

---

# Organizing Internationally: Georges Abi-Saab, the Congo Crisis and the Decolonization of the United Nations

Umut Özsu\*

## Abstract

*Why and how have ‘Third World’ international lawyers engaged with the law of international organizations? This article considers Georges Abi-Saab’s 1978 work The United Nations Operation in the Congo 1960–1964, an important but largely forgotten intervention in debates about the power and authority of the United Nations (UN) at the height of the post-World War II wave of decolonization. Fusing careful analysis of the legal rules and instruments that underwrote UN operations during the Congo crisis with a narrative reconstruction of the accompanying political and diplomatic negotiations, Abi-Saab’s book examines the organization’s involvement in the conflict following Congo’s formal independence from Belgium in June 1960, both during and after Dag Hammarskjöld’s tenure as UN Secretary-General. This article takes up Abi-Saab’s account of Hammarskjöld’s role in, and management of, the crisis. It demonstrates that Abi-Saab understood the Secretary-General’s office to be not only hedged in by significant ‘constitutional’ constraints on publicly justifiable action but also uniquely equipped to coordinate competing interests and facilitate collective action. It also demonstrates that this dual understanding of the Secretary-General – both ‘legalistic’ and overtly ‘political’ – informed Abi-Saab’s commitment to developing international law in and through international organizations.*

## 1 Introduction

Few jurists of the past half-century can justifiably claim to have exerted as broad and varied an influence on the discipline of international law as Georges Abi-Saab. From international criminal law to international investment law, to the drive to fix the scope and content of the principle of self-determination, to the struggle to realize

\* Associate Professor of Law and Legal Studies, Carleton University, Canada. Email: [Umut.Ozsu@carleton.ca](mailto:Umut.Ozsu@carleton.ca).

the principle of permanent sovereignty over natural resources, Abi-Saab has been at the forefront of international legal thought and practice for decades. Among other things, he has been a consultant to the United Nations (UN) Secretary-General on numerous occasions, a judge of both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, twice an ad hoc judge of the International Court of Justice, a chair of the World Trade Organization's Appellate Body, a member of the International Monetary Fund's Administrative Tribunal, a representative of Egypt at various diplomatic conferences and, not least, a dedicated teacher and mentor to generations of students of international law.<sup>1</sup> The reach of Abi-Saab's work on (and within) international organizations – and the law that formalizes their operation – is nothing short of exceptional.<sup>2</sup>

What is perhaps most remarkable about the range of Abi-Saab's work is that few lawyers have wielded comparably multifaceted *tiers-mondist* credentials. From his early work on the claims of newly decolonized states, to the analytical precision he tried to lend the New International Economic Order project, to his career-long desire to ensure that non-intervention and sovereign equality might amount to something more than rhetorical flourishes,<sup>3</sup> Abi-Saab has devoted much of his energy to defending positions typically associated with the Group of 77 and the Non-Aligned Movement. As a result, alongside R.P. Anand, Mohammed Bedjaoui, Taslim Elias and a handful of other jurists, Abi-Saab has been placed in the pantheon of figures (nearly all male, Western-trained and of bourgeois provenance) now heralded as 'first-generation' advocates of what has come to be known as the 'Third World approaches to international law' (TWAIL) movement.<sup>4</sup> On this account, Abi-Saab is not simply a scholar

<sup>1</sup> His experience as a judge is particularly significant, given the historical marginalization of extra-European jurists from many international courts and tribunals. See Obregón, 'The Third World Judges: Neutrality, Bias or Activism at the Permanent Court of International Justice and International Court of Justice?', in W.A. Schabas and S. Murphy (eds), *Research Handbook on International Courts and Tribunals* (2017) 181, especially at 186–187.

<sup>2</sup> For overviews, see Boisson de Chazournes, 'Portrait de Georges Abi-Saab', in L. Boisson de Chazournes and V. Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (2001) 3; 'Profile – Georges Abi-Saab, Egypt', in D. Terris et al. (eds), *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (2007) 131.

<sup>3</sup> See, e.g., Abi-Saab, 'The Newly Independent States and the Scope of Domestic Jurisdiction', 54 *ASIL Proceedings* (1960) 84; Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline', 8 *Howard Law Journal* (1962) 95; Abi-Saab, 'The Third World and the Future of the International Legal Order', 29 *Revue égyptienne de droit international* (1973) 27; Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order: Report of the Secretary-General, UN Doc. A/39/504/Add.1, Annex III (1984); Abi-Saab, 'Cours général de droit international public', 207(7) *Recueil des cours* (1987) 9; Abi-Saab, 'Some Thoughts on the Principle of Non-Intervention', in K. Wellens (ed.), *International Law: Theory and Practice – Essays in Honour of Eric Suy* (1998) 225; Abi-Saab, 'Whither the International Community?', 9 *European Journal of International Law (EJIL)* (1998) 248.

<sup>4</sup> Needless to say, efforts to devise a workable periodization scheme for different 'generations' of Third World approaches to international law (TWAIL) are prone to arbitrariness. For a classic periodization, see Anghie and Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', 2 *Chinese Journal of International Law (CJIL)* (2003) 77, at 79–87. For the broad lines of TWAIL's development, see Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and

and practitioner committed to an international legal system formally spearheaded by the UN. Instead, he is a jurist who has laboured assiduously for (and partly from) the Third World, struggling to reorient the international law in which he was trained and with which he was compelled to work. The assessment cannot be dismissed as mere hagiography. However, as Abi-Saab himself has noted, his after-the-fact identification as a forerunner or original exponent of TWAIL also raises important questions, a particularly critical one being whether this movement, or at least those facets of it that are anchored in critical legal studies, can be squared with the ‘constructive criticism’ he has sought to practise.<sup>5</sup>

This article examines Abi-Saab’s engagement with the law of international organizations. It considers his dual-track approach to international organizations, demonstrating that it was ‘legalistic’, on the one hand, in the sense of valuing strict conformity with (particular interpretations of) relevant rules and instruments, and, on the other hand, deeply and explicitly ‘political’, in the sense of tolerating a considerable degree of flexibility in diplomatic negotiations and actual policy implementation. I explore this mode of conceiving and practising international law by focusing on Abi-Saab’s 1978 study, *The United Nations Operation in the Congo 1960–1964*.<sup>6</sup> While Abi-Saab wrote extensively about the law of international organizations, and is in this regard often consulted for his 1981 edited volume *The Concept of International Organization*,<sup>7</sup> *United Nations Operation* puts his twofold approach to international law on display with particular clarity.

My argument proceeds in two steps. First, I argue that Abi-Saab’s views on international organizations underwent refinement during the 1960s and 1970s, with the increasingly experienced jurist cultivating a tactically flexible approach to the power and authority that international organizations wielded and the concrete work they undertook. Abi-Saab was prepared to temper his commitment to international law and its organizations by abandoning rules, doctrines and institutions that did not conform to decolonization’s transformative agenda of constructing a universal social order. Attuned though he was to the specifically legal facets of political conflict, he was, after all, keenly aware that the law of international organizations was itself political through and through. Second, I argue that Abi-Saab’s discussion of the UN’s involvement in the Congo crisis envisaged for the Secretary-General a role that

---

a ‘Tentative Bibliography’, 3 *Trade, Law and Development* (2011) 26; see also Fakhri, ‘Questioning TWAIL’s Agenda’, 14 *Oregon Review of International Law* (2012) 1; Eslava, ‘TWAIL Coordinates’, *International Law under Construction blog* (1 April 2019), available at <https://grojil.org/2019/04/01/twail-coordinates/>. The possibility of a ‘generational’ account is questioned in Galindo, ‘Splitting TWAIL?’, 33 *Windsor Yearbook of Access to Justice* (2016) 39.

