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Article

# The UN Security Council and the International Rule of Law

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## Abstract

This article considers the relationship between international law and the UN Security Council. The practical power of the Council is constituted at the intersection of its legal framing, its political legitimacy, and the interests of powerful states. This sometimes means the Council has less power than is assigned to it by the UN Charter, but it often means that it has more. It is clear that the Council sits within the international legal system, the legal limits on its action are interpreted in light of prior Council practice, and thus the meaning of ‘compliance’ and ‘violation’ of the Charter changes over time. Some transgressions of the Charter are understood as informal amendments to it; others are seen as threats to international peace and security that impel enforcement action. This ambiguity in the law and practice of the United Nations is inherent in the idea of the ‘international rule of law’. The Council straddles the unstable boundary between international law and politics, both undermining and reinforcing the distinction between them.

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The UN Security Council is the most powerful international organization in the history of the interstate system. Its permanent five members together account for over 60% of global military spending and their political influence is comparably dominant.<sup>1</sup> In addition, the UN Charter increases their power by giving the Council preeminent legal authority over international security affairs.

1 Stockholm International Peace Research Institute, *SIPRI Yearbook 2012* (Oxford: Oxford University Press, 2012).

The Charter mandates that the military and political resources of all Council members be made available for ‘carrying out the decisions of the Council’ with respect to ‘the maintenance of international peace and security’.<sup>2</sup> In addition to this military capacity, the Security Council has the legal authority to act on behalf of all 193 members of the United Nations (UN), most of whom have never served a term on the Council.<sup>3</sup> All UN members agree in advance to ‘accept and carry out the decisions of the Security Council in accordance with the present Charter’.<sup>4</sup>

This degree of centralized military and political authority is unprecedented in international politics. Never before has the globe been united beneath a single political-legal structure in this way, nor has the military capacity of the most powerful states ever been collectively organized toward a single purpose and encoded in law that is binding on both the powerful and the rest.<sup>5</sup> For better or worse, the Council centralizes international military power to an unprecedented extent.

Of course, this describes only the *potential* power of the UN Security Council, that which is made possible by the legal authorizations of the Charter. In practice, its *actual* power is different. The Council’s actual power is mostly less than is described in the UN Charter—though I will suggest below some areas in which it is greater. It is limited by the interests of powerful states and by the decision rule set in the Charter, and it is both empowered and limited by the degree to which it is seen as legitimate, and by its bi-directional relation with international law. The gap between the actual and the potential provides a window through which to examine the politics that animate the Security Council and its place in the broad international legal and political systems.

This article examines the relationship between the Security Council, legitimacy, and international law. It considers first how the legal framework of the UN Charter establishes the power of the Council. This entails a close reading of the Charter in order to understand how it centralizes the power of member states, and also how it limits Council authority. However, the practical power of the Council cannot be understood entirely from the formal terms of the Charter, and the second section therefore examines how the Council’s power depends on two extra-legal forces: legitimacy, and the interests of the permanent members. Finally, the article considers the practices of the Council, in order to see how law and politics are combined. At times, the Council acts in ways that contradict the black-letter law of the Charter; at others, its adherence to the Charter leaves powerful actors dissatisfied.

The power and practice of the Security Council helps to illustrate how the concept of the rule of law operates in international relations. In conclusion I suggest

2 *The UN Charter*, Article 49, Article 48(1).

3 *Ibid.*, Article 24(1).

4 *Ibid.*, Article 25.

5 G. John Ikenberry, *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order* (Princeton: Princeton University Press, 2011); Mark Mazower, *Governing the World: The History of An Idea* (London: Penguin, 2012).

that the international rule of law is distinct from the domestic rule of law, and the former cannot be derived from the latter. As it is manifest in world politics, the rule of law refers to the practice of framing the choices and of states and others in terms of compliance with international law. This view goes against prevailing approaches to international law, which focus on the choices that states make between compliance and non-compliance, and instead focuses on the instrumental use of law as a political resource. The legal and political dynamics of the UN Security Council demonstrate this novel account of the power of international law.

## The Council and International Law

The relation between the Security Council and international law is complex. The Council is clearly a product of international law, but it is also the author of, and interpreter of, law, and in different moments it alternates between sitting inside and outside of the law.

The Security Council as a formal organization is entirely derivative of international law: it exists by virtue of the UN Charter, which is the inter-state treaty that brings it into existence and defines the extent and limits of its authority. The Charter is a multilateral treaty that is binding on the states that sign it. It requires that they comply with its terms, and these terms include an extensive degree of deference to the Security Council.

The legal authority of the Council is constructed by several Articles in the Charter. Key among these are Articles 25, 27, 39, 41, and 42. These give the Council the authority to decide when an international ‘threat to the peace, breach of the peace, or act of aggression’ exists and when it does how to respond.<sup>6</sup> The existence of a threat to the peace is understood to be a political rather than a legal judgment; it is at the discretion of the Council to make this determination, and it does not imply that the Council is making a finding that a state has acted illegally. Once it identifies a threat to international peace and security, the Council can demand that states change their behaviors and also it can take action of its own to remedy the situation. Its remedies are described in Articles 41 and 42, which authorize the Council to ‘decide what measures ... are to be employed to give effect to its decisions’ including non-military measures (in Article 41) such as economic sanctions, and military actions (in Article 42) including ‘such action by air, sea or land forces as may be necessary to restore international peace and security’.

