



Discussion Paper Based on Panel 4 of the series  
“The Role of the Security Council in Strengthening a Rules-Based International System”

## THE SECURITY COUNCIL AS WORLD EXECUTIVE? *The Implementation and Enforcement of Rules by the Security Council*

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*Simon Chesterman & David A. Jordan  
Institute for International Law and Justice  
New York University School of Law*

Ambassador Ferdinand Trauttmansdorff (Legal Adviser, Austrian Federal Ministry for Foreign Affairs) and Dr Simon Chesterman (New York University School of Law) welcomed the participants. The panel was chaired by Ambassador Juan Manuel Gómez Robledo (Deputy Permanent Representative of Mexico to the United Nations, Chairman of the 6<sup>th</sup> Committee), and comprised the following speakers: Professor Alain Pellet (Professor of International Law at the University of Paris X-Nanterre, Member and former Chairman of the ILC); Sir Kieran Prendergast (former Under-Secretary-General for Political Affairs); and Ambassador Ellen Løj (Permanent Representative of Denmark to the United Nations, Chair of the Security Council Counter-Terrorism Committee).

This document records some of the issues and concerns that were raised during the discussion at the panel presentation on 26 October 2006, but is not intended to be comprehensive nor to represent an agreed position of the participants or the organizers.

## **Introduction**

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Though established in the UN Charter as the very model of a political body, the powers exercised by the Security Council have expanded in both quantity and quality. Previous panels in this series have explored the quasi-legislative and quasi-judicial functions of the Council; this session considered the Council's expanding executive authority and what checks, if any, exist on this exercise of power.

### **1 World Legislator, Judge, or Executive?**

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A preliminary question, noted by Professor Alain Pellet, is whether it makes sense to draw comparisons between the Security Council and domestic institutions that exercise legislative, judicial, and executive power. Implicit in such a comparison is the critique that the Council fails to distinguish between these three heads of power and therefore presents an accountability problem.

In practice, the Council may exercise these various types of power but without distinguishing between them. The Council routinely gives quasi-legislative instructions and creates mechanisms to implement those instructions: examples include Security Council resolution 1373 (2001) on counter-terrorism, resolution 1540 (2004) on weapons of mass destruction, and the various sanctions resolutions, such as resolution 1718 (2006) on North-Korea.

It is therefore unclear whether Council action fits within the political rubric of "executive" action, which might be more appropriately confined to describing political bodies acting within state governments.

The larger critique, however, concerns what restrictions, if any, limit the Council's ability to perform or delegate executive-type functions. The answer, according to Professor Pellet, is not none — but not much more than that. The Council is bound by the Charter, which requires the Council to act in accordance with the Purposes and Principles of the United Nations (UN Charter, Art 24(2)). The only other limitation are the norms of *jus cogens*, peremptory rules of international law that override treaties.

But is the Council's discretion limited in any other way? It is possible, Professor Pellet suggested, that the Council might be bound by natural justice, if such a thing exists, though for the most part protections from Council abuse will be limited to the two cited earlier: states are protected by the Charter, individuals take what comfort they may from the norms of *jus cogens*. Beyond this, the main check on Council decisions is the possibility that states will disregard its decisions: without member state support, Council decisions are mere wishful thinking.

## 2 Relations between the Council and other actors

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The personality of the Council changes with the ambassadors who constitute it. This is partly a function of the make-up of the ten elected members, but also of the fifteen individuals who gather to sit around a table. How it relates to other organs of the UN system also fluctuates according to geopolitics and individual proclivities: Cold War rivalry has given way to North-South tensions; informal, brief, and mostly open meetings have given way to long private consultations followed by stilted sessions in which statements are read into the record. These changes and the vast expansion of Council activity — in both quantitative and qualitative terms — have complicated how the Council implements its mandates, as Kieran Prendergast observed.

