THE EVOLUTION OF THE POWERS OF THE SECRETARY-GENERAL OF THE UNITED NATIONS IN THE FIELD OF PEACEFUL SETTLEMENT OF DISPUTES

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SUMMARY

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INTRODUCTION

The purpose of this study is to analyze the evolution of the powers of the Secretary-General of the UN in the area of peaceful settlement of disputes. In order to achieve this end, we will report first of all what means to settle disputes the Secretary-General has used so far. Afterwards, we will examine both articles of the Charter of the UN dealing with the powers of the Secretary-General and the subsequent practice of the UN in dispute settlement. This examination will help us to check to what extent the prerogatives conferred upon the Secretary-General in the Charter have been enlarged by the practice of both the deliberative organs of the UN -the Security Council and the General Assembly- which are competent in dispute settlement and by the practice of the Secretary-General himself. In other words, the burden of our work in this first part of our study is analyzing whether these different means of settlement used by the Secretary-General derive from the articles of the Charter where the powers of the Secretary-General are settled upon, and how these means have been applied in the practice of the UN. Following the aforementioned analysis, we will try to advance some possible legal foundations for the Secretary-General's evolution of prerogatives in the issue of peaceful settlement. We will conclude our study with an evaluation of the risks and the political advantages of such a trend within the UN system.

1. TYPE OF ACTIVITIES PERFORMED BY THE SECRETARY-GENERAL IN THE NAME OF PEACEFUL SETTLEMENT OF DISPUTES

Art. 33 of the Charter of the UN lists some of the means available to the parties to any dispute in order to seek its peaceful solution. Art. 33 in its first paragraph explicitly admits in its final residual clause the possibility of using any peaceful means agreed upon by the parties. But art. 33 does not name the Secretary-General at all. It does not foresee his role in this field even if he is known to be a mediator, good-officer, sends fact-finding commissions, information and observation missions or deploys his quiet diplomatic efforts to achieve the peaceful settlement of disputes. In his words, he is entitled to perform all these tasks because

he is one of the principal organs of an organization whose purpose is to preserve peace.[1]

In the subsequent sections, we will analyze on what basis the Secretary-General can act in the realm of peaceful settlement of disputes. For the moment, our aim is to give a description of the kind of issues usually covered by such a broad concept when used by the Secretary-General. This is already a difficult task since his activity covers a great variety of interchangeable subject-matter depending on the characteristics and the needs of each case. Moreover, the Secretary-General is always exploring new paths towards settlement of disputes.[2]

Despite the aforementioned handicaps, a few activities can be cited conducted by the Secretary-General in the name of peaceful settlement of disputes: to provide advance warning of impeding crises, to pursue his good offices, to establish inquiries, to pursue joint initiatives with regional organizations, to mediate in disputes, to dispatch representatives, to offer proposals and confidence-building measures, to exert his quiet diplomacy, informal contacts and consultations, to express concern, to collect information as well as to set up fact-finding and survey missions.[3] All these different activities could be labeled as means used by the Secretary-General UN for peaceful settlement of disputes. This catalog is not at all exhaustive. On the contrary, it is an open list which shows us to what extent the organs of the UN and the Secretary-General himself consider the Secretary-General to have a share of responsibility for the maintenance of peace and international security. Naturally, the real scope of the activities performed by the Secretary-General in the name of dispute settlement can not be easily weighed because most of them are conducted discreetly, behind the scenes.

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1 *Introduction to the Annual Report of the Secretary-General*, 1971. UN Doc.A/8401/Add.1; *Report of the Secretary-General on the Work of the Organization*, 1985. UN Doc.A/40/1 p. 5.

2 CORDOVEZ, DIEGO: *"Strengthening United Nations Diplomacy for Peace: The Role of the Secretary-General"*, in *The United Nations and the Maintenance of International Peace and Security*, Martinus Nijhoff Publishers, 1987, p. 172.

3 All these dispute settlement activities have been extracted from two different but exhaustive lists from two authors, namely: RAMCHARAN, B. G.: *The International Law and Practice of Early-Warning and Preventive Diplomacy: The Emerging Global Watch*, Martinus Nijhoff Publishers, 1991, pp. 16-22; and PECHOTA, VRATISLAV: *"A Study of the Good Offices exercised by the United Nations Secretary-General in the Cause of Peace"*, in *Dispute Settlement through the UN*, Oceana Publications, 1977, pp. 595-598.

2. THE POWERS OF THE SECRETARY-GENERAL ACCORDING TO THE RULES OF THE ORGANIZATION

Art. 2.J of the Vienna Convention on the Law of the Treaties between States and International Organizations or between International Organizations of 1986 and art. 1.34 of the Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 1975 establish that the rules of an international organization are the constituent instruments, the decisions and resolutions of its organs, as well as the established practice of the organization. Thus, when studying the possibilities of intervention available for the Secretary-General in the realm of dispute settlement, we must take into account not only what the articles of the UN Charter say about the powers of the Secretary-General, but also how the contents of these articles have been applied and understood by the organs of the organization.

Therefore, we will first analyze articles 98 and 99 of the Charter which deal with the political powers of the Secretary-General. Secondly, we will analyze the practice of the two deliberative organs which are competent in this field, as well as the practice of the Secretary-General himself having interpreted his own powers.

2.1. Articles 98 and 99 of the UN Charter

Articles 98 and 99 of the Charter deal with the political powers of the Secretary-General. Art. 98, apart from establishing that he will act as Secretary-General in all meetings of the General Assembly, Security Council, Economic and Social Council, and Trusteeship Council, leaves open ground for delegations of power from these organs to the Secretary-General. Art. 99 allows the Secretary-General to draw to the attention of the Security Council any matter which, in his opinion, may threaten international peace and security.

As far as the first of the articles is concerned, it foresees additional powers for the Secretary-General in case other organs decide to delegate their functions to him. These functions could be, depending on the delegation, of an administrative or a political nature. Among the latter kind of delegation, we find the ones made in the field of peaceful settlement of disputes. In effect: nothing prevents the General Assembly or the Security Council from, i.e., mandating the Secretary-General to conduct fact-finding activities in a concrete case, or to exert his good offices, or to make inquiries.