In authorizing such military action, the Council relies on member states to contribute the military and other resources that are required. These are voluntary contributions made by governments for a particular operation, where the terms are negotiated between the UN and the government in each case. The Charter implies an obligation in Articles 43 and 45 on members to ‘make available’ some military resources for such operations, but this has never been activated and may not exist any more.

6 *The UN Charter*, Article 25.

The Charter also establishes some legal limits on the authority of the Council. The most dramatic of these is contained in Article 2(7), which states that ‘nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state’. This is a general limit on all UN activity, including that of the Council, and it protects governments from intrusions by the UN in their internal affairs. It implies that *as a matter of law* the Council cannot take action with respect to the internal jurisdiction of countries.

However, this must be read in conjunction with Article 39 which empowers the Council to decide when a situation constitutes a threat to international peace and security. In UN law, ‘a threat to international peace’ is by definition not ‘a matter within the domestic jurisdiction of the state’. And it is the Council that decides when a situation constitutes a threat. Thus, the Council determines whether a matter is domestic or not, and so it gives meaning to the limit contained in Article 2(7). When the Council finds a threat to international peace, then the limits in Article 2(7) *ipso facto* do not apply to the situation.

A further limit on Council activity comes from the voting rule: the Council cannot take any ‘important’ decision without the support of nine of its fifteen members, ‘including the concurring votes of the permanent members’.<sup>7</sup> This is of course the well-known veto held by the five permanent members. The voting rule in Article 27(3) sets the legal parameters for Council decisions.

Council decisions are binding on member states and there are no channels for appeals or dissent—all states commit themselves upon joining the UN to go along with all Council decisions and demands.<sup>8</sup> Moreover, its resolutions can create new legal obligations on UN members by including them in resolutions. These two legal facts are clear in the language of Articles 25 (‘The Members of the United Nations agree to accept and carry out the decisions of the Security Council...’) and 49 (‘The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council’).

Because of this, Council resolutions can create new international legal obligations that are binding on all UN members.<sup>9</sup> Resolution 1373 illustrates this fact by demanding that states take certain actions to ‘prevent and suppress the financing of

7 *Ibid.*, Article 27(3).

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

9 This contrasts clearly with General Assembly resolutions, which can only ever be ‘recommendations’ and thus cannot create legal obligations except on the UN budget and the assessment of UN dues payable by members. See Chapter IV of the Charter.

terrorist acts'.<sup>10</sup> More specifically, it requires that governments change their criminal laws so that terrorist financing is a crime within their jurisdictions, and that they freeze the assets of people or organizations who engage in terrorist acts or plans. Once passed by the Council, these clauses become legal obligations of all members states, on a par with obligations that come from signing a treaty.

The Council creates new legal obligations where none existed before.<sup>11</sup> Every decision to impose sanctions requires that member states follow some set of actions, or refrain from some other actions. In addition, every Council resolution that invokes a 'threat to international peace and security' helps to define that phrase for future use. This clause was left deliberately undefined in the Charter, on the expectation that Council practice would give it meaning over time. This acts as a kind of informal precedent, in which each use of the term contributes to its content and so shapes future references. As a consequence, to understand the legal authority of the Council one must look at its past practice in using this phrase in relation to a concrete situation. The authority of the Council in effect expands each time it finds a new kind of problem to be a threat to the peace. It has in recent years decided that the trade in small arms could be a threat to international peace and security, as well as under-regulated financial flows and drug trafficking and the unequal circumstances of women and girls in some societies. Each of these draws the legal scope of the Council a little wider, and provides resources for future interpretations of the Council's powers.

To summarize the legal status of the Security Council, it is clear that the Council has an unassailable position atop the international legal hierarchy. The Charter grants it the authority to decide what situations constitute threats to international peace and also the right to determine what, if anything, should be done about that. This includes the right to order military intervention against a UN member, and the domestic sovereignty of a target state is no impediment. In signing the UN Charter, all UN members are committed in advance to carrying out the Council's decisions. Such wide-ranging and absolute legal powers invite comparisons with a domestic constitution, and some have concluded that the Charter occupies a constitutional position above the international system.<sup>12</sup>

The legal position of the Council contradicts the popular metaphor that describes the international system as an 'anarchy' of independent states.<sup>13</sup> The idea of

10 UN SC 1373, September 28, 2001.

11 José E. Alvarez, *International Organizations as Law-makers* (Oxford: Oxford University Press, 2005), chapter 4.

12 This is debated in Jeffery L. Dunoff and Joel P. Trachtman, *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009).

13 International anarchy is conventionally understood as the condition in which each sovereign state is in an equal legal position to all others, and where there is no overarching source of authority to which these states must submit. This is described (with variations) in

international anarchy presumes that states are not subject to any superior legal authority. Among states, Waltz says, 'none is entitled to command, none is required to obey'.<sup>14</sup> But this is not true. Since 1945, with the advent of the UN Charter, *all* states are required to obey the Council. The international political system has been placed within a legal hierarchy in which the UN Security Council in an unambiguous position of authority over all.<sup>15</sup> Moreover, the Council has a monopoly on the legitimate use of force in this international hierarchy.<sup>16</sup> This clearly falls short of effective *enforcement* of Charter rules, but as international anarchy is generally defined in terms of the absence of authority (rather than the presence of enforcement),<sup>17</sup> the legal status of the Council means that the international system cannot be described as anarchic.

### The Council and International Politics

In addition to the legal foundation of the Charter, the Security Council needs two further resources in order to function. These are the acquiescence of its permanent members and some measure of support from the rest of the UN membership.

