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# The Sword of Damocles: Revisiting the Question of Whether the United Nations Security Council is Bound by International Law

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# The Sword of Damocles: Revisiting the Question of Whether the United Nations Security Council is Bound by International Law

Joy Gordon\*

## Abstract

*This Article considers whether the United Nations Security Council is bound by international humanitarian law in the context of Chapter VII, which authorizes the Council to use force in response to aggression, threats to peace, and breaches of the peace. In the early 1990s, the Council took unprecedented measures that were seen by many as overreaching, raising the possibility that the leading institution of global governance might abuse its power. At the present moment, it seems that the matter is resolved politically and judicially. But it is not resolved constitutionally, and the abuse of power by the Security Council remains a possibility. If, in the future, a permanent member of the Council comes to hold considerable political and economic influence over the other permanent members, as was the case in the early 1990s, the possibility of an extraordinary abuse of power within the Security Council again becomes viable.*

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## I. INTRODUCTION

The early 1990s saw a dramatic increase in the activism of the United Nations Security Council. It was an extraordinary moment in the history of the Council, as the paralysis that had characterized it throughout the Cold War had ended. For the first time since its inception, it was possible for the Council to act assertively and consensually, particularly in the context of Chapter VII, which authorizes the Council to respond to aggression, breaches of the peace, and threats to the peace. With the dissolution of the Soviet Union and its replacement by Russia, there was no counterweight on the Council to the US and its allies. At the same time, a type of overreaching that had been anticipated at the formation of the United Nations, but had never before come close to actualization, became possible. Now, for the first time in human history, there was an institution of global governance that, in Chapter VII, had a mandate whose boundaries were uncertain, whose will would be implemented by virtually every nation on earth, and whose machinery could now be put in motion.

Starting in 1990, a number of the Council’s activities raised serious questions about whether its acts exceeded the scope of its mandate: if the United Nations Charter gave the Council such extensive powers “in order to ensure prompt and effective action,”<sup>1</sup> how do we make sense of the fact that this body invoked Chapter VII to create tribunals, which have continued for years after the crisis passed? What do we make of a situation where the Council punished a nation despite the fact that the nation was complying fully with its obligations under international law? How are we to make sense of a set of measures imposed by the Council in the name of stopping aggression and human rights

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<sup>1</sup> UN Charter Art 24, ¶ 1.

violations, measures which themselves brought about the widespread suffering of an entire civilian population?

In response to the Council's activism of the early 1990s, a critical question was articulated again and again: is the Security Council bound by law, exempt from law, or is it the ultimate arbiter of its own legality? This question was raised at the inception of the United Nations, was rarely of interest for the next forty years, and then became of matter of profound concern and urgency for a decade.<sup>2</sup> It seems now that the question is comfortably resolved. While international judicial bodies do not have direct judicial review, they have nevertheless spoken to the issue on several occasions and have been increasingly explicit in maintaining that the Council is bound by international law.<sup>3</sup> Likewise, current legal scholarship consistently recognizes a broad consensus regarding the particular principles of law that are binding on the Council. Politically, within the Council, there is no longer the unchallenged hegemony that characterized the early 1990s; consequently, the kind of overreaching that triggered concerns within the international community is no longer possible.<sup>4</sup> It would thus seem that the matter has been largely settled.

But it has not been resolved. It is not a matter controlled by legal scholarship, judicial dictum, or the politics of the moment. The question is a constitutional one, and it is as relevant now as it was in 1990, when every country in the world was obliged to participate in denying Iraq access to basic necessities, including food and potable water, until that strangulation brought about the deaths of infants and young children, as well as the collapse of every major system necessary to support human life.<sup>5</sup> It is fully conceivable that there may arise another historical moment in which one of the permanent members of the Council holds such extraordinary political and economic sway that none of the other permanent members are in a position to oppose its will. At the same time, the notions of aggression, breaches of the peace, and threats to the peace—the core of Chapter VII—lend themselves to interpretation of extraordinary breadth, arguably including anything from domestic civil rights violations to global climate change. However, as the venue for that argumentation, the Security Council is critically limited, its objectivity utterly precarious, and its judgment easily distorted by political machinations. At the same time, the stakes are high; at its extreme, the question is whether the Security Council, in the name of stopping aggression, can itself commit genocide. When we add to this the provision that every member state must

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<sup>2</sup> See Section II.

<sup>3</sup> See Section IV.C.

<sup>4</sup> See Section IV.A.2.

<sup>5</sup> See Section III.A.2.

implement measures imposed by the Council in accordance with Chapter VII<sup>6</sup> and that a state's obligations under the Charter override any other international treaty obligations,<sup>7</sup> we find ourselves looking at the possibility of an atrocity of a magnitude that simply staggers the imagination.

In this Article, I revisit the question of whether the Security Council is bound by law. In contrast to previous approaches, this Article does so by looking at the history of the question: who anticipated it; who dismissed it; when the question was irrelevant; when the question was a matter of life and death; why the question is still a live one long after it seems to have been resolved in a smooth and tidy fashion; and why it is an enduring constitutional concern. If the Council in fact is not restrained by international law—or is not restrained sufficiently and clearly—then, like the sword of Damocles, an abuse of power by this institution hangs in the air as a continuing possibility.

## II. THE HISTORY OF THE QUESTION

Chapter VII of the United Nations Charter authorizes the Security Council to address aggression, breaches of the peace, and threats to the peace. It provides that the Council “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression,” and that the Council will also decide what measures to take, in accordance with Articles 41 and 42, “to maintain or restore international peace and security.”<sup>8</sup> Articles 41 and 42 provide that the Council's actions under Chapter VII “may include” an array of measures:

Article 41: The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42: Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.<sup>9</sup>

It is striking that Chapter VII contains no explicit limits on the Council's Chapter VII powers. However, there are arguably other provisions of the

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<sup>6</sup> UN Charter Art 25.

<sup>7</sup> *Id.* at Art 103.

<sup>8</sup> *Id.* at Art 39.

<sup>9</sup> *Id.* at Arts 41, 42.

Charter that do. Most significantly, Article 24(2) provides that “[i]n discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.”<sup>10</sup> However, these “Purposes and Principles” are general statements that do not contain any clear limits on the Security Council.

This did not escape notice when the United Nations was established at the San Francisco Convention in 1948, nor in the preparatory documents. In the 1945 conference that formulated the United Nations Charter, the Conference on International Organisation, a number of delegations proposed amendments that would more explicitly articulate the Council’s limits and obligations.<sup>11</sup> Others were concerned that the Council would function as the overriding source of law in Chapter VII situations, such that it would be exempt from other forms of international law.<sup>12</sup> Many of the smaller nations pressed for more limits on the Council. These proposals were consistently rejected by the Great Powers that were to become the permanent members of the Council. For instance, Article 1 provided that peaceful settlement of disputes would be “in conformity with the principles of justice and international law.” The Norwegian delegate proposed an amendment to include the same language in regard to the use of force, stating that “no solution should be imposed upon a State of a nature to impair its confidence in its future security or welfare.”<sup>13</sup> Mexico also wanted the language included. However, the UK and US delegates argued that this was unnecessary in light of the reference to justice and international law in the principles of the Charter.<sup>14</sup> The Ukrainian delegate maintained that the language concerning justice and international law had already been accepted by the committee, and

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<sup>10</sup> UN Charter Art 24, ¶ 2.

<sup>11</sup> Dapo Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?*, 46 Intl & Comp L Q 309, 315 (1997), citing Doc 881 III/3 146, 12 UNCIO Docs 504–5 (1945).

<sup>12</sup> Mohammed Bedjaoui, *The New World Order and the Security Council: Testing the Legality of Its Acts* 1 (Martinus Nijhoff 1994). Bedjaoui states that:

the idea that the Security Council creates and imposes its own law raises [the question of] whether the Security Council, when operating in ‘lawmaker mode’, is exempted from the requirement to respect, on the one hand, the provisions of the United Nations Charter and, on the other, the rules and principles of international law. There is nothing new about these vital questions. They were raised at a theoretical level at the San Francisco Conference.

Id.

<sup>13</sup> Akande, 46 Intl & Comp L Q at 319 (cited in note 11), citing Doc 555 III/1/27, 11 UNCIO Docs 378 (1945).

<sup>14</sup> Id.

the US delegate maintained that this was an adequate response to Mexico's concern.<sup>15</sup>

Additionally, no form of judicial review was acceptable to the Great Powers. Belgium proposed that disputes over interpretation of the Charter should be submitted to the International Court of Justice (ICJ), but the proposal was rejected.<sup>16</sup> At the San Francisco Conference in 1948, the crucial decision was made not to set up a specific mechanism for interpreting the Charter; instead, each organ of the United Nations would interpret the provisions relevant to its work.<sup>17</sup> Consequently, the Security Council would judge for itself whether its acts were authorized by the Charter.

This is a particular concern in light of Articles 25 and 103. Article 25 establishes a mechanism of global enforcement with enormous reach: every member state of the United Nations is required to participate in the implementation of Chapter VII measures.<sup>18</sup> Article 103 is equally significant: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."<sup>19</sup> Consequently, a member state is required to implement Chapter VII measures, even if this requires the state to violate its other treaty obligations. Thus, there is good cause to ask not only whether the Charter created unprecedented machinery for coordinating global use of force, but also whether this machinery did not at the same time establish unprecedented possibilities for the abuse of power.

Does Chapter VII provide a blank check for the Council to do however it sees fit? Certainly the Security Council is not bound by international law in the same way that a state is. A state is only permitted to use force in self-defense,<sup>20</sup> whereas the Council is permitted to intervene militarily in a broader range of circumstances.<sup>21</sup> While Article 2 of the Charter affirms the sovereignty of all member nations without providing for any exceptions,<sup>22</sup> a military intervention

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<sup>15</sup> Id at 320.

<sup>16</sup> Bedjaoui, *New World Order* at 9–10 (cited in note 12).

<sup>17</sup> Id at 10.

<sup>18</sup> UN Charter Art 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.").

<sup>19</sup> Id at Art 103.

<sup>20</sup> Id at Art 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.").

<sup>21</sup> Id at Arts 39–51.

<sup>22</sup> UN Charter Art 2, ¶ 1.

under Chapter VII clearly violates the territorial integrity of a state. Collective sanctions in general “cannot but override other principles and rules of international law such as non-interference in internal affairs, sovereignty . . . and freedom of trade and navigation.”<sup>23</sup>

Still, the Charter includes language that may provide some limitations on the Security Council’s powers. This occurs primarily in Article 24(2), in conjunction with Article 1. Article 24(2) provides that “[i]n discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.”<sup>24</sup> Under Article 1, among the principles and purposes of the United Nations are:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.<sup>25</sup>

While Articles 25 and 103 do not contain explicit boundaries, it could be said that limits can also be inferred from their language. Article 25 provides 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*.”<sup>26</sup> Similarly, Article 103 states that the members’ “obligations *under the present Charter* shall prevail.”<sup>27</sup> These clauses could arguably be taken to mean that the member states are obligated to carry out only those acts of the Security Council that are in accordance with the Charter, implying that it is possible for Security Council measures to be *ultra vires* or otherwise in violation of the Charter. This view is contained in an early ICJ case, which held that “[t]he political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment.”<sup>28</sup>

After the Charter was adopted, there were occasions on which legal scholars or international bodies maintained in broad terms that the United

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<sup>23</sup> Nico Schrijver, *The Use of Economic Sanctions by the UN Security Council: An International Law Perspective*, in Harry H.G. Post, ed, *International Economic Law and Armed Conflict* 123, 124 (Martinus Nijhoff 1994).

<sup>24</sup> UN Charter Art 24, ¶ 2.

<sup>25</sup> Id at Art 1.

<sup>26</sup> Id at Art 25 (emphasis added).

<sup>27</sup> Id at Art 103 (emphasis added).

<sup>28</sup> *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, 1948 ICJ 57, 64 (May 28, 1948).

