THE UNITED NATIONS SECURITY COUNCIL AND THE NEED FOR STREGHTENING A RULES-BASED INTERNATIONAL SYSTEM

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ABSTRACT

International law and the rule of law are the foundations of the international system and the Security Council is the most powerful international body. This article argues that in fulfilling its mandate of international peace and security, economic development and social progress, the Security Council is most legitimate and effective when it submits itself to the rule of law. Section I examines what the rule of law is in international affairs. Section II illustrates how the Security Council has used this concept. Section III discusses how the concept applies to the Security Council by considering specific cases of Security Council action: quasi-legislative resolutions and quasi-judicial functions. Challenges to Security Council authority that have arisen in the context of sanctions targeted at individuals are also examined. Section IV proffers suggestions on the way forward towards clear and foreseeable rules and a system to prevent or sanction violations of these rules. Section V then concludes the article.

I) INTRODUCTION

The United Nations Security Council (Security Council) is the most powerful international body in the world. The United Nations Charter (Charter)[1] boosts the power of the Security Council by giving it preeminent legal authority over international security affairs encoded in law that is binding on both the powerful and the rest[2]. This is because the Security Council acts on behalf of all 193 members of the United Nations (UN)[3], most of whom have never served a term on the Security Council. All UN members agree in advance to 'accept and carry out the decisions of the Security Council in accordance with the present Charter'[4]. The Charter further mandates that the military and political resources of all Security Council members be made available for 'carrying out the decisions of the Security Council (for the) maintenance of international peace and security'.[5]

Traditionally, the functions of the Security Council were determining that a threat to the peace, breach of the peace, or act of aggression had occurred and prescribing legally binding obligations on Member States under Chapter VII of the Charter. These days its functions include establishing complex regimes to enforce its decisions and passing resolutions of general rather than specific application. Thus, the Security Council has grown well beyond its initial function as a political forum to serve important legal functions. These expanded powers can facilitate swift and decisive action, but have raised questions about the legal context within which the Security

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[1] Adopted 26 June 1945 and entered into force 24 October 1945. United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.
Available at: http://www.un.org/aboutun/charter/index.html. In addition, the Charter of the United Nations is always reprinted in the most current Volume of the Yearbook of the United Nations.
[2] Mark Mazower, *Governing the World: The History of an Idea* (Penguin) 2012; G. John Ikenberry, *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order* (Princeton University Press) 2011.
[3] *Op.cit*, note 1. See Article 24(1).
[4] *Ibid*, See Article 25.
[5] *Ibid*, Articles 48(1) & 49.

Council operates and the extent to which the Security Council itself adheres to the rule of law.

II) THE SECURITY COUNCIL AND THE INTERNATIONAL RULE OF LAW

The Security Council as a formal organization is entirely derivative of international law because it exists by virtue of the Charter. The relation between the Security Council and international law is complex because it is also the author of and interpreter of law.

The legal clout of the Security Council can be seen in several Articles of the Charter: Articles 25, 27, 39, 41, and 42. These give the Security Council the power to decide when an international 'threat to the peace, breach of the peace, or act of aggression' exists and when it does how to respond[6]. It is at the discretion of the Security Council to make a determination of the existence of a threat to the peace. This determination is a political rather than a legal judgment. Thus, finding of a threat to the peace does not mean finding that a state has acted illegally[7].

When the Security Council identifies a threat to international peace and security, it has remedies it can use in Articles 41 and 42 of the Charter, which authorize the Security Council to 'decide what measures… are to be employed to give effect to its decisions' including non-military measures such as economic sanctions[8], and military actions including 'such action by air, sea or land forces as may be necessary to restore

[6] *Ibid*, Article 25.
[7] Ian Hurd, 'The UN Security Council and the International Rule of Law', *Chinese Journal of International Politics*, May 2013.
[8] *Op.cit*, note 1, Article 41.

international peace and security'[9]. In addition, 'the Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council'[10]. The Charter implies an obligation in Articles 43 and 45 on members to 'make available' some military resources for such operations, however this has never been actuated.

International law has always strived to uphold the rule of law. This can be seen from human rights treaties since the 1948 Universal Declaration of Human Rights that has advocated the rule of law as the foundation of a rights-respecting State; development actors, including donor States, have since the 1960s promoted the rule of law as essential for economic growth; the 1970 Declaration on Friendly Relations, which referred to the 'promotion of the rule of law among nations'[11], and the Millennium Declaration, in which Member States resolved to 'strengthen respect for the rule of law in international law as in national affairs'[12]. Likewise, at the United Nations World Summit in September 2005, Member States unanimously recognized the need for 'universal adherence to and implementation of the rule of law at both the national and international levels' and reaffirmed their commitment to 'an international order based on the rule of law and international law'[13].