In art. 99, the Secretary-General is given a power of initiative without precedence but with unforeseen consequences, a real "departure of consequence"

according to S. M. Schwebel.[4] This article concedes the Secretary-General independent powers. It gives the Secretary-General a large margin of appreciation and discretion since it confers upon him a right to decide whether a matter is likely to endanger international peace and security and whether or not to call the attention of the Security Council. All the Secretaries-General until now have assumed that if the Secretary-General is supposed to bring a matter to the attention of the Security Council, he should first of all be able to get objective information and inquire about the subject.[5] Otherwise, how could he get a correct appraisal of the situation and make a feasible recommendation to the Security Council? How is it possible to know whether the UN is facing a real threat to the peace if there is no universal criteria for judging it? In his opinion, generally agreed upon by the majority of states, art. 99 implicitly permits the Secretary-General to exert his good offices with the parties to the dispute, to send fact-finding missions, to investigate and to make consultations and diplomatic moves. According to Dag Hammarskjold, to deny such possibility to the Secretary-General would mean to remove art. 99 from the Charter.[6] It goes without saying that if, while investigating and maintaining conversations with the states involved, the parties to a dispute agree on a peaceful and adequate solution, then we are not facing a case of a threat to the peace and to the international security anymore and there is no need for the Secretary-General to invoke his powers under art. 99. Further action becomes unnecessary.

One of the main features of art. 99 is that it gives the Secretary-General a large margin of maneuver. The Secretary-General is not bound to bring to the attention of the Security Council any case, which in his opinion, may threaten international peace. It is not a duty for him to act, but a right.[7] Furthermore, he will enlarge or reduce the scope of the expression "threat to international peace and security" according to his own views, to his own personality and perception about the UN.

Nevertheless, art. 99 has seldom been invoked by the Secretary-General. All the Secretaries-General have preferred to make an "invisible use" of art. 99 instead of publicly and formally stating that they were drawing the attention of the Security Council *ex* art. 99. The reasons for this avoidance are the unintended consequences of art. 99 and the political risks of convoking the Security Council. When the

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4 SCHWEBEL, S. M.: *"The Origins and Development of Article 99 of the Charter"*, BYBIL, vol. XXVIII, 1951, p. 372.

5 *Report of the Secretary-General on the Work of the Organization*, 1989. UN Doc. A/44/Add.1.

6 *Official Records of the General Assembly*, 15th session, 5th Committee, 768th meeting, Paragraphs 12-14.

7 UNCIO, *Documents*, vol. 7 Committee I/2, 17th meeting, pp. 162-3.

Secretary-General brings to the attention of the Security Council a matter on the grounds of art. 99 of the Charter, he is already manifesting his conviction that the matter is a threat to the peace. At the same time, he may be overdramatizing the matter, but surely he is prejudicing it since the Security Council will probably consider the Secretary-General's arguments seriously and probably will act against the state(s) whose activity the Secretary-General deemed a threat to international peace and security.[8] For this reason, the Secretary-General very rarely has explicitly used art. 99. Instead he has preferred alternative paths such as to conduct informal consultations with the Security Council,[9] to urge the Security Council,[10] to ask the Security Council to celebrate consultations on the matter[11] or to rather wait for a state to bring the case to the Security Council.[12] The result in all these cases is the same, the meeting of the Security Council, but without exposing the Secretary-General to criticism. As a consequence of this type of behavior, the norm (formal use of art. 99) has become the exception, and the exception (informal activity of the Secretary-General based on the potentialities of art. 99) has become the rule.

2.2. The practice

In this section we are going to first study the practice of the General Assembly manifested through its resolutions on peaceful settlement of disputes. Secondly, we will study the practice of the General Assembly and the Security Council manifested through the delegation of their functions from them to the Secretary-General. Thirdly, we will study the practice of the Secretary-General. The first type of practice will show us to what point the General Assembly has pretended to enlarge the powers of the Secretary-General in this field by the contents of its resolutions. The second type of practice -the practice of the General Assembly and

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8 ELARABY, NABIL: *"The Office of the Secretary-General and the Maintenance of International Peace and Security"*, in *The UN and the Maintenance of International Peace and Security*, Martinus Nijhoff Publishers, 1987, p. 189; SMOUTS, MARIE-CLAUDE: *Le Secrétaire-General des Nations Unies*, ARMAND COLIN, 1971, p. 222; FRANCK, THOMAS M.: *"Finding a Voice: How the Secretary-General Makes Himself Heard in the Councils of the Nations"*, in *Essays in International Law in Honour of Judge Manfred Lachs*, Martinus Nijhoff Publishers, 1984, p. 485; Córdovez, Diego, op. cit., p. 167.

9 *Report of the Secretary-General on the Work of the Organization*, 1993. UN Doc.A/48/Add.1 (in the case of Zaire).

10 *Report of the Secretary-General on the Work of the Organization*, 1991. UN Doc.A/46/Add.1 (in the case of Afghanistan).

11 *Report of the Secretary-General on the Work of the Organization*, 1987. UN Doc.A/42/Add.1 (in the case of Iran-Irak).

12 *Report of the Secretary-General on the Work of the Organization*, 1993. UN Doc.A/48/Add.1 (in the case of Rwanda).

the Security Council through their policy of delegation of powers in the Secretary-General's hands - will show us to what extent these two organs have actually entrusted the Secretary-General with new responsibilities in the area of peaceful settlement of disputes. The third type of practice - the practice of the Secretary-General himself will show us to what extent the Secretary-General's powers have been increased in this area and, if that is the case, on what grounds this phenomenon has taken place.