Nations and its organs were rooted in international law. For example, in 1949 a draft declaration of the International Law Commission stated that “[w]hereas a primary purpose of the United Nations is the maintenance of international peace and security, . . . the reign of law and justice is essential to the realization of that purpose.”<sup>29</sup> However, in none of these sources is it clear exactly where the boundaries of the Council’s mandate lie, much less what body would judge or enforce those boundaries. Indeed, shortly after the founding of the United Nations, some maintained that the Security Council was a source of law, not itself subject to the law, or was in some other way exempt. In 1950, John Foster Dulles maintained:

The Security Council is not a body that merely enforces agreed law. It is a law unto itself. If it considers any situation as a threat to the peace, it may decide what measures shall be taken. No principles of law are laid down to guide it; it can decide in accordance with what it thinks is expedient.<sup>30</sup>

The following year, the eminent jurist Hans Kelsen similarly held that “[t]he purpose of the enforcement action under Article 39 is not: to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law.”<sup>31</sup>

Among legal scholars, the issue of limitations on institutions of global governance, in particular the possibility of judicial review, was revisited time and again in the decades that followed the establishment of the United Nations, with varied results. In 1950, the Grotius Society conducted a study, *The Problem of Redress Against the Decisions of International Organisations*. Their rapporteur, André Gros, found that “[t]here is a crying need for judicial redress. States should be able to protect their rights by obtaining the annulment by an impartial tribunal of any decision of an organization which is *ultra vires* or represents an abuse of power.”<sup>32</sup> However, the Grotius Society refused to endorse these findings, on the grounds that the political organs of international bodies could be paralyzed by such an arrangement and that international judicial bodies could be overwhelmed with complaints.<sup>33</sup>

In 1952, at the Sienna Session of the Institut de Droit International, one commentator noted that most members were in favor of some form of judicial

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<sup>29</sup> Kenneth Manusama, *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality* 16 (Martinus Nijhoff 2006), citing International Law Commission, *Draft Declaration on Rights and Duties of States*, UN Doc A/CN.4/2, preamble (Dec 15, 1948).

<sup>30</sup> John Foster Dulles, *War or Peace* 194–95 (MacMillan 1950).

<sup>31</sup> Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* 294 (Fredrick A. Praeger 1st ed 1950).

<sup>32</sup> Bedjaoui, *New World Order* at 58 (cited in note 12), paraphrasing André Gros, et al, *The Problem of Redress Against the Decisions of International Organisations*, 36 *Transacts Grotius Socy* 30, 30–31 (1950).

<sup>33</sup> Bedjaoui, *New World Order* at 57–58 (cited in note 12).

review for international political bodies.<sup>34</sup> However, the British legal scholar Wilfred Jenks argued persuasively that it was too soon in the United Nation's history to have any real concerns about the need for judicial review and that the risk of frivolous complaints would restrict governance bodies from taking effective action.<sup>35</sup> The Institut concluded its deliberations with the modest suggestion that the possibility of judicial review should remain open.<sup>36</sup> At the Amsterdam Session in 1957, the Institut revisited the question, finding that the possibility of judicial review depended on the particular structure of each organization: "[I]t is *only* via conventional provisions or other instruments specific to each organ or organization that, *as matters stand at present*, it seems *practicable* to lay down rules to cover such review, the remedies it implies and the effects it would have."<sup>37</sup> Thus, among scholars of international law in the decade following the United Nation's inception, while there were occasional concerns about the possibility of abuses of power by organizations of global governance, these concerns tended to be overridden by a hesitation to impose measures that would burden the international judiciary or restrain the ability of the organizations to take effective action.

Outside the scholarly community, the issue received little attention. However, there were a handful of occasions on which international bodies addressed the question of the limits of the Council's powers in some form. In 1962, the United Nations General Assembly requested an advisory opinion regarding the costs of two United Nations operations: one established by the General Assembly in the Mideast and the other put in place by the Security Council in the Congo. The General Assembly requested guidance as to whether these could be considered "expenses of the Organization," which under Article 17 could then be charged to the member states.<sup>38</sup> The ICJ noted that when an organ of the United Nations is acting to achieve one of the purposes stated in the Charter, such as when the Security Council is taking action toward "the goal of international peace and security . . . the presumption is that such action is not *ultra vires* the Organization."<sup>39</sup> Thus, while the ICJ recognized the possibility that the Council could act outside the scope of its authority, at the same time it

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<sup>34</sup> Id at 58.

<sup>35</sup> Id at 58–59.

<sup>36</sup> Id at 58–60.

<sup>37</sup> Bedjaoui, *New World Order* at 60 (cited in note 12), citing Institut de Droit International, 47 *Annuaire de l'Institut de Droit International* 275 (1957).

<sup>38</sup> *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion, 1962 ICJ 151, 152 (July 20, 1962).

<sup>39</sup> Id at 168.

found that there is a presumption of validity when the Council acts pursuant to Chapter VII.

In an advisory opinion concerning South Africa's occupation of Namibia, the dissenting opinion of Judge Fitzmaurice maintained that the Security Council cannot abrogate or alter territorial rights, even when it is acting under Chapter VII. He noted: "This is a principle of international law that is as well-established as any there can be, and the Security Council is as much subject to it (for the United Nations is itself a subject of international law) as any of its individual member States are."<sup>40</sup> The 1970 Declaration on Principles of International Law reiterated the "paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations,"<sup>41</sup> and the 1971 Zagreb resolution of the Institut de Droit International provided that United Nations forces engaged in peacekeeping were subject to the laws of war.<sup>42</sup>

Thus, in the four decades following the creation of the United Nations, there were occasionally international legal scholars and judicial opinions from the ICJ that maintained that the Security Council should be subject to the limitations of general principles of international law or to judicial review. However, those opinions primarily took place in the context of theoretical discussions of international law, expressed minority views, or both.

But if there was little attention paid to the issue by scholars and international judicial bodies, it was also the case that there were few occasions on which to test this issue. While there had been resistance to mechanisms of accountability, particularly judicial review, the Security Council itself did not say explicitly, for example, that it was entitled to engage in genocide or human rights violations. One scholar noted that "members of the Security Council have never rejected the claim that international law applies to their conduct."<sup>43</sup> Indeed, member states often invoke international law in their argumentation before the Security Council.<sup>44</sup> Security Council resolutions often contain explicit reference

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<sup>40</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, 1971 ICJ 16, 300 (June 21, 1970) (Fitzmaurice dissenting).

<sup>41</sup> *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, General Assembly Res No 2625 (XXV), UN Doc A/RES/2625 (XXV), preamble (1970).

<sup>42</sup> Institut de Droit International, *Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in Which United Nations Forces May Be Engaged*, Zagreb Sess Res (1971), online at [http://www.idi-iil.org/idiE/resolutionsE/1971\\_zag\\_03\\_en.pdf](http://www.idi-iil.org/idiE/resolutionsE/1971_zag_03_en.pdf) (visited Sept 25, 2011).

<sup>43</sup> Mary Ellen O'Connell, *The United Nations Security Council and the Authorization of Force: Renewing the Council Through Law Reform*, in Niels Blokker and Nico Schrijver, eds, *The Security Council and the Use of Force: Theory and Reality—A Need for Change?* 47, 57 (Martinus Nijhoff 2005).

<sup>44</sup> Steven R. Ratner, *The Security Council and International Law*, in David M. Malone, ed, *The UN Security Council: From the Cold War to the 21st Century* 591, 593 (Lynn Rienner 2004).

to principles of international law, including human rights. For example, Resolution 666, adopted in September 1990, shortly after sanctions were imposed on Iraq, requests that the Secretary-General obtain information on the availability of food in Iraq and Kuwait and instructs him to pay particular attention to the “categories of persons who might suffer specially, such as children under 15 years of age, expectant mothers, maternity cases, the sick and the elderly.”<sup>45</sup> Because the formal language of United Nations resolutions has not explicitly rejected international law, there have been no documents or public statements that themselves provided an occasion to confront the question of whether the Council is bound in its practices and policies to abide by international law.

Prior to 1990, there also were not any actions or policies on the part of the Security Council that implicated this question in a serious way. Because of the broader paralysis of the Security Council during the Cold War, there were few resolutions passed at all, much less Chapter VII actions. The end of the Cold War changed that. While there were only twenty Security Council resolutions in 1989, this number increased to thirty-seven in 1990, forty-two in 1991, seventy-four in 1992, and ninety-three in 1993.<sup>46</sup> Chapter VII resolutions went from zero or one per year to fifteen to twenty per year.<sup>47</sup>

Some described this resurgence of Council activity in glowing terms, as signaling new possibilities for the effectiveness of institutions of global governance. Referring to the consensus that emerged in response to Iraq’s invasion of Kuwait, one commentator noted:

To many hopeful observers, this successful combination of American military capacity and Security Council legal authority represented a long-delayed realization of the founding vision of a world order that married power and legitimacy. . . . This was beginning to look like the sort of UN promised at San Francisco.<sup>48</sup>

However, the collapse of the Soviet Union also meant that the US could exercise hegemony within the Council in a way that had never been possible before; the US was in a position to insert its interests and agenda into what was now an extraordinarily powerful vehicle of global governance. One scholar expressed concern that the Security Council might exercise its extraordinary powers in a manner that was arbitrary and highly politicized:

There is a lack of consistency in practice, a failure to articulate principled lines of distinction identifying when a UN response is appropriate, and a

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<sup>45</sup> Security Council Res No 666, UN Doc S/RES/666, ¶¶ 3–4 (1990).

<sup>46</sup> Manusama, *United Nations Security Council* at 2 n 9 (cited in note 29).

<sup>47</sup> Edward C. Luck, *UN Security Council: Practice and Promise* 8 (Rutledge 2006).

<sup>48</sup> *Id.* at 52.

reliance on unrestricted mandates to coalitions of States led by the United States. The Security Council is perceived as a geopolitical instrument, one that is currently dominated by the United States . . .<sup>49</sup>

Thus, the concern of overreaching by the permanent members of the Council was anticipated from the inception of the United Nations and on many occasions thereafter; however, until the end of the Cold War, this concern was overridden by the view that the Council should not be constrained when facing emergency situations.

### III. THE ISSUE OF OVERREACHING

#### A. Lockerbie, Iraq, and Bosnia

In the early 1990s, there were a number of occasions that directly invited the question of the abuse of power within the Security Council. These include the Lockerbie incident; the sanctions on Iraq; and the arms embargo imposed on Bosnia.

##### 1. The Lockerbie case.

In 1988, terrorists detonated a bomb on an airliner while it was passing over Lockerbie, Scotland. Two-hundred seventy people were killed. Two of those sought for prosecution were Libyan nationals. The US and UK demanded that Libya extradite them, although neither country had an extradition treaty with Libya.<sup>50</sup> Libya initiated a criminal investigation against the suspects, asking the US and UK to provide any evidence they had in order to pursue a prosecution.<sup>51</sup> The US and UK refused to do so, insisting instead that Libya extradite the suspects. Libya declined.<sup>52</sup>

The 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation<sup>53</sup> provides that in such cases a state must either extradite suspects for trial or try the suspects itself.<sup>54</sup> Although Libya had complied with its treaty obligations by initiating criminal prosecution of the suspects, the Security Council demanded that Libya comply with the extradition

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<sup>49</sup> Richard A. Falk, *The United Nations and the Rule of Law*, in Saul H. Mendlovitz and Burns H. Weston, eds, *Preferred Futures for the United Nations* 301, 318 (Transnational 1995).

<sup>50</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v US)*, Application Instituting Proceedings (AIP), 1998 ICJ 115, § II.i (Mar 3, 1992) (*Libya v US AIP*).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 974 UN Treaty Ser 178 (1971).

<sup>54</sup> *Id.* at Arts 5(2), 5(3), 8.

demands of the US and UK (as well as France) for the alleged role of the two men in the bombing.