The rule of law is widely embraced at the national and international levels without much precision as to what the term means. There are significant differences between the rule of law as it is understood in common law and civil law systems. Further

[9] *Ibid*, Article 42.
[10] *Ibid*, Article 49.
[11] UN Doc. A/5217 (1970), preamble.
[12] UN General Assembly, *United Nations Millennium Declaration, Resolution Adopted by the General Assembly* , 18 September 2000, A/RES/55/2 para. 9.
[13] UN General Assembly, *2005 World Summit Outcome : resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1 para. 134.

complications arise when one applies the rule of law to the international level. In a national legal order, the sovereign exists in a vertical hierarchy with other subjects of law. However, at the international level sovereignty remains with States, existing in a horizontal plane of sovereign equality. Ultimately, this suggests that the international rule of law cannot be understood simply as an inter-state application of the domestic rule of law. Applying the rule of law to the international level thus requires an examination of the functions that it is intended to serve[14].

At the national level, the rule of law requires a government of laws, the supremacy of the law, and equality before the law. The first aspect, government of laws, requires non-arbitrariness in the exercise of power. Continued reliance on provisional rules of procedure by the Security Council, are an anomaly of this.

The second aspect, supremacy of the law, distinguishes the rule of law from rule by law. In the international legal system the primary question is the relationship between subject and subject and not subject and sovereign thus, this distinction is less applicable. This means that the relevance of concepts such as separation of powers is less important than the possibility of determinative answers to legal questions[15]. What is important here is greater acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ) and other independent tribunals and confirmation that international law applies to international organizations in general and to the Security Council in particular[16].

[14] Simon Chesterman Institute for International Law and Justice, '*The UN Security Council and the Rule of Law'*, Final Report and Recommendations from the Austria Initiative, 2004-2008 (New York University Press) 2008.
[15] *Ibid.*
[16] *Ibid.*

The third aspect, equality before the law, raises the question of who the true subject of law is. Equality of individual human beings before the law is a formal constraint on the exercise of public power by State institutions; it has a very different meaning in the context of sovereign equality of States. The individual's relationship to the State is defined by its coerciveness: one does not normally choose the State to the laws of which one is subject. Equality before the law here will mean the amelioration of structural irregularities such as the veto power of the permanent five over Security Council decisions[17].

Despite the international and domestic models of the rule of law rule having differences, they share some foundations. They share the idea that social order is enhanced to the extent that it is organized by a clear and coherent set of rules and laws. Nonetheless, the two models were designed in very different contexts to respond to very different political needs. The domestic rule of law arose as a solution to the dangers of centralized authority; it has been brought into being in diverse ways in various societies in order to manage relations between strong governments and their citizens, and to place limits on the overbearing sovereign.[18] While, the international rule of law arose as an institutional solution to the problem of decentralized authority, where numerous independent countries each holding legal equality interact and produce externalities. International law is thus a response to the problems and inefficiencies that arise where sovereignty is dispersed rather than concentrated.[19]

[17] *Ibid.*
[18] Tom Bingham, *The Rule of Law* (Penguin) 2011; Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press) 2004.
[19] Ian Hurd, 'The Rule of Law, Domestic and International', paper presented to the Regional Colloquium on International Law and International Organization, Madison, WI, May 3, 2013; Simon Chesterman, 'An International Rule of Law?' *American Journal of Comparative Law*, 56(2), 2008.

In 2004 UN Secretary-General Kofi Annan provided an expansive definition of the rule of law as:

> a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency[20].

The Security Council has recently promoted the rule of law as a form of conflict resolution. The Security Council first used the words 'rule of law' in a preambular reference in relation to the deterioration of law and order in the Congo in 1961[21]. In resolution 1040[22], the Security Council expressed its support for the Secretary-General's efforts to promote 'national reconciliation, democracy, security and the rule of law in Burundi'[23]. Many peacekeeping operations have subsequently had important rule of law components, such as those in Guatemala in 1997, the Democratic Republic of the Congo in 1999, Liberia in 2003, Côte d'Ivoire in 2004, and Haiti in 2004. The mandates for such missions tend to be broad, calling for the re-establishment or restoration and maintenance of the rule of law[24]. The UN has had direct responsibility for the administration of territory including control of police and prison services and administration of the judiciary in Kosovo in1999 and East Timor/Timor-Leste from1999 to 2002. Similar powers were exercised in Bosnia and Herzegovina through the Office of the High Representative from 1996.

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[20] UN Doc. S/2004/616 (2004), para. 6. See also UN Doc. A/61/636-S/2006/980 (2006).
[21] UN Security Council, *Resolution 161B (1961) of 21 February 1961*, 21 February 1961B, S/RES/161B (1961), preamble.
[22] UN Security Council, *Resolution 1040 (1996) Adopted by the Security Council at its 3623rd meeting, on 29 January 1996*, 29 January 1996, S/RES/1040 (1996)
[23] *Ibid*, See para. 2.
[24] *Op.cit*, see note 14.