The need for the support of the permanent members comes from the decision-rule described above. This is obviously a legal and procedural requirement, without which the Council cannot take any important action. But it is also a reflection of the political realities of 1945 when the Charter was written, and arguably of today as well. If the Council is to take action on international peace and security, it is unviable for it to act against the strongly held interests of the most powerful states. Doing so would threaten the survival of the organization as a whole. The Council was designed originally as a compact among the Great Powers of 1945 to manage the crises that threatened the stability of the system as they saw it. The veto ensures that it could never take enforcement decisions that were opposed by any of the permanent members.

This of course leads to apparent paralysis when the permanent members disagree with each other, as was evident throughout the Cold War and more recently over the Iraq invasion of 2003 and the Syrian war since 2011. But this is by design; the alternative would be to empower the Council to act against the strongest states, an

key texts including Kenneth Waltz, *Theory of International Politics* (Reading: Addison-Wesley, 1979); Hedley Bull, *The Anarchical Society: A Study in Order in World Politics* (New York: Columbia University Press, 2002); and Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999).

14 Waltz, *Theory of International Politics*, p. 88.

15 Ian Hurd, *After Anarchy: Legitimacy and Power in the UN Security Council* (Princeton: Princeton University Press, 2007).

16 This is qualified by the permissive rules on self-defense in the Charter, at Article 51.

17 See the discussion in Helen Milner, 'The Assumption of Anarchy in International Relations: A Critique', *Review of International Studies*, Vol. 17, No.1 (1991), pp. 67–85.

eventuality which would likely cause them to actively oppose or abandon the organization.

Thus, the actual power of the Council is limited to those issues where the permanent members find themselves more or less in agreement. This often leaves those who wish for a more activist Council disappointed since it means that many issues where a collective response could be helpful will go unaddressed. Given that the Great Powers will often disagree about what constitutes a threat to international peace and security, and that the premise of the Council is joint action by those states, then the veto is a *sine qua non* of the Security Council.

Alongside the support of the permanent members, the Council equally rests on a sense of its legitimacy. This is an important source of power which has recently become the subject of much attention.<sup>18</sup> Legitimacy is the belief of an agent that a ruler or institution has a right to be obeyed.<sup>19</sup> It is a subjective perception, located in the beliefs of the actor. For the Security Council, this is exemplified by the widely shared sense that the Council is an important and appropriate player in international security issues. The position of the Council depends on its legitimacy—and this is in the eyes of both the permanent members and the rank and file UN members.

‘Legitimacy’ here means something different than normative ‘goodness’. The two are often conflated but it is more useful to keep them separate.<sup>20</sup> One should distinguish the moral or normative rightness of an institution from perceptions of its legitimacy. The legitimacy of an institution exists in the eyes of some audience, and it may not be shared by others, and it may not match an outside observer’s moral intuition or philosophy of right. Legitimacy nevertheless will influence how actors behave toward the institution, and it is this effect that is of interest in studying the legitimacy of international organizations.

Legitimacy affects how actors feel about and behave toward an institution or rule. It induces deference to the institution and gives actors an internal motivation to comply with it—and in turn this creates a particular form of authority between the institution and the actor. Domestic social order is often described as resting on the shared belief of subjects in the legitimacy of the ruling institutions. The authority of the government derives from the citizens’ acceptance of its legitimacy. This

18 Hurd, *After Anarchy*, Ian Hurd, ‘Myths of Membership’, *Global Governance*, Vol. 14, No. 2 (2008), pp. 199–217; Erik Voeten, ‘The Political Origins of the UN Security Council’s Ability to Legitimize the Use of Force’, *International Organization*, Vol. 59, No. 3 (2005), pp. 527–57. See also ‘The Legitimacy of the UN Security Council,’ project of the Wissenschaftszentrum Berlin für Sozialforschung, <http://bit.ly/1a1ok6J>.

19 The literature on legitimacy is large and diverse. For an excellent introduction to this ‘subjective’ approach to the concept, see Tom Tyler, *Why People Obey the Law* (Princeton: Princeton University Press, 2006).

20 For an example where ‘legitimate’ is conflated with ‘normatively good’, see Andreas Føllesdal, ‘The Legitimacy Deficits of the European Union’, *Journal of Political Philosophy*, Vol. 14, No. 4 (2006), pp. 441–68.

produces social order that rests on consent and normative stability, perhaps to the benefit of both the subjects (who live in a state whose foundations they accept) and rulers (who rule with less coercion). International institutions rely on legitimacy in the same way. The power of the Security Council is enhanced to the extent that its subjects (ie. the non-P5 UN members) accept it as legitimate.

The self-motivated deference of UN members to the Council is crucial for its effectiveness. The Council in fact has few instruments by which to induce or coerce compliance with its decisions—in most instances, it cannot coerce states into acceding to its demands and therefore its success depends on the willingness of states to submit voluntarily. This includes being willing to contribute troops and resources to peace operations, to participate in sanctions regimes as demanded by the Council, to respect the decisions and authority of the Council more generally. While all these obligations are legally mandatory, it is clear as well that their performance depends on states' believing that they have an interest in going along with them. This interest is in part dependent on the perception that the Council has some legitimacy.

