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THE UN SECURITY COUNCIL
AND
INTERNATIONAL LAW

by

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SECOND LECTURE:
The Security Council's Powers and their Limits

(as delivered on 8th November 2006)

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1. Today, I am going to look more closely at the powers of the Security Council. I shall do so in three stages. *First*, I shall say a few words about the scope of the Council's powers. They are potentially far-reaching, although within a specific field - the maintenance of international peace and security. *Second*, I consider some of the limitations on these powers, real or imagined. I will look in particular at possible limits deriving from the Purposes and Principles of the United Nations and the norms of *jus cogens*. And, *third*, I shall say something about the checks and balances on the actions of the Council.

2. "[A] favourite of many legal academics but considered rather irrelevant by government officials and political scientists, is the concern that the Council might act either beyond its powers in the Charter or in violation of other norms of international law."[1] Those are not my words, but those of a law professor at the University of Michigan. The concerns are by no means always without foundation. They need to be

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[1] S Ratner, "The Security Council and International Law", in: D Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (2004), 603.

taken seriously if the Council is to remain effective. Most of the more serious concerns are, to my mind, political and substantive.

3. It is widely accepted that the Security Council, like any organ of the United Nations, is bound by law. It acts within a legal framework, under a constituent instrument that defines its powers and functions. The International Court said as long ago as 1948 in the *Conditions of Admission* case:

> "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers and criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of the constitution."

4. The Appeals Chamber of the Yugoslav Tribunal put it this way in *Tadić*:

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

5. It does not follow from the fact that the Council is bound by law that the exercise of its powers is subject to judicial review, at least in the sense in which the term is used in domestic legal systems. But even if its acts are not normally justiciable, that does not mean that the Council is absolved from complying with the law. The International Court has repeatedly made the point in relation to States (most recently in *Democratic Republic of the Congo v Rwanda*):

> "Whether or not States have accepted the jurisdiction of the Court, they are required to fulfil their obligations under the Charter of the United Nations and other rules of international law… and they remain responsible for acts attributable to them which are contrary to international law."

6. The Council's powers were intended, by the drafters of the Charter, to be broad and flexible. The powers of the Council within its core field of activity tend to be "open textured and discretionary."[2] But, they cannot, as a matter of principle, be unlimited, even within that core field. It is widely accepted that, *first*, the Council is to act in accordance with the Purposes and Principles of the United Nations, and, *second*, that the Council cannot contravene peremptory norm of international law (*jus cogens*). Having said that, the terms of the Charter, and the established practices of the Council, are sufficiently flexible that it is difficult to conceive of circumstances arising in practice that could raise serious doubts about the legality of the Council's actions. That, I suggest, is as it should be. A Security Council that was constantly looking at the "judge over its shoulder" might not always be willing and able to take "prompt and effective action" for the maintenance of international peace and security.

I. THE POWERS OF THE COUNCIL

7. The starting point for considering the powers of the Security Council is Article 24, paragraph 1, of the Charter, which reads:

> "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

Article 24, paragraph 2, second sentence, provides that "[t]he specific powers granted to the Security Council for the discharge of [its duties under its primary responsibility for the maintenance of international peace and security] are laid down in Chapters VI, VII, VIII, and XII."

8. In the time available, I shall not attempt to describe the Council's powers in detail. I shall pass over the provisions of Chapter VI (pacific settlement of disputes), not because they are not important. They are. Indeed, most of the Council's activity in its first forty

[2] S Lamb, "Legal Limits to UN Security Council Powers", in: *The Reality of International Law: Essays in Honour of Ian Brownlie*, 361 (1999)

years or so fell under Chapter VI. It is only when peaceful measures are inadequate to avert a threat or breach of the peace that Chapter VII comes into play.

9. I shall look more closely at Article 39, the first provision in Chapter VII. There are two questions concerning the scope of the Security Council's powers under this article. *First*, the Council's power to determine the existence of a threat to the peace, breach of the peace or act of aggression. And *second*, having made such a determination, the Council's power to make recommendations, or decide what measures shall be taken, to maintain or restore international peace and security.