Through the above, the Security Council has played a central role in the expansion of the rule of law, a role that raises the question of how the rule of law might apply to the Security Council itself. It is generally acknowledged that the Security Council's powers are subject to the Charter and norms of *jus cogens*. The absence of any formal review mechanisms is a prohibitive problem to establishing any practical check on the Security Council's expansive interpretation of its powers. However, the Charter establishes some legal limits on the authority of the Security Council hence some checks do exist.

Firstly, the Security Council's own voting rules are a check on the unfettered exercise of those powers. This provides that the Security Council cannot take any decision on substantive matters without the support of nine of its fifteen members, including the concurring votes of the permanent members[25]. This rule provides for the famous veto power held by the five permanent members. Thus, this voting rule in Article 27(3) sets the legal parameters for Security Council decisions.

Secondly, the General Assembly could challenge the Security Council's actions through a censure resolution[26], question them through a request for an advisory opinion of the ICJ, curtail them through its control of the UN budget or use the 'Uniting for Peace' procedure[27].

[25] *Ibid*, Article 27(3).
[26] UN Charter, Art. 10, provides that the General Assembly "may discuss any questions or any matters ... relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters." Art. 12 precludes the Assembly from making recommendations with regard to a particular dispute or situation unless the Council so requests.
[27] 'Uniting for Peace' UNGA Res 377 (V) (3 November 1950) UN Doc A/1775, 10; http://www.un.org/Depts/dhl/landmark/pdf/ares377e.pdf. Accessed 15 August 2012.

Thirdly, Article 2(7), which states that 'nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state' provides another limit on the Security Council. However, this is a general limit on all UN activity and it protects governments from intrusions by the UN in their internal affairs. Hence, as a matter of law the Security Council cannot take action with respect to the internal jurisdiction of countries.

Nevertheless, Article 2(7) must be read in conjunction with Article 39, which empowers the Security Council to decide when a situation constitutes a threat to international peace and security. In UN law, 'a threat to international peace' is not a matter within the domestic jurisdiction of a state: it is the Security Council that decides when a situation constitutes a threat to peace. This effectively means that, the Security Council determines whether a matter is domestic or not, and thus limits the force of Article 2(7)[28].

Fourthly, the issue may be raised in national and international courts as an incidental question in a case before it, as happened in the *Lockerbie* case[29], the *Tadic* case[30] and the cases concerning targeted financial sanctions, for example, the *Kadi*[31] and *Yusuf*[32] cases in which plaintiffs claimed that the freezing of their financial assets by a regulation of the European Community taken pursuant to a decision made by the

[28] *Op.cit*, see note 7.
[29] Questions of interpretation and Application of the 1971 Montreal Convention Arising from the Ariel Incident at Lockerbie (*Libyan Arab Jamahiriya v United Kingdom*) Order of 29 June 1999, I.C.J. Reports 1999, p.975.
[30] *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999.
[31] *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* (Court of First Instance of the European Communities, Case T-315/01, 21 September 2005) 3649.
[32] *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (Court of First Instance of the European Communities, Case T- 306/01, 21 September 2005) 3533.

Security Council's Al Qaeda and Taliban Sanctions Committee violated their rights. The ECJ decided it could review the decision by the UN Committee only within the narrow parameters of *jus cogens*. Beyond that, the judges noted that there was no international review mechanism available to the applicants[33] and fifthly, ultimate accountability lies in the respect accorded to the Security Council's decisions: if the Security Council's powers were stretched beyond credibility, States might simply ignore the expression of those powers and refuse to comply.

III) SECURITY COUNCIL ACTION: QUASI-LEGISLATIVE RESOLUTIONS AND QUASI-JUDICIAL FUNCTIONS.

The tension between effectiveness and legitimacy plays out most clearly in the passage of quasi-legislative resolutions[34]. Such quasi-legislative resolutions were adopted in response to a specific crisis, but drafted in language of general application: resolution 1373[35] on terrorism was passed in response to the September 11, 2001 attacks on the United States; resolution 1540[36] on proliferation of weapons of mass destruction came after revelations concerning the A.Q. Khan network; and resolution 1566[37] on terrorism followed the terrorist attack in Beslan, Russia.

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[33] Other cases are, *Faraj Hassan v. Council of the European Union and Commission of the European Communities* (Court of First Instance of the European Communities, Case T 49/04, 12 July 2006); *Chafiq Ayadi v. Council of the European Union* (Court of First Instance of the European Communities, Case T-253/02, 12 July 2006). See also the recent Opinion of Advocate General Poiares Maduro regarding the case of *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* (Case C-402/05 P, 16 January 2008). Cases available at http://curia.eu.int.

