International Law on Peacekeeping – A Study of Article 40 of the UN Charter

Hitoshi Nasu

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There is a strong sense that peacekeeping is a modern phenomenon. Certainly the pace, energy and tendency towards the exuberance displayed by the United Nations Security Council (during the 1990's especially) suggests that the underlying policy, doctrine and legal frameworks for peace operations were all developed in the contemporary era. It turns out, however, that the origins of peacekeeping can be traced back well over 100 years. Many of the principles that underpin our modern approaches to peace operations were actually formulated during the League of Nations period, and some even before then. In this regard, the publication by Hitoshi Nasu of his book, *International Law on Peacekeeping – A Study of Article 40 of the UN Charter*[1] provides a masterful, well researched and intriguing account of the development of peacekeeping and is a welcome addition to scholarship in this area.

The book itself derives from the author's Doctor of Philosophy dissertation submitted to, and accepted by, the Faculty of Law at Sydney University in 2006. It is evident that the intellectual rigour that contributed to that project has been successfully translated in a very accessible manner in this publication. The book is highly structured from both an historical and methodological perspective and has a particular point to make. The goal of the author is to advance an argument that peacekeeping has become 'trapped' within a particular normative space that limits its usefulness and true potential to prevent armed conflict. To Nasu, the central premise of the book is to 'address…two-faceted issues surrounding the Security Council - doing too little on the one hand, and doing too much on the other — by casting renewed light on its peacekeeping measures with the focus on Article 40 of the UN Charter as the primary legal basis'.[2]

Article 40 of the UN Charter provides, *inter alia*, that the Security Council may, upon determining a threat to international peace and security, 'call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable'. This power is logically expressed to be prior to the authorization of military 'enforcement measures' (ultimately by land, sea and air forces) mandated by Articles 41 & 42. It is within the realm of Article 40 that Nasu contends that peace operations may be most usefully anchored. Under prevailing doctrine, peacekeeping operations have been subject to three essential requirements namely, consent of the parties, the exercise of impartiality and the limited use of force. Under Articles 41 and 42 these elements may be dispensed with; hence there has

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1 Hitoshi Nasu, *International Law on Peacekeeping – A Study of Article 40 of the UN Charter*, Martinus Nijhoff Publishers, Leiden, 2009.

2 Ibid 2.

developed a convenient practice of authorizing peacekeeping missions under 'Chapter VII' (where Articles 40, 41 & 42 are situated). This ambiguity of authority is regarded as disingenuous and is criticised by Nasu. As to the constraining elements themselves, Nasu demonstrates that they largely arose out of historical happenstance and their continued influence inhibits the effectiveness of modern day peacekeeping operations. While he concedes that the structure of the UN Charter still requires careful observation of a nuanced type of impartiality and a muted form of proportionality for any peace operation,[3] there is a greater scope for preventative, de-escalatory action permitted under Article 40 than what prevailing conceptions acknowledge. Nasu argues that the Security Council has traditionally allowed a situation to become critical before authorizing a peace mission, almost always in a reactive manner. In essence, the Security Council is held captive to the doctrinal requirements of impartiality, consent and the limited use of force in circumstances where it could transcend these constraints. Thus, by invoking general 'Chapter VII' authority, Nasu argues that the Security Council achieves an 'out' from the doctrinal requirements but generates greater uncertainty as to the status and character of the peace operation which contributes to a less effective response.[4]

Nasu approaches his task in a typically formalist manner with a heavy reliance upon sources theory to underpin his arguments. He seeks to establish a number of propositions in support of his thesis, namely, that peacekeeping action authorized under Article 40 does not require a pre-existing determination of a threat to peace and security under Article 39;[5] that a 'decision' made under Article 40 carries with it authority under Article 103 of the Charter to displace inconsistent treaty obligations;[6] and pursuant to Articles 25 & 48(1) there is an abiding obligation on all states to assist in carrying out an Article 40 peacekeeping decision.[7]

Nasu also examines the tactical issues associated with the employment of armed force within a peacekeeping mission. He argues that notwithstanding the lack of 'enforcement' authority of the type recognized under Articles 41 & 42, Article 40 permits force under the rubric of 'self defence', which has been given a wide ambit of application under customary international law. This reading allows greater freedom of action and the right to use a broader amount of force for 'protection of the mandate'[8] by peacekeepers acting under an Article 40 determination. As to the types of activities that may be authorized under Article 40, Nasu readily identifies at least five, including, calling for a cease-fire, permitting a peace observation action, deployment of peacekeeping forces, provisional territorial administration

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3 Ibid 278.
4 Ibid 31.
5 Ibid 106.
6 Ibid 132.
7 Ibid 123, 133–4.
8 Ibid 172.