2.2.1. The practice of the deliberative organs

2.2.1.1. Resolutions of the General Assembly

We are going to study in this subsection the contents of the most important declarations approved by the General Assembly in the field of peaceful settlement of disputes. We will focus ourselves on the responsibilities that these declarations place in the Secretary-General's hands in the field of peaceful settlement. As stated before, the reason for the analysis of these declarations is due to the fact that the resolutions of the organs of international organizations are also deemed to be part of the rules of the organization. Nonetheless, one should never forget that the resolutions of the General Assembly, even if sometimes called Declarations, do not have binding character *per se*. Their values depend on variables such as the kind of principles they state, the majority of adoption as well as the practice in conformity with the principles stressed in the resolution.[13] Although it is not so easily asserted that the declarations of the General Assembly are legally binding, we should however always take into account that the General Assembly occupies a unique place among the organs of international organizations because of its large membership and because of its broad powers of discussion. In consequence, the value of the declarations of the General Assembly lays in the fact that these declarations express both what the members of the international organization have agreed on and what general rules of the behavior of states they want to formulate in solemnly. Moreover, sometimes the General Assembly declarations proclaim principles already accepted in practice.

The above mentioned questions should be taken into consideration when analyzing what the declarations of the General Assembly say about the powers of

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13 CASTAÑEDA, J.: *Valor Juridico de las Resoluciones de la Asamblea General*, México, 1967; SKUBSZEWSKI, K.: *"Resolutions of the General Assembly and the Evidence of Custom"*, in *Le Droit International à l'Heure de sa Codification. Etudes en Honeur de Roberto Ago*, Milan, 1987, pp. 503-519; SCHWEBEL, S. M.: *"UN Resolutions, Recent Arbitral Awards and Customary International Law"*, in *Realism in Law-Making. Essays on International Law in Honour of Willem Riphagen*, Dordrecht, 1986, pp. 203-210.

the Secretary-General in the field of peaceful settlement of disputes. Whether those declarations enlarge or restrict the Secretary-General's powers, their contents can open the path to new practices in dispute settlement. They also help us to check if there are new trends or new understandings about the role of the Secretary-General.

The resolutions of the General Assembly we are going to examine are the ones that focus on our subject of research, namely, the peaceful settlement of disputes: the Declaration on the Strengthening of International Security,[14] Manila Declaration on Peaceful Settlement of International Differences,[15] Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the UN in this Field[16] and Declaration on Fact-finding by the UN in the Field of Maintenance of International Peace and Security.[17]

All these resolutions allude, but with different emphasis, to the role of the Secretary-General in the area of dispute settlement. In all, the General Assembly acknowledges the proposal that the Secretary-General can and should contribute to the maintenance of peace and international security in cooperation with the organ who bears the primary responsibility in this field, namely, the Security Council. But the different emphasis and space devoted to the issue of the role of the Secretary-General in the field of peaceful settlement of disputes in each of them let us point out that there has been an evolution in the way the General Assembly understands the powers of the Secretary-General. As a matter of fact, Declaration 2734 (XXV) and 37/10 (approved in 1970 and 1982, respectively) scarcely mention or persuade the Secretary-General to help states to resolve their disputes peacefully; they only mention him in paragraph six of both declarations. In fact, both place all stress on the Security Council and the parties involved in the roles they must play in solving a dispute. By contrast, resolutions 43/51 and 46/59 insist now and again on the crucial role that the Secretary-General is called to play in helping states to resolve their disputes and situations. Declaration 43/51 clarifies that the legitimacy of the Secretary-General's involvement in peaceful settlement activities can derive from art. 98, that is, by delegation of powers from the Security Council or the General Assembly (para. 8), as a result of an invitation from a state directly concerned with the dispute (para. 20), or even as a result of the Secretary-General's own initiative (paras. 22-22). Additionally, declaring such a broad range of possible sources for legitimacy of the Secretary-General's activity, the General Assembly confirms the

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14 General Assembly Resolution 2734 (XXV).

15 General Assembly Resolution 37/10.

16 General Assembly Resolution 43/51.

17 General Assembly Resolution 46/59.

opinion of a number of scholars.[18] This declaration also advises the Secretary-General to exercise the right conferred upon him by art. 99 where appropriate. The stress is put on the discretionary nature of the invocation of art. 99, the General Assembly respectfully encourages the Secretary-General to employ art. 99 wherever he judges it convenient (para. 23). It neither forces the Secretary-General to use art. 99 nor censures him for not making use of it. On the other hand, resolution 46/59 claims the Secretary-General's legitimate authority to send fact-finding missions on his own initiative, that is to say, without prior authorization (para.13). This declaration adds that the Secretary-General should be given preference in the direction of such missions (para. 15). Attention should also be paid to paragraph 12 of the declaration where the Secretary-General is encouraged to use all the possibilities the Charter offers him in the prevention of disputes and situations. Such wording leaves no place for doubt about the General Assembly's conviction that when exerting all these powers, the Secretary-General is not acting *contra legem*, that he is not going beyond what the Charter allows him to do. Quite the opposite: he is just performing the prerogatives accorded to him in the Charter.

Our conclusion after the analysis of the four documents is that in recent declarations of the General Assembly on dispute settlement, the role of the Secretary-General in this field is more stressed and his powers more clarified than they were in the past. This new approach allows and favors the initiatives of the Secretary-General in the field of dispute settlement - even when he is not provided with an authorization. In any case, the value of those declarations depends on whether the practice of the organization confirms their provisions. Therefore, their value will now be checked through the confrontation of their contents with the practice of the organs of the UN when they delegate functions on the Secretary-General.

2.2.1.2. The practice of the Security Council and the General Assembly in their use of art. 98 of the UN

From the outset of the UN, the Secretary-General has experienced a gradual increase of the tasks performed by him in the area of peaceful settlement of disputes. This progressive accumulation of powers has partly been due to the constant mandates made by the General Assembly and the Security Council conferring new responsibilities upon him. These delegated additional functions have covered

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18 For example, RAMCHARAN, B. G.: *"The Good Offices of the United Nations Secretary-General in the Field of Human Rights"* in A.J.I.L., vol. 76, 1982, p. 134; FRANCK, THOMAS M.: *"The Role and Future Prospects of the Secretary-General"* in *The Adaptation of Structures and Methods at the UN*, Martinus Nijhoff Publishers, 1986, p. 84.

different means of peaceful settlement such as good offices, inquiries, fact-finding or observance missions.

