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"The Role of the Security Council in Strengthening a Rules-Based International System"

WHO NEEDS RULES?

The Prospects of a Rules-Based International System

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In his address to the 59th General Assembly Secretary-General Kofi Annan pledged to make the strengthening of the rule of law a priority for the remainder of his tenure. As a contribution to the Secretary-General's efforts, Austria initiated a discourse to examine the "Role of the Security Council in strengthening a rules-based international system". Over the next three years, the Austrian Mission, together with the Institute for International Law and Justice at New York University School of Law, is convening an occasional series of panel discussions on various aspects of the central theme. The discussions among experts from theory and practice will lead to a comprehensive picture of the possible role and function of the Security Council in strengthening an international system based on rules and norms.

This document records some of the issues and concerns that were raised during the discussion at the second panel presentation on 5 May 2005, but is not intended to be comprehensive nor to represent an agreed position of the participants or the organizers.

The document draws upon notes from the meeting prepared by Antonios Tzanakopoulos (New York University School of Law, LL.M. '05).

Introduction: Who Needs Rules?

In the lead up to the Security Council-authorized military action that drove Iraq from Kuwait in 1991, U.S. President George H.W. Bush told a joint session of Congress that the world had reached a unique and extraordinary moment. At the end of the Cold War, there was a possibility that from the crisis in the Persian Gulf "a new world order can emerge … A world where the rule of law supplants the rule of the jungle." The successful military operation ushered in a period of unprecedented cooperation and activism by the United Nations in general and its Security Council in particular. Twelve years later, another war in Iraq split the Council, divided traditional allies, and prompted the Secretary-General to establish a High-Level Panel to rethink the very idea of collective security in a world defined by differing perceptions of threats and shaped by unequal capacities to respond to them.

This strategic dilemma is frequently conceptualized in terms of a tension between power and law. But underlying that tension are two more basic questions. First, whether a rules-based approach to international order is necessary, desirable, or possible given power disparities in the current situation. Second, what forms of accountability might appropriately and realistically give weight to such rules. This paper considers these issues in turn.

1 The Inevitability of Rules

If one approaches the international order as a system, the question of whether rules are "needed" or not becomes nonsensical, Martha Finnemore argued. Rules are implicit in the very idea of a system: the question is not whether there are rules but what *type* of rules exist and how they are to be interpreted and applied.

Focusing only on the first question — the existence of rules — it is arguable that the international system is now undergoing a form of bureaucratization comparable to that which German sociologist Max Weber described in the evolution of authority in the domestic sphere. Though clearly happening inconsistently in different spheres of activity, the rationalization of power through new international bureaucratic mechanisms presumes a degree of formalism and reliance upon non-arbitrary rules.

This is not to say that rules must apply to all equally, however. Any system of rules that is to survive must accommodate power disparities. In the international system, such disparities are accommodated in structures that (i) give additional weight to the decisions of certain more powerful actors (such as vetoes in the Security Council and weighted voting in International Financial Institutions); (ii) grant such actors special rights (such as nuclear status in the Non-Proliferation Treaty regime); or (iii) allow them greater say in the construction of new rules (such as disproportionate influence in the negotiation of treaties or permanent status on the Security Council). This is hardly a new phenomenon: the Concert of Europe was also structured around differentiated rights and responsibilities.

Sovereign or *juridical* equality, then, need not presume *empirical* equality. But there is some evidence that sovereign equality itself — traditionally meaning freedom from the jurisdiction of other states and some degree of consent in international law-making processes — is now being called into question. Sovereign equality in its traditional conception made sense when most laws were derived from natural law; as the consent-based notion of international law evolved and positivism took hold, it came to be understood literally as the consent of each and every state to general norms rather than the presumed universal applicability of certain rules to all.[1] This was only possible because international law for centuries tended to avoid the hardest questions that might undermine the principle: on the one hand, by not attempting to regulate such areas of activity as recourse to war; on the other, by excluding from consideration relations with those

deemed outside the law, such as those subject to colonialism. Assumptions today that international law meaningfully constrains states even in the use of force and sets the smallest and poorest states on an equal footing with the largest and richest has led some — typically the larger and richer — to question whether freedom from jurisdiction and consent in law-making processes should continue to apply equally to all.

Some of these matters were considered in the first panel discussion on the role of the Security Council as a legislative body.[2] The more general danger of abandoning sovereign equality in favour of practical expedience — even in the most extreme situations — was highlighted in the report of the High-Level Panel on Threats, Challenges, and Change in its consideration of a putative doctrine of "preventive" war against a non-imminent or non-proximate threat, falling outside the realm of self-defence, discussed by Abiodun Williams. After stating that any case for military action in such circumstances should be put before the Security Council, the Panel anticipated a challenge by those "impatient" with this response: "in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all."[3]

But an argument in favour of rules does not depend on Kantian universalizability, where one acts only according to norms that could rationally be willed to become a universal law. Instead, as a practical matter, it is evident that, paraphrasing Louis Henkin, almost all states seek to subject

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1 There are rare examples of norms being imposed against the will of persistent objector states, such as the prohibition of apartheid over the objections of South Africa and the UN Charter provisions on the applicability of its peace and security provisions to non-members: UN Charter, art 2(6).