When Libya refused, the Security Council, invoking Chapter VII, sanctioned Libya, imposing an embargo on arms, aviation, and imports for petroleum production.<sup>55</sup> Libya then brought a set of actions against the US and the UK before the ICJ, in which Libya argued that it was in full compliance with the Montreal Convention; that Article 7 of the Convention entitled Libya to prosecute its own nationals, especially in the absence of extradition treaties with the US or UK; and that the Council had no legitimate grounds to impose sanctions.<sup>56</sup> The ICJ ruled against Libya on the grounds that, under Article 103 of the Charter, a Security Council resolution overrides other international agreements, including the Montreal Convention.<sup>57</sup>

The case raised concerns within the international community about the Council's interpretation of its powers and the extremes to which it would go to enforce a questionable interpretation. If the Council could invoke Chapter VII to impose sanctions when Libya was in full compliance with international law, then it seemed the Council was free to make a determination that any state had committed a breach or threat to peace, even if it had not violated international law in any regard.

The case also raised the question of the scope and limits of the Council's power. In a separate opinion, Judge Shahabuddeen asked:

[W]hether a decision of the Security Council may override the legal rights of States, and, if so, whether there are any limitations on the power of the Council to characterize a situation as one [warranting this consequence]. Are there any limits to the Council's powers of appreciation? . . . If there are any limits, what are those limits, and what body, if other than the Security Council, is competent to say what those limits are?<sup>58</sup>

In his dissent, Judge Weeramantry used stronger language, maintaining that “[t]he history of the United Nations Charter thus corroborates the view that a clear limitation on the plenitude of the Security Council's powers is that those powers must be exercised in accordance with the well-established principles of international law.”<sup>59</sup> A number of scholars reacted to the Council's measures against Libya and to the ICJ ruling by asking whether the Council is bound by

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<sup>55</sup> Security Council Res No 748, UN Doc S/RES/748 (1992); Security Council Res No 883, UN Doc S/RES/883 (1993).

<sup>56</sup> *Lockerbie*, 1998 ICJ 115, § II.iii.

<sup>57</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v US)*, Provisional Measures, 1992 ICJ 114, ¶ 42 (Apr 14, 1992).

<sup>58</sup> Id at ¶ 142 (separate opinion of Shahabuddeenin).

<sup>59</sup> Id at ¶ 175 (Weeramantry dissenting).

law, and if so, who would judge which laws were binding and whether the Council was or was not in compliance.<sup>60</sup>

The case illustrated the degree to which the Security Council was susceptible of being driven by the unilateral interests of its permanent members: without a counterweight, the US and UK were able to employ the machinery of global governance to pursue their national interests in prosecuting the Libyan suspects, regardless of the legality of the measure.

## 2. The humanitarian impact of the Iraq sanctions.

In August 1990, in response to Iraq's invasion of Kuwait, the Security Council imposed on Iraq the most comprehensive sanctions in the history of global governance, prohibiting all exports and all imports, except medicine and, conditionally, food.<sup>61</sup> For eight months, Iraq was not even allowed to import food.<sup>62</sup> The combined humanitarian impact of the sanctions and the bombing campaign of the 1991 Persian Gulf War was immediate and severe. With the sanctions in place, it was not possible for Iraq to rehabilitate its infrastructure after the bombing, and a humanitarian crisis continued. In particular, the allied bombing destroyed electric generating plants, water purification systems, and sewage treatment facilities. The sanctions prevented them from being repaired or rebuilt. This lack of infrastructure resulted in ongoing epidemics of cholera and typhoid. In 1990 the incidence of typhoid was 11.3 per 100,000 people; by 1994 it was more than 142 per 100,000.<sup>63</sup> In 1989 there were 0 cases of cholera per 100,000 people; by 1994 there were 1,344 per 100,000.<sup>64</sup> In March 1991, an envoy of the United Nations Secretary-General reported that the situation was

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<sup>60</sup> See, for example, David Schweigman, *The Authority of the Security Council Under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* 244–60 (Kluwer 2001); Scott I. Bortz, *Avoiding a Collision of Competence: The Relationship between the Security Council and the International Court of Justice in Light of Libya vs. United States*, 2 Fla St U J Transnatl L & Poly 353, 370 (1993); Thomas M. Franck, Comment, *The 'Powers of Appreciation': Who Is the Ultimate Guardian of the UN Legality?*, 86 Am J Intl L 519, 522 (1992); Bernd Martenczuk, *The Security Council, the International Court, and Judicial Review: What Lessons from Lockerbie?*, 10 Eur J Intl L 517, 518–19 (1999).

<sup>61</sup> Security Council Res No 666, UN Doc S/RES/661, ¶¶ 3–4 (1990).

<sup>62</sup> Id at ¶ 4. This at least was the public language of the document, although in closed meetings the US and other members of the Council blocked all imports of food into Iraq for several months. See Joy Gordon, *Invisible War: The United States and the Iraq Sanctions* 52–54 (Harvard 2010).

<sup>63</sup> World Health Organization, *Health Conditions of the Population in Iraq Since the Gulf Crisis*, WHO/EHA 96.1, 1, 12 (1996), online at <http://www.who.int/disasters/repo/5249.html> (visited Oct 14, 2011).

<sup>64</sup> Id.

“near apocalyptic,”<sup>65</sup> describing in detail the broad collapse of Iraq’s infrastructure, including water purification, sewage treatment, agricultural production, food supplies and distribution, and the telephone system and all modern means of communication. Iraq, he reported, “has, for some time to come, been relegated to a pre-industrial age.”<sup>66</sup> With the sanctions in place, the humanitarian crisis continued for more than a decade.

The widespread and indiscriminate damage done by the Iraq sanctions brought criticisms of the Council and its use of sanctions from many sources. Within the United Nations, the humanitarian damage raised fundamental questions about the nature, and even the legitimacy, of the United Nations itself. In 1995 United Nations Secretary-General Boutros Boutros-Ghali described economic sanctions as a “blunt instrument” that raised ethical questions about the legitimacy of inflicting suffering on vulnerable groups, complicated the work of humanitarian agencies by imposing arduous bureaucratic requirements on them, and conflicted with the development objectives of the United Nations by doing long-term damage to the productive capacity of the country.<sup>67</sup> In 2000, United Nations Secretary-General Kofi Annan maintained that “the humanitarian situation in Iraq poses a serious moral dilemma for this Organization.”<sup>68</sup> The Office of the High Commissioner for Human Rights passed a resolution condemning the Security Council sanctions on Iraq.<sup>69</sup> In a report commissioned by the Commission on Human Rights, the Belgian jurist Marc Bossuyt described the situation in Iraq as “extremely grave,”<sup>70</sup> and he suggested that the sanctions were “unequivocally illegal under existing international humanitarian law and human rights law.”<sup>71</sup> Legal scholars repeatedly questioned whether the Security Council was exceeding the scope of its legitimacy in imposing such measures. Many asked whether the Council, in its Chapter VII interventions, should be subject to the same restraints as nations in

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<sup>65</sup> UN, *Report to the Secretary-General on Humanitarian Needs in Kuwait and Iraq in the Immediate Post-Crisis Environment by a Mission to the Area Led by Mr. Martti Ahtisaari, Under-Secretary-General for Administration and Management*, UN Doc S/22366, ¶ 8 (1991).

<sup>66</sup> Id.

<sup>67</sup> UN Secretary-General, *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations: Report of the Secretary-General on the Work of the Organization*, UN Doc A/50/60 - S/1995/1, ¶ 70 (1995).

<sup>68</sup> UN SCOR, 55th Sess, 4120th mtg at 2, UN Doc S/PV.4120 (2000).

<sup>69</sup> UN Office of the High Commissioner for Human Rights, *Humanitarian Situation of the Iraqi Population*, Sub-Commission on Human Rights Decision 2000/112, UN Doc E/CN.4/2000/L.11/Add.2 (2000).

<sup>70</sup> Marc Bossuyt, UN Commission on Human Rights, *The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights*, UN Doc E/CN.4/Sub.2/2000/33, ¶ 59 (2000).

<sup>71</sup> Id at ¶ 71.

warfare, particularly the principles of discrimination and proportionality; whether the use of sanctions against Iraq was itself a human rights violation; whether the sanctions on Iraq undermined the broader credibility of the United Nations; and whether the effects of the sanctions created instability and harmed the innocent, contravening the Council's mandate to ensure peace and security.<sup>72</sup>

### 3. Bosnia.

In response to the conflict in the former Yugoslavia, the Security Council invoked Chapter VII and passed Resolution 713, which prohibited the supply of arms and military equipment to all parties to the conflict.<sup>73</sup> However, this did not de-escalate the conflict. On the contrary, because of the substantial imbalance in arms, the result was that the embargo enabled Serbia to implement a policy of ethnic cleansing, while the population of Bosnia-Herzegovina could not acquire arms to defend itself.<sup>74</sup> Although this result was not the intention of the Council, it nevertheless raised concerns about Chapter VII measures that go awry. Because these measures required the participation of all the member states within the United Nations, they demonstrated that a strategic misjudgment on the part of Council could result in a catastrophe of great magnitude. When Bosnia brought an action against Serbia before the ICJ, Judge Lauterpacht

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<sup>72</sup> See, for example, Michael Cornell, *A Decade of Failure: The Legality and Efficacy of United Nations Actions in the Elimination of Iraqi Weapons of Mass Destruction*, 16 Conn J Intl L 325, 346–47 (2001) (“Does UNSCR 687’s Broad Scope Violate the UN Charter? . . . [The issue becomes] whether such far-reaching provisions are necessary to achieve such peace and security.”); Marcella David, *After-Words: At the End of the Day*, 11 Transnatl L & Contemp Probs 427, 428 (2001) (suggesting that there was neither “moral nor political authority” for the sanctions on Iraq); Andrew K. Fishman, *Between Iraq and a Hard Place: The Use of Economic Sanctions and Threats to International Peace and Security*, 13 Emory Intl L Rev 687, 708–10 (1999) (discussing the application of *jus cogens* to the Security Council); Judith G. Gardam, *Legal Restraints on Security Council Military Enforcement Action*, 17 Mich J Intl L 221, 293 (1996) (noting that concern about the impact of economic sanctions is not new but takes on new implications when associated with Security Council enforcement); Peggy Kozal, Note, *Is the Continued Use of Sanctions As Implemented Against Iraq a Violation of International Human Rights?*, 28 Den J Intl L & Poly 383, 391–99 (2000) (discussing customary law and the United Nations Convention on the Rights of the Child as measures of accountability for the Council); Mary Ellen O’Connell, *Debating the Law of Sanctions*, 13 Eur J Intl L 63, 63 (2002) (“The impact of United Nations sanctions on Iraq has sparked a worldwide debate on all aspects of sanctions, including their legality.”); Rene Provost, *Starvation As a Weapon: Legal Implications of the United Nations Food Blockade Against Iraq and Kuwait*, 30 Colum J Transnatl L 577, 618–22 (1992) (discussing the application of the principles of distinction and proportionality to the food embargo); Burns Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 Am J Intl L 516, 523 (1991) (questioning whether Resolution 678, which implicitly authorized the use of force against Iraq, exceeded the legitimate scope of the Council’s authority, in response to inordinate pressure from the United States).

<sup>73</sup> Security Council Res No 713, UN Doc S/RES/713 (1991).

<sup>74</sup> Kimberly Ann Elliott, *Analyzing the Effect of Targeted Sanctions*, in David Cortright and George A. Lopez, eds, *Smart Sanctions: Targeting Economic Statecraft* 171, 174 (Rowman & Littlefield 2002).

maintained that the Security Council had to be bound by international law, at least with regard to something as fundamental as the prohibition on genocide: “One has only to state the . . . proposition thus—that a Security Council resolution may even require participation in genocide—for its unacceptability to be apparent.”<sup>75</sup> As with the *Lockerbie* case and the Iraq sanctions, legal scholars noted that the Council’s actions regarding Bosnia raised concerns about whether it is limited in its actions by international law, and if so, who would make and enforce such a determination.<sup>76</sup>

## B. Other Concerns of Overreaching

There were other occasions on which the Security Council, invoking Chapter VII, took unprecedented measures of questionable legitimacy. Some, such as the establishment of the tribunals for the former Yugoslavia and for Rwanda, ultimately had broad credibility.<sup>77</sup> But even those measures raised questions.<sup>78</sup> As international law scholars have maintained for decades, Chapter VII gives such broad powers to the Council because the Charter envisions a moment of crisis, where it would not be possible to wait for the consensus of the broader international community before acting; the member states confer primary responsibility on the Council for the maintenance of international peace and security “[i]n order to ensure prompt and effective action by the United Nations.”<sup>79</sup> This mandate to respond quickly in the face of emergencies was the rationale that was given when the Charter was drafted, and it was echoed repeatedly in the years that followed. In light of this, creating a judicial tribunal, which would hear cases that could continue on for years, seems a questionable use of those powers.