[34]Thomas M. Franck, 'The Security Council as World Legislator?' at the Austrian Initiative Panel Series convened at the Dag Hammarskjold Library Penthouse, UN Headquarters, New York on 04 November 2004.

[35] UN Security Council, *Security Council resolution 1373 (2001) [on threats to international peace and security caused by terrorist acts]*, 28 September 2001, S/RES/1373 (2001).

[36] UN Security Council, *Security Council Resolution 1540 (2004) concerning weapons of massive destruction*, 28 April 2004, S/RES/1540 (2004).

[37] UN Security Council, *Security Council Resolution 1566 (2004) Concerning Threats to International Peace and Security Caused by Terrorism*, 8 October 2004, S/RES/1566 (2004)

As the Security Council's powers have expanded, it is arguable that it has also taken on judicial functions. Among other things, the Security Council has established international tribunals with criminal jurisdiction over individuals and created exceptions to the jurisdiction of the International Criminal Court.

A) THE SECURITY COUNCIL AS LEGISLATOR

All states commit themselves upon joining the UN to go along with all Security Council decisions and demands[38] thus, Security Council decisions are binding on member states[39]. There are no channels for appeals or dissent on Security Council decisions. Moreover, Security Council resolutions can create new legal obligations on UN members[40]. Resolution 1373 illustrates this fact by demanding that states take certain actions to 'prevent and suppress the financing of terrorist acts'[41]. More specifically, it requires that governments change their criminal laws so that terrorist financing is a crime within their jurisdictions, and that they freeze the assets of people or organizations who engage in terrorist acts or plans. Once passed by the Security Council, these clauses become legal obligations of all members states, on a par with obligations that come from signing a treaty[42].

[38] This may include some obligations upon non-UN members as well: Article 2(6) says that 'The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security'. This can be read as implying that non-members have some obligation to comply with the UN. However, it can also be read as stating that the UN takes on an obligation that relates to non-members.

[39] *Op.cit*, note 1, Article 25: The Members of the United Nations agree to accept and carry out the decisions of the Security Council.

[40] For example, Resolution 1540 on Weapons of mass Destruction; This contrasts clearly with General Assembly resolutions, which can only ever be 'recommendations' and thus cannot create legal obligations except on the the UN budget and the assessment of UN dues payable by members. See Chapter IV of the Charter.

[41] *Op.cit*, note 35.

[42] *Op.cit*, note 7.

This means that the legal position of the Security Council contradicts the popular metaphor that describes the international system as an anarchy of independent states[43]. The idea of international anarchy presumes that states are not subject to any superior legal authority. Waltz opines, 'none is entitled to command, none is required to obey' among states[44]. However, the position of the Security Council contradicts this. The international system has been placed within a legal hierarchy in which the Security Council is in an unambiguous position of authority over all[45]. The international system can no longer be accurately described as an anarchy and the Security Council has a monopoly on the legitimate use of force in this international hierarchy[46].

Legislation by the Security Council under Chapter VII of the Charter is an enticing short-cut to law. Years of negotiations over international instruments related to the prevention and suppression of international terrorism and the proliferation of weapons of mass destruction may be contrasted with the swift adoption of resolutions 1373[47], 1540 [48]and 1566[49]. The same holds true for the Rome Statute establishing the International Criminal Court as compared to the swift creation of the International Criminal Tribinal for the former Yugoslavia (ICTY) and its counterpart the International Criminal Tribunal for Rwanda (ICTR) or the establishment of the

[43] International anarchy is conventionally understood as the condition in which each sovereign state is in an equal legal position to all others, and where there is no overarching source of authority to which these states must submit. This is described (with variations) in key texts including, Hedley Bull *The Anarchical Society: A Study in Order in World Politics* (Columbia University Press, 3rd ed.) 2002; Alexander Wendt *Social Theory of International Politics* (Cambridge University Press) 1999 and Kenneth N. Waltz *Theory of International Politics* (Addison-Wesley) 1979.
[44] Kenneth N. Waltz, *Theory of International Politics* (Addison-Wesley, 1979), 88.
[45] Ian Hurd, *After Anarchy: Legitimacy and Power in the UN Security Council* (Princeton University Press) 2007.
[46] This is qualified by the permissive rules on self-defense in the Charter, at Article 51.
[47] *Op.cit*, see note 35.
[48] *Op.cit*, see note 36.
[49] *Op.cit*, see note 37.

Special Tribunal for Lebanon[50]. Unlike the ICTY and ICTR, resolution 1757[51] provided for the Lebanon tribunal to be created by Security Council authority under Chapter VII in the event that Lebanon did not execute within eleven days an agreement with the United Nations to establish that tribunal.

This preparedness of the Security Council to act in support of law within States was endorsed at the 2005 World Summit, which embraced the principle of Responsibility to Protect. Member States cited their preparedness to take collective action, through the Security Council, where peaceful means are inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, or crimes against humanity[52].