An overview of the cases where art. 98 of the Charter was applied during the period of the Cold War shows us that the more the superpowers were involved in a dispute, the easier were the possibilities of the Security Council to become deadlocked and the more likely the possibilities of the Secretary-General to be requested to solve the matter. The cases confirming this hypothesis are numerous (Suez, Hungary, Congo, etc.[19]). In all the cases, the paralysis of the Security Council or the inability of the General Assembly to manage the matter resulted in the enlargement of the Secretary-General's prerogatives in the field of peaceful settlement of disputes. In these conflicts, the competent organs were only able to agree on authorizing the Secretary-General to make diplomatic moves or to dispatch fact-finding missions or surveys, but they could neither agree on the scope of the mission nor in the way it had to be fulfilled.

The end of the Cold War has meant for the Security Council the end of an era of continuous exercise of the veto power by its permanent members. But even if the Security Council is not blocked anymore, both the Security Council and the General Assembly have persisted in their policy of delegation of functions in the Secretary-General's hands (i.e. Iraq-Kuwait, Haiti, Bosnia, Liberia[20]). This trend shows us that, as long as the Secretary-General acts with the approval or at least the acquiescence of the organs of the UN, he will continue being charged with new missions. By so doing, the Security Council and the General Assembly avoid extra-meetings as well as the risk of dealing with polemic burdens.

As we can see from the previous sample, both in the during and following the Cold War era, the possibility offered by art. 98 of the Charter has generally been used. However, the scope of the mandates has been different depending on questions such as which state was involved in the dispute,[21] the conditions of the

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19 For the case of Suez, see General Assembly Resolution 3354 (XI). For the case of Hungary, see General Assembly Resolution 1004 (XIII). For the case of Congo, see S/4387 July 14th 1960.

20 For the case of Irak-Kuwait, see Security Council Resolution 687 (1991). For the case of Haiti, see General Assembly Resolutions 46/4 of October 11th 1991 and 47/20A of November 24th 1993. For the case of Bosnia, see Security Council Resolution 780 (1992). For the case of Liberia, see Security Council Resolution 788 (1992).

21 When one of the superpowers was directly involved in the matter, the Security Council controlled the Secretary-General's prerogatives in the dispute much more than when none of them had a special interest on it. Evidence of this can be found in the comparison of the Security Council resolutions on the India-Pakistan case (211 (1965) of September 20th), the Dominican Republic case (203 (1965) of May 14th) and in the Vietnam case (in the latest, there was not even an agreement in the Security Council to confer upon him any power at all).

international context at the time the dispute or situation took place,[22] the degree of satisfaction of the states (and specially of the superpowers) with the way the Secretary-General had performed previous missions entrusted to him,[23] etc. In particular, examples can be found where the Secretary-General has been assigned such vague and broad mandates that he has just become an autonomous authority in their accomplishment[24] while in other cases, he has been given very strict and meticulous mandates and his activities with regards to those missions have been closely monitored by the delegating organ.[25] When confronted with mandates requiring interpretation, the Secretary-General has normally asked for further clarifications from the competent organ.[26] This has happened often during the Cold War whenever the case was a delicate one involving superpowers' interests. In such cases, the Secretary-General has preferred not to be conferred a "carte blanche". Just the opposite: he has preferred to act with certainty, with clear guidance about what he was expected to do and how far he was supposed to go in his efforts to achieve a peaceful settlement. Broad authorizations are often the evidence of one of two things: the lack of consensus reached in the deliberative organ, which only permits it to agree on a general formula entrusting the burden of its function to the Secretary-General,[27] or the level of confidence achieved in the deliberative organ towards the Secretary-General.[28]

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22 PÉREZ DE CUÉLLAR admits in one of his last reports to the General Assembly that he has found more support for his activities and initiatives during his last years in office - when the international conditions changed and collaboration between states became more usual (*Report of the Secretary-General on the Work of the Organization*, 1991. UN Doc.A/46/1).

23 For example, the powers conferred upon the Secretary-General in the Congo case - after Hammarsjold success in Thailand and Cambodia, Guinea and Laos - were larger than the ones conferred upon him in the Cyprus case, after the controversial end of the Congo mission (Security Council resolutions 145 (1960) and 186 (1964), respectively).

24 Examples of broad mandates can be found in the cases of the North-American hostages in China (General Assembly Resolution 906 (IX) of December 10th), Congo (Security Council Resolution 145 (1960) of July 22nd), and Namibia (General Assembly Resolution 3030 (XXVII) of December 13th), among others.

25 For example, Dominican Republic (Security Council Resolution 203 (1965) of May 14th).

26 For example, in the case of Congo, see *Official Records of the Security Council* 888 meeting, August 21st 1960, where the Secretary-General states that he has the right to expect guidance from the Security Council to interpret the resolution approved by this organ.

27 For example, in the case of Congo (Security Council Resolution S/4389 of July 14th 1960).

28 For example, in the case of the North-American hostages in China, where despite the violent debates that took place within the Security Council, neither the functions nor Hammarsjold's role was ever challenged (*Official Records of the General Assembly*, December 9th 1954, 507 meeting, p. 444-445).