The legitimacy of the Council was a major concern in the earliest Charter negotiations. These discussions were begun among the United States, the UK, and the USSR in 1943, were joined by China at Dumbarton Oaks in 1944, and culminated in the San Francisco conference of 1945. Throughout the process, and in the Council's history since then, the Great Powers actively sought to create and sustain its legitimacy. The 1945 conference itself was designed to legitimate the draft Charter in the eyes of the general UN membership, as was the decision to add 6 (later 10) non-permanent members to the Council.<sup>21</sup> More recently, one can see a concern among the Council and its defenders for the body's legitimacy—it is as the heart of the Great Powers' interest in reforming the membership of the Council; it animated the self-reflection after the Iraq invasion; as it does every time an international crisis is either ignored or made worse by Council action or inaction, from Rwanda to Syria.

It is impossible to measure how legitimate the Council is in world politics.<sup>22</sup> This is due to the fact that the belief in its legitimacy is an internal, subjective quality possessed by the audience. These cannot be accessed by measurement tools. And even when they are approximated (for instance, by public opinion polls<sup>23</sup>) there is likely to be a wide margin of disagreement and contestation over the terms such that no general conclusion can be drawn. Different people will have different ideas about

21 Hurd, *After Anarchy*, chapter 4.

22 Ian Hurd, 'Theories and Tests of International Authority,' in Bruce Cronin and Ian Hurd, eds., *The UN Security Council and the Politics of International Authority* (London: Routledge, 2008).

23 Gregory A. Caldeira and James L. Gibson, 'The Legitimacy of the Court of Justice of the European Union: Models of Institutional Support,' *American Political Science Review*, Vol. 89, No. 2 (1995), pp. 356–76. Also, Christopher J. Anderson, 'When in Doubt Use Proxies: Attitudes toward Domestic Politics and Support for European Integration,' *Comparative Political Studies*, Vol. 31, No. 5 (1999), pp. 569–601.



the legitimacy of the UN, and these cannot be reconciled by social science methods. Legitimacy is, in the end, a domain of political contestation.

However, we can infer some evidence of legitimacy from the behavior of states and other kinds of actors. To the extent that agents take the institution for granted, and use its language and channels to pursue their interests, this may be a sign that they see it as a legitimate actor with respect to that issue. Also, the degree of deference that they give it may be evidence as well, seeing it as reason to act in a certain way. Such indicators are ambiguous, since they may also be associated with coercion or other motivations that are independent of legitimacy but for the Security Council there is strong evidence that states take it to be a legitimate actor and institution on questions of international peace and security.<sup>24</sup>

The Security Council is extremely powerful when the political conditions align with its legal framework. At such moments, it has unparalleled capacity to take decisive action in international politics. This was in evidence in 2011 when it authorized the military intervention that overthrew the Libyan government. When its members are politically united behind a course of action, the Council can mobilize legal and material resources almost without limit, and its legitimacy in the international system makes it immensely powerful. At such moments, it is reasonable to worry about the ‘imperial Council’, a body unchecked by other institutions and empowered by law and the control of resources to impose itself anywhere in the world.<sup>25</sup> However, when its permanent members are *not* united, the Council falls into paralysis. Between empire and paralysis sits the Security Council in practice.

## The Council in Practice

The practical power of the Council must therefore be understood at the intersection of its legal authority and its political composition. These combine to create the particular dynamics and effects that we know as the Council in practice. Neither the legal nor the political can trump the other, and so a uniquely legal or political perspective is insufficient for understanding the Council’s role in international affairs. The two need to be taken together, as mutually implicating: decisions of the Council draw on the legal framing provided by the Charter, but they enter into the wider discourse of international politics and can have effects that go beyond the Charter—they can also reconstitute international law, including the Charter, and so change the terms for Council power in the future.

The dynamic relationship between the law and politics of the Council is evident in the ways that the practices of the Council redefine its authority. The Council frequently transcends its legal parameters, and this is legitimated by both legal and political means. I examine several instances that highlight this process, all of which

24 Hurd, *After Anarchy*, chapter 2.

25 B. S. Chimni, ‘International Institutions Today: An Imperial Global State in the Making’, *European Journal of International Law*, Vol. 15, No. 1 (2004), pp. 1–37.

complicate separating legal compliance from non-compliance. The implications for the international rule of law are considered in the conclusion.

It is well known that the Charter is difficult to amend. Changes require the support of two-thirds of the membership including the support of the five permanent members.<sup>26</sup> As a consequence, there have been only two instances of formal amendment in the UN's history, both taking place in the 1960s. These increased the size of the Council and of ECOSOC. As the international context has changed in various ways since 1945, the UN has felt institutional pressure to adapt itself to new needs, challenges, and demands, but these generally cannot be met with formal changes to the Charter. Instead, most of these pressures have been managed through less formal means, either by changes to the working methods of the organization or by interpreting the formal rules in new ways that suit new needs.<sup>27</sup>

A key example is the membership of the Council. Despite adding four non-permanent members in 1965, the Council has found it hard to accommodate its needs within the fixed membership that is set out in the Charter. It has made several informal changes to its membership in order to continue operating as the world changed around it. In the 1980s, it began consulting more regularly with non-Council members ahead of key decisions. This includes meetings with troop-contributing countries in relation to peace operations but also includes regular meetings with major UN donor-countries who do not at the time occupy non-permanent seats. These consultations amount to informal additions to the membership of the Council, but have never been formalized in amendments to the Charter.