The long-running debate as to whether the Security Council itself must abide by international law arises frequently as states and other actors challenge the decisions of the Security Council on legal grounds. To what extent must the decisions of the Security Council respect international law as it currently exists? As Hurd[53] opines:

> The Charter says that the Security Council must act in accordance with the present Charter, but it does not define the relation between the Security Council and international law more generally. This is likely because the political logic behind the Security Council's enforcement power strongly suggests that it cannot be contained within the bounds of existing law- in empowering the Security Council to create new legal obligations on states in response to threats to international security, the Charter implies that the Security Council is not limited by currently existing international law. The Charter seems to give the Security Council legal authority that is constrained only by the requirement that it acts within the Charter, which is to say that it acts only with respect to questions that it deems to be related to international peace and security.

[50] *Op.cit*, see note 14.
[51] UN Security Council, *Security Council resolution 1757 (2007) [on the establishment of a Special Tribunal for Lebanon]*, 30 May 2007, S/RES/1757 (2007).
[52] UN General Assembly, *2005 World Summit Outcome : resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1.
para. 139; UN Security Council, *Security Council resolution 1674 (2006) [on protection of civilians in armed conflict]*, 28 April 2006, S/RES/1674 (2006), para. 4.
[53] *Op.cit*, see note 7.

However, a number of recent cases illustrate that the Security Council may be constrained by international law. This can be via the ICJ which is empowered to decide 'all cases which the parties refer to it', which may include direct referrals or indirect (such as might come from a treaty that includes the automatic jurisdiction of the Court)[54]. Only states may be parties to contentious cases before the ICJ[55]. Thus, the ICJ has no explicit authority to review the legality of decisions of the Security Council, but this authority may arise by implication if an inter-state legal dispute hinges on some action of the Security Council.

This situation occurred in the *Lockerbie* cases[56] at the ICJ in the 1990s. The cases were initiated by Libya against the UK and the US in response to those countries advancing sanctions against Libya through the Security Council. Libya argued that its obligations regarding the bombing suspects were governed by the Montreal Convention[57] on air terrorism and that the UK and US could not lawfully demand something different through the Security Council than what was set out in that Montreal Convention[58]. Thus, it argued, UN sanctions were unlawful. The Security Council can not be named as a party in an ICJ case, thus, Libya argued that the UK and US were violating obligations owed to Libya under the Montreal Convention[59] by enforcing the sanctions.

[54] Article 36 of the Statute of the ICJ.
[55] Article 34(1) of the Statute of the ICJ.
[56] *Supra*, See note 29; Terry D. Gill, *Rosenne's The World Court: What it is and How it Works* 6th ed. rev. (Nijhoff), 2003.
[57] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 974 UNTS 177; 24 UST 564; 10 ILM 1151 (1971).
[58] *Ibid.*
[59] *Ibid*.

The issue before the ICJ was whether the Security Council could lawfully contradict existing treaty obligations. Early documents in the cases showed the judges to be divided on the question, with Article 103 of the Charter which states, 'in the event of conflict between … the present Charter and … any other international agreement, … the present Charter shall prevail', playing a major role. The case was withdrawn at the request of the parties after a diplomatic solution to the crisis was negotiated when the bombing suspects were voluntarily transferred by Libya to a court meeting in the Netherlands, where they were prosecuted under Scottish law. Unfortunately for legal clarity, there remains no definitive legal judgment on whether the Security Council can demand of states acts that are otherwise illegal under international law.

B) THE SECURITY COUNCIL AS JUDGE

As indicated earlier, the Security Council's powers are subject to the Charter and norms of *jus cogens*. While the Charter establishes the ICJ as the 'principal judicial organ of the United Nations'[60], the Charter is not conclusive as to the Security Council's relationship to international courts or whether the Security Council, in carrying out its specific duties under its primary responsibility to maintain international peace and security, might also assume judicial functions. This lack of a separation of powers in the Charter is compounded by the fact that each UN organ determines the scope of its own competence under the Charter.

In addition to supporting or supplanting domestic rule of law institutions, the Security Council has created international criminal ad-hoc tribunals for trials arising from the violent conflicts in former Yugoslavia and Rwanda. The ICTY confirmed in the *Tadic*

[60] *Op.cit*, note 1, see Article 93.

case[61] the Security Council's competence to create a tribunal of its kind. Hybrid tribunals, such as the Special Court for Sierra Leone that was set up at the request of the Security Council in resolution 1315[62], the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon which was established with Security Council authority substituting for agreement of one of the parties[63], represent an attempt to blend international supervision with local ownership and development of national capacity.

