the background motivating them with a reminder of the consequences of failed negotiation. Deterrence has maximum power when it stays in the background in this way — threatening but never threatened.

The enforcement pyramid might not seem to be a bad description of what the United States did, with the backing of UN legitimacy, in the Gulf War. My view, however, is that it was a deeply flawed application of this strategy in three ways:

1. Seemingly in part due to the incompetence of the US Ambassador to Iraq, the United States did not prior to the invasion of Kuwait clearly signal an enforcement pyramid. It did not signal clearly to Iraq that it was willing to escalate intervention right up to the point of a counter-invasion to prevent an invasion of Kuwait. The Iraqis did not have their hopes decisively shattered for an East Timor scenario — where the United States would piously condemn the invasion in the United Nations while sitting on its hands.
2. Having jettisoned its initial posture of appeasement toward its old ally, the United States over-reacted in the other direction by escalating far too quickly through its enforcement pyramid. For example, on its own advice from General Powell and others, five months was not long enough for the naval blockade to cripple the Iraqi economy.

<sup>4</sup> Ayres and Braithwaite, *supra* note 2, Chapter 2.

3. The United States never signalled a willingness to negotiate de-escalation down its enforcement pyramid. A pause in the air war or even a holding back on escalation to the ground war were options that were ruled out by the United States.

In practice, then, the US response amounted to a precipitate transition from appeasement to all-out commitment to war rather than the astute deployment of an enforcement pyramid. The ruling out of de-escalation led to a policy which was stupid, immoral and arguably criminal. The latter may seem a provocative claim. One perspective is that while it is a defence of shooting a man to point out that he was confronting someone with a knife, it is murder to shoot him in the back after he says "I give up" and turns around to walk away, even if he walks away with the knife still in his hand.<sup>5</sup> The policy of slaughtering the retreating Iraqi army was stupid because it was motivated by an explicit US policy of humiliating Saddam Hussein. "Humiliation is the name of the game", said one US official on 24 February 1991. "Or to put it more positively, we want to make sure that Saddam cannot emerge as a mystical or heroic creature in the Arab world."<sup>6</sup>

It can be argued<sup>7</sup> that the psychology of popular support for violent conflict is the desire to humiliate the adversary and to avert humiliation. The problem is that the more one side succeeds in humiliating the other, the more the other seeks to prove the power of its own capacity for violence by perpetuating the cycle of humiliation. Hence the Kurds are paying the price of American success in humiliating Saddam Hussein just as they paid it after set-backs in the Iran-Iraq war, as the Jews and the occupied nations of Europe paid the price of the humiliating terms of the Versailles settlement, or as the retreating Iraqi troops and the civilian victims of the invasion of Panama paid the price of America's humiliation in Vietnam. The appeal of Saddam Hussein to his own people, to the Palestinians and so many other Arabs was explicitly an appeal to a humiliated people:

<sup>5</sup> There seem to be profoundly good reasons why the criminal law of civilised nations encourages circumspection in the use of violence in this way. If international law does not foster such circumspection, then that is a fatal error of international law.

<sup>6</sup> *The Canberra Times*, 25 February 1991.

<sup>7</sup> See, for example, J Braithwaite, "Dangerous Simplifications", *Australian Society*, March 1991, pp 32-33.

Rise up, so that the voice of right can be heard in the Arab nation. Rebel against all attempts to humiliate Mecca. Make it clear to your rulers, the emirs of oil, as they serve the foreigner; tell them the traitors there is no place for them on Arab soil after they have humiliated Arab honour and dignity (Saddam Hussein, speech of 10 August 1990).

In contrast, the world has benefited from the rejection of the policy of humiliation by the victorious allies after World War II. Japan and Germany are peaceful giants today because of the alternative policy of reintegration so evident in MacArthur's decision not to execute the Emperor of Japan (even though he was clearly a war criminal), in the Marshall plan, and in so many other acts of wisdom and restraint shown by the allied leadership after World War II. They had learnt the lessons of World War I, but today's leaders have forgotten them. The result — a Middle East that is a more seething hot-bed of resentment and unsolved problems than ever before.

When the United States refused to co-operate with the initiative negotiated by the Soviet Union for a voluntary withdrawal to prevent the needless slaughter of the ground war, it killed off the last chance for a dénouement to the conflict that laid the basis for regional reintegration. And as Dr Saikal points out elsewhere in this volume, it may have killed off prospects for Soviet support in future conflicts of this sort. When a nation nears victory in a war, it must shift its objective from winning the war to securing a just peace, to ensuring that victory in this war will not be a cause of another war (like all the previous victories in Middle East wars). Worse than clinging to the objective of a glorious victory, the Americans escalated their military objectives to deposing Saddam Hussein.

The positive aspect of the Gulf War for the United Nations, it seems, is that it legitimated a naval blockade which was a necessary escalation to show that the international community was not in appeasement mode. The tragedy of the Gulf War is that it has left the region in worse shape because the United Nations was too weak to resist precipitate and irreversible military escalation by the United States even when the Soviet Union and many other UN members were advocating more circumspection. In other words the Gulf War both enabled the United Nations to make progress in its capacity to legitimate international resistance to aggression and to lose ground in its capacity to delegitimize precipitate and excessive use of force by a superpower.

The world will be a safer place when the Secretary-General of the United Nations can sit down with the leadership of a potential aggressor to open negotiations on a diplomatic settlement to a conflict against a background where the Secretary-General can say that the consequence of a resort to force will be UN orchestration of an escalated response up an enforcement pyramid that might include sanctions, blockade and ultimately military force with the backing of a great power. Negotiation will be more effective when it ceases to be seen as appeasement from a position of international weakness. But such victories for the United Nations would be pyrrhic if they unleashed and legitimated the kind of Ramboesque performance of the Allies that was seen in the Gulf War. It is hard to say whether appeased international aggression or Ramboesque counter-aggression by the United States is the greater long-term threat to world peace.