It is also true that the Charter still formally lists as members two states that no longer exist: the Union of Soviet Socialist Republics and the Republic of China. These two countries are fixed in Article 23 as among the Council's five permanent members. Their successor states, the People's Republic of China and the Russian Federation, are widely accepted as having inherited the former states' legal rights and obligations as is customary in cases of state succession.<sup>28</sup> This is relatively uncontroversial; it has been legitimated by decades of state practice. However, it shows how the Charter can (perhaps must) be understood flexibly, so that its formal terms can be reinterpreted as needed by changed conditions. Its formal terms matter less than how those terms are put to use in practice over time. The capacity of the UN to provide 'collective legitimation' of new facts in world politics was emphasized by Inis Claude in the 1960s.<sup>29</sup> This is standard practice with respect to

26 *The UN Charter*, Article 108.

27 Ian Hurd, 'Security Council Reform: Informal Membership and Practice,' in Bruce Russett ed., *The Once and Future Security Council* (St. Martin's Press, 1997).

28 On state succession, see for instance the work of the International Law Commission <http://bit.ly/146AAQ6>. Also Gerhard Von Glahn and James Larry Taubee, *Law Among Nations: An Introduction to Public International Law* (New York: Pearson, 2009).

29 Inis L. Claude Jr., 'Collective Legitimation as a Political Function of the United Nations', *International Organization*, Vol. 20, No. 3 (1966), pp. 367–69.

customary international law, and the informal amendment of the Charter through repeated practice shows that this also takes place with black-letter treaty law.

A further example is apparent in the voting rule for the Council. As set out in the Charter, this says that anything short of ‘the concurring votes of the permanent members’ will cause a resolution to fail to pass (Article 27(3)).<sup>30</sup> This was the understanding generated by the debate over the clause at San Francisco in 1945, in which the Big Four states made promises to the rest that an abstention would count as a veto.<sup>31</sup> However, from almost the first meetings of the Council in practice, it has operated on the opposite principle, that a permanent-member abstention is *not* a veto. The first occasion in which this happened resulted from the Soviet delegate storming out of a meeting, after which the remaining states took decisions in his absence.<sup>32</sup> This gradually became the operating consensus in the Council and it has remained relatively uncontroversial ever since.<sup>33</sup> The practical advantages of the current practice are often noted: treating abstention as something less than a veto allows for more nuanced signaling and diplomacy by permanent members.<sup>34</sup> They can express displeasure with a draft while still allowing the will of the majority to go ahead.

These are examples of ‘constructive non-compliance’: where apparent violations of international law are legitimated by the collective will of the dominant states and thus form the basis for a change in the law, rather than a violation of the law. They are well-known instances of informal development in the practices of the Council, and they are taken for granted today as a part of the life of the institution.<sup>35</sup> They likely increase the legitimacy of the Council in the sense that it would probably be seen as less legitimate and less important if it insisted on applying the formal rules at all costs. Nevertheless, I suspect that most scholars and practitioners would, if pressed on the matter, readily admit that they are violations of the strict letter of the law of the Charter, minor or ‘technical’ though they might be.

30 The French language version is even clearer: ‘un vote affirmatif de neuf ... dans lequel sont comprises les voix de tous les membres permanents.’

31 Hurd, *After Anarchy*, chapter 4.

32 Bailey tells the story in colorful language in Sydney D. Bailey, ‘New Light on Abstentions in the UN Security Council’, *International Affairs*, Vol. 50, No. 4 (1974), pp. 554–73.

33 The Soviets insisted that the rule not be codified, even though they were happy to acquiescence in the practice when it served their interests. After a flurry of controversy in the early years in the Council, the matter sat quietly until the early 1970s when it was raised (unsuccessfully) by South Africa to argue against the legality of Council resolutions on Namibia. This sparked new deliberations on the practice in leading capitals, though no change resulted.

34 See Sydney D. Bailey and Sam Daws, *The Procedure of the UN Security Council* (Oxford: Oxford University Press, 1998).

35 See Hurd, ‘Security Council Reform’.

## Legal Dilemmas of the Security Council

Despite the explicit grant of legal authority by the Charter to the Council, there remain several long-running debates about the Council's relationship to law which are worth considering. These arise at points where there is ambiguity in the Charter or a conflict among legal traditions, and where states or other actors are motivated to use those gaps to advance their preferences.

First, the Council is reluctant to find that a country is violating international law *per se*. In general, it avoids passing judgment on the legality of the acts of members, and instead defers such opinions to the International Court of Justice (ICJ) or to other explicitly judicial bodies. As noted above, the trigger for Council action is a threat or breach of 'international peace and security' (as opposed to a 'violation of international law').<sup>36</sup> At San Francisco in 1945 there were suggestions that the Charter should give the Council the right to intervene in response to violations of international law but these were defeated in favor of the current arrangement in which the Council has a self-consciously 'political' rather than 'legal' role.<sup>37</sup>

The difference is evident in the 2011 resolution that authorized military action against the Qadhafi government of Libya.<sup>38</sup> Among other things, the resolution demanded 'that the Libyan authorities comply with their obligations under international law, including humanitarian law, human rights and refugee law', and in this sense the Council was concerned with the presumed violations of those laws by the Libyan government. But the legal foundation for the Council's decision did not come from these violations but rather from the fact that it found that the situation in Libya 'continues to constitute a threat to international peace and security' and thus that enforcement measures under Chapter VII of the Charter were called for. One might argue that a threat to international peace and security is in itself a violation of the Charter and thus that the Council does respond to legal violations, but it cannot be said that all legal violations are necessarily the province of the Council.