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<sup>75</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures (Bosnia v. Herzegovina)*, 1993 ICJ 325, 440 (Sept 13, 1993) (separate opinion of Lauterpacht).

<sup>76</sup> See Faiza Patel King, *Sensible Scrutiny: The Yugoslavia Tribunal’s Development of Limits on the Security Council’s Powers Under Chapter VII of the Charter*, 10 Emory Intl L Rev 509, 514 (1996) (suggesting that “the Yugoslavia Tribunal’s conclusions regarding the limits on the Security Council’s powers have advanced international jurisprudence on this issue by several steps”); Craig Scott, et al, *A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council’s Arms Embargo on Bosnia and Herzegovina*, 16 Mich J Intl L 1, 6 (1994) (discussing the concern that the arms embargo contributed to the Bosnian government’s inability to prevent genocide).

<sup>77</sup> Louise Arbour and Aryeh Neier, *History and Future of the International Criminal Tribunals in the Former Yugoslavia and Rwanda*, 13 Am U Intl L Rev 1495, 1496 (1998).

<sup>78</sup> Jared Schott, *Chapter VII As Exception: Security Council Action and the Regulative Ideal of Emergency*, 6 Nw J Intl Hum Rts 24, 25 (2007).

<sup>79</sup> UN Charter Art 24, ¶ 1.

There were also other measures by the Council in the early 1990s that expanded the use of Chapter VII in unprecedented ways and that raised questions of overreaching. In response to Iraq's invasion of Kuwait in August 1990, the Council's imposition of reparations was unprecedented in its history, as were its determination of the boundary dispute and its imposition of no-fly zones.<sup>80</sup> While Article 47 of Chapter VII envisions that the Security Council would establish a body to oversee the use of force, the Iraq measures, as well as others, authorized the use of force by member states, not by the forces under United Nations leadership envisioned under Article 43. As the Council more frequently invited member states to enforce its Chapter VII measures, it ceded direct supervision, raising questions about the legitimacy of member states interpreting for themselves the scope of their authority in these cases.<sup>81</sup> The expanded use of peacekeeping forces and the role of member states in enforcing Chapter VII measures raised questions about whether such forces were subject to the laws of war.<sup>82</sup> Criticisms of the humanitarian impact of the sanctions imposed by the Council were also raised in the context of Haiti.<sup>83</sup> Others questioned the legitimacy of Chapter VII interventions in internal conflicts;<sup>84</sup> whether United Nations peacekeeping forces are bound by international law; and the proliferation of measures involving economic sanctions.<sup>85</sup>

Thus, the concern about the Council's overreaching and the very real possibility that the Council might abuse its considerable power—or had already done so—led many to revisit the question: What exactly are the legal limits on the Council, particularly in the context of Chapter VII measures? In contrast to the 1950s, the mid-1990s marked a dramatic shift in how this question was asked—insistently and with considerable anxiety—and by whom. It was no longer an abstract issue discussed at academic conferences that arose occasionally and fleetingly. Beginning in the mid-1990s, the question became an explicit and serious challenge to the preeminent institutions of global governance and a topic that was addressed repeatedly and in many variations within the international community and scholarly literature.

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<sup>80</sup> Schweigman, *Authority of the Security Council Under Chapter VII* at 1 (cited in note 60).

<sup>81</sup> Gardam, 17 *Mich J Intl L* at 294 (cited in note 72).

<sup>82</sup> See generally Richard D. Glick, *Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces*, 17 *Mich J Intl L* 53 (1995); Robert O. Weiner and Fionnuala Ni Aolain, *Beyond the Laws of War: Peacekeeping in Search of a Legal Framework*, 27 *Colum Hum Rts L Rev* 293 (1996).

<sup>83</sup> O'Connell, *Authorization of Force* at 69 (cited in note 43).

<sup>84</sup> Ruth Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond*, 15 *Mich J Intl L* 519, 528 (1994).

<sup>85</sup> Schrijver noted that as of January 1, 1994, there were eight cases of sanctions imposed by the Security Council. *Use of Economic Sanctions* at 123 (cited in note 23).

## IV. RESPONSES TO THE COUNCIL'S ACTIVISM

The international legal and diplomatic community reacted in several ways. First, there was explicit discussion of a question that had not been viewed as a live issue in many decades. The concern articulated was not just that the Council might exceed the scope of its mandate or that the machinery of the Council might be subject to extraordinary control by one of the permanent members, but that the Council itself might violate fundamental standards of human rights and international humanitarian law. If the Council were, in principle, limited by international law, what court could judge it, and what entity would enforce those limits? Secretary-General Boutros-Ghali asked: “[W]ith the permanent members now largely unanimous, does the Security Council have unlimited powers? How far can it extend the scope of its activities? Is it up to the Council alone to interpret what its own powers are? Are its actions essentially unchecked?”<sup>86</sup> José Alvarez noted that “[s]ome realists characterize the Charter scheme as constituting a ‘police state’ rather than a system based on the ‘rule of law.’”<sup>87</sup> Michael Reisman and Douglas Stevick proposed that the Council be subject to the same limitations as states during warfare, such as the principles of proportionality and discrimination.<sup>88</sup> Schweigman argued that the Security Council could not commit a manifest abuse of rights, which “would occur when [its] action was manifestly disproportionate or unnecessary as regards its aim, the restoration of international peace.”<sup>89</sup>

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<sup>86</sup> Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* 13 (Kluwer 1998). See also Boutros Boutros-Ghali, *Statement Delivered to the Congress on Public International Law Held at the United Nations (Mar 17, 1995)*, in *International Law as a Language for Foreign Relations* 593, 596 (Kluwer 1996).

<sup>87</sup> José E. Alvarez, *Judging the Security Council*, 90 *Am J Intl L* 1, 2 (1996).

<sup>88</sup> W. Michael Reisman and Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 *Eur J Intl L* 86, 96 (1998). See also Joy K. Fausey, Comment, *Does the United Nations’ Use of Collective Sanctions to Protect Human Rights Violate Its Own Human Rights Standards?*, 10 *Conn J Intl L* 193, 209–213 (1994) (discussing whether economic sanctions violate the principle of proportionality); T.D. Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers Under Chapter VII of the Charter*, 26 *Netherlands YB Intl L* 33, 68 (1995) (discussing “the question as to which legal limitations—if any—apply to the Council in the execution of its responsibilities as the collective security organ of the United Nations”); Gardam, 17 *Mich J Intl L* at 307–309 (cited in note 72).

<sup>89</sup> Schweigman, *Authority of the Security Council Under Chapter VII* at 177 (cited in note 60). Thomas Franck and José Alvarez propose similar standards of “gross abuse of discretion” and “test of manifest irregularity.” *Id.* at 177 n 784, citing Thomas M. Franck, *The United Nations as Guarantor of International Peace and Security: Past, Present and Future*, in Christian Tomuschat, ed, *The United Nations at Fifty: A Legal Perspective* 25, 37 (Kluwer 1995), and citing Alvarez, 90 *Am J Intl L* at 26 (cited in note 87).

Within the international community, there was also a multifaceted initiative toward Security Council reform. Except for the expansion of the elected members in 1965 from six seats to ten seats,<sup>90</sup> there had been little interest in any institutional changes in the Council for decades. The sense that the Security Council had abused the enormous power at its disposal, and the fear that it could do so again, triggered a series of initiatives toward Security Council reform, specifically challenging the adequacy of the representation on the Council and the special powers of the permanent members. In June 1992, Secretary-General Boutros-Ghali, in his *Agenda for Peace*, envisioned a number of ways that the Council could be more effective.<sup>91</sup> Later that year, there was a summit meeting of the nonaligned movement, at which there was broad international support for proposals to reform the structure of membership within the Council. At the General Assembly session in November 1992, there were further calls for Security Council reform, and in December, the General Assembly adopted a resolution to consider the question of equitable representation, and an increase in membership, of the Council.<sup>92</sup> The following year, the General Assembly created an “Open-Ended Working Group to consider all aspects of the question of an increase in membership . . . and other matters related to the Security Council.”<sup>93</sup> In 1995, the General Assembly adopted a resolution that “[t]he Security Council should . . . be expanded and its working methods continue to be reviewed to enhance its representative character and improve its . . . transparency.”<sup>94</sup>

Within the Working Group and the General Assembly, the permanent members consistently objected to the proposed changes. Still, the calls for reform, from many sources, continued. The United Nations Millennium Declaration of 2000 stated that member states would intensify their efforts “to achieve a comprehensive reform of the Security Council in all its aspects.”<sup>95</sup> In 2003, Secretary-General Annan initiated an effort to revisit the idea of Security Council reform, appointing a High Level Panel on Threats, Challenges and Change to consider new approaches to threats to peace and security, including

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<sup>90</sup> UN Charter Art 23.

<sup>91</sup> UN Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, UN Doc A/47/277 - S/24111 (1992).

<sup>92</sup> General Assembly Res No 47/62, UN Doc A/RES/47/62 (1992).

<sup>93</sup> General Assembly Res No 48/26, UN Doc A/RES/48/26 (1993).

<sup>94</sup> General Assembly Res No 49/499, UN Doc A/RES/49/499 (1995).

<sup>95</sup> United Nations Millennium Declaration, General Assembly Res No 55/2, UN Doc A/RES/55/2, ¶ 30 (2000).

Security Council reform. In 2005, he proposed changes in representation to provide a place for underrepresented regions.<sup>96</sup>

The legitimacy of the institutional structure of the Council came under fire in legal scholarship as well. In 1993, for example, David Caron commented on the impunity of the permanent members, noting that the veto means “that certain members of the [international] community potentially are not governed.”<sup>97</sup> Erskine Childers argued that “[n]o longer is it morally possible for democratic peoples to accept that 5 out of 165 member governments can have such deadly power in the name of a peace-dedicated world organization.”<sup>98</sup> In 1994, Sean Murphy, while defending the legitimacy of the Council, conceded that “the perception that Security Council decisions lack legitimacy resonates because it is not clear why some states should count more than others.”<sup>99</sup> Where the efforts at Security Council reform addressed in abstract terms the issues of representation and voting, some scholars explicitly raised the issue of the influence of the US within the Council, calling it a “Faustian bargain,” or examined the problematic impact of US unilateralism on the Council and the United Nations in general.<sup>100</sup>

A second response to Security Council activism, found in both legal scholarship and judicial rulings, entailed revisiting the question of whether there could be judicial review that would provide some degree of oversight over the Council. José Alvarez asked:

Should the International Court of Justice (ICJ) “judicially review” Security Council decisions? The question, once fanciful, is now being asked seriously by litigants in and judges on the World Court, nonpermanent members of the Security Council that consider it an “undemocratic” body acting as “a

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<sup>96</sup> UN Secretary-General, *In Larger Freedom: Towards Development, Security, and Human Rights for All*, UN Doc A/59/2005 (2005).

<sup>97</sup> David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 Am J Intl L 552, 565 (1993).

<sup>98</sup> Erskine Childers, *Gulf Crisis Lessons for the United Nations*, 23 Bull of Peace Props 129, 133 (1992).

<sup>99</sup> Sean D. Murphy, *The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War*, 32 Colum J Transnatl L 201, 252 (1994).