<sup>5</sup> See Abi-Saab, ‘The Third World Intellectual in Praxis: Confrontation, Participation, or Operation behind Enemy Lines?’, 37 *Third World Quarterly* (2016) 1957. Abi-Saab writes as follows: ‘I am with two minds about the label TWAIL. If taken literally – Third World Approaches to International Law – then, of course, I am a TWAILer or TWAILian. But if it is taken, as presented or perceived by some, as an off-shoot of the Critical Legal Studies school, I am not. ... It is the summum of cynicism to criticise the existing rules vehemently, while refusing to propose any alternatives, as do the members of this school’ (at 1958).

<sup>6</sup> G. Abi-Saab, *The United Nations Operation in the Congo 1960–1964* (1978).

<sup>7</sup> G. Abi-Saab (ed.), *The Concept of International Organization* (1981).

conformed to the ‘constitutional’ framework of UN law while still retaining for this office a significant degree of manoeuvrability. One of the most complex byproducts of post-1945 decolonization, the crisis broke out shortly after Congo won its independence from Belgium in June 1960 and unfolded over the years that followed: the resource-rich regions of Katanga and South Kasai launched secessionist struggles with extensive Belgian military and economic support; rival centres of power emerged in Léopoldville (Kinshasa), Élisabethville (Lubumbashi) and Stanleyville (Kisangani); the UN Security Council authorized a peacekeeping force, while the Soviet Union, the USA and numerous other states armed, funded, trained and intervened on behalf of different factions.<sup>8</sup> Less an effort to provide a comprehensive account of the crisis than an attempt to parse these developments from the standpoint of UN law, Abi-Saab’s book focuses on the concurrence of freedom and constraint in Dag Hammarskjöld’s efforts to manage the crisis from above.

## 2 International Organizations in a New Key

Abi-Saab’s views on the function, power and authority of international organizations developed over the course of his personal and professional maturation. In 1960, the year the UN General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples,<sup>9</sup> Abi-Saab published a piece in the proceedings of the American Society of International Law’s annual meeting, taking the opportunity to argue that recently decolonized states were seeking to turn international law to their advantage. ‘[I]t could be said’, he wrote, ‘that when the United Nations can be used by the newly independent states as a vehicle of social change, they attempt to maximize its powers, but when it is used as a bar to social change,

<sup>8</sup> For analysis of the crisis, see especially A. L. Gavshon, *The Last Days of Dag Hammarskjöld* (1963); T.M. Franck and J. Carey, *The Legal Aspects of the United Nations Action in the Congo* (1963); P.H. Gendebien, *L’intervention des Nations Unies au Congo, 1960–1964* (1967); B. Urquhart, *Hammarskjöld* (1972); T. Kanza, *Conflict in the Congo: The Rise and Fall of Lumumba* (1972); R. Dayal, *Mission for Hammarskjöld: The Congo Crisis* (1976); M. Kalb, *The Congo Cables: The Cold War in Africa – From Eisenhower to Kennedy* (1982); D.N. Gibbs, *The Political Economy of Third World Intervention: Mines, Money, and U.S. Policy in the Congo Crisis* (1991); A. James, *Britain and the Congo Crisis, 1960–63* (1996); L. De Witte, *The Assassination of Lumumba* (2001); Nwaubani, ‘Eisenhower, Nkrumah and the Congo Crisis’, 36 *Journal of Contemporary History* (2001) 599; S. Mazov, *A Distant Front in the Cold War: The USSR in West Africa and the Congo, 1956–1964* (2010); Nzongola-Ntalaja, ‘Ralph Bunche, Patrice Lumumba, and the First Congo Crisis’, in R.A. Hill and E.J. Keller (eds), *Trustee for the Human Community: Ralph J. Bunche, the United Nations, and the Decolonization of Africa* (2010) 148; Iandolo, ‘Imbalance of Power: The Soviet Union and the Congo Crisis, 1960–1961’, 16 *Journal of Cold War Studies* (2014) 32; E. Gerard and B. Kuklick, *Death in the Congo: Murdering Patrice Lumumba* (2015); A. O’Malley, *The Diplomacy of Decolonisation: America, Britain and the United Nations during the Congo Crisis, 1960–1964* (2018); Kendall, ‘Postcolonial Hauntings and Cold War Continuities: Congolese Sovereignty and the Murder of Patrice Lumumba’, in M. Craven et al. (eds), *International Law and the Cold War* (2020) 533.

<sup>9</sup> GA Res. 1514 (XV), 14 December 1960.

they try to restrict its jurisdiction'.<sup>10</sup> Among other things, this explained 'why in many cases their attitude coincides with that of the Eastern bloc'.<sup>11</sup> 'There are strong indications', he went on to note, 'that the former area is expanding and the latter is contracting', particularly in connection with the question of how to interpret the UN Charter's formal restriction of intervention 'in matters which are essentially within the domestic jurisdiction of any state'.<sup>12</sup>

In the *Howard Law Journal* two years later, Abi-Saab pressed this line further, suggesting that '[t]he last fifty years have witnessed a revolutionary process on a world wide scale unparalleled in history', one marked by a twofold approach on the part of newly independent states towards international law and its institutions.<sup>13</sup> As 'weaker members of the international community', these states took principles like 'territorial integrity, nonaggression, sovereign equality, and nonintervention in domestic affairs' – all integral to the UN project and all to be reaffirmed in the 1970 Friendly Relations Declaration, adopted 25 years after the UN Charter<sup>14</sup> – to be 'necessary and useful to them as a protection against the incursions of the larger and more powerful states'.<sup>15</sup> Given such weakness, though, they also understood 'this same body of law [to] be a hindrance to their policies of internal change and reconstruction' under certain circumstances, seeing as how it did not always 'respond to the new needs and the fundamental changes in the world community'.<sup>16</sup> Abi-Saab now invoked J.L. Brierly's wartime claim that international law had yet to leave behind its '*laissez-faire* stage of social development' and adapt itself to the 'social welfare' impulses of the modern world,<sup>17</sup> arguing that it was growing out of its classical mould and adjusting to 'fundamental changes in the society it is supposed to regulate [so as] to promote the security and well being of its members'.<sup>18</sup>

By 1973, Abi-Saab could be found writing on the rising power of the Third World and its push to restructure international legal and economic relations in the pages of

<sup>10</sup> Abi-Saab, 'Newly Independent States', *supra* note 3, at 90.

<sup>11</sup> *Ibid.*, at 90.

<sup>12</sup> *Ibid.*; UN Charter, Art. 2(7).

<sup>13</sup> Abi-Saab, 'Newly Independent States', *supra* note 3, at 97.

<sup>14</sup> Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (Friendly Relations Declaration), GA Res. 2625, 24 October 1970. See further Moyn and Özsü, 'The Historical Origins and Setting of the Friendly Relations Declaration', in J.E. Viñuales (ed.), *The Friendly Relations Declaration at 50: A Study of the Fundamental Principles of International Law after Half a Century* (2020), 23.

<sup>15</sup> Abi-Saab, 'Newly Independent States', *supra* note 3, at 99.

<sup>16</sup> *Ibid.*, at 99, 118. Such suspicions were felt with particular force in respect of customary international law. For a trenchant critique, see M. Bedjaoui, *Towards a New International Economic Order* (1979), at 134–138. For the corresponding 'Second World' critique, see G.I. Tunkin, *Theory of International Law* (1974), at 127, 136. For recent reappraisals, see Galindo and Yip, 'Customary International Law and the Third World: Do Not Step on the Grass', 16 *CJIL* (2017) 251; Chimni, 'Customary International Law: A Third World Perspective', 112 *American Journal of International Law (AJIL)* (2018) 1.

<sup>17</sup> J.L. Brierly, *The Outlook for International Law* (1944), at 11.