2 "The Security Council as World Legislator? Theoretical and practical aspects of law-making by the Security Council" (New York, 4 November 2004).

3 A More Secure World: Our Shared Responsibility (Report of the High-Level Panel on Threats, Challenges, and Change), UN Doc A/59/565 (1 December 2004), available at <http://www.un.org/secureworld>, para 191.

almost all non-trivial international activity to rules of general application almost all of the time.[4] Even *in extremis* it is evident that states generally choose to operate within the context of a rules-based system: examples include efforts to bring the 1999 Kosovo intervention under the auspices of NATO and belatedly the Security Council; counterproliferation being organized through mechanisms such as Security Council resolution 1540 (2004) and the proliferation security initiative (PSI); and even efforts to bring the Iraq question to the Security Council in the months leading up to the war and again two months after hostilities had commenced.

The demand for rules, then, may reflect a desire for legitimacy. This quasi-legal concept has been stretched to near-breaking point since the Kosovo Commission concluded that the 1999 war had been "illegal but legitimate". If it means anything, however, it excludes the imposition of unilateral "rules".

2 Forms of Accountability

The fact that the very existence of a system implies the existence of rules does not, of course, answer the challenge of whether such rules are worth having. Accountability for non-compliance with these rules is frequently held up as the touchstone of their "relevance", but the concept of accountability is often understood very narrowly as the possibility of sanctions to deter or punish acts that are illegal or *ultra vires*. This is a particular problem in the UN Charter system, where bodies such as the Security Council were established with the power to interpret their own powers. Though the International Court of Justice held out the possibility of exceptional review of Council decisions in the 1992 *Lockerbie* case, there is no international analogue to a constitutional court that routinely determines the scope and contours of the Council's powers.

[4] Cf. Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed. (New York: Columbia University Press, 1979), p. 47: "Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."

Nevertheless, as Gerhard Hafner observed, there is increasing demand for international organizations to be made accountable for their actions and the acts of their delegates.

There are, however, many ways of holding power to account, as Benedict Kingsbury contended.[5] Various mechanisms already exist at the international level, but they tend to be responsive in nature and ad hoc in structure. Recent examples at the United Nations include the Independent Inquiry Committee into the United Nations Oil-for-Food Programme (the Volcker Committee) and Prince Zeid's 2005 report to the Secretary-General on sexual abuse by peacekeepers in the Congo. Accountability should not simply be a reaction to scandal, however. It should normally exist as of right, which requires the creation of institutions.

When contemplating such institutions, three different perspectives on the nature of accountability may be helpful. First, and most generally, a useful distinction can be made between legal accountability and political accountability. *Legal* accountability typically requires that a decision-maker has a convincing reason for a decision or act. Compliance with a rule would frequently be a sufficient reason, though some administrative agencies may be established with a requirement to have substantive reasons on the merits of a particular decision. *Political* accountability, by contrast, can be entirely arbitrary. In an election, for example, voters are not required to give reasons for their decision — indeed the secrecy of the ballot implies the exact opposite: that it is generally prohibited even to seek reasons from voters. These forms of accountability may be seen as lying on a spectrum, with other variations possible. In a legislature, for example, individual legislators may have specific reasons for voting in favour of or against a piece of legislation, sometimes demonstrated through speeches made before or after it was adopted. But if such reasons are inconsistent, it may be unclear what significance is to be attributed to them.

[5] This is the subject of ongoing research at New York University School of Law. For further information on the Global Administrative Law project, visit <www.iilj.org/global_adlaw>.

A second way of thinking about forms of accountability is with reference to participation. Direct participation in decision-making, such as a system of voting, involves a correspondingly direct form of accountability. Decision-making power is often delegated through a representative, however. This act of delegation may be in the form of a principal-agent relationship or a trustee-beneficiary relationship, with the latter allowing broader discretion on the part of the decision-maker.