<sup>100</sup> See, for example, Kishore Mahbubani, *The Permanent and Elected Council Members*, in David M. Malone, ed, *The UN Security Council: From the Cold War to the 21st Century* 253, 257 (Lynne Rienner 2004); David M. Malone, *A Decade of US Unilateralism?*, in David M. Malone and Yuen Foong Khong, eds, *Unilateralism and US Foreign Policy: International Perspectives* 19, 20 (Lynne Rienner 2003); Frederick Rawski and Nathan Miller, *The United States in the Security Council: A Faustian Bargain?*, in David M. Malone, ed, *The UN Security Council: From the Cold War to the 21st Century* 357, 357 (“The Council has been forced to cater to U.S. interests, thereby undercutting its achievements and undermining its legitimacy in an effort to remain relevant.”).

cloak for a new form of imperialism,” and scholars worried about its recent “quasi-legislative” or “quasi-judicial” acts.<sup>101</sup>

Writing in 1994, Mohammed Bedjaoui observed that in 1952, when the Institut de Droit International considered whether there should be judicial remedy for improper decisions by international political organs, the concern was dismissed as premature. But, Bedjaoui notes:

Now that half a century has elapsed, it is no longer “premature” to raise the problem of controlling legality once again. Far from exonerating the United Nations from all surveillance, the weight of the responsibilities entrusted to it, which is now even greater than in 1952, cries out for the installation of checks and balances, including a reasonable and balanced mechanism for checking the legality of its acts.<sup>102</sup>

## A. Judicial and Scholarly Responses

It was in this context that scholars and jurists revisited the question of whether the Security Council is bound by international human rights law when exercising its mandate under Chapter VII, or whether the Chapter VII powers override principles of human rights.<sup>103</sup>

### 1. The 1990s: revisiting the question.

The first generation of responses, primarily in the early and mid-1990s, were diametrically opposed to the position of Kelsen and Dulles: of course the Council is bound by international law—it is unthinkable that the Council could legally commit an atrocity in the name of restoring peace. These responses were widespread and emphatic, and they incorporated several different arguments.

The central argument relied on Article 24. Judge Weeramantry in his dissent in *Lockerbie* noted that Article 24(1) provides that the Council “‘shall act in accordance with the Purposes and Principles of the United Nations.’ The duty is imperative and the limits are categorically stated.”<sup>104</sup> Judge Lauterpacht in the *Bosnian Genocide* case reasoned: “Nor should one overlook the significance of the provision in Article 24(2) of the Charter that, in discharging its duties to maintain international peace and security, the Security Council shall act in accord

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<sup>101</sup> Alvarez, 90 Am J Intl L at 1 (cited in note 87). See also Akande, 46 Intl & Comp L Q at 310–11 (cited in note 11) (discussing whether judicial review is a viable means of achieving accountability for the Council); Karl Doehring, *Unlawful Resolutions of the Security Council and their Legal Consequences*, 1 Max Planck YB UN L 91, 93 (1997); Gill, 26 Neth YB Intl L at 113 (cited in note 88); Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 Harv Intl L J 1, 3 (1993).

<sup>102</sup> Bedjaoui, *New World Order* at 59 (cited in note 12).

<sup>103</sup> See, for example, Gardam, 17 Mich J Intl L at 312 (cited in note 72); Anna M. Vradenburgh, Comment, *The Chapter VII Powers of the United Nations Charter: Do They ‘Trump’ Human Rights Law?*, 14 Loyola LA Intl & Comp L J 175, 189–92 (1991).

<sup>104</sup> *Lockerbie*, 1992 ICJ at 171 (Weeramantry dissenting).

with the Purposes and Principles of the United Nations.”<sup>105</sup> Many others echoed this view, invoking an array of arguments.<sup>106</sup> The Bossuyt Report, commissioned by the UN Commission on Human Rights to examine the Security Council’s use of economic sanctions, maintained that because Article 24 requires the Council to act in accordance with the principles and purposes contained in Article 1, it follows that “no act of the Security Council is exempt from scrutiny as to whether or not that act is in conformity with the Purposes and Principles of the United Nations.”<sup>107</sup>

In addition to the limitations implied by the Charter, the Bossuyt Report maintained that the Security Council’s right to economic sanctions cannot “in any way violate principles of international law stemming from sources ‘outside’ the Charter.”<sup>108</sup> Judith Gardam argued that “there appears to be no justification for the view that the Security Council is at liberty to completely disregard the purposes and principles of the Charter, and even less for the denial that it operates to a certain extent within the general system of international law.”<sup>109</sup> Some looked to the intent of those who drafted the Charter, as did Judge Weeramantry in his dissent in *Lockerbie*.<sup>110</sup> Others, such as Doehring, argued that the United Nations and the Security Council were subjects of international law, even if they were not states, since every subject of international law is bound by international law; therefore, they may violate international law.<sup>111</sup> Some argued that since the Security Council was an entity comprised of states, it could not have a mandate that conflicted with the legal limits upon states:

If it is the case that the Security Council cannot require States to breach fundamental humanitarian values in the sanction regimes it imposes on States, it is surely anomalous to regard it as able to do so itself. It is inconceivable that with the current emphasis on human rights and humanitarian principles, the Security Council can be regarded as operating

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<sup>105</sup> *Bosnian Genocide*, 1993 ICJ at 440 (separate opinion of Lauterpacht).

<sup>106</sup> See Schweigman, *Authority of the Security Council Under Chapter VII* at 168 (cited in note 60). For example, Suy says that “[t]he Council is bound by the Purposes and Principles of the Organization and discharges its duties on the basis of the specific powers granted by the Charter”; Gowlland-Debbas holds that “[t]he substantive limits are to be found in Article 24(2), according to which the Council is bound to act in accordance with the purposes and principles of the United Nations”; and Fassbender maintains that “[t]he values and goals set out by the Charter in its preamble and first two articles are . . . standards of legality (or constitutionality) for legal acts passed by UN organs.” *Id.*

<sup>107</sup> Bossuyt, *The Adverse Consequences of Economic Sanctions* at ¶ 23 (cited in note 70).

<sup>108</sup> *Id.* at ¶ 24.

<sup>109</sup> Gardam, 17 *Mich J Intl L* at 303 (cited in note 72).

<sup>110</sup> See text accompanying note 59.

<sup>111</sup> Doehring, 1 *Max Planck YB UN L* at 92 (cited in note 101).

outside the constraints on the conduct of armed conflict that have been painstakingly developed over the years by States.<sup>112</sup>

Judge Lauterpacht in the Bosnia case considered the possibility that Resolution 713, imposing an arms embargo on all the belligerents, “can be seen as having in effect called on Members of the United Nations, albeit unknowingly and assuredly unwillingly, to become in some degree supporters of the genocidal activity . . . and in this manner and to that extent to act contrary to a rule of *jus cogens*.”<sup>113</sup> He maintained that it follows that when this resolution “began to make members of the United Nations accessories to genocide, it ceased to be valid and binding . . . and that members of the United Nations then became free to disregard it.”<sup>114</sup>

Where Kelsen maintained a distinction between international law and restoration of peace, Bedjaoui reasoned that these cannot be separated. He rejected Kelsen’s argument that the Security Council need not take account of principles of justice and international law. He argued that “Hans Kelsen’s analysis is not acceptable,” asserting that “all the principal organs of the United Nations must respect not only the Charter but international law itself.”<sup>115</sup> Some commentators simply appealed to moral intuition and seemed to be struggling for adequate language to capture the absurdity and wrongfulness of the possibility that an institution established for governance and peaceful order could itself profoundly undermine those purposes—“this machinery cannot be meant to perform unlawfulness.”<sup>116</sup> In the end they reasoned that the notion of exempting the Council from international humanitarian law was inconceivable, unacceptable, and untenable; that the truth of this is so obvious it is incapable of demonstration; or that “it is undisputed,” even though the matter was clearly very much in dispute.<sup>117</sup>

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<sup>112</sup> Gardam, 17 Mich J Intl L at 319 (cited in note 72). Gill notes that:

[h]umanitarian law . . . forms part of the core values and principles of the Organization . . . . In founding the UN as primary repository of collective security, the Member States could not, in transferring or conferring the power to wage war and conduct military operations as an instrument of international policy, invest the Organization with the power to maintain and restore international peace and security by means which would violate these fundamental precepts. The Member States could not attribute to the Organization a power which they themselves did not and do not possess.

Gill, 26 Neth YB Intl L at 82 (cited in note 88).

<sup>113</sup> *Bosnian Genocide*, 1993 ICJ at 441 (separate opinion of Lauterpacht). See also Akande, 46 Intl & Comp L Q at 322 (cited in note 11).

<sup>114</sup> *Bosnian Genocide*, 1993 ICJ at 441 (separate opinion of Lauterpacht).

<sup>115</sup> Bedjaoui, *New World Order* at 32 (cited in note 12).

<sup>116</sup> Doehring, 1 Max Planck YB UN L at 100 (cited in note 101).

<sup>117</sup> See, for example, *Bosnian Genocide*, 1993 ICJ at 441 (separate opinion of Lauterpacht) (“One has only to state the proposition thus—that a Security Council resolution may even require

However, there was a second generation of responses to the question of whether the Council must itself abide by international human rights law. They echoed the position held by Kelsen and Dulles, suggesting that the Council can legally override any such principles, but with a radically different tone. Where Kelsen and Dulles saw this as simply a matter of the Council's entitlement and blithely dismissed objections, those jurists and scholars who were now suggesting that there may in fact be no limits on the Council conveyed a sense of anguish. In articles with titles like *Playing the Devil's Advocate: The Security Council is Unbound by Law*,<sup>118</sup> there is a common theme: it may in fact be that the Charter and international law are inadequate to control the Council under Chapter VII—and God help us if this is so.

Many of the arguments revisit exactly the concerns addressed in 1948 by critics of the Charter, who had maintained that the Charter's language permitted precisely this interpretation. Of particular concern, as some noted, is Article 103, which holds that obligations under the Charter override any treaty obligations, that arguably might include the Convention against Genocide, the Geneva Conventions, the Convention against Torture, and the International Covenant of Civil and Political Rights. The supremacy clause “threatens to render the Council's subjection to international law partially void.”<sup>119</sup> Some suggested that Article 103 would vitiate customary law as well. Since it provides that Charter obligations override member states' “obligations under any other international agreement,” it follows that “[i]n a literal sense, Article 103 would render inoperable not only treaties, but also state obligations under customary

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participation in genocide—for its unacceptability to be apparent.”); Bedjaoui, *New World Order* at 7 (cited in note 12) (“It appears less acceptable than ever that sovereign States should have created an international organization equipped with broad powers of control . . . but *itself* exempted from the duty to respect both the Charter which gave it birth and international law.”); id at 120 (“To place the Security Council above international law would scarcely be a legally sustainable proposition, like a Euclidean theorem incapable of demonstration.”); Manusama, *United Nations Security Council* at 31 (cited in note 29) (“It is undisputed that principles of humanity must be applied to each instance in which force is used, irrespective of whom or what is involved.”); Malcolm N. Shaw, *The Security Council and the International Court of Justice: Judicial Drift and Judicial Function*, in A.S. Muller, et al, eds, *The International Court of Justice: Its Future Role After Fifty Years* 219, 230 (Martinus Nijhoff 1997) (“One cannot easily envisage it being acceptable that the Council should by decision consciously breach the norms of the law of armed conflict.”); Akande, 46 *Intl & Comp L Q* at 314 (cited in note 11) (“It is almost inconceivable for there to be no legal limits to the power of the Security Council . . .”); Doehring, 1 *Max Planck YB UN L* at 93 (cited in note 101) (discussing “the assumption that the Security Council alone determines its rights” and concluding that “this position is, of course, not tenable”).

<sup>118</sup> Gabriël H. Oosthuizen, *Playing the Devil's Advocate: The Security Council is Unbound by Law*, 12 *Leiden J Intl L* 549 (1999).