But we can also find cases where the opposite phenomenon takes place and where as a result of the narrow margin of maneuver left to the Secretary-General by a very severe delegation of powers, he has decided to go further and has surpassed the limits of the authorization. Examples of this can be found in the case of Laos, where the Secretary-General sent a negotiation mission instead of the technical mission envisaged by the Security Council,[29] and in the dispute between Pakistan and India, in which the Secretary-General understood that the resolution of the Security Council, allowing him to strengthen the observation mission sent there by the Security Council, also permitted him to create a new and different mission.[30] Whenever this has happened, the Secretary-General has acted on his own initiative, beyond the realm of art. 98. Sometimes, the action of the Secretary-General has been followed by the protests of some states who, however, have not finally challenged the Secretary-General's decision.[31] Moreover, whenever one of these cases has taken place, the Secretary-General has always counted with the express or tacit consent of the large majority of the member-states, and specially with the consent of the parties to the dispute.[32]

Apart from the doubts about the correctness of vague mandates and mandates whose terms are surpassed when implemented, whose acceptance in practice has been evidenced in both cases, art. 98 still leaves another question unanswered, namely: whether delegations of power to the Secretary-General have to be made beforehand or whether *ex post facto* authorizations - as a confirmation from the competent organ of what the Secretary-General has already done - are admissible. The direct involvement of the Secretary-General in the Central America peace efforts provides the best example of a retroactive authorization of power. Although only *a priori* delegations can produce certainty,[33] the Secretary-General of the UN

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29 *Official Records of the General Assembly* 5th Committee, 15th session, 768 meeting, paras. 12-14.

30 Security Council Resolution 211 (1965) of September 20th.

31 For example, the USSR protested in the case of Laos. In the General Assembly, the representative of this state declared: "In making a political visit of that nature without the requisite authorization from the Security Council, the Secretary-General has exceeded his competence" (*Official Records of the General Assembly*, 5th Committee, 15th session, 768 meeting, paras. 12-14).

32 For example, in the case of Laos, the Secretary-General replied the USSR representative in this way: "...the USSR representative's criticism implies that the Secretary-General could not respond to a practical request from a Government and the legitimate authorities of a country" (*Official Records of the General Assembly*, 5th Committee, 15 session, 769 meeting, paras. 10-17).

33 PECHOTA, VRATISLAV: *"Good Offices of the Secretary-General of the United Nations: Contemporary Theory and Practice"*, in *Essays on International Law in Honour of K. Krishna Rao*, Sijhoff, 1976, p. 191.

in 1986 took the initiative to become engaged in the Central American process of peace along with the OAS Secretary-General. It was not before 1987 that the General Assembly of the UN adopted a resolution approving the previous action undertaken by his Secretary-General and encouraged him to go on with his efforts.[34] No claim against the Secretary-General's action was ever raised. Of course, the support received by the Secretary-General in this case could only be due to the fact that all the parties involved in the peace process had given their consent to the Secretary-General's mediator role.[35] The same token applies to the Observer Mission to verify the electoral process in Nicaragua (ONUVEM) which was created by the Secretary-General and was retrospectively endorsed by the Security Council[36] as well as to the fact-finding commission sent by the Secretary-General to Georgia and whose activities were confirmed later by the Security Council.[37]

All the previous evidence supports the thesis that as long as the Secretary-General gets the consent of states or at least their acquiescence, his powers will not be limited by the need of a prior authorization in the field of peaceful settlement of disputes. In other words: the vacuums of the Charter can easily be filled up by the practice of the organization as long as his actions are explicitly or tacitly supported by states.

2.2.2. The practice of the Secretary-General

As the precise scope of the Secretary-General's functions is not too clear nor defined in the Charter, the practice of the Secretary-General has evolved to fill the gap. There has always been a general agreement among the drafters of the Charter[38] and states on the belief that the Secretary-General had significant political role to play - although the exact contents of this political role were never clarified. This is why the prerogatives of the Secretary-General have been developed empirically according to each Secretary-General's view about the UN and about his own role within the organization.

We will show now that every Secretary-General has understood the powers conferred upon him by the Charter and by the UN deliberative organs in the realm of dispute settlement in a very active and dynamic way. But when dealing with the practice of the Secretary-General in this field and with the question of how he has

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34 General Assembly Resolution 42/1 of October 7th 1987.

35 OAS General Assembly Resolution 870 (XVII-0/87).

36 Security Council Resolution 637 (1989).

37 Security Council Resolution 876 (1993).

38 UNCIO, *Reports*, Cap. VIII, Sec. 2, p. 87, PC/20.

understood his own powers, we will first of all have to study the cases which show us how *de facto* the Secretary-General has understood his role. Afterwards, we will study the proposals made by the Secretary-General in order to improve the UN peaceful settlement machinery - specially his proposals supporting a more activist role for him and for his office. Briefly said: we have to make the distinction between facts and recommendations.

To begin with, it is worth noting that the Secretary-General has always deemed his endeavors in the domain of peaceful settlement to be part of his job, whether due to the delegation of the General Assembly or the Security Council, due to the invitation of a state concerned or even due to his own initiative.

As said before, when acting upon delegation, the Secretary-General has sometimes strictly respected the terms of the mandate (i.e. in the case of the Dominican Republic[39]). By contrast, sometimes he has reinterpreted the terms of the resolution allowing him to act.[40] During the Cold War era, the difference between these divergent ways to perform usually laid in the fact that in the first way to perform, one of the superpowers was involved and there was no freedom of maneuver for the Secretary-General, whereas in the second type of cases the superpowers were not directly concerned and, moreover, the parties to the dispute supported the Secretary-General's peaceful settlement endeavors.

Nowadays, in the post Cold War era, the international context has changed and the Secretary-General has an even larger margin of maneuver provided he acts with the express or tacit consent of the organs of the organization. Delegations of power are welcomed.[41] Similarly, the use of *ex post facto* authorizations by the Secretary-General has expanded.[42] The limit to these practices was mentioned earlier: the Secretary-General is not a totally independent actor, he needs the support and full confidence of states and cannot act in contradiction to the Security Council

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39 The Security Council invited the Secretary-General to send a representative to the Dominican Republic by its resolution 203 (1965). And that is exactly what he did. He did not try to go further in a case involving such delicate interests as those of the USA, who had invaded the country, and the USSR, who supported the dismissed pro-Castro government of Juan Bosch.

40 For example, in the case of India and Pakistan - one of the few cases where consensus could be achieved within the Security Council to deploy a mission and where the Secretary-General himself created a second mission (Security Council Resolution 211 (1965) of September 20th).