and preventive arms embargo.[9] According to Nasu, these activities (or a combination thereof) have the capacity to prevent further deterioration of conflicts and to create 'an atmosphere conducive to a peaceful settlement' of conflict.[10] The authority of the Security Council acting under Article 40 is not unlimited, Nasu concedes that respecting the 'purposes and principles' of the UN Charter are an essential requirement of the lawful exercise of authority[11] and that the 'enforcement measure' caveat of Article 2(7) does not apply to an Article 40 measure.[12] Hence there is a delicate balance required by not 'intervening' within the domestic affairs of a host state when authorising and deploying a peacekeeping force under Article 40.[13] This turns on what 'intervention' means when interpreted in context.[14]

There is much to commend in Nasu's account. He seeks to establish a more formally 'correct' legal authority for the deployment of peacekeeping forces, by demonstrating the legal and policy advantages of relying upon Article 40 of the UN Charter to sustain such operations. Reliance upon Article 40 would, according to Nasu, avoid the high stakes political brinkmanship and inflexible attitude bestowed when consistently invoking Chapter VII authority;[15] a practice that he contends is legally misplaced in any event. It also allows, according to Nasu, a greater agility to deploy forces in an earlier, preventative type role within an operational theatre to thus avoid or mute any escalation of violence.

Effective, timely and empowered peacekeeping is certainly a noble and laudatory goal. There are, however, the usual costs that go with a highly calibrated and formalistic advocacy of legal authority. What the law provides, it also denies, especially given the basic indeterminacy that underpins most of Charter law. At present the approach to peacekeeping may be dysfunctional and imprecise with its 'easy' reliance upon Chapter VII and 'all necessary means' habit to mandate authorisation. Yet it does provide an established avenue of action that melds policy and law as well as legitimacy with validity. It may, in fact, be engineered in such a way as to achieve the preventative goals sought by Nasu, without the need for the strategic legal re-alignment he asserts. It is hard to comprehend why reliance on Article 40 as an authority for a peacekeeping mission would be any easier than 'Chapter VII' measures traditionally invoked. Indeed, any authorisation necessarily implicates a significant degree of political and policy calculation and maneuvering. As former Secretary General Dag Hammarskjold demonstrated, there is an essential and effective pragmatism that can be wrought from the fusion

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9 Ibid.

10 Ibid 171.

11 Ibid 278.

12 Ibid 168-9.

13 Ibid 135–6.

14 Ibid ch 5.

15 Ibid 125–6.

of law and policy within a fragmented and deconstructed environment.[16] The pragmatic role of lawyers within this context was latently grasped by leading Australian academic Hilary Charlesworth in her disquieting reflection on the role of lawyers during the debate concerning Australian involvement in the Iraq war. Reflecting on that experience she acknowledged the potential need for a 'new disciplinary self-image' for international lawyers by accepting that we are 'active participants in intensely political and negotiable contexts and … must confront this responsibility without sheltering behind the illusion of an impartial, objective, legal order'.[17] Law may not be the completely autonomous authority we all think it is, at least in the context of international law, especially at the convergence point of sovereign and security rights and prerogatives. Instead, it may be more a system of better or worse legal arguments that possess (or not) persuasive power according to relevant political and legal constituencies.[18] In this context, the reach for conclusive legal autonomy to ground peacekeeping operations advanced by Nasu may itself be a constraining, illusory and ultimately self-defeating quest.

This is not to deny that Nasu's account of peacekeeping isn't a powerful piece of scholarship. It certainly is that. He has painstakingly researched the evolution of peacekeeping and presented a highly readable and extremely well argued account of the legal underpinnings of United Nations peacekeeping operations. By providing a convincing argument as to the utility of Article 40, he opens up well-constructed avenues of legal inquiry and develops an intriguing formalist architecture. His partial demolition of the 'sacrosanct' pillars of contemporary peacekeeping, namely impartiality, consent and limited use of force is a highly engaging and persuasive account that should influence future thinking. In short, it is a worthy book that should be read by practitioners and academics alike and his well made arguments seriously and soberly assessed.

Dale Stephens
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16 Oscar Schachter, 'Dag Hammarskjold and the Relation of Law to Politics' (1956) 56 *American Journal of International Law* 1.

17 Hilary Charlesworth, 'Saddam Hussein: My Part In His Downfall' (2005) 23 *Wisconsin International Law Journal* 127, 143.

18 David Kennedy, *Of War and Law*, Princeton University Press, Princeton, New Jersey, 2006, pp 96–98.

19 The views expressed by the reviewer are his personal views and do not necessarily reflect those of the Royal Australian Navy or the Department of Defence.