10. Both the meaning of the three terms used in Article 39 (threat to the peace, breach of the peace, act of aggression), and the Council's discretion in determining what constitutes "a threat to the peace" in particular, have given rise to much debate in the literature - though relatively little discussion in New York.

11. As is well known, the concept of a "threat to the peace" has tended to expand over the years, and (as one author put it, in a book published in September 2006) now includes "humanitarian emergencies; overthrow of democratically-elected leaders; extreme repression of civilian populations and cross-border refugee flows threatening regional security; and failure to hold perpetrators of major atrocities accountable." Often the Council has acted "[b]y substantially broadening the concept of threats to the peace to include such internal crises where there was a plausible concern that their continuation might lead to international conflict or destabilize neighboring countries."[3]

12. A much debated question among writers, particularly since the *Lockerbie* cases, is whether the Security Council's Article 39 determinations are justiciable. The International Court has not itself expressed a view on the matter. Individual judges have. In his dissenting opinion at the Provisional Measures stage of the *Genocide Convention* case between Bosnia and Serbia, Judge *ad hoc* Lauterpacht said, and I respectfully agree, that "it is not for the Court to substitute its discretion for that of the Security Council in determining the existence of a threat to the peace, a breach of the

[3] M J Matheson, *Council Unbound: The Growth of UN Decision Making on Conflict and Post-conflict Issues after the Cold War* (2006).

peace or an act of aggression, or the political steps to be taken following such a determination." In *Tadić*, the Yugoslav Tribunal said that whereas "the act of aggression is more amenable to a legal determination, the threat to the peace is more a political concept."

13. Most writers share the view that the Council's determination under Article 39, and especially as regards a "threat to the peace", is essentially political, and that courts and tribunals should not seek to substitute their own views for those of the Council. Some, however, adopt a more "constitutionalist" approach, and a few even suggest that the Council has regularly exceeded its powers over the last fifteen years or so. That view that has little support in State practice.

14. I now turn to the second aspect of Article 39, the scope of the Council's power, having made the necessary Article 39 determination, to make recommendations and adopt measures. Here again, the Appeals Chamber of the Yugoslav Tribunal had something to say: "Article 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluations of highly complex and dynamic situations." Judge Lauterpacht also covered the point in the passage just cited from the *Genocide Convention* case.

15. I do not have time to detail the powers of the Council to call upon the parties to comply with provisional measures (under Article 40); to decide on measures not involving the use of force, including so-called "sanctions" (under Article 41); or to take military action (under Article 42). But these will be familiar to many of you.

II. POSSIBLE LIMITS ON THE POWERS OF THE COUNCIL: GENERAL

16. I now turn to possible limits on the Council's powers. Some lawyers have recently devoted great efforts to devising a whole series of sweeping limits on the powers of the Council, and to suggesting that the acts of the Council are or should be subject to judicial review in the same ways as the acts of national authorities. What they tend to overlook is that the principal restraints on the Council are political, not legal. Some appear to want to bind the Council in a legal straight-jacket. Yet to do so would to run

counter to the Council's purpose: in the words of Article 1, "to take effective collective measures for the prevention and removal of threats to the peace", and in the words of Article 24, "to ensure prompt and effective action" to that end.

17. I only have time this evening to address some of the more important among the suggested limits on the Council's powers. I shall deal with those of a general nature. Perhaps the chief limitation in practice is that, with very few exceptions, the Council's actions fall within its primary responsibility for the maintenance of international peace and security. This may be often overlooked nowadays because of the flexibility of the Charter and the expansion of the concept of peace and security over the years. In the 2005 World Summit Outcome Document, for example, the Heads of State and Government committed themselves to working towards "a security consensus based on the recognition that many threats are interlinked, that development, peace, security and human rights are mutually reinforcing". It is difficult to envisage the limitation to its core field being justiciable, except perhaps in a most extreme case, which is not going to arise in practice; but it remains an obvious and very real limitation in practice nonetheless. The members of the Council (not least their lawyers) do have regard to limitations on the powers of the Council, whether or not there is the threat of challenge in court.