41 See for example, Security Council resolutions 666 (1990) in the case Irak-Kuwait, 780 (1992) in the case of Bosnia, 824 (1993) in the case of Somalia, 834 (1993) in the case of Angola and 918 (1994) in the case of Rwanda.

42 For example, in the cases of Nagorno-Karabaj (S/24493) or Georgia (Security Council resolution 876 (1993)).

or General Assembly's opinion. Needless to mention, he neither can act in contradiction to the principles and purposes of the Charter.

Hitherto we have only considered the case where the Secretary-General acts on someone else's initiative. Nonetheless, we now face the possibility of the Secretary-General acting on his own initiative because in many occasions the Secretary-General has acted where authorization was totally lacking. Examples abound: Berlin crisis (1948), Lebanon (1958), Thailand and Cambodia (1959), Tunisia and France (1961), West Irian (1962), Cuba (1962), Yemen (1963), Vietnam (1964), Equatorial Guinea (1969), Bahrain (1970), Venezuela-Guyana (1982), Falklands (1982), Central America (1986), East Timor (1992), Liberia (1993) and Georgia (1993). As mentioned previously, the result of all these relevant cases, as far as the role of the Secretary-General is concerned, has been very different depending on the level of concern and interest showed by the superpowers in them[43] as well as according to the intensity of the support of the parties involved.[44]

During the Cold War, the Secretary-General's policy consisted of acting in the interest of world peace when the political organs had fallen into disuse, but only in places and situations where he found the informal consent of the major powers and of the parties to the dispute. In most cases, the Secretary-General's initiative arose as a pragmatic answer to the inability of the competent organ to cope with events. However, not only was the inability of the competent organ the reason of the Secretary-General's concentration of powers, but also his narrow margin of maneuver, due to the lack of understanding between both ideological blocs prevented him from going too far -in case the USSR or the USA misunderstood his intentions and interpreted he was taking a stand, provoking a hardening of the East-West positions. Moreover, the superpowers preserved their own interests against incursions by the Secretary-General.[45]

In broad terms, we can say that the practice of the Secretary-General in the realm of dispute settlement has been rich and multiform. At times he has acted after an explicit delegation took place. At times, after an invitation from one of the parties concerned. At times, on his own authority. At times he has reinterpreted the mandate conferred upon him by the competent organ. At times he has asked for clarifications.

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43 The superpowers were deeply concerned with the issues of Vietnam, Dominican Republic and Cuba missiles crisis. Thus, the Secretary-General could not go very far in any of them.

44 In 1961, the diplomatic moves of the Secretary-General in the dispute between France and Tunisia did not work as a result of France's rejection of his good offices.

45 This was recognized by Pérez de Cuéllar on his first report after the end of the Cold War (*Report on the Work of the Organization*, 1991. UN Doc.A/45/1).

At times he has surpassed the terms of the mandate. At times he has maintained his activities within the limits of the authorization. Finally, other times he has just abstained from taking part in the dispute at all - i.e. in the case of Hungary. The attitude of the Secretary-General and the final outcome of the case have depended on the historical moment, on the consensus and expectations of states, on the states involved, and on each Secretary-General's personality and view-point about the role of the UN.

Having completed our study of how the Secretary-General has acted until now *de facto,* we will now study how he proposes to behave in the future. So, henceforth, we are going to analyze the new powers he pretends to accumulate in the field of peaceful settlement of disputes according to his document Agenda For Peace.[46] This document submitted by the Secretary-General at the request of the Security Council constitutes a reflection about the new challenges of the international environment and how to handle them. It analyzes four areas: preventive diplomacy, peace-making, peace-keeping and post-conflict peace-building (the latter being an addition of the Secretary-General not included in the Security Council's request). In sum and focusing on dispute settlement, the Secretary-General recognizes in this text the need for coordination between the deliberative organs of the UN and the Secretary-General's office.[47] He also stresses the importance of preventive diplomacy and reminds the Security Council about the privileged position the Secretary-General has to conduct such activities.[48] He suggests that, in some cases, his chances of success are greater when the Secretary-General acts independently from other organs.[49]

In general, the reaction of the deliberative organs of the UN to the proposals advanced by the Secretary-General in the area of dispute settlement in Agenda For Peace has been quite positive.[50] As far as the General Assembly is concerned, it passed by consensus resolution 47/120 Agenda for Peace: Preventive Diplomacy and Connected Questions on December 18th 1992. It encourages the Secretary-General to continue with his efforts in this field and assumes the increasing

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46 S/24111 of June 17th, 1992.

47 Para. 16: "The Secretary-General's contribution rests on the pattern of trust and cooperation established between him and the deliberative organs of the UN".

48 Para. 23: "The most desirable and efficient employment of diplomacy is to ease tensions before they result in conflict... Preventive diplomacy may be performed by the Secretary-General personally...".

49 Para. 37: "The good offices of the Secretary-General may at times be employed most effectively when conducted independently of the deliberative bodies".

50 SCHRICKE, CHRISTIAN: *"L'Agenda pour la Paix de Boutros-Ghali: Analyse et Premières Réactions"* in A.F.D.I., vol. XXXVIII, 1992, pp. 11-31.

independent powers of the Secretary-General in the realm of peaceful settlement of disputes. As far as the Security Council is concerned, it has welcomed in successive resolutions most of the recommendations made by the Secretary-General in the field of dispute settlement.[51] The Security Council has only remained silent on the proposals concerning coercive action, such as the proposals about the use of military force, the implementation of articles 43 and 47 of the Charter and the creation of peace-enforcing units under the Secretary-General's command.[52]

As a conclusion about the practice of the Secretary-General, we can say that he has used the Charter as a mere point of departure from which his powers are expanded. The scope of the expansion has varied from one period to the next. Every Secretary-General has acted differently depending on each one's own view of the organization and on the peculiarities of the international system at a given moment. The Secretary-General is an actor performing in the international sphere, thus, his role changes according to the changing needs of the international context. Nevertheless, there are some limits the Secretary-General cannot surpass: he cannot act against the will of the parties to the dispute and without the tacit acquiescence of the Security Council. This is why neither U Than nor Kurt Waldheim were successful in Vietnam. And he cannot act against the principles and purposes set up in the Charter. Briefly: he is not an independent actor.