Second, there remains a long-running debate as to whether the Council must itself abide by international law. This question arises frequently as states and other actors challenge the decisions of the Council on legal grounds. To what extent must the decisions of the Council respect international law as it currently exists? The Charter says that the Council must act 'in accordance with the present Charter', but it does not define the relation between the Council and international law more

36 Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (Clark: Lawbook Exchange, 2000). On the relationship of 'legal' and 'political' at the UN, see the classic article by Oscar Schachter, 'Dag Hammarskjöld and the Relation of Law to Politics', *American Journal of International Law*, Vol. 56, No. 1 (1962).

37 See among others Ruth B. Russell, *A History of the United Nations Charter: The Role of the United States, 1940-1945* (Washington, DC: The Brookings Institution, 1958); Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge: Cambridge University Press, 2007), chapter 2.

38 UN SC 1973, March 17, 2011.

generally. This is likely because the political logic behind the Council's enforcement power strongly suggests that it cannot be contained within the bounds of existing law—in empowering the Council to create new legal obligations on states in response to threats to international security, the Charter implies that the Council is not limited by currently existing international law. The Charter would seem to give it legal authority that is constrained only by the requirement that act within the Charter, which is to say that it acts only with respect to questions that it deems to be related to 'international peace and security'.

At the same time, it would be a mistake to suggest that the Council is ungoverned by international law. In a number of recent cases and controversies one can see ways that the Council is constrained by the international legal framework in which it sits. For instance, there has always been the possibility that the International Court of Justice might have the power to review the legality of Council decisions. It has never claimed or made use of this power, but many believe that this is implicit in the Court's authority. The ICJ is empowered to decide 'all cases which the parties refer to it', which may include direct referrals or indirect (such as might come from a treaty that includes the automatic jurisdiction of the Court).<sup>39</sup> Only states may be parties to contentious cases before the Court.<sup>40</sup> Thus, the Court has no explicit authority to review the legality of decisions of the Security Council, but this authority may arise by implication if an inter-state legal dispute hinges on some action of the Council.

This is precisely the situation that arose in the *Lockerbie* cases at the ICJ in the 1990s. These cases were initiated by Libya against the UK and the United States in response to those countries advancing sanctions against Libya through the Security Council. Libya argued that its obligations regarding the bombing suspects were governed by the Montreal Convention on air terrorism, and that the United States and UK could not lawfully demand something different through the Security Council than what was set out in that Convention. Thus, it argued, UN sanctions were unlawful. As the Council could not be named as a party in an ICJ case, Libya instead complained that the United States and UK were violating obligations owed to Libya under the Montreal Convention by enforcing the sanctions. The ICJ was therefore presented with the question of whether a Council could lawfully contradict existing treaty obligations. Early documents in the cases showed the judges to be divided on the question, with Article 103 playing a heavy role.<sup>41</sup> Unfortunately for those interested in legal clarity, the case was withdrawn at the request of the parties after a diplomatic solution to the crisis was negotiated—the bombing suspects were

39 *The UN Charter*, Article 36 of the Statute of the ICJ.

40 *Ibid.*, Article 34(1) of the Statute of the ICJ.

41 Article 103 of the UN Charter says that 'in the event of conflict between ... the present Charter and ... any other international agreement, ... the present Charter shall prevail'. On the *Lockerbie* cases, see Terry D. Gill, *Rosenne's The World Court: What It Is and How It Works* (Leiden: Nijhoff, 2003), pp. 199–201.

voluntarily transferred by Libya to a court meeting in the Netherlands, where they were prosecuted under Scottish law. There remains no definitive legal judgment on whether the Council can demand of states acts which are otherwise illegal under international law.

A related controversy has developed with respect to domestic law, provoked by the Council's recent turn to targeting individuals (rather than states) with sanctions. Beginning in 1999 with Resolution 1267 against the Taliban, the Council now demands that member-states cooperate in limiting the finances and movement of individuals believed to be engaged in international terrorism and other crimes. This typically involves the demand that states freeze a person's assets. Using Article 25 of the Charter, this demand is immediately binding on all states.<sup>42</sup> It requires that the state take action against an individual and makes no concessions to any domestic laws that might provide for rights of due process. The conflict-of-laws problem is easy to envision: the Council could demand that a government impound the assets of a citizen in ways that contradict the citizen's rights under the domestic constitution. Who prevails?

Several such cases have progressed through the domestic courts of various countries. In contrast to the Lockerbie situation, in these cases it is the rights of individuals rather than states that are at stake and so domestic courts may have jurisdiction and there is much greater scope for legal action than is possible in the inter-state domain of the ICJ. As a consequence, there is a growing body of case law, especially in European courts. A landmark decision was issued by the European Court of Justice (ECJ) in the *Kadi* case. Kadi is a Saudi national whose assets were frozen by the EU in response to his blacklisting by the Security Council. He challenged his treatment under EU law and the ECJ agreed that his rights had been violated. As summarized by Peter Fromuth, 'The ECJ held that the procedure followed by the EU Council afforded the appellants no opportunity to be heard upon initial listing or de-listing, did not disclose the reasons for listing, used extrajudicial means ... to make listing decisions, and provided no judicial review. Consequently, the regulation violated the appellants' rights to defense; to an effective legal remedy; to effective judicial protection; and to property. The Court annulled the regulation ...'<sup>43</sup> Thus, the ECJ decided that European governments must abide by their domestic and EU legal obligations, ahead of the demands of the Security Council. This poses a deep challenge to the Council's claim to authority over UN members.

The *Kadi* and *Lockerbie* cases begin with this legal foundation but they also show the limitations of applying a purely legal approach to the Security Council. Both controversies suggest that there may be other legal institutions with the power and jurisdiction to pass judgment on Council decisions. This is much stronger in the

42 Article 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.'

43 Peter Fromuth, 'The European Court of Justice *Kadi* Decision and the Future of UN Counter-terrorism Sanctions', *ASIL Insight*, Vol. 13, No. 20 (2009).