<sup>119</sup> Manusama, *United Nations Security Council* at 22 (cited in note 29).

international law, as such obligations are theoretically based on some sort of agreement.”<sup>120</sup>

Some argued that Article 25 imposes obligations on states to implement Council resolutions, without recognizing any circumstances in which they can question or decline to follow the Council’s decision, because Article 25 provides that United Nations members “agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”<sup>121</sup> Gabriël Oosthuizen submits that this arguably implies that the Council must act in accord with the Charter but not necessarily with international law.<sup>122</sup>

Several commentators have suggested that the deliberate intent of the drafters was to exempt the Council from any limits or control. Bedjaoui says:

[I]t is not unreasonable to ask [whether the drafters meant to exempt the Security Council from any limits] when, on the one hand, the founders of the Charter deliberately refrained from including any specific legality-test clause and, on the other hand, the absence of such a clause not only fails to offer protection against any action in excess of Charter powers but is even conducive to it. This has been clearly demonstrated in practice.<sup>123</sup>

August Reinisch observes that “[t]he most prominent theory, which ‘liberates’ the Security Council from any legal constraints, is based on the argument that the Council, as the main ‘executive’ organ of the United Nations, was deliberately exempted from legal limits when fulfilling its major task of securing world peace and security.”<sup>124</sup>

Anna Vradenburgh argues that the drafters’ intent was evident in the language of the Charter, which “appears to vest unlimited power in the Council.”<sup>125</sup> This is true of Articles 41 and 42. Article 41 provides that the Council can impose measures not involving the use of force and that these may include economic, diplomatic, or other measures, without stating any exclusions or conditions. Article 42, concerning measures involving the use of force, likewise provides that “[s]uch action may include” operations by air, sea, or land forces. Neither Article 41 nor 42 provides for any exclusions or conditions.

Others pointed out the disparity contained in Article 1(1). The clause “in conformity with principles of justice and international law” refers only to

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<sup>120</sup> Id at 22–23.

<sup>121</sup> Boris Kondoch, *The Limits of Economic Sanctions Under International Law: The Case of Iraq*, in Michael Bothe and Boris Kondoch, eds, 7 *International Peacekeeping: The Yearbook of International Peace Operations* 267, 282 (Kluwer 2002), quoting UN Charter Art 24.

<sup>122</sup> Oosthuizen, 12 *Leiden J Intl L* at 555–56 (cited in note 118).

<sup>123</sup> Bedjaoui, *New World Order* at 9 (cited in note 12).

<sup>124</sup> August Reinisch, Note, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 *Am J Intl L* 851, 855 (2001).

<sup>125</sup> Vradenburgh, 14 *Loyola LA Intl & Comp L J* at 175 (cited in note 103).

settlements of disputes “by peaceful means.”<sup>126</sup> No such provision is found in the clause pertaining to the use of force, which authorizes the United Nations “to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.”<sup>127</sup> There was also another argument made in regard to Article 1(1): that the reference to purposes and principles does not serve as a substantive limitation on the Council’s powers. Gardam suggested there could be an interpretation holding that the purposes and principles are “merely words of exhortation.” She notes that if this were the case, it would allow “for dangerous leeways of choice to an unrepresentative body necessarily swayed by considerations that may be antithetical to the ideals of the Charter.”<sup>128</sup> In addition, Gardam suggests, in light of the fairly vague language of the principles and purposes, “it is possible to infer from Article 1(1) that if the Charter had intended otherwise to restrict the Security Council in any way,” it would have done so explicitly.<sup>129</sup>

Oosthuizen suggested that an argument might be made that Article 2(7), which concerns the principle of non-intervention in domestic matters, could also be read as supporting the interpretation that the Security Council is not limited by international law because it provides that “[n]othing contained in the present Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state . . . but this principle shall not prejudice the application of enforcement measures under Chapter VII.”<sup>130</sup> Bedjaoui suggested that the Council could be understood to function as a legislative body, and if so, then there was no provision for overturning or questioning it in this mode:

[T]he idea that the Security Council creates and imposes its own law raises [the question of] whether the Security Council, when operating in “lawmaker mode”, is exempted from the requirement to respect, on the one hand, the provisions of the United Nations Charter and, on the other, the rules and principles of international law.<sup>131</sup>

Dapo Akande and others noted that, in any event, in the absence of judicial review, no venue has jurisdiction to make a determination as to the legality of a direct and enforceable Security Council measure.<sup>132</sup> The ICJ, at best, could

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<sup>126</sup> UN Charter Art 1(1).

<sup>127</sup> Id. See also Oosthuizen, 12 Leiden J Intl L at 552 (cited in note 118); O’Connell, *Authorization of Force* at 57 (cited in note 43).

<sup>128</sup> Gardam, 17 Mich J Intl L at 321 (cited in note 72).

<sup>129</sup> Id at 297–98.

<sup>130</sup> Oosthuizen, 12 Leiden J Intl L at 553 (cited in note 118), quoting UN Charter Art 2, ¶ 7.

<sup>131</sup> Bedjaoui, *New World Order* at 1 (cited in note 12).

<sup>132</sup> Akande, 46 Intl & Comp L Q at 311 (cited in note 11).

“engage in an ‘expressive’ mode of review by casting doubt on the acceptability or legality of Council action, thus ‘cueing’ the Council to exercise care in the future, though not actually voiding the Council decision.”<sup>133</sup> Implicitly referring to the Security Council “activism” from the early 1990s, Oosthuizen concludes:

Ultimately, then, there are no international legal limits to the [Security Council (SC)]’s Chapter VII enforcement powers. For example, it is conceivable that the SC might not honour a people’s right to self-determination since it could constitute a threat to or a breach of the peace. It is conceivable that the SC might ignore the violation, by its own or mandated forces who are attempting to reimpose international peace and security in a strategically vital part of the globe, of the fundamental human rights of those responsible for its serious destabilisation. It is conceivable that the SC might turn a blind eye to the actual non-compliance with the Geneva Conventions in a long drawn-out struggle against a pernicious aggressor. It is conceivable that the SC might underwrite an illegal secessionist claim because it will ensure regional peace. It is conceivable that the SC might block weapons supply to a people fighting against genocide. It is conceivable that the SC might impose sanctions that violate international human rights and humanitarian law. . . . The [United Nations Charter]’s drafters clearly intended the SC to be left with absolute powers of appreciation in maintaining international peace and security. The SC’s powers are nowhere curtailed by an implicit or explicit reference to international law.<sup>134</sup>

## 2. The late 1990s through the present.

By the late 1990s, many things had changed. The political balance of the Council shifted, and there was far more resistance to the will of the US. This was perhaps most apparent in 2003, when the Council refused to authorize the invasion of Iraq, despite considerable pressure on the part of the US. The Council continued to employ Chapter VII measures actively, but there was no longer the possibility of consensus for the sort of broad or extreme measures that were seen in the early 1990s. Instead, as with the sanctions imposed on Iran in 2009 and 2010, the resolutions often resulted from compromises, imposing measures that were not as harsh or as broad as the US sought.

In addition to the resistance within the Council, the Secretary-General and General Assembly were increasingly vocal in identifying the points of conflict between the Council’s Chapter VII measures and international law, and they called for greater accountability. In 1998, the Secretary-General, in his annual report to the General Assembly, stated that “[t]he international community should be under no illusion: these humanitarian and human rights policy goals

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<sup>133</sup> Id.

<sup>134</sup> Oosthuizen, 12 *Leiden J Intl L* at 562–63 (cited in note 118).

cannot easily be reconciled with those of a sanctions regime.”<sup>135</sup> The following year, the Secretary-General stated that “[t]he fundamental principles and rules of international humanitarian law,” including the treatment of noncombatants, the prohibition on the use of chemical and biological weapons, the prohibition of anti-personnel mines, the destruction of places of worship and cultural institutions, and so forth, would be applicable to United Nations forces “in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.”<sup>136</sup> In 2005, the report of the Secretary-General’s High Level Panel on Threats, Challenges and Change called on the Council “to improve transparency and accountability.”<sup>137</sup> The report also held that the Security Council “should always address” several basic “criteria of legitimacy” drawn from international humanitarian law: seriousness of threat, proper purpose, last resort, proportional means, and balance of consequences.<sup>138</sup>

## B. The Question of Judicial Review

In addition, there was growing judicial recognition of limitations on the Security Council, in multiple venues. While there is no procedure to appeal a resolution passed by the Council directly to a judicial body with the machinery to enforce a decision against the Council, the ICJ may speak to the validity of a Security Council resolution in certain circumstances. It can do so in an advisory opinion sought by the General Assembly, UN agencies within the scope of their work, or the Council itself.<sup>139</sup> It can also comment upon the validity of resolutions in contentious cases between states where a Security Council resolution is pertinent, as was the situation with the *Lockerbie* case.<sup>140</sup> Writing in the late 1990s, Akande commented that “[t]he Court may not have the *ultimate authority* to interpret the Charter but it certainly has authority to do so.”<sup>141</sup> Even without machinery to enforce its finding, Akande maintained that an ICJ decision “to the effect that a certain Security Council resolution is invalid or

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<sup>135</sup> UN Secretary-General, *Report of the Secretary-General on the Work of the Organization*, UN Doc A/53/1, ¶ 64 (1998).

<sup>136</sup> UN Secretary-General, *Observance by United Nations Forces of International Humanitarian Law: Secretary General’s Bulletin*, UN Doc ST/SGB/1999/13, ¶ 1.1 (1999).

<sup>137</sup> Secretary-General’s High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, UN Doc A/59/565, ¶ 258 (2004).

<sup>138</sup> *Id.* at Annex I, ¶ 56.

<sup>139</sup> UN Charter Art 96.

<sup>140</sup> *Libya v US AIP*, § II.i (cited in note 50).

<sup>141</sup> Akande, 46 *Intl & Comp L Q* at 342–43 (cited in note 11).

beyond its powers would undermine the legitimacy of that decision and weaken its claim to compliance.”<sup>142</sup>

In 2001, John Dugard suggested that “the total rejection of judicial review . . . is unlikely to prevail” and that there were several arguments for some form of judicial review that had growing momentum: the Charter does not explicitly exclude the competence of the ICJ, as it does with the General Assembly in Article 12; the preparatory documents were ambiguous on the point; and there were the limits contained in Articles 1 and 24, requiring the Council to abide by the principles and purposes of the United Nations.<sup>143</sup>

Within judicial venues themselves, there has been a growing recognition that the Council is bound by international law, as well as a willingness to make a finding of whether or not the Council has acted in conformity with international law. In the early 1990s, in the *Lockerbie* and *Bosnian Genocide* cases, individual judges raised these concerns in dissents or in separate opinions. But in 1995, in the *Tadić* case before the International Criminal Tribunal for the former Yugoslavia, it was the court that stated in a ruling on jurisdiction:

The Security Council is . . . subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).<sup>144</sup>

But by far the most significant development in this regard is a line of cases concerning the due process rights of those whose assets were frozen pursuant to Security Council Resolution 1267 and the successor resolutions. These resolutions designate persons, companies, and foundations whose assets are to be frozen on the basis of putative ties to al Qaida, the Taliban, or Osama bin Laden. While some procedural protections have been added in response to litigation and political pressure, these lists have been deeply problematic: initially names were added by the Security Council committee overseeing the sanctions (the “1267 Committee”) without any evidence, or even any specific information, about the alleged ties of these individuals to al Qaida or the Taliban. For many years there was no opportunity for the individuals affected to see the accusations against them, even in summary form, much less to challenge their accuracy. Even after multiple reforms, there is still no impartial body to which affected

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<sup>142</sup> Id at 336.

<sup>143</sup> John Dugard, *Judicial Review of Sanctions*, in Vera Gowlland-Debbas, ed, *United Nations Sanctions and International Law* 83, 85 (Kluwer 2001).

<sup>144</sup> *Prosecutor v Tadić*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, ¶ 28 (ICTY 1995).

individuals can appeal, and in some cases individuals remain on the list for years on end, designated globally as supporters of terrorism despite being vindicated by extensive investigations.