"in accordance with the present Charter"

18. Article 25 provides that -

> "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

It is sometimes suggested that the words "in accordance with the present Charter" are ambiguous. They might either refer to the decisions being carried out in accordance with the Charter or they might mean that it is only decisions that are adopted in accordance with the Charter that have to be accepted and carried out. The latter reading could lead to a situation in which individual States decide for themselves which Council decisions are, and which are not, in conformity with the Charter. That would place the Charter system of collective security at the mercy of individual states, and thus

potentially toothless, as the League system proved to be when things got tough. That is what the drafters of the Charter were determined to avoid.

19. The better reading of Article 25, the more natural and grammatical reading, and the one more in line with the intention that the Council be effective, is that the words "in accordance with the present Charter" qualify the way in which Members of the United Nations are to carry out the Council's decisions. This interpretation does not mean that a resolution of the Council cannot be *ultra vires*; but it should mean that a Member of the United Nations cannot rely on these words in Article 25 to claim the right unilaterally to decide that it will not comply with a decision of the Council.

III. LIMITS INHERENT IN THE WORDS "IN ACCORDANCE WITH THE PURPOSES AND PRINCIPLES OF THE UNITED NATIONS"

20. The starting point for those who would bind the Council within a legal straitjacket is usually the first sentence of Article 24, paragraph 2, which provides that:

> "In discharging these duties [that is to say, the Council's duties under its primary responsibility for the maintenance of international peace and security] the Security Council shall act in accordance with the Purposes and Principles of the United Nations."

It is somewhat artificial to extrapolate from this a whole series of specific limits on the Council's powers. The Purposes of the United Nations, which are set out in Article 1 of the Charter, have been described as "very loosely formulated, reflecting a political programme rather than strictly defined legal rules." As one author recently put it, "[t]he Purposes and Principles are very general statements that are not defined and are subject to a wide range of interpretation, and some by their nature do not seem to have specific legal content." [4] Their fulfilment, and the relative importance to be attached to them, are essentially matters for policy choice, not for courts or lawyers.

[4] Matheson, at note 3 above.

21. The maintenance of international peace and security is placed first among the Purposes of the United Nations. The first Purpose, in Article 1, paragraph 1, is –

> "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace…"

22. Other Purposes in Article 1 are particularly broad; they include "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples…"; and "To achieve international cooperation in solving problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights…".

23. The Principles in Article 2 are - for the most part - more specific, the main relevant one in the present context being Article 2, paragraph 7, on domestic jurisdiction. But even here we find very broad concepts such as "the principle of the sovereign equality of all [the] Members [of the United Nations]" and the fulfilment "in good faith of the obligations assumed … in accordance with the Charter".

24. I shall now look at some of the individual Purposes and Principles set out in Articles 1 and 2 of the Charter.

"in conformity with the principles of justice and international law"

25. The second Purpose set out in Article 1, paragraph 1, of the Charter, reads:

> "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

Some commentators claim that this means that the Security Council is bound always to act in accordance with justice and international law. They rather overlook the fact that, and this was quite deliberate at San Francisco, the reference to justice and international law only applies in relation to the bringing about, by peaceful means, of the adjustment

or settlement of disputes or situations. It does not apply to action under Chapter VII. And even in the case of action under Chapter VI, the juxtaposition of justice and international law may make the application of this clause quite delicate, and a matter for political appreciation.

Domestic jurisdiction

26. Article 2, paragraph 7, provides expressly that the principle of non-intervention set out in that paragraph "shall not prejudice the application of enforcement measures under Chapter VII." There is therefore no scope for an argument limiting the powers of the Security Council to adopt enforcement measures under Chapter VII by reference to the principle of non-intervention in the domestic affairs of a State.