*Kadi* case than in *Lockerbie*, but even the hypothetical possibility of a legal equal to the Council means that the Council cannot assume that it enjoys unquestioned legal superiority, regardless of the plain language of the Charter.

To the extent that other institutions are willing to second-guess Council decisions, then the resolutions of conflicts between them take on an unavoidable political character, and the limits of a legal formalist approach have been reached. What is at stake in the *Kadi* case and others like it is whether the Council should be seen as a political or a legal actor. The Council has interpreted its Charter mandate in such a way as to maximize its freedom to operate autonomously, which at some times entails prioritizing its legal status and at others its political status; it aspires to be accepted as a political body that is empowered to make legally binding demands on member states, since this frees it of both political and legal oversight. But the *Kadi* decision rests on the opposite view, that it is a political player whose demands must be interpreted in light of the domestic rules and needs of member states. This puts domestic legal requirements ahead of the Council.

## The Council and the International Rule of Law

These cases show the difficulty in applying the idea of the ‘rule of law’ to the operation of the Security Council, and indeed its difficulties in applying to international politics more generally.

The rule of law is often used to describe the international system, either as it actually is or as an ideal which should be sought. This generally refers to the idea that international politics should take place within a framework of law. States might argue over the meaning and content of international law, but it is uncontroversial to maintain that international law exists and that it makes a contribution to international order. This is the premise of John Ikenberry’s recent book on *Liberal Leviathan*, in which he argues that the international system is an ‘open and rule-based order’ with the United States as the ‘hegemonic organizer and manager of that order’.<sup>44</sup>

The main currents of international legal scholarship over the 20<sup>th</sup> century sustained this view, and sought continually to codify states’ legal obligations and to enlarge the domain of international politics which was subject to international law. The codification movement became dominant during the League of Nations era, with its Committee of Experts for the Progressive Codification of International Law. The League Covenant included the demand for ‘a scrupulous respect for all treaty obligations’ and Woodrow Wilson’s 14 Points document began with the first principle of ‘Open covenants, openly arrived at’. The UN continued this march toward legal codification. The UN Charter includes as a goal of the organization ‘the progressive development of international law and its codification’ (Art. 13) and the International Law Commission took up where the League’s Committee of Experts

44 Ikenberry, *Liberal Leviathan*, p. 2.

left off, devoted to 'the more precise formulation and systematization of rules of international law'.<sup>45</sup> The codification movement sees the growth of international treaties as evidence of its success, and of the progressive enveloping of purely political domains within a legal framework.

The international rule of law shares some foundations with the domestic model of the rule of law, though the two have some necessary differences. They share the idea that social order is enhanced to the extent that it is organized by a clear and coherent set of rules and laws. But the two were designed in very different contexts to respond to very different political needs. The domestic rule of law arose as a solution to the dangers of centralized authority; it has been brought into being in diverse ways in various societies in order to manage relations between strong governments and their citizens, and to place limits on the overbearing sovereign.<sup>46</sup> The international rule of law arose as an institutional solution to the problem of decentralized authority, where numerous independent countries each holding legal equality interact and produce externalities. International law is thus a response to the problems and inefficiencies that arise where sovereignty is dispersed rather than concentrated.<sup>47</sup>

Both versions of the rule of law presume that agents should comply with their legal obligations. They require that it be possible to distinguish between compliance and non-compliance with the law. This is necessary if agents are to consider the legality of their behavior ahead of taking action. It therefore underpins the individual's calculations about the costs and benefits of action, and the collective understanding of a coherent social order. A stable, public, and clear set of rules is often taken to be one hallmark of a rule-of-law society. This is equally true of the international application of the rule of law. Where such rules exist, the theory of the rule of law suggests that actors should comply with rather than violate the law. In international law, this is embodied in the principle of *pacta sunt servanda* and in myriad treaties including the UN Charter and the Vienna Convention on the Law of Treaties.

However, the relation between law and politics that exists in the Security Council shows how tenuous is this concept of the rule of law as it relates to international politics. It is difficult to clearly specify the content of the rules that bind the Council, as they shift under pressure from the practice of the Council. Some violations of the Charter are understood as informal amendments to it, and therefore as not violations at all. Others are held up as threats to international peace and security and therefore as authorizing enforcement action. The distinction between compliance

45 UN General Assembly Resolution 174, 1947, A/RES/174(II).

46 See, for instance, Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004); Tom Bingham, *The Rule of Law* (London: Penguin, 2011).

47 See, for instance, Simon Chesterman, 'An International Rule of Law?', *American Journal of Comparative Law*, Vol. 56, No. 2 (2008); Ian Hurd, 'The Rule of Law, Domestic and International', paper presented to the Regional Colloquium on International Law and International Organization, Madison, WI, May 3, 2013.



and non-compliance with the law *follows from* state action, rather than standing independent of it as is expected by the theory of the rule of law.

This is evident in comparing how the Council treated Libya's behavior in relation to Resolution 1970 in early 2011 with its interpretation of the abstention rule discussed above. In both instances, a strictly formal reading of the Charter could sustain the conclusion that the Charter was being violated—in the first case by the Libyan government refusing to accede to Council demands to stop using lethal force against anti-government protesters (contra Art. 25), and in the second by the Council passing resolutions despite the language of Article 27(3). The treatment of abstentions, however, has been legitimated over time through the practices and statements of states and the UN, such that it has been accepted as an appropriate interpretation of the Charter. The legal question has been answered by the political process of collective legitimation.