Apparent problems arise when considering the relationship between the Security Council and its creations. Once a judicial tribunal comes into being, it enjoys certain powers of its own that make it independent of the organ that created it. This has raised special concerns in the hybrid tribunals of Sierra Leone, Cambodia, and Lebanon that enjoy an ambiguous relationship to both the domestic and international jurisdictions[64].

The tendency to create new ad hoc institutions has not always been effective and has certainly been inefficient. It has also contributed to the fragmentation of international law. There are existing institutions to which the Security Council could turn, but in each case it has done so only once: in the Corfu Channel case through resolution 22[65] to the ICJ; in relation to Namibia in resolution 284[66] by requesting an advisory opinion from the ICJ and referring a matter to the International Criminal Court (ICC)

[61] *Supra*, See note 30.
[62] UN Security Council, *Security Council resolution 1315 (2000) [on establishment of a Special Court for Sierra Leone]*, 14 August 2000, S/RES/1315 (2000).
[63] UN Security Council, *Security Council resolution 1757 (2007) [on the establishment of a Special Tribunal for Lebanon]*, 30 May 2007, S/RES/1757 (2007).
[64] Richard Goldstone, 'The Security Council as World Judge?' at the Austrian Initiative Panel Series convened at the Dag Hammarskjold Library Penthouse, UN Headquarters, New York on 27 October 2005.
[65] UN Security Council, *Security Council Resolution 22 (1947) on the Corfu Channel*, 09 April 1947, S/RES/22 (1947).
[66] UN Security Council, *Security Council Resolution 284 (1970) on Namibia*, 29 July 1970, S/RES/284 (1970)

in resolution 1593[67] on Darfur, Sudan. Despite the paucity of practice, these establish clear precedent for further action by the Security Council.

Other concerns arise with respect to the ICC, which was set up as a separate international organization independent from the United Nations. Its independence was tested by efforts by the Security Council to create exemptions from its jurisdiction through the operation of resolutions 1422[68] and 1487[69]. These resolutions provided that the ICC would not investigate or prosecute officials from a State not party to the Rome Statute, extending that provision on an annual basis[70].

One area of particular concern in relation to the Security Council's quasi-judicial actions with respect to domestic law has been the use of targeted sanctions. This is as a result of the Security Council targeting individuals (rather than states) with sanctions. Developed in the 1990s to limit the collateral impact of economic sanctions, targeted sanctions are intended to put pressure on specific individuals or limit their ability to undermine international peace and security, such as through financing terrorism[71].

Targeted sanctions first took place in 1999 via Resolution 1267[72] against the Taliban. Currently, the Security Council demands that member-states cooperate in limiting the

[67] UN Security Council, *Security Council Resolution 1593 (2005) on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan*, 31 March 2005, S/RES/1593 (2005)
[68] UN Security Council, *Security Council resolution 1422 (2002) on United Nations peacekeeping*, 12 July 2002, S/RES/1422 (2002).
[69] UN Security Council, *Security Council resolution 1487 (2003) on United Nations peacekeeping*, 12 June 2003, S/RES/1487 (2003).
[70] A further proposed renewal was withdrawn by the United States in 2004 during the controversy arising from abuse of prisoners in Iraq.
[71] *Op.cit*, note 14.
[72] UN Security Council, *Resolution 1267 (1999) Adopted by the Security Council at its 4051st meeting on 15 October 1999*, 15 October 1999, S/RES/1267 (1999).

finances and movement of individuals engaged in international terrorism and other crimes. This usually involves the demand that states freeze a person's assets. Using Article 25[73] of the Charter, which states that 'the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter', this demand is immediately binding on all states. This means that a state is required take action against an individual and makes no recognition to any domestic laws that might provide for rights of due process. The conflict-of-laws problem is easy to envision: the Security Council could demand that a government impound the assets of a citizen in ways that contradict the citizen's rights under the domestic constitution: who prevails[74]?

In contrast to the Lockerbie situation, it is the rights of individuals rather than states that are at stake. Thus, domestic courts may have jurisdiction and there is much greater scope for legal action than is possible in the inter-state domain of the ICJ. A historic decision was issued by the European Court of Justice in the *Kadi*[75] case. The facts of the case are: Kadi is a Saudi national whose assets were frozen by the EU in response to his blacklisting by the Security Council. Kadi challenged the blacklist under EU law and the European Court of Justice (ECJ) agreed that his rights had been infringed and annulled the regulation by holding that the procedure followed by the EU Council afforded the appellants no opportunity to be heard upon initial listing or de-listing, extrajudicial means were used to make listing decisions with no reasons disclosed for listing and there was no process for judicial review. Thus, the regulation violated the appellants' rights to defense; to an effective legal remedy; to effective

[73] *Op.cit*, note 1, Article 25.
[74] *Op.cit*, note 7.
[75] *Supra*, note 30.

judicial protection; and to property[76]. In this ruling, the ECJ decided that European governments must abide by their domestic and EU legal obligations, ahead of the demands of the Security Council. This poses a challenge to the Security Council's claim to authority over UN members[77].