<sup>18</sup> Abi-Saab, 'Newly Independent States', *supra* note 3, at 119–121 (quotation at 121).

the *Revue égyptienne de droit international*, one of several international law periodicals (including the *Indian Journal of International Law*) based in the extra-European world and providing additional outlets for Third World international lawyers who would otherwise publish much of their work in US and European law journals.<sup>19</sup> His faith in the UN had grown stronger, and he was confident enough in his identity as a jurist to suggest that the Third World, working through institutions like the General Assembly and the UN Conference on Trade and Development, was capable of reshaping much of the world's economic and political architecture.<sup>20</sup> For Abi-Saab, the 'traditional international law' defended by 'the Western powers' – and marked by outdated and increasingly dysfunctional approaches to questions of state succession, foreign investment and customary international law – had 'already [been] challenged and refuted by Third World and Eastern bloc States'.<sup>21</sup> International organizations were key to this transformative development, none more so than the UN itself. 'International law has shown a surprising degree of resilience, given its previous record, in responding to the demands of the Third World for revision of existing law and active participation in the process', he wrote, chalking this up 'in large part to the United Nations, which provided an institutional framework within which this effort was deployed, in a continuous and sustained manner'.<sup>22</sup> States of all stripes may once have had good reason to be wary of according independent legal personality to international organizations. Much Soviet scholarship had expounded the view that the UN enjoyed no independent personality and that any agreement it concluded created rights and obligations only for member states, not for the UN itself. But times had changed, as even Grigory Tunkin, the most influential Soviet international lawyer of the time, had admitted in 1970.<sup>23</sup> Abi-Saab encouraged this cautious willingness to work with the world's peace palaces, international tribunals and administrative agencies, organizing in the name of global social justice.

Notwithstanding the distance he sought to maintain from the classical international law of the 19th and early 20th centuries, as well as many elements of the post-World War II settlement, Abi-Saab supported international organizations, at least insofar as they promoted economic development and facilitated interstate cooperation, particularly in territories liberated from foreign rule. Many mainstream advocates of international organizations had long assumed (or at least made a point of repeating) that such bodies are best understood as apolitical, technocratic agencies for the common good, adopting an austere functionalism with deep roots in the ideological 'science'

<sup>19</sup> Abi-Saab, 'The Third World', *supra* note 3.

<sup>20</sup> *Ibid.*, at 59–62.

<sup>21</sup> *Ibid.*, at 66.

<sup>22</sup> *Ibid.*, at 64.

<sup>23</sup> Tunkin, *supra* note 16, at 108–109, 244, 357–365. Cf. *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Memorandum of the USSR Government, ICJ Pleadings (1962), at 270; *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Oral Statement of Mr. Tunkin, ICJ Pleadings (1962), at 397. On the *Certain Expenses* case, which concerned United Nations (UN) operations in Congo and the Middle East, see further T.O. Elias, *New Horizons in International Law* (1979), at 76–77, 103–106.

of colonial administration and capable of being applied in principle to any institution demonstrating the capacity to attend to certain basic concerns.<sup>24</sup> Abi-Saab did not share this view; he was far too attuned to the fact that international organizations did not always prioritize the material interests of the global South. Yet he also rejected the notion that international organizations should be dismissed on that account. Institution building on the international plane was not a panacea but, rather, a matter of grim, stoic necessity, a grudging acceptance of the responsibility of strengthening those sources of social authority and institutional power likeliest to further the cause of global emancipation.

### 3 Commanding Heights

At root, *United Nations Operation* was devoted to the capabilities and responsibilities of the UN Secretary-General, and ‘constitutional’ questions about the legal rules that govern relations between this office, the Security Council, the General Assembly, the UN’s other organs and each of the organization’s member states. In addition to demonstrating a high degree of sensitivity to the bargaining tactics of the various parties to the Congo crisis, Abi-Saab insisted on the centrality of such ‘constitutional’ considerations to any credible assessment of the UN’s role in the establishment and consolidation of an independent Congo. If the ‘Congo question’ showcased the brutality of the international law of colonial capitalism,<sup>25</sup> ‘resolving’ it with the aid of the new international law might well be the most appropriate way to put an end to colonialism once and for all.

<sup>24</sup> For Paul Reinsch, the American diplomat, political scientist and scholar of colonialism often regarded as the progenitor of a functionalist approach to international institutional law, see Klabbbers, ‘The Emergence of Functionalism in International Institutional Law: Colonial Inspirations’, 25 *EJIL* (2014) 645; Schmidt, ‘Paul S. Reinsch and the Study of Imperialism and Internationalism’, in D. Long and B.C. Schmidt (eds), *Imperialism and Internationalism in the Discipline of International Relations* (2005) 43; see also Klabbbers, ‘Schermers’ Dilemma’, 31 *European Journal of International Law (EJIL)* (2020) 565. For functionalism in international organizations law more generally, see G.F. Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (2017), at 8, 20, 108, 179, 212; see Sinclair, ‘C. Willfred Jenks and the Futures of International Organizations Law’, 31 *EJIL* (2020) 525. As Sinclair also notes (*ibid.*, at 103), a prominent example of this position and one that appeared only a few years before Abi-Saab’s book on the Congo crisis, is D. Mitrany, *The Functional Theory of Politics* (1975). On Mitrany, see also Lagrange, ‘Functionalism According to Paul Reuter: Playing a Lone Hand’, 31 *EJIL* (2020) 543.

<sup>25</sup> The literature is enormous, and colonialism in Congo is a central through-line in the historiography of international law. For recent reconsideration, see Craven, ‘Between Law and History: The Berlin Conference of 1884–1885 and the Logic of Free Trade’, 3 *London Review of International Law* (2015) 31. As Koskenniemi has demonstrated, the modern international legal profession is deeply mired in the ‘Congo question’, the Institut de droit international having devoted much of its initial work to considering the legal implications of the 1884–1885 Berlin Conference. See M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001), especially at 121–127, 155–166. See further Fisch, ‘Africa as *terra nullius*: The Berlin Conference and International Law’, in S. Förster, W.J. Mommsen and R. Robinson (eds), *Bismarck, Europe, and Africa: The Berlin Africa Conference 1884–1885 and the Onset of Partition* (1988) 347; Hébié, ‘The Acquisition of Original Titles of Territorial Sovereignty in the Law and Practice of European Colonial Expansion’, in M.G. Kohen and M. Hébié (eds), *Research Handbook on Territorial Disputes in International Law* (2018) 36, at 82–85.

Of particular concern to Abi-Saab was Hammarskjöld's tenure as Secretary-General. Although Hammarskjöld was not the only Secretary-General involved in the Congo crisis, U Thant being his successor, he presided over much of its critical period, coordinating the legal and policy framework for the organization's involvement. As its 'chief administrative officer',<sup>26</sup> he was directly or indirectly responsible for most of what the UN did (and failed to do) during Congo's violent liberation from Belgium, securing authorization from the Security Council and General Assembly, setting the legal and logistical parameters of the ensuing operation, fending off challenges to his power to interpret and implement resolutions and maintaining open channels of communication with all parties deemed relevant, from Léopoldville to Élisabethville and from New York to Brussels. Even today, he is remembered for the highly suspicious circumstances in which he died in September 1961 while seeking an end to the conflict that had engulfed the newly independent country and in response to which Patrice Lumumba, its prime minister, and Joseph Kasa-Vubu, its president, had requested UN assistance against Belgium's intervention in July 1960.<sup>27</sup> For Abi-Saab, Hammarskjöld was not simply at the helm of the world's leading international organization; he also exemplified a dual approach to international governance, marrying 'legalistic' formality with 'political' elasticity in order to hold himself accountable to an evolving international law with world-constitutional pretensions while furnishing himself with sufficient freedom to modify policies as circumstances changed over time. It was partly because of the skill with which he made use of this approach, undertaking independent action and extracting approval from others, that Thomas Franck would later claim that 'no Secretary-General except Hammarskjöld has ever really used his "bully pulpit" effectively'.<sup>28</sup>

<sup>26</sup> UN Charter, Art. 97.