3. POSSIBLE LEGAL JUSTIFICATIONS OF THE SECRETARY-GENERAL'S EVOLUTION OF POWERS IN THE FIELD OF PEACEFUL SETTLEMENT OF DISPUTES

Hereinafter, we will advance some of the reasons alleged by the doctrine, by the organs of the UN, by some states and by the Secretary-General in order to justify the development of the powers of the Secretary-General in the field of dispute settlement.

Leaving aside the cases where the accumulation of functions by the Secretary-General is clearly due to delegations *ex* art. 98 of the Charter, most of the scholars maintain that the evolution of the powers of the Secretary-General is implicit not in the wording but in the spirit of art. 99 of the Charter.[53] For some of

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51 Security Council Documents 24210, 24728, 24872, 25036 of 1992.

52 The silence of the Security Council in the latter matter is due to the risk of "militarization" of the Secretariat that such a measure could entail (CARDONA LLORENS, JORGE: *"Nuevo Orden Mundial y Mantenimiento de la Paz y Seguridad Internacionales"*, in *Cursos de Derecho Internacional de Vitoria-Gasteiz*, Universidad del País Vasco, 1993).

53 STEIN, ERIC: *"Mr. Hammarskjold, the Charter Law and the Future Role of the United Nations Secretary-General*, in A.J.I.L., vol. 56, 1962, p. 13; FRANCK, THOMAS M.: *"The Prerogative Powers of the Secretary-General"* in *The Non-aligned and the UN*, Rajan Mani Murthy, 1987,

them, the potentialities of art. 99 taken not alone but in connection with articles 98,[54] 33[55] or 97[56] produce the accumulation of powers in the hands of the Secretary-General in a way not envisaged by the wording of art. 99. The successive Secretaries-General of the UN have embraced this line of argumentation in the thought that the provisions of art. 99 were meant for rare formal use but its principles far exceed the formal resorts of procedures. In effect, for them, art. 99 carried with it, as its necessary corollary, a broad discretion to conduct inquiries, to engage in diplomatic activity and to send observance missions in regard to any matter likely to endanger peace. In other words, they defend an extensive interpretation of art. 99 of the Charter as the most plausible solution to fill the constitutional vacuums left by the wording of the Charter. For them, an interpretation of the Charter which takes into account its wording, context and objectives (art. 31 of Vienna Convention on the Law of the Treaties) would lead to an invisible or indirect instead of formal use of art. 99. This line of reasoning leads to the maintenance of the theory of the implicit powers formulated by the International Court of Justice in the case of Reparation for Injuries Suffered in the Service of the United Nations.[57] The application of this theory to our realm has, as a

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p. 271; PUENTE EGIDO, JOSE: *"Funciones Administrativas y Diplomático-políticas del Secretario General de las Naciones Unidas según la Carta y Práctica de la Organización"*, in ZEITSCHRIFT FÜR AUSLANDISCHES OFFENTLICHES UND VOLKERRECHT, Band 20, 1959/60, p. 451 and 157; GORDENKER, LEON: *"The Secretary-General"*, in *The UN: Past, Present and Future*, Free Press, 1972, p. 109.

54 See, for example: PIROTTE, OLIVIER; MARTIN, PIERRE-MARIE: *La Fonction de Secrétaire Général de l'O.N.U. à travers l'éxpérience de M. Kurt Waldheim"* in REVUE DE DROIT INTERNATIONAL PUBLIC, vol. LXXVIII, 1974, p. 145. In this article, his author reports that Dag Hammarsjold understood that his functions ex art. 99 were to be complemented through the delegation of powers of art. 98 of the Charter.

55 PECHOTA, VRATISLAV, 1977, op. cit., p. 672. This author establishes a link between the means listed in art. 33 and the powers of the Secretary-General to bring a matter to the Security Council's attention. Art. 33 does not name the Secretary-General at all, but the means available in art. 33 could be used by him to check whether the matter is likely to endanger international peace and security, and therefore, before deciding whether to call the attention of the Security Council.

56 COT Y PELLET: *La Charte des Nations Unies*, Economica, 1985, p. 1322. According to this author, by using a dialectic interpretation of arts. 97 and 99, the Secretary-General has always considered himself entitled to intervene in the Security Council's debates and to propose his own suggestions and interpretations instead of formally calling the attention of the Security Council.

57 *"Reparation for Injuries Suffered in the Service of the United Nations"*, Advisory Opinion: I.C.J. Reports, 1949, p. 179. In this advisory opinion, the ICJ was asked whether the UN enjoyed active responsibility as a result of the murder of one of its agents who was in mission in Palestine. The ICJ responded that the answer to that doubt would depend on whether the UN had international personality or not. Despite the fact that the Charter does not expressly state that the UN has active responsibility, the ICJ claimed: "It becomes clear that the capacity of the

consequence, the assumption by the Secretary-General of certain political functions which are not *contra legem*, but are in harmony with the spirit of art. 99.[58] If we do not want the Secretary-General to become a kind of clerk of the UN or just a channel of communication between the organs of the organization, he is supposed to interpret facts, to research as well as to formulate suggestions.[59]

Some authors have gone further and they maintain that the practice of the Secretary-General in the field of peaceful settlement has already become customary international law.[60] This theory is based on the idea that as a result of a constant practice of delegation of functions in the Secretary-General, a norm of customary law has already appeared supporting the accumulation of powers in the Secretary-General's hands.

The opposing line of argumentation could be maintained as well. It could be argued that the Secretary-General may be going further than envisaged, that he may be going beyond the powers conferred upon him in the Charter and therefore he is an agent of the UN committing *ultra vires* acts. However, this opinion cannot be easily sustained because, as we mentioned before, the rules of the UN are not only the Charter, but also the resolutions of its organs and the practice of the organization. So, none should ignore them, specially in this area where the resolutions and practice of the organization have been the key to the evolution of the powers of the Secretary-General.

