INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE
NYU LAW

Discussion Paper Based on Panel 3 of the series
"The Role of the Security Council in Strengthening a Rules-Based International System"

THE SECURITY COUNCIL AS WORLD JUDGE?

The Powers and Limits of the UN Security Council in Relation to Judicial Functions

Simon Chesterman & Chia Lehnardt
Institute for International Law and Justice
New York University School of Law

Ambassador Ferdinand Trauttmansdorff (Legal Adviser, Austrian Federal Ministry for Foreign Affairs) and Under-Secretary-General Nicolas Michel (Legal Counsel, United Nations) welcomed the participants. The panel was chaired by Ambassador Juan Antonio Yáñez-Barnuevo (Permanent Representative of Spain to the United Nations, Chairman of the 6th Committee), and comprised the following speakers: Professor David Caron (University of California at Berkeley), Justice Richard J. Goldstone (former Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda), Professor Paula Escarameia (International Law Commission), and Judge Nabil Elaraby (International Court of Justice).

This document records some of the issues and concerns that were raised during the discussion, but is not intended to represent an agreed position of the participants or the organizers.

The report draws upon notes taken by James Cockayne and Liliana Jubilut.

Introduction: Frustration and Fear in the Security Council

The Security Council can be at once an object of frustration and fear, as David Caron noted. It is an object of frustration when it struggles to reach consensus; when it does reach consensus the wide range of measures at its disposal makes it an object of fear. An irony in Council practice is that this power unleashed by consensus is a key reason why consensus — especially among the permanent five (P5) — can be difficult to achieve.

Such reasoning depends on the assumption that limits to Council authority are to be found in the political process of adopting resolutions rather than the normative context within which it operates. Previous panels have examined recent quasi-legislative activity by the Council and the nature of a rules-based international system. The present panel focused on the narrower question of what constraints operate on the Council as it begins to assume judicial functions. Though the UN Charter does not establish a separation of powers at the international level, some activities in this area — notably the imposition of economic sanctions on individuals — are encouraging discussion of checks on Council authority. These might arise in challenges to the *vires* exercised by the Council, but are more likely to be found in procedural reforms.

0 Does the Council Act as a "World Judge"?

The Security Council has been expanding its powers for the past 15 years, in the process arguably taking on judicial functions and interceding in the jurisdiction of international courts. It has, among other things, established international tribunals with criminal jurisdiction over individuals, created exceptions to the jurisdiction of the International Criminal Court, ruled on border disputes between Iraq and Kuwait, and applied sanctions to both states and individuals.

This increasing scope of its powers raises a number of questions — of competence, of applicable safeguards, and of the Security Council's relationship to other bodies.

It is generally acknowledged that the Security Council's powers are subject to the UN Charter and *jus cogens*. These limits, however, are not conclusive as to whether the Security Council might assume judicial functions, or as to its relationship to international courts. The lack of a separation of powers in the Charter is compounded by the fact that each UN organ determines the scope of its own competence.

Once the Security Council has determined that there is a threat to international peace and security, it enjoys a wide margin of discretion in choosing the appropriate course of action. The Charter did not envisage that the Security Council would act as a judge, as Nabil Elaraby noted, but nothing clearly states that it may not.

The Security Council's primary responsibility for international peace and security may call for actions not foreseen when the Charter was drafted. At the same time, the need for a swift and effective response to a threat to international peace and security might require broad measures, and generally preclude the application of the same safeguards that would apply to courts. This raises questions of legitimacy in two discrete areas: when the Council intercedes in the exercise of jurisdiction by duly constituted international tribunals, and when the Council itself acts in a manner that affects the rights and obligations of individuals or states.

The International Criminal Tribunal for the former Yugoslavia (ICTY) confirmed in the *Tadič* case the Security Council's competence to create a tribunal of its kind; there now seems little doubt that the Security Council has the power to establish such tribunals. Less clear, however, is the relationship between the Security Council and its creations. As Richard Goldstone stressed, once a judicial tribunal comes into being, it enjoys certain powers of its own that make it independent of the organ that created it. The same is, arguably, true of the International Criminal Court.

The Council's power to create tribunals lies in the link that it makes between peace and justice: tribunals may be established if this is done as a measure to maintain or restore peace. It would be possible, therefore, for the Council to pass a resolution stating that the threat that led to the establishment of a tribunal has passed and that the tribunal should therefore be wound up — or even that maintenance of the peace required that a particular person be given immunity from prosecution. This is not the same, however, as declaring that the tribunals should wind up as a matter of convenience by a certain date, or that the Council could order a tribunal to find a particular person guilty. (The example of the UN Compensation Commission (UNCC), however, might provide an example of a determination of guilt with the UNCC being established merely to determine compensation.)