<sup>27</sup> For the request, see 'Cable Dated 12 July 1960 from the President of the Republic of the Congo and Supreme Commander of the National Army and the Prime Minister and Minister of National Defence Addressed to the Secretary-General of the United Nations', UN Doc. S/4382, 13 July 1960. There has been significant controversy surrounding the crash of the DC-6 plane that resulted in the death of Hammarskjöld and 15 others. The event was investigated by the UN. See Report of the Commission of Investigation into the Conditions and Circumstances Resulting in the Tragic Death of Mr. Dag Hammarskjöld and of Members of the Party Accompanying Him, UN Doc. A/5069, 24 April 1962. A new UN investigation is ongoing. For the paper trail, see Investigation into the Conditions and Circumstances Resulting in the Tragic Death of Dag Hammarskjöld and of the Members of the Party Accompanying Him, UN Doc. A/68/800, 21 March 2014; GA Res. 69/246, 29 December 2014; GA Res. A/70/132, 2 July 2015; GA Res. 70/11, 19 November 2015; GA Res. 71/260, 23 December 2016; GA Res. A/71/1042, 5 September 2017; GA Res. 72/252, 24 December 2017; GA Res. 73/973, 12 September 2019; GA Res. 74/248, 27 December 2019; see also Borger, 'Plane Crash That Killed UN Boss "May Have Been Caused by Aircraft Attack"', *Guardian* (26 September 2017), available at [www.theguardian.com/world/2017/sep/26/plane-crash-which-killed-un-boss-dag-hammarskjold-may-have-been-caused-by-aircraft-attack](http://www.theguardian.com/world/2017/sep/26/plane-crash-which-killed-un-boss-dag-hammarskjold-may-have-been-caused-by-aircraft-attack); Gladstone and Cowell, 'More Clues, and Questions, in 1961 Crash That Killed Dag Hammarskjöld', *New York Times* (17 February 2019), available at [www.nytimes.com/2019/02/17/world/africa/hammarskjold-crash-mystery.html](http://www.nytimes.com/2019/02/17/world/africa/hammarskjold-crash-mystery.html).

<sup>28</sup> Franck, 'The Secretary-General's Role in Conflict Resolution: Past, Present and Pure Conjecture', 6 *EJIL* (1995) 1, at 26.



True to this commitment, Abi-Saab commenced *United Nations Operation* by declaring that while the Security Council authorized the UN's involvement in post-independence Congo, it was Hammarskjöld himself who was responsible for proposing the basic terms of the organization's mandate, interpreting and reinterpreting these terms as the crisis gathered pace and implementing the mandate with the assistance of representatives. As Abi-Saab observed in his book's opening paragraph, 'if the Security Council provided the formal sanction, the political initiative and proposed content of the decision came from the Secretary-General'.<sup>29</sup> This stance followed directly from Hammarskjöld's dedication to a form of diplomatic practice suitable to his office's demands. This mode of administrative action, which Hammarskjöld himself tended to dub 'preventive diplomacy', was designed, in Abi-Saab's words, 'to forestall the extension, through intervention and counter-intervention, of the cold war to conflicts outside or on the periphery of the contending blocs', a goal that was to be achieved through 'the strict localization or "international neutralization" of these conflicts through the intervention of the U.N. itself'.<sup>30</sup> Hammarskjöld offered an explicit justificatory rationale for this vision of executive administration on a number of occasions, and Abi-Saab pointed, in particular, to the introduction of his 1959–1960 annual report, in which he had written that '[p]reventive diplomacy ... is of special significance in cases where the original conflict may be said either to be the result of, or to imply risks for, the creation of a power vacuum between the main blocs'.<sup>31</sup> It had been clear from an early stage to Hammarskjöld that a system of international peacekeeping – a system that had begun to evolve through the 1948 Arab-Israeli War, the 1947–1948 Indian-Pakistani War and the 1956 Suez Crisis – would be crucial for ensuring the viability of any such 'preventive diplomacy', particularly in situations arising from the disintegration of formal colonial rule.<sup>32</sup>

Abi-Saab believed that the role of law in shaping the UN Operation in Congo (Organisation des Nations Unies au Congo and, subsequently, Opération des Nations Unies au Congo [ONUC]) came to the fore in three ways. To begin with, law had proven a valuable instrument of what Abi-Saab termed 'social engineering'. The UN operation, Abi-Saab wrote with more than a touch of hyperbole, had been 'conceived and mounted from scratch by Dag Hammarskjöld, in a brilliant exercise of social engineering, with the double purpose of facing up to the immediate crisis, but also

<sup>29</sup> Abi-Saab, *supra* note 6, at 1.

<sup>30</sup> *Ibid.*, at 2. On the long history of UN 'preventive diplomacy', as first expounded by Hammarskjöld, see B.G. Ramcharan, *Preventive Diplomacy at the UN* (2008), at 1–8.

<sup>31</sup> Introduction to the Annual Report of the Secretary-General on the Work of the Organization, 16 June 1959–15 June 1960, GAOR, 15th Sess., Supp. 1A, UN Doc. A/4390/Add.1 (1960), at 4; see also Introduction to the Annual Report of the Secretary-General on the Work of the Organization, 16 June 1960–15 June 1961, GAOR, 16th Sess., Supp. 1A, UN Doc. A/4800/Add.1 (1961), at 3. For Abi-Saab's gloss, see Abi-Saab, *supra* note 6, at 2.

<sup>32</sup> Abi-Saab, *supra* note 6, at 3–5. For doubts about Hammarskjöld's reliance upon UN peacekeeping, a mechanism easily manipulated by great powers, see Akintan, 'The Basic Attitude of the Afro-Asian Group towards Peacekeeping Operations of the United Nations', 1 *Nigerian Annual of International Law* (1976) 124, at 131–132.

of expanding the role of the U.N. in world affairs'.<sup>33</sup> The legal mandate with which Hammarskjöld had been provided was 'thus a legal translation of political purpose into specifically defined *functions*', but one that also imposed certain restrictions on the way in which he was expected to go about achieving this purpose.<sup>34</sup> Rather than being 'a purely enabling instrument', it also had an important 'constraining facet', limiting the logistical and interpretational liberties potentially available.<sup>35</sup> Far-reaching though they were as levers for effecting change, the legal instruments that authorized the ONUC also stayed Hammarskjöld's hand.

In addition to its capacity to further one or another form of 'social engineering', the relevant law should, Abi-Saab wrote, be broached from a tactical perspective. Considered from this perspective, Hammarskjöld had exercised the interpretational powers vested in his office deftly, negotiating '[t]he tension between the pursuit of political aims ... and the constraining effect of the [legal] principles', a tension he saw as 'the basis of all the controversies to which the Operation gave rise'.<sup>36</sup> The Secretary-General exercised his power to interpret resolutions, authorizing UN action in Congo creatively and with broader political objectives in mind. But he also sought to remain within the recognizable parameters of these resolutions in order to retain the formal justification he needed to ensure his authority. Interestingly, Abi-Saab couched this point in terms familiar to domestic lawyers in the common law tradition, observing that Hammarskjöld wielded his power to interpret and mount arguments on the basis of these instruments as a 'sword' as well as a 'shield': just as they empowered the Secretary-General to cajole recalcitrant actors into complying with his preferred policies, so too did these instruments insulate him from demands for more robust forms of intervention, such as those that might have involved UN forces in the conflict in a non-defensive capacity.<sup>37</sup>

The third and final dimension of law's role in the Congo operation related to the internal 'constitutional' development of the UN itself. Hammarskjöld, Abi-Saab stressed, was motivated by a fundamentally 'constitutionalist outlook'.<sup>38</sup> Concerned with the normative and institutional architecture of the organization over which he presided, not only for its own sake but also for the purpose of shoring up the legitimacy of the liberal international order it ostensibly safeguarded, he underscored the importance of legal authorization for the UN mission in Congo. He did this through a variety of means. His default approach was premised on obtaining Security Council resolutions that he claimed lent tacit support to his invocation of broad interpretational liberties – 'tacit' because he would not necessarily seek express confirmation of the interpretations he gave to their texts.<sup>39</sup> According to Abi-Saab, though, when he found himself

<sup>33</sup> Abi-Saab, *supra* note 6, at 193.