As Hurd[78] opines:

> The *Kadi* and *Lockerbie* cases begin with the legal foundation of the superiority of the Security Council but suggest that there may be other legal institutions with the power and jurisdiction to pass judgment on Security Council decisions. This is much stronger in the *Kadi* case than in *Lockerbie*, but even the hypothetical possibility of a legal equal to the Security Council means that the Security Council cannot assume that it enjoys unquestioned legal superiority, regardless of the plain language of the Charter. This means that domestic institutions are willing to second-guess Security Council decisions. The Security Council has interpreted its Charter mandate in such a way as to maximize its freedom to operate autonomously, which at some times entails prioritizing its legal status and at others its political status; it aspires to be accepted as a political body that is empowered to made legally binding demands on member-states, since this frees it of both political and legal oversight. But the *Kadi* decision rests on the opposite view, that it is a political player whose demands must be interpreted in light of the domestic rules and needs of member states. This puts domestic legal requirements ahead of the Security Council.

Although the use of targeted sanctions have successfully reduced the humanitarian consequences of sanctions, they have been criticized for the manner in which individuals have been selected for such coercion without either transparency or the possibility of formal review as evidenced from the *Kadi*[79] and other similar cases.

Hence, in the 2005 World Summit Outcome Document[80], Member States called upon the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures exist for the listing and delisting of individuals and entities on

[76] Peter Fromuth, 'The European Court of Justice *Kadi* Decision and the Future of UN Counterterrorism Sanctions', *ASIL Insight*, October 30, 2009, v.13 (20).
[77] *Op.cit*, note 7.
[78] *Ibid*.
[79] *Supra*, note 30.
[80] *Op.cit*, note 52.

targeted sanctions lists[81]. Secretary-General Kofi Annan responded in June 2006 with a non-paper reaffirming that targeted sanctions can be an effective means of combating, among other things, the threat of terrorism, but cautioning that such sanctions will only remain useful to the extent that they are effective and seen to be legitimate; that legitimacy depends on procedural fairness and the availability of a remedy to persons wrongly harmed by such lists. He noted four basic elements that should serve as minimum standards for such a regime[82]:

(a) A person against whom measures have been taken by the Security Council has the right to be informed of those measures and to know the case against him or her as soon as, and to the extent, possible. The notification should include a statement of the case and information as to how requests for review and exemptions may be made. An adequate statement of the case requires the prior determination of clear criteria for listing.
(b) Such a person has the right to be heard (via submissions in writing) within a reasonable time by the relevant decision-making body. That right should include the ability to directly access the decision-making body, possibly through a focal point in the Secretariat, as well as the right to be assisted or represented by counsel. Time limits should be set for the consideration of the case.
(c) Such a person has the right to review by an effective review mechanism. The effectiveness of this mechanism will depend on its impartiality, degree of independence and ability to provide an effective remedy (lifting of the measure and/or, under specific conditions to be determined, compensation).
(d) The Security Council should, possibly through its committees, periodically review on its own initiative "targeted individual sanctions", especially the freeze of assets, in order to mitigate the risk of violating the right to property and related human rights. The frequency of such review should be proportionate to the rights and interests involved.

Subsequent Security Council resolutions marked significant progress towards achieving the goal set by the World Summit. Resolution 1730[83] strengthened procedural safeguards to protect the rights of individuals by establishing a focal point to receive delisting requests and adopted specific procedures to govern the handling of delisting requests; these apply to all sanctions committees established by the

[81] *Ibid*, UN General Assembly, *2005 World Summit Outcome : resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1, para. 109.
[82] The unpublished letter by the Secretary-General dated 15 June 2006 was referred to in the Security Council debate on 22 June 2006: UN Doc. S/PV.5474 (2006), p. 5.
[83] UN Security Council, *Resolution 1730 (2006) General Issues Relating to Sanctions*, 19 December 2006, S/RES/1730 (2006).

Security Council. In resolution 1732[84] the Security Council welcomed the report of the Informal Working Group on General Issues of Sanctions[85], containing recommendations and best practices on how to improve sanctions, and requested its subsidiary bodies to take note of it. It has been questioned, however, whether by adopting these measures the Security Council has satisfied the need for fair and clear procedures in this area.

IV) THE WAY FORWARD

The Charter established the Security Council as an organ to deter instability, to police breaches of the peace, and to act swiftly to achieve these ends. These virtues of the Security Council as a police officer are precisely its vices as a legislator. Hence, as the Security Council is not a representative body, any legislative resolution should be adopted only after a process that seeks to address the legitimate concerns of the wider membership of the United Nations. This is because the Security Council is a creature of law but there is no formal process for reviewing its decisions; the ultimate sanctions on its authority are political. These include challenges to the Security Council's authority through the General Assembly, or individual or collective refusal to comply with its decisions. When it is necessary to pass resolutions of a legislative character, a process that ensures transparency, participation, and accountability will enhance respect for them.