The problems of the Council's practice with regard to individuals is clearly illustrated by the *Kadi* case before the European Court of First Instance, in which the plaintiffs claimed that the freezing of their financial assets by a Regulation of the European Community taken pursuant to a decision made by the Council's Al Qaeda Sanctions Committee violated their right to due process. The Court decided it could review the decision by the UN Committee only within the narrow parameters of *jus cogens*. Beyond that, the judges noted that there was no international review mechanism available to the applicants.

Does this mean that the Council is acting as a "world judge"? Clearly this depends on one's definition. If this is limited to the making of legal conclusions, then the Council regularly does so. Alain Pellet suggested a more rigorous definition that a judge: (1) makes binding decisions; (2) on the basis of law; (3) after a contradictory process. On this basis, the Council is empowered to enforce judgments of the International Court of Justice (ICJ) or constitute tribunals but is not acting as a judge itself in this stricter sense, in the absence of a formal contest of arguments. Nevertheless, it is clear that the Council is at least exercising judicial functions when it applies law to specific cases. Perhaps the better question, then, is to examine what leads the Council to act in this manner and what consequences follow.

0 Sanctions and Individuals

The Council's speed and flexibility are central to its importance. The establishment of the Counter-Terrorism Committee by resolution 1373 (2001) is seen by many as a key example of the Council's ability to respond to a crisis. Some have challenged this type of action as an intrusion of the Council into the legislative sphere; for present purposes the more relevant example of Council improvisation is in the field of targeted financial sanctions.

Concerns about the humanitarian consequences of comprehensive economic sanctions, in particular those imposed on Iraq from 1990, led to efforts to make them "smarter" by targeting sectors of the economy or particular individuals more likely to influence policies — or at least confining them to ensure that those who bore the brunt of the consequences were also those perceived as most responsible for the situation. This utilitarian approach to minimizing suffering raised different ethical problems, however, as the identification of individuals (and, in some cases, their immediate families) for the freezing of assets suggested a shift in the way that sanctions were being used.

Though other taxonomies are possible, sanctions tend to be imposed for one of three reasons. First, sanctions may be intended to compel compliance with international law, including acceding to demands by a body such as the UN Security Council. Second, sanctions may be designed to contain a conflict, through arms embargoes or efforts to restrict an economic sector that is encouraging conflict. Third, sanctions may be designed primarily to express outrage but without a clear political goal; sanctions are sometimes invoked as a kind of default policy option, where something more than a diplomatic plea is required but a military response is either inappropriate or impossible.

Targeted financial sanctions were initially a subspecies of the first type of regime, employed in an effort to coerce key figures in a regime to comply with some course of action. As the tool came to be applied in the context of counter-terrorism, however, the use of sanctions moved into

the second type: individuals were not having their assets frozen in an effort to coerce them to do or refrain from doing anything; instead the assets were frozen as a prophylactic against future support for terrorism.

There would appear to be a qualitative difference, however, between using economic sanctions as a measure intended to maintain or restore international peace and security in the sense of containing or ending a conflict, and freezing an individual's assets indefinitely on the basis that he or she might at some unspecified point in the future provide funds to an unidentified terrorist network.

An indication of concerns about the need for procedures was evident in the Council's adoption of resolution 1617 (2005) in July 2005, which required a statement of case to be submitted for future listings of individuals — though it did not apply retrospectively to the approximately 400 individuals and entities already listed. This is likely to be merely the beginning of a process that will lead to some form of due process safeguards in the listing process.

1 Ways Forward

Recent discussion of Council reform has, unfortunately, focused almost exclusively on membership rather than working methods, as Nabil Elaraby noted. In the absence of Council willingness to address what is increasingly perceived as a legitimacy deficit, this debate is being conducted outside its chamber. In the case of the Council's judicial activities this might, Simon Chesterman suggested, lead to a rebellion from below, with domestic courts refusing to apply decisions of the Council, or from above, with international courts reviewing Council resolutions. As individuals have no standing before the ICJ, however, it seems uniquely unsuited to a lead role as a check on the exercise of the Council's power, though it is possible that an advisory opinion might provide some form of future guidance.