<sup>34</sup> *Ibid.* (emphasis in original).

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, at 49–50, 194.

<sup>38</sup> *Ibid.*, at 194.

<sup>39</sup> *Ibid.*, at 48–51, 194. Abi-Saab's understanding of the centrality of UN resolutions to the Congo crisis (and a variety of other events) tracks the interest of many other Third World scholars at the time. Of course, such interest was directed mainly towards General Assembly resolutions, seeing as how that body's composition and ideological trajectory had been transformed through the admission of a large number of newly independent states. For a famous example, see Bedjaoui, *supra* note 16, at 133, 138–144, 154.

under fire,<sup>40</sup> Hammarskjöld tended to resort to slightly different tactics, such as soliciting such confirmation, establishing a loose advisory committee attached directly to his office or even entertaining the possibility of a more weighty and independent body that would be appointed by the Security Council or General Assembly to review his actions and decisions.<sup>41</sup> Under certain circumstances, he felt compelled to ground the authority of his office in the ongoing support of the organization's members, as expressed in resolutions that operated as 'votes of confidence'.<sup>42</sup> In every instance, he was determined to present himself as faithful to – and as contributing to the progressive augmentation of – an international constitutional order.

When all was said and done, Abi-Saab's Hammarskjöld was a complex figure, motivated by an assertive mode of executive action indexed upon 'preventive diplomacy'. On Abi-Saab's account, Hammarskjöld merged formalism in regard to legal rules with adaptability in regard to overriding political aims. Law provided him with 'a margin of subjectivity', affording a measure of freedom rooted in his 'perception and understanding of the standards of legality', his 'evaluation of factual situations which may be highly complex and dynamic' and his 'background, ideology, and sympathy with, or antipathy to, causes and persons involved in a situation'.<sup>43</sup> But it also functioned as an important 'parameter of action', partly due to the UN's status as an international organization to which states had delegated specific legal and political powers.<sup>44</sup> Abi-Saab made a point of emphasizing this constraining dimension, noting that Hammarskjöld grounded his determinations in the UN Charter, benefited from the counsel of Oscar Schachter, his chief legal advisor during the crisis, and regularly underscored his own 'legal propriety' by claiming that he was 'working within an evolving constitutional structure, and contributing by his action to its evolution'.<sup>45</sup>

<sup>40</sup> Due, for instance, to his perceived inability to prevent Lumumba's political marginalization and eventual assassination or what Soviet and other representatives characterized as his weak stance towards Belgian support for secessionist Katanga and South Kasai and the legally controversial decisions of his subordinates in Congo. Abi-Saab, *supra* note 6, at 55–56, 71–72, 97–103, 113–117, 148–149.

<sup>41</sup> *Ibid.*, at 51–53, 115–119, 194–195.

<sup>42</sup> *Ibid.*, at 114, 116–117, 121–123, 195.

<sup>43</sup> *Ibid.*, at 195–196.

<sup>44</sup> *Ibid.*, at 195. In his 1987 course at the Hague Academy of International Law, Abi-Saab expanded upon this familiar characterization of international organizations by taking up the International Court of Justice's 1949 *Reparation* advisory opinion: 'Mais l'avis consultatif de la Cour internationale de Justice portait en l'espèce sur une autre catégorie de sujets de droit international, celle des associations d'Etats en forme d'organisation internationale. Celles-ci, tout en n'étant pas des "dérives" ou des "variations" à partir du modèle étatique, ne sont néanmoins pas tout à fait détachées de la problématique de l'Etat, car ce sont des personnes juridiques secondaires, ou plutôt de second degré, créées par les sujets primaires, telles les sociétés ou les associations en droit interne, pour encadrer leur coopération dans la poursuite des objectifs qu'ils ne peuvent atteindre, ou atteindre complètement, en agissant individuellement. Ces "créatures" restent dans le sillage ou l'orbite des Etats, même quand elles développent un dynamisme propre et agissent de manière autonome par rapport aux Etats membres'. Abi-Saab, 'Cours général', *supra* note 3, at 82. See also *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949) 174.

<sup>45</sup> Abi-Saab, *supra* note 6, at 62, 196. For Schachter's own thoughts on the crisis, see Miller, 'Legal Aspects of the United Nations Action in the Congo', 55 *AJIL* (1961) 1; Schachter, 'Preventing the Internationalization of Internal Conflict: A Legal Analysis of the U.N. Congo Experience', 57 *ASIL Proceedings* (1963) 216. That 'E.M. Miller', author of the first article, was a pseudonym for Schachter (his wife's maiden name) and that Hammarskjöld approved the article's publication, is confirmed in

## 4 Playing All Sides

Abi-Saab argued that Hammarskjöld's vision of 'preventive diplomacy' found its sharpest expression in the resolution of conflicts arising from decolonization, a process that resulted in the admission into the UN of no fewer than 17 new states in 1960 alone.<sup>46</sup> On his own reconstruction of Hammarskjöld's thinking, 'institutional intervention' on the part of the UN was 'an appropriate technique to stabilize post-colonial situations in Asia and Africa', capable of 'temporarily filling the power vacuum created by colonial disengagement' and 'giv[ing] the newly independent States time to develop their own solutions to ensuing conflicts and problems and to engage in "nation-building"'.<sup>47</sup> Crucially, UN involvement would also prevent newly constituted or reconstituted states from 'becoming a theatre of competition and intervention on the part of the contending blocs', this being a particularly widespread concern in light of contemporaneous developments like the 1961 Berlin Crisis, the 1962 Cuban Missile Crisis and the 1962 border war between China and India, not to mention the Korean War and Suez Crisis of the preceding decade.<sup>48</sup> For Abi-Saab, the 'acid test' of this approach was none other than the Congo crisis, and Hammarskjöld's principal contribution to its provisional settlement, far from being 'limited to the articulation of a political doctrine and the establishment of a U.N. presence', involved the creation of 'a blueprint for U.N. action in response to the crisis which was legally and constitutionally compatible with the Charter, politically acceptable to all concerned, and materially capable of fulfilling its objectives'.<sup>49</sup>

From the outset, Hammarskjöld took steps to ensure that he would be able to exercise significant control over the Congo operation. In the wake of the initial Congolese requests for action, he invoked Article 99 of the UN Charter to ensure that he would bring the matter to the Security Council's attention.<sup>50</sup> The Soviets were hardly reluctant to voice their opposition to the ongoing presence of Belgian troops, mercenaries and administrative personnel in secessionist Katanga, and similar support for the much smaller South Kasai. Like representatives of Congo's central government and many other states, particularly other socialist states or those of non-aligned persuasion,<sup>51</sup>

---

Damrosch, 'In Memoriam: Oscar Schachter (1915–2003)', 98 *ASIL Proceedings* (2004) 393, at 394; Damrosch, 'Remembering Oscar Schachter', 104 *Columbia Law Review* (2004) 542, at 545. On this, see also Abi-Saab, *supra* note 6, at 103.

<sup>46</sup> Abi-Saab, *supra* note 6, at 5.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, also at 54.

<sup>49</sup> *Ibid.*, at 5, 9–10.

<sup>50</sup> 'The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security'. UN Charter, Art. 99. Stephen Schwebel had argued as early as 1951 that this provision 'flavoured and fortified the whole of the Secretary-General's political endeavour', providing 'the constitutional base for a structure of varied and significant political activity'. Schwebel, 'The Origins and Development of Article 99 of the Charter', 28 *British Yearbook of International Law* (1951) 371, at 382; see also Abi-Saab, *supra* note 6, at 10–11, 103.