The two key sets of relationships are with the wider membership of the United Nations and the Secretariat. The first has emerged as a key restraint on Council activity: the Council may create mandates, but the Fifth Committee of the General Assembly allocates resources. Member states

now use this as a balancing mechanism, exerting influence where they can on how Council decisions are implemented. At times this leads to the appearance that foreign policy is being made in the treasuries of some member states.

The second relationship, that with the Secretariat, has the possibility to serve as a reality check on the Council — at the very least making it harder for the Council to pass impossible mandates — but this requires a Secretariat that will tell the Council what it needs rather than wants to hear, and a Secretariat that will accurately describe what is required to complete a Council mandate. At present, however, the Secretariat lacks the capacity to fulfil such a role, in part because the wider membership has been unwilling to give it that capacity, epitomized in the EISAS<sup>1</sup> debacle of 2000 in which efforts to improve Secretariat analytical capacity were criticized and swiftly abandoned.

### **3 Executing the Council's thematic mandates**

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The need for self-restraint on the part of the Council is particularly important as it moves from responding to specific crises to addressing larger themes. This need is partly due to the danger that the Council will exceed its legal authority in bearing primary responsibility for international peace and security, but also due to concerns that ill-considered Council resolutions will undermine its authority more subtly, as Ambassador Ellen Løj argued.

Legal concerns raised by thematic mandates concern the formulation of a mandate, its relationship to peace and security, and the clarity of what it authorizes or prohibits. Reducing ambiguity should facilitate enforcement, but also reduce the likelihood or appearance that the Council is operating beyond its competence.

The more subtle undermining of the Council's status occurs when the lack of clarity reflects not ambiguity about the boundaries of the Council's competence, but about what, exactly, it hopes to achieve. This has become a particular problem in the area of sanctions, where regimes have been adopted — in Sudan and Côte d'Ivoire, for example — without the political will of some Council members to secure their implementation. When adopting any resolution, the Council should consider implementation from the outset, avoiding the unedifying spectacle of mandates being modified in light of implementation difficulties. The perceived malleability of such mandates may also detract from their binding nature, offering states less compulsion toward immediate compliance.

## 4 Conclusion

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The Council's role as implementer and enforcer of rules that it frequently also creates and adjudicates is problematic, but it is not true to say that the Council acts unfettered as legislator, judge, or executioner. The Council's actions in this area may conflate powers one might understand to be legislative, judicial, and executive, but separation of such powers does not translate directly from the national to international sphere. More important is the question of accountability for how those various powers are exercised, and the quality of decisions.

The Council operates under the rule of law. In strict legal terms, this means that the Council's executive powers are exercised subject to the Charter and norms of *jus cogens*. More importantly, however, the Council's authority derives *from* the rule of law; the most important limitation on the Council's exercise of executive power is therefore self-restraint. In the absence of a constitutional court to sit in judgment of how that restraint is exercised, accountability, such

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<sup>1</sup> Executive Committee on Peace and Security (ECPS) Information and Strategic Analysis Secretariat.

as it is, tends to be exercised only through the possibility of extreme reactions: cutting off funding or disregarding Council resolutions.

## Appendix: Agenda

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### “The Security Council as World Executive?”

#### The Implementation and Enforcement of Rules by the Security Council

International Law Panel, Thursday, 26 October 2006, 12:30pm-3:00 pm

Dag Hammarskjöld Library Penthouse  
United Nations Headquarters, New York

#### Welcome

H.E. Mr. Ferdinand Trauttmansdorff, *Legal Adviser, Austrian Federal Ministry for Foreign Affairs*

Dr. Simon Chesterman, *New York University School of Law*

#### Chair

H.E. Mr. Juan Manuel Gómez Robledo, *Chairman of the Sixth Committee, Deputy Permanent Representative of Mexico to the United Nations*

#### Panelists

Professor Alain Pellet, *University of Paris X - Nanterre*

Sir Kieran Prendergast, *former Under-Secretary-General for Political Affairs*

H.E. Ms. Ellen Løj, *Permanent Representative of Denmark to the United Nations*