When the Security Council contemplates judicial functions, it should draw on existing institutions of international law. Sanctions targeted at individuals have presented a challenge to the authority of the Security Council: legal proceedings have been

[84] UN Security Council, *Resolution 1732 (2006) General Issues Relating to Sanctions*, 21 December 2006, S/RES/1732 (2006),
[85] UN Doc. S/2006/997 (2006).

commenced in various jurisdictions and there is evidence that sanctions are not always applied rigorously. The Security Council should be proactive in further improving fair and clear procedures to protect the rights of individuals affected by its decisions, complying with minimum standards and providing its own for periodic review.

Moreover, the Security Council should support and use existing judicial institutions of international law more frequently. This includes: promoting peaceful settlement of disputes before the ICJ; requesting advisory opinions from the ICJ; and referring matters to the International Criminal Court. The Security Council should establish ad-hoc judicial institutions only in exceptional circumstances in order to avoid the proliferation of costly new courts and tribunals and the fragmentation of international law.

In addition to post-conflict peacebuilding, the rule of law is now also seen as a tool for preventing or resolving conflicts. The preparedness of Member States to take collective action, through the Security Council, was endorsed, in limited circumstances, at the 2005 World Summit by the adoption of the Responsibility to Protect and can be seen in action in the 2011 Libyan intervention. The rule of law should be supported by firm opposition to impunity and greater efforts to establish or re-establish the rule of law in fragile States. The rule of law must also apply to those who intervene. Hence, when establishing UN operations, the Security Council should give greater weight to establishing or re-establishing the rule of law. Such efforts may include transitional justice mechanisms but also efforts to build mechanisms for peaceful resolutions of disputes. In a period of transition, it may be necessary to

establish temporary institutions to combat impunity, prevent revenge killings, and lay the foundations of more sustainable order.

Furthermore, the Security Council could draw more effectively on two sets of actors in supporting its efforts to prevent conflict or establish peace: at the regional level, institutions such as the African Union, the Organisation for Security and Co-operation in Europe, and the Council of Europe should be encouraged to support the rule of law; at the national level, seven years after the adoption of resolution 1325[86] the Security Council's efforts to include women in peacebuilding and the Secretary-General's efforts to appoint high-level women, have struggled to move beyond the level of rhetoric[87].

Acknowledging that the Security Council's powers derive from and are implemented through law will ensure greater respect for its decisions. As part of a commitment to the rule of law, the Security Council should adopt formal rules of procedure rather than continuing to rely on provisional rules. There is no question, today, that supporting the rule of law when it breaks down within States is an important function of the Security Council. Action is needed to affirm the importance of the rule of law in all UN operations, and to ensure the sustainability of rule of law assistance measures through improved coordination with bodies such as the newly established Rule of Law Coordination and Resource Group, its Rule of Law Unit[88] and the

[86] UN Security Council, *Security Council resolution 1325 (2000) [on women and peace and security]* , 31 October 2000, S/RES/1325 (2000)
[87] The first female special representative of the Secretary-General (SRSG) was appointed in 1992. In 2002 the Secretary-General set a target of fifty percent of women in high-level positions. UN Doc. S/2002/1154 (2002), para. 44. By 2005 there were two female SRSGs. In late 2007 there was only one
[88] UN Doc. A/61/636-S/2006/980 (2006).

Peacebuilding Commission[89]. Strengthening a rules-based international system by applying these principles at the international level would increase predictability of behaviour, prevent arbitrariness, and ensure basic fairness.

V) CONCLUSION

The power of the UN Security Council is a function of both its legal and its political settings. The first is derived from the Charter, and the second is derived from the political interests of powerful states and the legitimacy that the institution commands in the international system. This legal authority comes into action only when the permanent members of the Security Council are sufficiently in agreement to allow it to happen, and only when the broader audience for Security Council resolutions sees the action as legitimate.

In conclusion, the Security Council is an extraordinarily powerful instrument for promoting the rule of law at both national and international levels, but it is most legitimate and effective when it submits itself to the rule of law. For the Security Council, greater use of existing law and greater emphasis on its own grounding in the law will ensure greater respect for its decisions. The Security Council's effectiveness as a political actor and its legitimacy as a legal actor are inter-connected: Member States' preparedness to recognize the authority of the Council depends in significant part on how responsible and accountable it is and is seen to be in the use of its extraordinary powers. All Member States and the Security Council itself thus have an interest in promoting the rule of law and strengthening a rules-based international system.

[89] UN General Assembly, *The Peacebuilding Commission : resolution / adopted by the General Assembly*, 30 December 2005, A/RES/60/180
para. 16.