<sup>51</sup> The term 'non-aligned', used by Jawaharlal Nehru as early as 1949, began to enjoy widespread circulation during the early 1960s, with the establishment of the Non-Aligned Movement in 1961. Lüthi, 'Non-Alignment, 1946–1965: Its Establishment and Struggle against Afro-Asianism', 7 *Humanity* (2016) 201, at 202–203. Abi-Saab himself preferred to speak of 'Afro-Asian' countries. See, e.g., Abi-Saab, *supra* note 6, at 11, 74, 84. Others at the time preferred to focus on 'neutralist' states.

they tended to characterize Belgian involvement, extensive enough that Katanga and South Kasai remained aspiring statelets, as aggression pure and simple.<sup>52</sup> This characterization was resisted or deemed less than ideal, at least during the initial stages of the crisis, by the advanced capitalist countries on the Security Council, whose representatives often linked the crisis to the disintegration of domestic law and order.

Article 99 allowed Hammarskjöld to assume a position of leadership and avoid an immediate breakdown in the consensus-building efforts requisite for collective action. Among other things, Resolution 143, the Security Council's first substantive act in response to the crisis, called on Belgian troops to withdraw 'from the territory of the Republic of the Congo' and authorized Hammarskjöld to take all 'necessary steps', in consultation with the central government in Léopoldville, to provide military assistance until such time as 'the national security forces may be able, in the opinion of the Government, to meet fully their tasks'.<sup>53</sup> This, Abi-Saab noted, was 'what is meant by "filling the vacuum"', and the beauty of the mandate it offered lay in the fact that it did not require formal condemnation – or even formal characterization – of Belgian actions.<sup>54</sup> After all, 'given the divergent ideologies, interests, and outlooks between member States, consensus on action is very hard to achieve, except on deliberately vague formulae glossing over points of potential disagreement which would have blocked the initial U.N. decision to act'.<sup>55</sup>

Hammarskjöld's 'vague and wide mandate' – the basic goal of which was 'the international neutralization of the Congo', harkening back in some respects to the 1884–1885 Berlin Conference and its effort to neutralize the 'Congo Free State' – had a number of implications.<sup>56</sup> In the first instance, it allowed him to avoid having to take a clear public stand on the legal status of the relationship between the ONUC and Belgian soldiers, advisers and other personnel. Framing its actions as a form of 'humanitarian intervention' designed to protect Belgian nationals and other white settlers, and also to serve 'the interests of the Congo and of the international community at large' by ensuring 'respect for fundamental rules which must be observed in any civilized community', Brussels argued that its troops should be recognized as either

<sup>52</sup> As it happens, one of the first major acts of escalation in the Congo crisis was the Soviet Union's move to provide military aid to Lumumba's central government. Abi-Saab, *supra* note 6, at 55–56.

<sup>53</sup> SC Res. 143, 14 July 1960. The resolution was adopted by eight votes to none, with China, France and the United Kingdom abstaining. Its adoption came a mere week after the Security Council first recommended the country's formal admission to the UN. SC Res. 142, 7 July 1960; see also SC Res. 152, 23 August 1960. The General Assembly would act on this recommendation later the same year; see GA Res. 1480 (XV), 20 September 1960. Note further that Res. 143 inaugurated not simply military assistance but also a far-flung process of 'technical' assistance, eventually involving numerous UN agencies and a mammoth group of specialists. Sinclair, *supra* note 24, at 170–171.

<sup>54</sup> Abi-Saab, *supra* note 6, at 13.

<sup>55</sup> *Ibid.*, at 19. For a similar reading of the resolutions, see Franck, 'United Nations Law in Africa: The Congo Operation as a Case Study', 27 *Law and Contemporary Problems* (1962) 632, at 637 (suggesting that 'vagueness of language may be the only way to get action at all' and that 'broad delegation helps break log jams').

<sup>56</sup> Abi-Saab, *supra* note 6, at 20, 56; General Act of the Conference Respecting the Congo 1885, 165 CTS 485, Arts 10–12, 25, 33; see also G. Vanthemsche, *Belgium and the Congo, 1885–1980* (2012), at 103–106.

assimilable to, or in close functional association with, the ONUC, thereby legitimizing its presence in Congo.<sup>57</sup> Abi-Saab was attentive to Belgium's fear that this argument would fail to persuade most parties, and he recounted its ancillary argument that Belgian forces would need to remain in Congo for security purposes until UN forces relieved them, an act that would have implied a degree of operational continuity and breathed life into Brussels' claim that Hammarskjöld recognized not only the necessity but also the legality of its actions.<sup>58</sup>

As he noted, some Western states supported this supplementary argument, suggesting that the Belgians should withdraw immediately prior to the installation of the ONUC's forces. By contrast, many socialist and non-aligned states rejected both arguments, characterized the Belgian presence as aggression, or at least as far more serious than a mere deterioration in domestic security, and contended that the Belgians were under a legal obligation to withdraw without delay, irrespective of the purpose and specific timing of the ONUC's deployment.<sup>59</sup> The disagreement would never be defused, at least not definitively and to the satisfaction of all parties, but it would yield a second resolution, drafted by Ceylon and Tunisia and once again authorizing Hammarskjöld 'to take all necessary action' while calling upon Belgium to effect an immediate withdrawal.<sup>60</sup> The key point for Abi-Saab was that Hammarskjöld was able to secure this resolution without having to adopt an unequivocal stance on the precise legal status of the Belgian intervention and the timing of its termination.<sup>61</sup>

Hammarskjöld's ability to preserve for himself a sphere of executive action formally anchored in UN deliberative and decision-making processes allowed him to implement the policies he deemed necessary to resolve the crisis while dispersing legal and political responsibility among a variety of other parties. Thus, roughly half a month after this second key resolution, the Security Council adopted a third resolution to underscore the obligatory character of the first two and to emphasize that the ONUC's deployment to Katanga did not constitute interference in the ongoing dispute between that

<sup>57</sup> These were the words of Walter Loridan, a Belgian political scientist then serving as his country's permanent representative to the UN. UN SCOR, 15th Sess., 873 mtg., UN Doc. S/PV.873, 13–14 July 1960, paras 192, 196–197; see also Abi-Saab, *supra* note 6, at 21–22.

<sup>58</sup> UN SCOR, 15th Sess., 873 mtg., *supra* note 57, para. 196; Abi-Saab, *supra* note 6, at 22–23. These arguments should be understood in the context of broader debates about continuing Belgian rights in and obligations towards Congo (particularly in regard to debts incurred under colonial rule). See, e.g., Louis, 'L'accession du Congo à l'indépendance: Problèmes de succession d'États dans la jurisprudence belge', 12 *Annuaire français de droit international* (1966) 731; Lejeune, 'Le contentieux financier belgo-congolais', 5 *Revue belge de droit international* (1969) 535.

<sup>59</sup> For the basic terms of the debate, see Abi-Saab, *supra* note 6, at 11–12, 23. For two articulations of these opposing positions, see UN SCOR, 15th Sess., 873 mtg., *supra* note 57, para. 242 (Soviet Union) (arguing that Res. 143 'fixes no conditions for the withdrawal of Belgian troops from Congolese territory. I repeat: it fixes no conditions'); UN SCOR, 15th Sess., 879 mtg., UN Doc. S/PV.879, 21–22 July 1960, para. 27 (United Kingdom) (encouraging the Security Council to concentrate on 'this interlocking process of building up the United Nations operation and arranging for the withdrawal of the Belgian forces').

<sup>60</sup> See SC Res. 145, 22 July 1960. This resolution was adopted unanimously.