Possible ways forward, however, are not confined to direct or indirect judicial review of Council resolutions. A more viable solution, Paula Escarameia argued, is to change the Council's rules of procedures, including giving individuals the right to fair hearing. This could take numerous forms, such as a full appeal to a specially constituted tribunal (comparable to the ICTY), a form of administrative review (comparable to the UNCC), a confidential review process (comparable to the Detention Review Commission created by UNMIK in Kosovo in 2001), or an ombudsman institution (comparable to those established in Kosovo and East Timor).

At a more general level, the Council itself might address many of the concerns raised in this area by exercising a degree of self-restraint: recognizing the limits of its ability to make legal determinations and respecting the realm of the ICJ and other organs. From this perspective, the imperative to act promptly and effectively when faced with threats to international peace and security is precisely what could be taken into account when contemplating the limits to the Council's jurisdiction: it should step in only for as long as other competent organs are not ready yet to deal with the situation, and take only preliminary decisions where possible, with an opportunity for review including a right to representation on part of the affected state or individual. In particular, the current disregard for due process requirements when imposing sanctions could be remedied through the inclusion of a sunset clause or a review mechanism, as Nabil Elaraby suggested.

This highlights the importance of procedural reforms not merely in how Council resolutions are implemented but in how they are drafted in the first place. As David Caron noted, the importance of the Council is its ability to act swiftly and severely. Once it has acted, however, reversing a decision requires the same level of agreement as deciding in the first place. For this reason the Council's powers should be exercised sparingly and with due care to avoid unforeseen consequences of its actions: the Council, therefore, should not decide that which does not need to be decided, erring on the side of provisional responses rather than permanent solutions.

The alternative may be that the Council's legitimacy deficit is address not through judicial oversight but administrative disregard. Though the ICJ refrained from declaring the Council's

sanctions against Libya *ultra vires* in the *Lockerbie* case, many states came to disregard the air embargo in practice — an exercise of what Georges Abi-Saab referred to as the right of revolution.

2 Conclusion

The absence of a system of separation of powers, combined with its primary responsibility for international peace and justice, allows the Security Council to assume many functions at once. In this way, the Council may function like a Roman praetor, as David Caron observed. In a rule-based international legal system, the exercise of these functions does not take place in a normative vacuum. Thus, the typical pragmatic approach to the Council's powers must be complemented by the recognition that, in order to ensure legitimacy, an increase in powers necessitates a more principled approach. Ultimately, the Council's practice has to accommodate both: the need for an effective and quick response to a threat to international peace and security, and the rights of other organs and affected entities. Nonetheless, it is likely that efforts to ensure legitimacy through the establishment of principles will follow the Council's use of its expansive powers, rather than the other way around.

The role of law in this context is to serve not as a wall, as David Caron paraphrased John Locke, but as a hedgerow; not to block political action but to channel it away from danger. Even as recent years have seen the substantial expansion of Council powers, this has been accompanied by a growing recognition of the importance of regulating those powers through a kind of international public law. Benedict Kingsbury suggested that the beginnings of an answer might lie in emphasizing this "public" nature of the power that is being exercised by the Council, drawing upon the manner in which public power within the state is regulated.

Hard cases make bad law, as Oliver Wendell Holmes, Jr, famously warned a century ago. Now a cliché, Holmes' observation is frequently removed from its context — for, as Holmes went on to observe, the hard cases are frequently the great ones:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

The "war on terror" is certainly a hard case for international law. But the appropriate response may not be to resist the hydraulic pressure currently at work on the international system; rather it may be more effective to understand the nature and source of that pressure and channel it through appropriate forms, legitimate procedures, and sustainable institutions.

Appendix: Agenda

"The Security Council as World Judge?"

The Powers and Limits of the UN Security Council in Relation to Judicial Functions

International Law Panel, Thursday, 27 October 2005, 3 pm-5:30 pm

Dag Hammarskjöld Library Penthouse
United Nations Headquarters, New York

Welcome

Ambassador Ferdinand Trauttmansdorff, *Legal Adviser, Austrian Federal Ministry for Foreign Affairs*

Nicolas Michel, *Legal Counsel, United Nations*

Chair

Ambassador Juan Antonio Yáñez-Barnuevo, *Permanent Representative of Spain to the United Nations, Chairman of the 6th Committee*

Panelists

Professor David Caron, *University of California at Berkeley*

Justice Richard J. Goldstone, *former Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda*

Professor Paula Escarameia*, International Law Commission*

Judge Nabil Elaraby, *International Court of Justice*