For some other sectors of the doctrine, the accumulation of powers in the hands of the Secretary-General has been due to a tacit use of art. 98. Every time the Secretary-General has exerted his good offices on his own initiative or has not restricted his activity to the terms of the mandate of the competent organ, there has been an implicit delegation of functions covering all the activities performed by the

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organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter" (p. 184). And what is more important for our subject of study: "Under International Law, the organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties" (p. 179).

58 *Introduction to the Annual Report of the Secretary-General,* 1961. UN Doc.A/4800.

59 GOODRICH, LELAND M.: *"Hammarskjold, the UN and the Office of the Secretary-General"* in INTERNATIONAL ORGANIZATION, 1974, vol. XXVIII, p. 478; SMOUTS, MARIE-CLAUDE, op. cit., p. 275; PIROTTE and MARTIN, op. cit., p. 145.

60 LAVALLE, ROBERTO: *"The Inherent Powers of the UN-Secretary-General in the Political Sphere: A Legal Analysis"*, in NETHERLANDS INTERNATIONAL LAW REVIEW, vol. 37, 1990, p. 29; RAMCHARAN, 1982, op. cit., p. 131. For the latter, there is a norm of customary international law only in respect to the good offices of the Secretary General in the field of human rights.

Secretary-General. In this sense, the acquiescence or approval by the competent organ, even the lack of protestation of the competent organ, has meant the exercise of a tacit delegation.[61]

Yet, there is a last argument defended by Caminos and Lavalle as the legal basis for the increasing powers of the Secretary-General, namely, the implicit powers of the Secretary-General.[62] It should be noted that the way to understand the expression "implicit powers" is different here from the way we understood it when we explained the first doctrinal argument about the potentialities of art. 99.

In no way are both arguments the same. In contrast to what the first set of authors believe, the latter authors claim that the implicit powers of the Secretary-General do not stem from art. 99. For Caminos and Lavalle, the activities undertaken by the Secretary-General on his own are not included in the scope of art. 99. On the contrary, when the Secretary-General acts on his own initiative mediating, negotiates an end to the dispute, sends a representative, etc, he is not fostering the application of art. 99 but avoiding its application. Such avoidance is made inevitable by the substitution of the Security Council by the Secretary-General in the Security Council cases and by the likelihood that the dispute will never be brought to the attention of this organ. Instead, the Secretary-General will try to settle the dispute himself. According to Caminos, the inherent powers of the Secretary-General stem from the normal functions of the chief representative of an organization whose purpose is to preserve the peace.[63]

In our opinion, the most plausible legal arguments for the increasing powers of the Secretary-General are the first and last ones. The evolution of the powers of the Secretary-General in dispute settlement can satisfactorily be explained by the existence of implied powers, whether deriving from art. 99, in combination or not with other articles from the Charter, or deriving from the mere fact that the Secretary-General is the highest servant of an organization concerned with international peace and security. If we follow this doctrine, we cannot make a restrictive interpretation of the Charter but one which permits the Secretary-General to act in the realm of dispute settlement even on his own initiative as well as always in coordination with the deliberative organs of the UN.

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61 SMOUTS, MARIE-CLAUDE, op. cit., p. 230.

62 CAMINOS, HUGO: *"New Departures in the Exercise of Inherent Powers by the UN and OAS Secretaries-General: The Central American Situation"* in A.J.I.L., 1989, vol. 83, p. 395; LAVALLE, 1990, op. cit., p. 28.

63 CAMINOS, HUGO: *"L'Exercise de Pouvoirs Implicites par le Secrétaire Général de l'Organisation des Etats Américains dans le Cadre de l'Etablissement de la Paix en Amérique Centrale"* in A.F.D.I., 1989, vol. XXXV, p. 202.

4. CONCLUSIONS: ADVANTAGES AND DISADVANTAGES OF THE SECRETARY-GENERAL'S INCREASE OF POWERS IN PEACEFUL SETTLEMENT OF DISPUTES

In closing, it is necessary to acknowledge first and foremost the fact that the Secretary-General has been gradually acquiring independent powers since the inception of his office. This is not to say that he is supplanting the Security Council, the organ which is primarily responsible for international peace and security, against its will. On the contrary, the Secretary-General is acting in coordination with the rest of the organs of the organization. The Secretary-General knows his powers are void without the states' approval.[64]

In this context, the evolution of the powers of the Secretary-General has been due to the combination of several factors. Among them: the deadlock in the Security Council, the incapacity of the General Assembly to deal with this kind of matter, the impossibility of the collective security mechanism set up in the Charter to function normally, the constant delegation of powers made to the Secretary-General and the increasing demands and expectations from states, etc.

Even though today the ideological cleavage is over and subsequently the Security Council is normally functioning, the Secretary-General is still enlarging his powers in the field of dispute settlement. States and organs of the organization alike trust him and support his autonomous initiatives borne by the political advantages of the work of the Secretary-General. To begin with, the matter can be studied discreetly, even secretly, and the dispute does not suffer the dramatization process unavoidable in the Security Council. Furthermore, if the solution to the dispute or situation is attempted in the Secretariat instead of in the Security Council, a lot of time is saved because the meetings of the latter organ are slower, demand a formal convocation as well as a discussion, and finally, there is a vote procedure. Last but not least, the risk of the Security Council becoming deadlocked still exists.

However, one should not idealize the "Secretary-General's Solution" because it also entails some risks. Concretely, there is the uncertainty that an empirical development of functions brings for the states concerned. In addition, there is also the risk for the UN to depend too much on the personality of the Secretary-General in charge, on the way he conceives the role of the UN in today's world, and on how far he interprets his implicit powers to reach.

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64 *Report of the Secretary-General on the Work of the Organization,* 1993. UN Doc.A/47/1.