My goal here is not to criticize the Council for how it treats abstentions. It is instead to show that the international community can transform apparent rule-breaking into rule-following. Once this point is clear, then several implications follow for how the rule of law is understood for international politics.

First, the international rule of law must be understood differently than the domestic. It remains a powerful doctrine but it cannot rest on a strict analytic separation between behavior and rules. The domestic rule of law requires the law to distinguish in advance between compliance and non-compliance with rules. For international law compliance is a function of state practice. This does not mean that the rule of law does not exist in world politics. Instead, it suggests that the international rule of law rests on different foundations than its domestic version.

The importance of the international rule of law is evident in the degree to which governments appear to care that their behavior be seen as consistent with their international obligations. The above cases show the lengths to which states will go to maintain the image of their own rule-following. This may well be both an internal and an external imperative, in the sense that they want to be seen by others as good legal citizens and they are attached to their self-identity as a rule-following state. Despite the ambiguities of compliance, international law may satisfy what Hayek called 'the basic intuition' underlying the rule of law: that 'the law must be capable of guiding the behavior of its subjects'.<sup>48</sup> This is similar to what Oscar Schachter identified as the 'spirit of the law' in world politics.

Second, it highlights that the legal justifications that states give for their conduct can change the rules themselves. What states do and say about international law helps to constitute the rules. Instead of being separate, international rules and state behavior are in a relationship of co-dependence: each needs the other. This suggests that the power of international law cannot be understood in the classical Newtonian way of the conventional rule-of-law model. The rules exist only because they are invoked and used by states, and states need the rules to explain and justify their

48 Hayek cited in Tamanaha, *On the Rule of Law*, p. 93.

behavior. Foreign policy both makes and reflects international law. Legality may therefore not be a quality that is intrinsic to a particular act—it may be better seen as the product of the interaction between law and practice.

Finally, compliance may be wrong metric for assessing the impact of international law on governments. Howse and Teitel recently argued that what they call the ‘compliance model’ underestimates the impact of law on states’ interests and behavior.<sup>49</sup> For international laws that are not subject to an adjudicative body (which is to say: most of them) governments will universally present their actions as rule-compliant and their claims can be challenged only by providing a competing interpretation of the act, the rules, or the connection between acts and rules. This means that international legal disputes have a natural tendency to turn into debates about the proper interpretation of the meaning of compliance, in the context of all parties claiming to represent the *fact* of compliance.

In place of compliance, we might look at two other sources for evidence of the power of an international treaty or rule: first, how much do governments make use of the rule to explain and justify their behavior? And second, how much do governments work to hide their actions in relation to the rule or treaty? These are somewhat in tension with each other, but both evasion and use are evidence that the rule has a powerful hold on states. When the United States defended its invasion of Iraq on the grounds of the Security Council resolutions of 1990 and 1991, it reaffirmed the importance of UN Charter rules on the use of force, especially Article 42 on collective military action and Articles 24 and 25, which give the Council the authority to act on behalf of all states. The United States believed, or perhaps believed that its audience believed, in the legality and legitimacy of these rules and their relevance to the situation at hand. Its use of these rules reflected the power of the rules, and indeed reinforced it. That it flatly contradicted the anti-UN, anti-internationalist spirit of much of the first George W. Bush administration makes it all the more interesting. Secrecy is another response to the impact of law. When governments reach the limits of their ability to invoke international rules to justify their behavior, they often switch to a strategy of secrecy. This maintains the policy and avoids the rule-violation, at least at the level of official diplomacy. The value of secrecy is the inverse of the power of the law; secrecy is the tribute that expedience pays to law in international affairs.

## Conclusion

The power of the UN Security Council is a function of both its legal and its political settings. The first is derived from the Charter, and the second is derived from the

49 Robert L. Howse and Ruti Teitel, ‘Beyond Compliance: Rethinking Why International Law Really Matters’, *Global Policy*, Vol. 1, No. 2 (2010). Also Lisa L. Martin, ‘Against Compliance’, in Jeffrey L. Dunoff and Mark A. Pollack, eds., *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013).

political interests of powerful states and the legitimacy that the institution commands in the international system. The Charter gives the Council unparalleled authority in international relations to issue binding commands on states, and to take collective action in defense of international peace and security on behalf of all the member states of the UN. This legal authority comes into action only when the permanent members of the Council are sufficiently in agreement to allow it to happen, and only when the broader audience for Council resolutions sees the action as legitimate.

Neither a legal nor a political understanding of the Council is on its own sufficient to understand its power in practice. The two perspectives must be combined. The legal framework contained in the Charter limits the ability of the Great Powers to use the Council for their own interests, and their interests limit the activism of the Council that is made possible by the legal terms of the Charter. The power of the Council is constituted by the interaction of these legal and political forces.

When seen in this light, the UN Security Council can be used to illustrate the complex relation between international law and international politics. For many international rules, including the Charter, the meaning of compliance is unstable. Determining what counts as compliance requires interpreting how the rules have been used and understood in practice by states, and this opens the concept of compliance to a more political reading than is conventional. While states are expected to comply with their legal obligations, and there are clear political costs to being seen as violating some international laws, the content of compliance is a function of state practice rather than a prior and objective category. Ultimately, this suggests that the international rule of law cannot be understood simply as an inter-state application of the domestic rule of law.