27. Article 2, paragraph 7, could impose limits on the Security Council's powers except where it is taking enforcement measures under Chapter VII. But the current interpretation of this provision, both by the General Assembly and the Council, and the expansion of international law into fields previously thought to be within the reserved domain (and not only in the field of human rights) means that its importance as a restriction is much reduced. In addition, it is difficult to imagine how the Council, in making recommendations under its Chapter VI powers (or under Chapter VII for that matter), could be said to be intervening in matters which are essentially within the domestic jurisdiction of any state. Nor is it easy to see how such recommendations by the Council could be said to infringe the rather neglected second limb of Article 2, paragraph 7, and "require the Members to submit [matters which are essentially within the domestic jurisdiction of any state] to settlement under the … Charter."

Self-determination

28. Article 1, paragraph 2, of the Charter refers to "the principle of equal rights and self-determination of peoples". It has been suggested that the Security Council would infringe the right of self-determination if, for example, it imposed a government against the wishes of the people of a territory, or without their consent. Yet it might well need to do this temporarily in order to secure the peace and even, in the longer term, to

enable a people to exercise their right of self-determination. The modes of exercising the right of self-determination are many, and the choices essentially political.

Human rights

29. As a matter of policy the Security Council will doubtless not wish to override the human rights of individuals, except where it is necessary and proportionate so to do in order to carry out its primary responsibility to maintain international peace and security. The circumstances in which the Council may act under Chapter VII – threat to the peace, breach of the peace, act of aggression – could be likened, at the international level, to a "war or other emergency threatening the life of the nation", the basis for derogations under human rights treaties, though the analogy is not exact. Yet it is sometimes suggested that the Council is legally bound to respect international human rights law, either because of the inclusion of promoting and encouraging respect for human rights among the Purposes in Article 1 of the United Nations Charter, or because the rules of international human rights law are *jus cogens*. I consider in the next section those few human rights norms that may qualify as *jus cogens.*

30. The attempt to show that the Council is, as a matter of law, constrained generally by human rights usually relies on the cross-reference in Article 24 of the Charter to the Purposes of the United Nations. But the specific reference to human rights in Article 1 of the Charter is not a strong hook upon which to hang a great theory. Nor are the other Charter references to human rights. Paragraph 3 of Article 1 provides that the Purposes of the United Nations include "To achieve international cooperation … in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex language, or religion." I read the passage yesterday from the Court of Appeal in *Al-Jedda*, in which the Court said that if the Security Council considered that the exigencies posed by a threat to the peace must override human rights, "seemingly other that *jus cogens*, from which no derogation is possible", the Charter has given it the power so to provide.

31. A separate line of argument is to the effect that, as the members of the Security Council are individually bound by human rights obligations, both conventional and customary, the Council itself is so bound. This is not a strong argument. Among other

things, it ignores the separate legal personality of the United Nations, and the effect of Article 103 of the Charter.

32. Another line of argument is that the individual Council members remain bound by their respective human rights obligations, and remain liable under their respective conventional and customary law obligations when exercising their responsibilities as Council members. They cannot, or should not, do through the Council that which they could not do individually, so the argument goes. Thus it has been suggested that a member of the Security Council that is also a member of the Council of Europe could be brought before the European Court of Human Rights in respect of its actions on the Council. Presumably the same could be argued in respect of other human rights systems. Such arguments are untested.

Good faith and abuse of rights

33. The last of the possible restrictions deriving from the Purposes and Principles of the Charter that I will consider is good faith. A requirement to act in good faith seems unexceptional. But what does it mean in the context of action by the Security Council, and who decides whether the Council has acted in good faith or not? One author concludes that it means "that it may neither abuse its powers, nor act arbitrarily", and that "the measures decided upon in order to restore the peace should be necessary and proportional."[5] But that is to read a great deal into a few general words.

34. The Council is sometimes accused of inconsistency in its approach to comparable situations. Accusations of double standards are understandable. The Council may well act in one situation but not, for political or other reasons, in another that is considered to be comparable. Occasionally the argument has been put forward in legal terms. In *Tadić*, it was argued that the Council had been inconsistent in not setting up tribunals in other situations where there were violations of international humanitarian law, but the Tribunal was not impressed. It is difficult to see how any persuasive legal argument

[5] D Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (2001). See also E De Wet, *The Chapter VII Powers of the United Nations Security Council* (2004).

could be mounted to impose a requirement of consistency upon a body with a remit as political as that of the Security Council.