<sup>61</sup> Abi-Saab, *supra* note 6, at 23–24.

region and the central government in Léopoldville.<sup>62</sup> This augmented Hammarskjöld's already formidable position *vis-à-vis* Congolese authorities of all stripes. Abi-Saab was particularly impressed by the fact that Hammarskjöld used the resolution to explain that, while he was prepared to discuss the modalities of the ONUC's operation with all interested authorities, 'constitutional' considerations precluded renegotiation of the ONUC's basic mandate. This, on Abi-Saab's account, enabled him to impose his will on the Belgians and Katangese, at least provisionally, while also tethering him even more tightly to the terms of the resolutions that had been issued.<sup>63</sup>

All this had far-reaching consequences for questions of intervention and sovereign equality. According to Abi-Saab, Hammarskjöld took Article 2(7) of the UN Charter to apply not simply to states but also to their subdivisions and constituent regions – an interpretation Abi-Saab understandably found 'rather peculiar', given that its text refers solely to states and is clearly 'a reformulation of the principle of sovereignty'.<sup>64</sup> It seems to have been from this position that Hammarskjöld derived his view that the UN Charter prohibits the UN from intervening in the domestic affairs of a given state even when its government has explicitly requested such intervention, the only significant exception to this otherwise general rule being situations in which the Security Council has authorized the use of force pursuant to its Chapter VII powers.<sup>65</sup> Hammarskjöld believed that 'the U.N. should not act as a Holy Alliance between the existing governments of member States against all revolutionary movements in these States', even in the face of socialist and non-aligned claims that 'U.N. action in Katanga would not constitute intervention in an internal affair but a counter-intervention to bring to an end and eliminate the results of the initial Belgian intervention which already conferred on the situation an international character'.<sup>66</sup> Yet, if taken at face value and pushed to its logical conclusion, Hammarskjöld's interpretation of intervention could have rendered the ONUC's activities all but untenable, as even the provision of assistance to the central government for the purpose of maintaining law and order (central to the Security Council's resolutions) could be deemed to transgress the kind of action he thought valid. An additional complication was that the mere presence of

<sup>62</sup> See SC Res. 146, 9 August 1960 (stating, *inter alia*, that the ONUC 'will not be a party to or in any way intervene in or be used to influence the outcome of any internal conflict, constitutional or otherwise'). This resolution was adopted by nine votes to none, with France and Italy abstaining.

<sup>63</sup> Abi-Saab, *supra* note 6, at 33, 35.

<sup>64</sup> *Ibid.*, at 39.

<sup>65</sup> *Ibid.* The question of how to interpret Art. 2(7) and subsequent formulations of intervention concerned Abi-Saab deeply. Two decades after the publication of his book on Congo, he noted that the UN Charter does not fully enshrine the principle of non-intervention, making no express mention in Art. 2(7) of the possibility of intervention by one state in the domestic affairs of another state and restricting itself to a prohibition of intervention by the UN 'in matters which are essentially within the domestic jurisdiction of any State'. Like many other scholars, though, he was impressed by the 1970 Friendly Relations Declaration, which 'brought little to the elaboration of the normative content of the principle' but had 'the merit of establishing clearly that the principle did exist and that its ambit went beyond the use of force to cover other means of interference – political, economic or otherwise'. Abi-Saab, 'Some Thoughts', *supra* note 3, at 227.

<sup>66</sup> Abi-Saab, *supra* note 6, at 40–41.

any international force of the ONUC's size could not but affect the balance of power on the ground, potentially altering the outcome of the struggle between the different blocs and factions in Congo. This encouraged a certain massaging of the principle of non-intervention, if not a measure of outright obfuscation.<sup>67</sup>

In any event, what is important for Abi-Saab in all this is the legal-cum-diplomatic 'style' Hammarskjöld cultivated, 'casting collective action in pursuit of political aims in a clear legal framework, which in turn would be used to persuade the contenders to conform to the desired course of action'.<sup>68</sup> Central to this approach – which was premised upon the deployment of power from above, from the pinnacle of the world's most authoritative international organization – was the interpretational discretion he enjoyed over his mandate. This was a freedom he used to elaborate interpretations of relevant resolutions that were 'consistent with the Charter and the mandate' but that 'would from a political point of view accommodate at least the minimal claims of all the contenders'; this provided him with an opportunity to 'bring the maximum legal and political pressure he could marshal to bear on each of them'.<sup>69</sup> Abi-Saab associated Hammarskjöld's vision of 'preventive diplomacy' as a means of managing the Cold War with this power of interpretation. Once he had advanced a distinct understanding of a particular question relating to his mandate, Hammarskjöld generally adopted a 'defensive posture', referring those who would challenge this interpretation to the Security Council.<sup>70</sup> And since the availability of the veto power for the Council's five permanent members reduced the possibility that authoritative interpretations might be established, Hammarskjöld was typically left 'with relatively free hands to use his power of interpretation as a means of persuasion and accommodation in pursuit of the political aims of the Operation'.<sup>71</sup>

While Hammarskjöld may have been responsible for the macro-level coordination of the organization's involvement in post-independence Congo, most of its concrete operation was left to subordinate officials. These officials often exercised considerable discretionary power with respect to the on-the-ground implementation and incremental, hour-by-hour reinterpretation (or even recalibration) of the ONUC's mandate.<sup>72</sup> The most celebrated such figure was none other than Ralph Bunche, the distinguished African-American political scientist, Nobel Peace Prize laureate and civil rights advocate who had helped to draft the UN Charter's

<sup>67</sup> *Ibid.*, at 64–65. Such concerns would grow over time, particularly with SC Res. 169, 24 November 1961. Issued after Hammarskjöld's death in September 1961, this resolution authorized the Secretary-General to 'take vigorous action, including the use of the requisite measure of force, if necessary', to apprehend, detain or deport 'foreign military and paramilitary personnel and political advisers not under the United Nations Command'. For reconstruction of its implications, see Abi-Saab, *supra* note 6, at 162–168.

<sup>68</sup> Abi-Saab, *supra* note 6, at 48. Abi-Saab himself puts 'style' in scare quotes.

<sup>69</sup> *Ibid.*, at 48–49.

<sup>70</sup> *Ibid.*, at 50.

<sup>71</sup> *Ibid.*, at 51.

<sup>72</sup> See especially *ibid.*, at 61–62ff. Part of the difficulty here stemmed from what Abi-Saab characterizes rather bluntly as Hammarskjöld's tendency to provide 'complex and rather muddled' instructions to his subordinates. *Ibid.*, at 143.



chapters on trusteeship and later directed the UN Department of Trusteeship and Information from Non-Self-Governing Territories.<sup>73</sup> Bunche was serving as under-secretary for special political affairs at the time the crisis broke out, and he figured prominently in the UN presence in Congo, which involved ‘technical’, as well as military, assistance, even before the crisis began to unfold in earnest. In May 1960, already concerned by the prospect of political instability and large-scale violence in the resource-rich, ideologically divided and ethno-linguistically diverse territory, Hammarskjöld dispatched Bunche to Congo to attend independence ceremonies and establish an organizational presence.<sup>74</sup> Bunche remained active in Congo, in a variety of capacities, after independence the following month and for much of the ensuing crisis. But, while his time in the new state was often regarded as reasonably successful, at least in the sense of ensuring broadly even-handed implementation of the ONUC enterprise, that of Andrew Cordier, another American political scientist working for Hammarskjöld, came in for serious criticism, from Congolese, as well as socialist and non-aligned, officials.<sup>75</sup> At a key juncture in the ONUC’s activities, in the midst of a complex struggle in September 1960 between Patrice Lumumba and Joseph Kasa-Vubu, Cordier ordered the radio station in Léopoldville to be shut down and major airports throughout the country to be closed to all non-UN traffic. This had the effect of strengthening Kasa-Vubu and weakening Lumumba, whose forces had taken control of the radio station and had begun to use it to broadcast their message.<sup>76</sup> The result was a serious exacerbation of the crisis, resulting eventually in the death of roughly 100,000 people, Lumumba and Hammarskjöld included, and decades of poverty, instability and civil and regional war.<sup>77</sup> Such were the difficulties confronting a vision of global governance premised upon the balancing of legal propriety and political prudence.

## 5 Conclusion

In 1973, in the midst of the decade’s first major oil crisis, the fallout from the effective demise of the Bretton Woods monetary order and a global recession caused

<sup>73</sup> On Bunche’s role in drafting the UN Charter, and folding the League of Nations Mandate System into the UN Trusteeship System, see Crawford, ‘Decolonization through Trusteeship: The Legacy of Ralph Bunche’, in R.A. Hill and E.J. Keller (eds), *Trustee for the Human Community: Ralph J. Bunche, the United Nations, and the Decolonization of Africa* (2010) 93, at 102; S. Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (2015), at 321–324.