These due process issues have been raised before numerous domestic and international courts. In 2009, a Canadian judge commented that the 1267 regime was “not unlike that of Josef K. in Kafka’s *The Trial*, who awakens one morning, and for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime.”<sup>145</sup> In the case of *Sayadi v Belgium*,<sup>146</sup> the Brussels Court of First Instance ruled in favor of a Belgian couple whose assets were frozen on dubious grounds and ordered the Belgian government to submit a delisting request to the 1267 Committee. The government did so, but the request was denied.<sup>147</sup> However, when the couple appealed to the Human Rights Committee (HRC), the Belgian government argued that it could not be subject to the HRC’s jurisdiction because Belgium had no choice in implementing the Security Council measure—Article 25 obliges it to implement Chapter VII measures without allowing for exception or challenges, and Article 103 holds that, in the event of a conflict, a Chapter VII measure overrides a state’s other treaty obligations. The HRC found that it did not have jurisdiction to rule directly on the legality of a Security Council measure but that it could find that a state was in violation of the International Covenant of Civil and Political Rights (ICCPR), even if the state was acting pursuant to the Security Council’s measures.<sup>148</sup>

The *Kadi* case, concerning the European Community’s implementation of the 1267 regime, has contributed significantly to this jurisprudence. Yassin Abdullah Kadi, a Saudi businessman, was added to the list of those associated with al Qaida shortly after the bombing of the World Trade Center in September 2001, and his assets were frozen in October 2001. According to the summary of reasons justifying these measures, Kadi was a shareholder in a bank in which “planning sessions for an attack against a United States facility . . . may have taken place.”<sup>149</sup> There was no information as to the nature of the attack, the date, whether the meeting in fact took place, whether al Qaida was involved, and in what manner Kadi was allegedly involved.<sup>150</sup> The summary of reasons also states

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<sup>145</sup> *Abdelrazik v Canada (Minister of Foreign Affairs)*, 2009 FC 580, ¶ 53 (Can); Grant L. Willis, *Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson*, \*19 (University of Leiden Working Paper 2010), online at [http://works.bepress.com/grant\\_willis/1/](http://works.bepress.com/grant_willis/1/) (visited Sept 25, 2011).

<sup>146</sup> *Sayadi v Belgium*, Comm No 1472/2006, UN Doc CCPR/C/94/D/1472/2006 (2008).

<sup>147</sup> *Id.*; Willis, *Security Council Targeted Sanctions* at \*19 (cited in note 145).

<sup>148</sup> Helen Keller and Andreas Fischer, *The UN Anti-Terror Sanctions Regime Under Pressure*, 9 Hum Rts L Rev 257, 263 (2009).

<sup>149</sup> *Kadi*, Case T-85/09 at ¶ 157.

<sup>150</sup> *Id.*

that Kadi “owned several firms in Albania which funneled money to extremists,” although it does not identify the firms, the extremists, or Kadi’s ostensible role. The court noted that there was an extensive criminal investigation against Kadi in Albania, which turned up no evidence against him.<sup>151</sup> Likewise, in the face of extensive criminal investigations in Turkey and Switzerland, where Kadi had the opportunity to refute the claims against him, he was exonerated.<sup>152</sup>

The European Community’s Court of First Instance (CFI) ruled in 2005 that because the EU was acting pursuant to a Chapter VII measure, the EU had no discretion in implementing the will of the Security Council.<sup>153</sup> Consequently, the court reasoned, reviewing the legality of the EU’s implementation would indirectly constitute judicial review of the Security Council. The court found that it did not have this jurisdiction. The court commented that indirect judicial review of a Security Council resolution was possible where there were alleged violations of *jus cogens*, which is binding on all subjects of international law, including the United Nations. However, the CFI found that no rights within the parameters of *jus cogens* had been violated.<sup>154</sup>

Kadi appealed to the European Court of Justice (ECJ), which overruled the CFI, finding that EU regulations, even those implementing a Security Council measure, must conform with European Community law, including human rights law developed and recognized by the EU. The ECJ found that the EU regulations violated fundamental rights, including the right to property, as well as the right to a hearing and to effective judicial review.<sup>155</sup> The most recent ruling, issued by the General Court of the EU<sup>156</sup> in September 2010, found that the EU’s practices still did not provide an adequate review of Kadi’s claims, and the court again annulled the EU regulations implementing Resolution 1267.<sup>157</sup> The *Kadi* case suggests that the courts are showing increasing willingness not only to comment upon the legality of Chapter VII measures, but also to issue rulings that effectively block implementation of the Security Council measures.

In addition, two recent decisions of the Grand Chamber of the European Court of Human Rights (ECHR) open an extraordinary possibility for judicial review. In *Al-Skeini v United Kingdom*,<sup>158</sup> a case was brought under the

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<sup>151</sup> Id.

<sup>152</sup> Id at ¶ 158.

<sup>153</sup> *Kadi*, Case T-85/09 at ¶ 158.

<sup>154</sup> Id.

<sup>155</sup> *Kadi & Al Barakaat v Council & Comm*, Joined Cases C-402/05 P and C-415-05 P, 2008 ECR I-06351.

<sup>156</sup> Formerly known as the Court of First Instance.

<sup>157</sup> *Kadi*, Joined Cases C-402/05 P and C-415-05 P at ¶ 149.

<sup>158</sup> *Al-Skeini v United Kingdom*, App No 55721/07, 2011 Eur Ct HR 1093 (Grand Chamber 2011).

Convention for the Protection of Human Rights and Fundamental Freedoms by the families of six Iraqis who had been killed by UK soldiers, during the period in 2003 and 2004 when Iraq was occupied by the Coalition Provisional Authority, whose authority was recognized by the Security Council in Resolution 1483 (2003). Rejecting the findings of the UK courts, the Grand Chamber awarded substantial damages to the plaintiffs. It reasoned that, in light of the occupation of Basrah, the UK held “some of the public powers normally to be exercised by a sovereign government,” and consequently, it had “exercised authority and control over individuals killed in the course of such security operations,” giving the ECHR jurisdiction.<sup>159</sup>

In *Al-Jedda v United Kingdom*,<sup>160</sup> the applicant was an Iraqi who came to the UK in 1992, where he was granted asylum and citizenship. In 2004, he returned to Iraq, where he was arrested by US soldiers and held in a UK detention center on suspicion that he had conspired with Islamic terrorists to attack the coalition forces.<sup>161</sup> The plaintiff argued that his detention violated Article 5(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention), which provides that a person may be detained only in certain circumstances, such as lawful arrest.<sup>162</sup> The UK government maintained that while Al-Jedda’s detention did not fall under one of the enumerated categories, the Convention did not apply because Al-Jedda’s detention had been authorized by Security Council Resolution 1546.<sup>163</sup> Consequently, they argued that since Resolution 1546 had been adopted pursuant to Chapter VII, Article 103 implied that Resolution 1546 overrode the Convention.<sup>164</sup> The House of Lords agreed unanimously, finding that “Article 103 of the United Nations Charter gave primacy to resolutions of the Security Council, even in relation to human rights agreements.”<sup>165</sup> However, the Grand Chamber of the ECHR rejected this argument in strong terms:

[T]he Court must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first subparagraph of Article 1 of the United Nations Charter, the third subparagraph provides that the United Nations was established to “achieve international cooperation in . . . promoting and encouraging respect for human rights and fundamental freedoms.” Article

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<sup>159</sup> Id at ¶ 149.

<sup>160</sup> *Al-Jedda v United Kingdom*, App No 27021/08, 2011 Eur Ct HR 1092 (2011).

<sup>161</sup> Id at ¶ 11.

<sup>162</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UN Treaty Ser 221, Art 5(1) (1950).

<sup>163</sup> *Al-Jedda*, 2011 Eur Ct HR 1092 at ¶ 16.

<sup>164</sup> Id.

<sup>165</sup> Id at ¶ 20.

24(2) of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to “act in accordance with the Purposes and Principles of the United Nations.” Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations’ important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.<sup>166</sup>

Thus, the ECHR rulings suggest that regional courts may find that a state is in violation of international human rights law while acting under color of a Chapter VII measure, and it may then be subject to at least civil penalties.

### C. The Scholarly Literature: An Emerging Consensus

As domestic and international courts have increasingly come to recognize legal limits on the Security Council, the scholarly literature has, for the most part, developed a consensus. There is now rarely anyone who suggests that the Council can override international humanitarian law altogether. On the contrary, there is general agreement that the Council is limited on a variety of grounds. Some maintain, in broad terms, that “[t]he Security Council is obliged to respect the rules of international law, i.e. the limits of its own competencies under the Charter of the United Nations and the rules of general international law as well”<sup>167</sup> and that the Council’s mandate must be circumscribed by the broader commitment to international humanitarian law.<sup>168</sup> In 2002, Mary Ellen O’Connell wrote that “a clear consensus is emerging among international lawyers that while the Security Council may have broad authority to impose sanctions, it must observe standards in how sanctions are imposed, even if that means that sanctions are less effective,”<sup>169</sup> and that has continued to be the case. In 2007, Schott described a “growing unease with the UN’s ability to limit a Security Council increasingly wont to exercise its impressive discretion by reference to security concerns.”<sup>170</sup>

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<sup>166</sup> Id at ¶ 102.

<sup>167</sup> Doehring, 1 Max Planck YB UN L at 108 (cited in note 101).

<sup>168</sup> Gardam, 17 Mich J Intl L at 321 (cited in note 72).

<sup>169</sup> O’Connell, *Authorization of Force* at 64 (cited in note 43).

<sup>170</sup> Schott, 6 Nw J Intl Hum Rts L at 24 (cited in note 78).

For the last decade, scholars have, with consistency, dismissed the argument that Article 1(1) implies that international law only applies to peaceful settlements and not to Chapter VII measures. O’Connell, for example, maintains that this position “appear[s] to contradict the plain terms of Article 24(2) that ‘in discharging [its] duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.’”<sup>171</sup> It is a common viewpoint that the principles and purposes articulated in Article 1 require that the Council “cannot maintain peace and security at the complete expense” of the right of self-determination, the promotion of human rights, the obligation to solve social and economic problems, the obligation to act in good faith, and so on.<sup>172</sup>

There is not complete consensus about exactly what the limits on the Security Council are, but in judicial rulings and among scholars, there is considerable agreement. Many maintain that the Security Council is bound by the non-derogable rights—those rights that must be respected by states even in times of emergency or armed conflict—that are contained in the central documents of human rights, such as the ICCPR, the International Covenant on Economic, Social and Cultural Rights, the Universal Declaration of Human Rights, and the Genocide Convention. Erika De Wet maintains that “the non-derogable rights include the right to life, the prohibition of torture or cruel and degrading treatment, the prohibition of slavery . . . and freedom of thought, religion and conscience.”<sup>173</sup> Likewise, T.D. Gill maintains that “in any event the Council will *at a minimum* be bound by the rules of human rights contained in the International Bill of Rights from which no derogation is permitted in time of emergency or armed conflict.”<sup>174</sup> In addition to the *Kadi* court, others have maintained that the Security Council may not violate due process and the right to a fair trial<sup>175</sup> or the non-derogable rights under the ICCPR.<sup>176</sup> Some argue that the protections contained in Common Article 3 of the Geneva Conventions

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<sup>171</sup> O’Connell, *Authorization of Force* at 57 (cited in note 43). See also Kondoch, *Limits of Economic Sanctions* at 282 (cited in note 121) (“According to Art. 24(1) read together with Arts. 1 and 2 of the UN Charter the Council’s decisions must be in accord with the purposes and principles of the United Nations.”).

<sup>172</sup> Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* 192–93 (Hart 2004).

<sup>173</sup> *Id.* at 201. See also Schweigman, *Authority of the Security Council Under Chapter VII* at 198 (cited in note 60) (discussing “which legal rules can be classified as constituting *jus cogens*,” and maintaining that “[t]here are various candidates in this respect, the foremost being the prohibition on the unlawful use or threat of force, the prohibition on genocide, and the duty to respect basic human rights”).

<sup>174</sup> Gill, 26 *Netherlands YB Intl L* at 79 (cited in note 88).

<sup>175</sup> Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 *Eur J Intl L* 59, 65 (2005).

<sup>176</sup> Manusama, *United Nations Security Council* at 29 (cited in note 29).

should apply to any measures by the Council.<sup>177</sup> Others frame the position more broadly, reasoning that the Council is obliged to abide by the principles of discrimination, proportionality, and military necessity.<sup>178</sup>

Numerous scholars maintain that *jus cogens*, the peremptory norms of international law, constitute an “inherent limit on any organization’s powers.”<sup>179</sup> Akande maintains that the Security Council is bound by *jus cogens* and generally recognized norms of human rights.<sup>180</sup> Kenneth Manusama agrees, citing the Vienna Convention on the Law of Treaties: Article 53 of the Vienna Convention provides that “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.”<sup>181</sup> Manusama maintains that “[t]hese norms are in particular applicable to the United Nations and the Security Council as part of its international legal personality and international rights and duties.”<sup>182</sup> De Wet argues that because the Charter is a treaty, the principle contained in Article 53 of the Vienna Convention applies.<sup>183</sup> Further, it has been argued that *jus cogens* cannot be overridden by Article 103.<sup>184</sup> As De Wet notes, the stakes are extremely high: if the Charter can override the peremptory norms of *jus cogens*, then “states could instrumentalise the collective security

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<sup>177</sup> De Wet, *Chapter VII Powers of the United Nations Security Council* at 214 (cited in note 172).