IV. LIMITS INHERENT IN THE CONCEPT OF *JUS COGENS* NORMS

35. I now turn from the Purposes and Principles of the Charter to *jus cogens*. A norm of *jus cogens* (otherwise known as a peremptory norm of general international law) is defined in the Vienna Convention on the Law of Treaties as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

36. Is the Security Council bound to respect *jus cogens* norms? In his Separate Opinion at the Provisional Measures stage of the *Genocide Convention* case, Judge *ad hoc* Lauterpacht said:

> "The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot - as a simple hierarchy of norms - extend to a conflict between a Security Council resolution and *jus cogens.*"

37. It is widely considered that this is a correct statement of the position, though the matter has not been determined authoritatively. There are still a few dissenting voices. Some even continue to question the very existence of *jus cogens* norms. It may not be easy to maintain that position in the face of the references to *jus cogens* in the Vienna Convention, in the 2001 Articles on State Responsibility, and in the decisions of national and international courts. The President of the International Court, speaking recently in New York, described the 2006 *Democratic Republic of the Congo v Rwanda* judgment as "the first explicit and direct recognition of the existence of rules of *jus cogens* by the Court, with the specification that the prohibition of genocide is such a rule." [6]

[6] Judge Higgins's speech to Legal Advisers, 23 October 2006.

38. It seems to be taken for granted that obligations under the Charter cannot prevail over a *jus cogens* obligation, and therefore Article 103 is to be read as implicitly but necessarily subject to this exception. In the *Kadi* case, the Court of First Instance of the European Communities said:

> "International law … permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, *however improbable that may be*, they would bind neither the Member States of the United Nations nor, in consequence, the Community."

As we have seen, the Court of Appeal in London also referred to *jus cogens* in *Al-Jedda,* though there was no question of a breach of a *jus cogens* norm on the facts of that case.

39. Assuming (for present purposes) that the priority given to Charter obligations does not extend to peremptory norms of general international law (*jus cogens*), the next step is to be clear what are, and what are not, peremptory norms, and how they might limit the Council's freedom of action. The problem, of course, is that, in the words of Professor Brownlie, "[m]ore authority exists for the category of *jus cogens* than exists for its particular content". And as Judge Higgins recently said, "The examples [of norms having the character of *jus cogens*] are likely to be very, very few in number."[7]

40. This one of those areas of international law where there is a certain amount of wishful thinking. A recent monograph, for example, relies heavily on writings; downplays the consensual element; and appears to assert the existence of an extraordinarily wide range of *jus cogens* norms, including the whole of human rights law, the principle of *non-refoulement,* and norms prohibiting the large-scale pollution of the environment.[8]

41. In its *Kadi* judgment, the Court of First Instance in Luxembourg also appeared to adopt a somewhat loose view of *jus cogens*. Using various terms to refer to the notion, the Court referred to "the mandatory provisions concerning the universal protection of

[7] "A Babel of Judicial Voices? Ruminations from the Bench", 55 *ICLQ* 791, at 801 (2006).
[8] A Orakhelashvili, *Peremptory Norms of International Law* (2006).

human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute 'intransgressible principles of international customary law'." Turning to the human rights at issue in the case, the Court said (somewhat obscurely) that "in so far as the right to property must be regarded as forming part of the mandatory rules of general international law, it is only an arbitrary deprivation of that right that might, in any case, be regarded as contrary to *jus cogens*." As regards the right to a fair hearing, the Court found that "no mandatory rule of public international law requires a prior hearing for the persons concerned in circumstances such as those in this case …." As regards the right of access to a court, the Court similarly found that the limitations imposed by the Security Council were "inherent in that right as it is guaranteed by *jus cogens"*.