On the latter score we should not be excessively pessimistic, however. There is no inevitability that the Secretary-General of the United Nations need be as weak and ineffectual as was the case during the Gulf Crisis. One hypothesis is that in the emerging world system the United Nations needs superpower support to be effective in dispute resolution, but that the superpowers need a degree of UN legitimation to sustain domestic support for costly wars at the end of a century where war has exacted a more terrible cost than in any other century. Without UN legitimation, superpower politicians today are vulnerable to political defeat by peace movements within their own borders during any war that becomes costly or protracted. So there is a mutual interdependence between the superpowers and the United Nations which leaves the organisation with genuine leverage over the superpowers if only the UN leadership has the courage to use it. Perhaps UN Secretaries-General should have reasonably short and non-renewable tenures to foster such courage.

A United Nations with an established track record of legitimating resistance to aggression and delegitimizing excessive or precipitate force in police actions would enjoy a stature that would enable it to engage more effectively with international disputes long before they festered into wars. The important thing is to explain what "engaging more effectively" might mean. If humiliation in one war is a fundamental cause of aggression in a later war, then positive steps must be taken by the United Nations to address the grievances of peoples who have been humiliated in war. In the Middle East, this means most fundamentally, the Palestinians. There will be no peace in the Middle

East until there is an honourable settlement to the Palestinian problem which restores pride, dignity and self-determination to the Palestinian people. Until this is done, one war of righteous vengeance will follow another.

Secondly, war can be explained by misunderstandings of the position of the other. In the Gulf War, the United States did not communicate clearly enough its determination to resist militarily, if necessary, any invasion of Kuwait. In World War I, England communicated to France its willingness to fight to defend France, but it did not communicate this to Germany until it was too late. A decisive role the United Nations can play is that of a communications broker, to clear up such misunderstandings.

In a brilliant, as yet unpublished paper, Thomas Scheff<sup>8</sup> argues that nations stumble into war by tripping over their own webs of deception. Open communication is the enemy of war. Scheff draws on Bowen's<sup>9</sup> family systems theory as a model of conflict among the family of nations. According to this model, families that disintegrate into conflict are victims of their own intentional secrecy and deception. Triangling is the key concept in the model. Two parties to a dispute seldom negotiate directly with each other. Instead, A conspires with C in secret against B. Scheff analyses the causes of World War I as a set of interlocking triangles — a web of deception that led to the assassination of Archduke Ferdinand:

Instead of negotiating directly with Germany about their dispute, France triangled with Russia, who triangled with Serbia, who triangled with the terrorist group, three interlocking triangles which excluded the three parties whose interests were connected with the outcome: Germany, Austria-Hungary and England. It is possible that not even Lord Grey [England's Foreign Minister], who conspired with the French about military co-operation against the Germans, had knowledge of the assassination plot, much less the anti-war majority [in the English cabinet]. England was as much a target of the conspiracy.

An effective UN Secretary-General operating in 1914 would have ensured that Germany was under no illusion that England would fight

8 T Scheff, "The Causes of War: A Systems Analysis", Unpublished Manuscript, University of California, Santa Barbara (1991).

9 M Bowen, *Family Therapy in Clinical Practice* (1978).

for France and that France and Russia wanted to draw Germany into an attack because they knew what Germany was unsure of — that England would send troops to defend Paris. A United Nations facilitating direct communication between England and Germany was needed. More fundamentally, what was needed was a United Nations that brought France and Germany together to negotiate over the grievances of a France that was humiliated by the defeat of the Franco-Prussian War of 1871 and that was determined to recover from Germany by any means territories it had lost in that war. Realising this, the post-World War I diplomatic community established the League of Nations. The League failed for many reasons, but fundamental among them was its failure to be realistically articulated to the facts of great power hegemony. So the challenge today is articulating idealism for peace to a United Nations that uses an interdependence with great powers to legitimate resistance to aggression, to de-legitimate excessive counter-aggression, to pierce misunderstandings based on triangles of deception within the family of nations, and to cause nations to directly confront each other with the grievances born of past humiliations.

## International Law and the Gulf War

Ivan A Shearer<sup>1</sup>

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### Back to 1945?

In some, but not all, important respects we are standing again where we were in 1945 in contemplating the UN Charter provisions on collective security and the use of force. Then, as now, there was some hope, but no assurance, that the five permanent members of the Security Council would live up to their responsibilities to make the provisions of the Charter regarding aggression work; that none of them would seek to intervene in the affairs of other states; or through the exercise of the veto seek to shield their allied or client states from the consequences of a breach of the rules prohibiting the use of force as a means of settling international disputes.

The invasion of Kuwait by Iraq on 2 August 1990 provided the first instance since the foundation of the United Nations where the collective security system established under the Charter to deal with threats to, or breaches of, the peace was seen to work to its fullest extent. The instance of Korea in 1950 was not really a precursor, because in that case the five permanent members of the Security Council were not unanimous and the Council was able to authorise the use of force to repel attacks on the south by North Korea only because of the absence from the chamber of the USSR delegation when the relevant votes were taken. This was an error of judgment which no permanent member has since repeated. The example of the oil embargo against Rhodesia — "the Beira Blockade" — in 1966 is a closer precedent since it was authorised by the Security Council without dissent, but it was limited in its aim and only the United Kingdom was authorised by the Security Council to apply force. In August 1990, by

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<sup>1</sup> Ivan Shearer is Professor of Law at the University of New South Wales. In 1991, the writer is attached to the Department of Foreign Affairs and Trade as Consultant on International Law. The views expressed above are personal to the writer and should not be taken as in any way an expression of the views of the Australian Government.