<sup>178</sup> Discrimination requires that a party to conflict discriminate between combatants and civilians and cannot target civilians. Under the principle of necessity, “the Council may only authorize force if it is probable that the use of military force can accomplish a reasonable military objective.” O’Connell, *Authorization of Force* at 58 (cited in note 43). “Proportionality prohibits that which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to concrete and direct military advantage anticipated.” *Id.*, quoting Protocol Additional to the Geneva Conventions of 12 Aug 1949 and Relating to the Protection of Victims of International Armed Conflict, Art 51(5) (1977), 1125 UN Treaty Ser 3 (1978) (internal quotations omitted). Gardam argues that the Security Council is bound by the principles of necessity and proportionality. Gardam, 17 *Mich J Intl L* at 305–12 (cited in note 72). See also Orakhelashvili, 16 *Eur J Intl L* at 67 (cited in note 175) (“The Chapter VII economic sanctions are subject to peremptory norms, particularly the fundamental humanitarian rules, such as the principles of proportionality and necessity.”).

<sup>179</sup> Orakhelashvili, 16 *Eur J Intl L* at 60 (cited in note 175).

<sup>180</sup> Akande, 46 *Intl & Comp L Q* at 322–25 (cited in note 11).

<sup>181</sup> Vienna Convention on the Law of Treaties, Art 53, 1155 UN Treaty Ser 331 (1969).

<sup>182</sup> Manusama, *United Nations Security Council* at 27 (cited in note 29). Other scholars are in agreement. See, for example, Schweigman, *Authority of the Security Council Under Chapter VII* at 197 (cited in note 60) (“This non-derogatory character means that all subjects of international law, including the Security Council, have to abide by them.”). See also Kondocho, *Limits of Economic Sanctions* at 282 (cited in note 121); Oosthuizen, 12 *Leiden J Intl L* at 558 (cited in note 118).

<sup>183</sup> De Wet, *Chapter VII Powers of the United Nations Security Council* at 189 (cited in note 172).

<sup>184</sup> Orakhelashvili, 16 *Eur J Intl L* at 69 (cited in note 175).

system in order to engage in slavery, apartheid or even genocide, provided that the requisite majority in the Security Council can be secured.”<sup>185</sup>

Antonios Tzanakopoulos argues that Article 25 simply does not oblige states to carry out Chapter VII measures that are *ultra vires*:

[O]nly those decisions taken in accordance with the Charter, namely *intra vires* decisions, are to be accepted and carried out. *Ultra vires* decisions, conversely, can lay no claim to binding force. States have specifically agreed to carry out only those decisions that are in accordance with the Charter. This may seem trite; it would make little sense if States agreed to be bound by decisions that are not in accordance with the Charter.<sup>186</sup>

Tzanakopoulos maintains that in the face of Security Council measures that are illegitimate, states are justified in refusing to implement them. He cites an early commentator on the newly created United Nations, who notes that while there is no judicial organ that can review the Council’s measures, that does not mean that the Council has unbounded power, since the United Nations as “an organization whose various organs *and members* all have the power to interpret the basic constitutional instrument without definite legal effect on the other organs and members can hardly be viable.”<sup>187</sup> Tzanakopoulos maintains that “[s]tates themselves may proceed to determine the engagement of UN responsibility.”<sup>188</sup> He says that on occasion, they have done so: “Following up on their auto-determination of the UN’s responsibility, States have proceeded to react, in particular by disobeying the Council’s binding commands. In fact, disobedience has always been championed as the ‘last resort’ if States are faced with illegal Council non-forcible action under Chapter VII.”<sup>189</sup> Indeed, in his view, the threat of organized disobedience is “a potent tool for inducing compliance of a powerful organ with international law.” This is illustrated in the case of the sanctions on Libya: when the Organization of African Unity refused to comply any longer with the Council’s sanctions on Libya, “a seven-year deadlock was miraculously resolved and the sanctions were suspended.”<sup>190</sup>

Thus, we have seen a growing reluctance on the part of international courts as well as legal scholars to concede the kind of unlimited powers to the Security Council that were envisioned at its inception. We have also seen an

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<sup>185</sup> De Wet, *Chapter VII Powers of the United Nations Security Council* at 189–90 (cited in note 172).

<sup>186</sup> Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions* 165 (Oxford 2011).

<sup>187</sup> Id at 201, citing Oliver James Lissitzyn, *The International Court of Justice: Its Role in the Maintenance of International Peace and Security* 96 (Carnegie Endowment for International Peace 1951).

<sup>188</sup> Tzanakopoulos, *Disobeying the Security Council* at 202 (cited in note 186).

<sup>189</sup> Id.

<sup>190</sup> Id.

increased willingness to openly criticize what courts and scholars see as overreaching on the Council's part.

## V. CONCLUSION

In a sense, this is the oldest story in the world: How is power to be limited? In the seventeenth century, Filmer rejected the theory that government should be based on the consent of the governed. It is argued, he said, that this would eliminate arbitrary power, but in truth, there is no power that is not arbitrary. Whoever it is that rules is either the source of law, with none above him and none constraining him, or else he is not the ruler, because there is someone else who is above him. But in either case, at the top there simply is someone with ultimate power. Filmer argued that whether the holder of that power is a king, the people, or some other entity, it does not change the fact that ultimate power is fundamentally arbitrary.<sup>191</sup> It seems that this is at the heart of the dilemma of whether the Security Council is bound by law: either it holds the highest power globally, or it does not.

The question of whether the Security Council, which holds such extraordinary power, is itself bound by law is rooted in the fundamental contradictions that characterize the design of the Council. At the drafting of the United Nations Charter, there was on one hand an argument of emergency—that in the face of aggression, there would be such urgency to respond that any restraint on the Council posed the risk of crippling it in a moment of crisis. Yet at the same time, Article 24 was meant to provide a sense of assurance that the Council would never go terribly astray. The vagueness and ambiguity of Article 1 turned a question of interpretation into a constitutional contradiction: there is a clause that requires the Council to abide by international law in the context of peaceful settlements, so why is it absent in the clause about the use of force? Is it because it was so obviously applicable that there is no need to say it explicitly? Or is it the exact opposite—that it was deliberately excluded so that, under Chapter VII, the Council could literally do absolutely anything it wanted? The answer seems to be that the drafters, or more specifically the Great Powers who would become the permanent members, wanted the Council's power to be unbounded, but it would not have been politically feasible to say this explicitly and still maintain the broad support of the international community needed for ratification.

The ambiguity of the document seems tied to a certain sleight of hand: if the grant of unbounded authority had been stated in such bald terms; no one

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<sup>191</sup> Robert Filmer, *Patriarcha* (1680), reprinted in Johann P. Sommerville, ed, *Patriarcha and Other Writings* 1, 35 (Cambridge 1991).

would have consented, other than those who would wield that authority, so at the beginning there were assurances that this was not really the case. These assurances were sufficient to stave off outright rejection from those countries that would never wield this power, and of course, politically, there was little choice in the matter anyway. But the assurances were vague, as well as lacking means of enforcement, so that everyone understood they would not ever amount to much. We see this most vividly with regard to Article 24: the solution to the political problem was to include Article 24, which seemed to provide limits on the Council, while actually neither providing any venue with jurisdiction to hear a complaint that the Council had abused its power nor establishing an entity with the power to enforce any restraints against the will of this Leviathan.

Two years later, the bluntness of Kelsen and Dulles is striking. How many nations would have signed on to the United Nations if it were made explicit that in restoring peace, the Security Council was not bound by law? With the ink dry on the document, it seems that there was no longer any need to pretend that the permanent members considered themselves to be anything other than unbounded in their powers. But in the context of the broader paralysis of the Security Council throughout the Cold War, the issue remained dormant for forty years. It was not until the balance of power shifted so starkly in favor of one of the permanent members that the theoretical possibility of the Council's overreaching in profound and disturbing ways became a reality.

At this juncture, it seems as though the matter is largely resolved. The political tenor of the Council has shifted, with the balance of power restored in some degree, such that neither the US nor any other permanent member could see its will implemented in the Council without opposition, as was the case in 1990 and was largely true until 1993. The refusal of the Council to authorize the invasion of Iraq in 2003 was a decisive marker in this regard. The negotiations and compromises that characterize recent Chapter VII measures suggest that, while there is not opposition of the degree that characterized the Cold War, neither is there complete compliance with the will of the US or any of the other permanent members. Consequently, the political balance now is such that the Council no longer seems susceptible to the kind of unilateralism and overreaching that took place in the early 1990s.

There are also now voices from venues that were silent or less potent in the early 1990s. Within the institutions of international law, while there is no direct judicial review of the Council's resolutions, there has been a growing willingness among international and domestic courts to comment upon the legality of the Council's actions and to intervene in the implementation of these measures when they are seen to violate fundamental principles of human or civil rights. There were few within the international courts who spoke to such questions in the early 1990s, and those who did were not writing for the court

but rather in dissents or in separate opinions. There have also been challenges from the international community, both implicit and explicit, to the Security Council's overreaching in other venues. The multiple calls for Security Council reform, documents such as the report from the High Level Panel on Threats, Challenges and Change, and expressions of concern and disagreement from the Secretary-General and the General Assembly, all suggest that there would be vocal opposition and some amount of political resistance in the event that the Council were to pursue measures as extreme or controversial as was the case in the early 1990s. Finally, within legal scholarship, the issue seems to be settled: the clear consensus is that international human rights law does indeed impose limits on the Security Council. There is not full consensus on what those limits are, but there is broad agreement that they are the principles of *jus cogens* and that *jus cogens* at least includes prohibitions on genocide, slavery, and torture.

Filmer might have something to say about this as well. In his critique of limited monarchy, he argues that there can be no meaningful constitutional limitations on a monarch. In the end, he says, it all comes down to the question of who will judge if the king has violated the limits: if the people judge, then it is not a monarchy; if the monarch judges for himself, then there are no limits.<sup>192</sup> Similarly, Filmer says that neither principles of conscience nor natural law—of which *jus cogens* is a variety—can serve as a limit. Natural law and principles of conscience are in themselves mute. The question is: Who will articulate them?<sup>193</sup> If it is the monarch himself who articulates the limits on his own power, there will be no limits; if it is the people, then the monarchy is fundamentally impotent. We cannot avoid this truth: a body that articulates its own limits is a body that has no limits.

Steven Ratner, referring to “the concern that the Council might act either beyond its powers under the Charter or in violation of other norms of international law,” wrote that “[t]his fear reached its zenith in the heady days after the Cold War when the Council seemed forever unified; today that era seems but a distant memory.”<sup>194</sup> It seems that Ratner is right. The fear of abuse of power by the Security Council has been put to rest on several levels. Politically, a balance of power has been restored to some degree. Legally, it seems the matter is resolved; the courts and legal scholarship now consistently recognize that there are limits and largely agree on what those are. But constitutionally, the matter is not resolved at all. The kind of overreaching that took place in the early 1990s could occur again. If there were another juncture at which one of the permanent members exercised the degree of political and

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<sup>192</sup> Id.

<sup>193</sup> Id at 41–42.

<sup>194</sup> Ratner, *Security Council and International Law* at 603 (cited in note 44).

economic influence that characterized the US in the aftermath of the collapse of the Soviet Union, the political restraints would evaporate; and there is no mechanism for direct, enforceable judicial review. Thus, there will again be the possibility that the machinery of global governance can be mobilized to implement the agenda of a single nation, however extreme, absurd, or inhumane that agenda may be.