A third way of regarding accountability mechanisms is by their structural context. Seven discrete types of structural relationship present themselves (though other taxonomies are possible):

(i) hierarchical accountability within a bureaucracy, such as the UN Secretariat;

(ii) supervisory accountability, such as member-states on the executive boards of the World Bank and IMF;

(iii) fiscal accountability, such as through the Advisory Committee on Administrative and Budgetary Questions (ACABQ) of the General Assembly or the unilateral withholding of UN dues;

(iv) legal accountability, where a disinterested independent third party, such as a court, is vested with decision-making powers, for example the International Criminal Court;

(v) market accountability, where decisions are left to the operation of the market, such as pressure on developing economies to adopt standards attractive to global capital markets or consumer pressure against inadequate labour standards on running shoes;

(vi) peer accountability, such as the desire of diplomats to maintain credibility and influence among their colleagues; and

(vii) public reputational accountability, which applies to all the preceding categories but also embraces "soft power" connected with the prestige and esteem of a given state.[6]

The UN Security Council presents an interesting case-study of mechanisms of accountability. There is no electoral or political accountability, since the Council is composed of both permanent and elected members — and any implicit political accountability of the latter group is undermined by the rule against re-election. Ad hoc measures draw upon a kind of "expert accountability", such as the recent International Commission of Inquiry on Darfur and the many reports of the Secretary-General and his representatives to the Council, though with very limited effectiveness in holding the Council to account when it acts inadequately or fails to act at all. There is a degree of quasi-legal accountability, for example through the Volcker Committee, though this has not examined the legality of Council actions as such. (Nevertheless, as indicated earlier, such a power was hinted at by the International Court of Justice in the *Lockerbie* case; it was also implicit in the International Criminal Tribunal for the former Yugoslavia's 1995 ruling in the *Tadic* case, which examined the validity of the resolution establishing the Tribunal itself.) Public reputational accountability of the Council is problematic because of the willingness of states that play a lead role on the Council nonetheless to call upon "the Council" or "the UN" to act. Since any such action depends upon state capacities, such calls are often disingenuous.

There is, then, no simple answer to the question of to whom the Security Council is accountable for its actions and those taken in its name. Since it was traditionally understood as the apotheosis of a purely political body, this was not seen as a major concern at the creation of the UN nor in the course of much of its subsequent history. That situation may be changing, however, as the Council assumes and delegates administrative powers on a more frequent and a more far-reaching basis. Pressure for change may come from two directions. First, as the Council takes decisions that increasingly affect individuals, such as including them on lists of suspected terrorist financiers whose assets are to be frozen, national courts (notably in Canada and Europe)

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[6] This categorization draws upon Ruth W. Grant and Robert O. Keohane, "Accountability and Abuses of Power in World Politics," *American Political Science Review*, Vol. 99, No. 1, 2005.

have begun to examine whether they themselves can review Council decisions. Second, and more generally, as the Council moves along the spectrum from being a purely political body to assuming more traditionally administrative responsibilities — including, at its most extreme, the governance of territory in Kosovo and Timor-Leste — a more "legal" model of accountability, in which the Council is expected to have and give reasons for its decisions, becomes appropriate.

Conclusion

In his report "In Larger Freedom", Secretary-General Kofi Annan urged that "decisions should be made in 2005 to help strengthen the rule of law internationally and nationally".[7] As Gerhard Hafner stressed, the need to strengthen the rule of law should be seen as addressed to international organizations as well as states. The confidence of states in international organizations depends in significant part on the willingness of those organizations to rely upon and be bound by law.

There is, nonetheless, a danger of the international system embracing too many rules and too much accountability. The General Assembly is a more representative body than the Security Council, but there is a reason why matters of international peace and security were delegated to a smaller body with special rights accorded to the most powerful states of the day. If the cost of greater accountability were that the capacity of the Security Council to respond to a crisis suffered, many would argue that the cost would be too great. In this respect, those who urge the Council to make decisions in a transparent manner open to a wide range of contesting viewpoints should be careful what they wish for: the only example of the Council functioning in this manner in recent years is on the Iraq file from 2002-2003 — the rifts to which this gave rise are the reason why reform is on the agenda today.

Nevertheless, as the Council's role continues to evolve it may be possible to differentiate between appropriately "political" functions and those where more structured forms of accountability are possible. In the Council's increasingly administrative functions, having and giving reasons for decisions — including, as appropriate, input from states and other actors not on the Council prior to decisions and responding to challenges after them — would be a useful first step.

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[7] In Larger Freedom: Towards Development, Security, and Human Rights for All, UN Doc A/59/2005 (21 March 2005), available at <http://www.un.org/largerfreedom>, para 132.

APPENDIX: AGENDA

"Who Needs Rules? – The Prospects of a Rules-Based International System"

Dag Hammarskjöld Library Penthouse
United Nations Headquarters, New York

International Law Panel, Thursday, 5 May 2005, 3pm-6pm

Welcome: H.E. Mr Jean Ping, *President of the 59th UN General Assembly*

Chair: Dr Simon Chesterman, *Executive Director, Institute for International Law and Justice, New York University School of Law*

Panellists: Professor Martha Finnemore, *George Washington University*

Professor Benedict Kingsbury, *New York University School of Law*

Professor Gerhard Hafner, *University of Vienna*

Dr Abiodun Williams, *Executive Office of the Secretary General*