<sup>74</sup> Abi-Saab, *supra* note 6, at 6.

<sup>75</sup> Most of Hammarskjöld’s closest collaborators were American and were known collectively as the ‘Congo club’. *Ibid.*, at 51. Cordier maintained especially close ties to the US ambassador to Congo, a fact that Abi-Saab emphasizes (at 66).

<sup>76</sup> *Ibid.*, at 60, 66.

<sup>77</sup> Cordier left the UN in 1962, joining Columbia University shortly thereafter. He would go on to edit Hammarskjöld’s papers. See A.W. Cordier and W. Foote (eds), *Public Papers of the Secretaries-General of the United Nations*, vols 2–5 (1972–1975). On Lumumba’s assassination, see De Witte, *supra* note 8; Gerard and Kuklick, *supra* note 8.

by overproduction and declining rates of profit in many advanced capitalist countries,<sup>78</sup> Abi-Saab could suggest with some plausibility that it might be difficult for Western powers ‘to maintain traditional international law as the only international legal order acceptable to them’.<sup>79</sup> Similarly, in a lengthy 1984 report that he prepared for the UN Institute for Training and Research on the institutional mechanisms through which the New International Economic Order project might be implemented, Abi-Saab could explain the role of international organizations in post-classical international law by reference to the putative shift from the ‘international law of co-existence’ to the ‘international law of cooperation’ – a trope that had been popularized by Wolfgang Friedmann and that Hammarskjöld had also used.<sup>80</sup> The move from simple ‘self-regulatory mechanisms’ to a system of interdependence in which states are under positive obligations to cooperate necessitated commitment to ‘an institutional law’ and was ‘intimately associated with international organizations’.<sup>81</sup>

Limited though they were, these hopes were to be dashed. While he recognized that decolonization had exerted significant influence on certain areas of international law,<sup>82</sup> Abi-Saab also conceded that advanced capitalist countries had largely neutralized an enlarged UN by channelling many disputes to the collective security organizations and international financial institutions they continued to control.<sup>83</sup> Today, in an age marked by financial, ecological and microbiological catastrophe, it seems clear that the failure of the Third World project of transforming international law ran deeper, manifesting in everything from the containment of self-determination, a ‘right’ that has revealed itself to be exercisable by some but not all peoples, to the distinctly secondary (and even then generally ignored) status of socio-economic rights, with the International Covenant on Economic, Social, and Cultural Rights itself falling short of strict legal obligations upon state parties.<sup>84</sup> By 1998, writing in the pages of

<sup>78</sup> See, in particular, E. Mandel, *Late Capitalism* (1975); R. Brenner, *The Economics of Global Turbulence: The Advanced Capitalist Economies from Long Boom to Long Downturn, 1945–2005* (2005); see also H. Addo (ed.), *Transforming the World-Economy? Nine Critical Essays on the New International Economic Order* (1984).

<sup>79</sup> Abi-Saab, ‘The Third World’, *supra* note 3, at 66.

<sup>80</sup> W. Friedmann, *The Changing Structure of International Law* (1964); Hammarskjöld, ‘“The Development of a Constitutional Framework for International Cooperation” – Address at the University of Chicago, Chicago, Illinois, May 1, 1960’, in A.W. Cordier and W. Foote (eds), *Public Papers of the Secretaries-General of the United Nations* (1974), vol. 4, at 583.

<sup>81</sup> Progressive Development, *supra* note 3, para. 125. For the view that Abi-Saab relies upon a progressive theory of history, see Koskeniemi, ‘Repetition as Reform: Georges Abi-Saab Cours Général de droit international public’, 9 *EJIL* (1998) 405, at 411.

<sup>82</sup> See, e.g., Abi-Saab, ‘International Law and the International Community: The Long Road to Universality’, in R. St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (1994) 31, at 41 (‘[i]f the process of “progressive development of international law and its codification” ... seems to have lost momentum for some time now, it has in the meantime achieved impressive results which left almost no major subject or field of international law untouched’).

<sup>83</sup> He did so at least as early as 1981. See Abi-Saab, ‘The Concept of International Organization: A Synthesis’, in G. Abi-Saab (ed.), *The Concept of International Organization* (1981) 9, at 21–23.

<sup>84</sup> The International Covenant on Economic, Social, and Cultural Rights requires that each state party ‘take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full

this journal, even Abi-Saab could no longer afford the cautious optimism of his youth and was forced to admit that the world had returned to ‘the wild liberalism of the nineteenth century’ and ‘the pure tradition of social Darwinism’, leaving behind ‘the protective and “affirmative action” strategy of the international law of development’.<sup>85</sup>

In his 1978 book, Abi-Saab depicted Hammarskjöld as ‘combining a strong formal stand on principle with great flexibility in negotiating modalities of implementation acceptable to the interested parties’.<sup>86</sup> Although he was not alone in this assessment, the vigour with which he presented it as the foundation for a general theory of international organizations was remarkable.<sup>87</sup> Hammarskjöld’s commitment to a mode of executive action grounded in both legal formalism and diplomatic dexterity was intended to leverage the UN Secretariat’s power to curb conflict and facilitate decolonization. While *United Nations Operation* did not venture sweeping conclusions about the merits – or political and economic valence – of this commitment, Abi-Saab was clearly sympathetic to Hammarskjöld’s vision of executive administration. And this is precisely what revealed the limitations of his analysis, for the kind of ‘preventive diplomacy’ in which Hammarskjöld invested and to which Abi-Saab lent his support has proven facilitative of some of the very developments that Abi-Saab has decried. Perhaps most famously, the kind of top-down managerialism that it exemplifies has encouraged the development of the ‘responsibility to protect’, an ‘emerging doctrine’ that has been supported by Kofi Annan and Ban Ki-moon and upon which the Secretary-General has reported annually since 2009,<sup>88</sup> but which is regarded by many states and jurists, particularly in the global South, as a means of circumventing the UN Charter’s prohibition against non-defensive use of force unauthorized by the Security Council.<sup>89</sup> Abi-Saab may have been convinced that an assertive programme of executive administration that fused legal formalism with political flexibility in the service of ‘preventive diplomacy’ was both indispensable and unavoidable. But there is ample reason to think that it may instead have reinforced and amplified new forms of elite rule in international law and politics.

---

realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures’. International Covenant on Economic, Social, and Cultural Rights 1966, 993 UNTS 3, Art. 2. For the view that it is ‘more exhortatory than mandatory’, see B. Saul, D. Kinley and J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (2014), at 134. On the failure of the project of decolonizing international law more generally, see U. Özsü, *Completing Humanity: The International Law of Decolonization, 1960–82* (forthcoming).

<sup>85</sup> Abi-Saab, ‘Whither the International Community?’, *supra* note 3, at 265.

<sup>86</sup> Abi-Saab, *supra* note 6, at 112.

<sup>87</sup> For another strong example, see Schachter, ‘Dag Hammarskjöld and the Relation of Law to Politics’, 56 *AJIL* (1962) 1, at 2 (stressing that Hammarskjöld ‘affirmed the importance of law in the United Nations while acknowledging the realities of power and political pressures’).

<sup>88</sup> Implementing the Responsibility to Protect: Report of the Secretary-General, UN Doc. A/63/677, 12 January 2009. For the list of reports, see UN Office on Genocide Prevention and the Responsibility to Protect, ‘Key Documents’, available at [www.un.org/en/genocideprevention/key-documents.shtml](http://www.un.org/en/genocideprevention/key-documents.shtml).

<sup>89</sup> For the view that the ‘responsibility to protect’ framework affirms and formalizes decades-old UN practices, see A. Orford, *International Authority and the Responsibility to Protect* (2011), especially chs 1, 2.