42. On the other hand, in *Al-Jedda* Lord Justice Brooke recalled that –

> "the International Law Commission has said that the criteria for identifying peremptory norms of general international law are stringent …. They suggested that those that were clearly accepted and recognized included the prohibitions of aggression, genocide, slavery and racial discrimination, crimes against humanity and torture, and the right to self-determination."

43. In its commentary to article 26 of the 2001 Articles on State Responsibility, referred to by Lord Justice Brooke, the International Law Commission pointed out that–

> "Article 53 of the Vienna Convention requires not merely that the norms in question should meet all the criteria for recognition of a norm of general international law, binding as such, but further that it should be recognised as having a peremptory character by the international community of States as a whole. So far, relatively few peremptory norms have been recognised as such. But various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties. Those peremptory norms that are clearly accepted and recognised include the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right of self-determination."

The Study Group of the International Law Commission on Fragmentation included a similar list in its final report of August 2006.

Particular norms of jus cogens

44. I shall now look briefly at some of the *jus cogens* norms listed by the International Law Commission, to see what relevance they might have in practice as limits on the powers of the Council. First, the prohibition of aggression. It is inconceivable, perhaps logically impossible, that the Council would impose an obligation on States that would contravene the prohibition of aggression. The use of force authorised by the Council is in principle lawful, and provided that the use of force remains within the bounds of what the Council has authorised cannot amount to aggression.

45. It also seems inconceivable that the Council would impose an obligation on States to contravene the prohibition of genocide. However, in his Separate Opinion in the *Genocide Convention* case, Judge *ad hoc* Lauterpacht concluded, at least tentatively, that the Security Council resolution imposing an arms embargo on the whole of the former Yugoslavia, including Bosnia, could "be seen as having in effect called on Members of the United Nations … to become in some degree supporters of the genocidal activities of the Serbs and in this manner and to that extent to act contrary to a rule of *jus cogens.*" Judge Lauterpacht would have been prepared to indicate a provisional measure that "the continuing validity of the embargo in its bearing on the Applicant has become a matter of doubt requiring further consideration by the Security Council."

46. On the facts alone, it would have been difficult to substantiate a charge that either the Council or Members of the United Nations were in breach of any prohibition amounting to a norm of *jus cogens.* But it is interesting to note the terms in which Judge *ad hoc* Lauterpacht would have been prepared to indicate a provisional measure, which seem to recognize that the decision was indeed, at least in the first place, for the Council. It would have been an unusual provisional measure, indirectly addressed to an international organ not party to the proceedings.

47. It likewise seems inconceivable that the Security Council would act, or require States to act, in contravention of the norms of *jus cogens* prohibiting slavery, racial discrimination, torture, or crimes against humanity.

Human rights as *jus cogens*

48. It has sometimes been suggested that all non-derogable human rights are norms of *jus cogens*, since otherwise they would not be non-derogable. But that is too wide a proposition. Neither of the lists suggested recently by the International Law Commission, that of 2001 or that of 2006, includes among the norms of *jus cogens* any general category of "human rights" or "fundamental human rights " or "non-derogable human rights", as opposed to certain specific human rights, in particular the prohibitions of torture and slavery.

49. There are various reasons why a right may be non-derogable under one or more human rights treaties. These might include the strength of feeling in the region (for example, the prohibition of the death penalty, which is non-derogable under Protocols to the European Convention), or the fact that no one could think of circumstances in which derogation would be necessary (for example, the right not to be imprisoned for debt, which is non-derogable under the Covenant). What is non-derogable varies as between the different human rights treaties

50. The Security Council is most often accused of infringing the right to property, the right to a fair trial, and the right to a remedy in respect of these two rights. But these are not *jus cogens* norms. The right to property, though included in the Universal Declaration, does not appear in the Covenants; it is in a Protocol to the European Convention on Human Rights. The right to a fair trial is derogable, and clearly not a norm of *jus cogens,* at least not the right to a remedy in respect of a right that is not itself a norm of *jus cogens.*

V. PARTICULAR RESTRICTIONS

51. At this point, I planned to deal with a number of particular restrictions that have been suggested. But in view of the time I shall just mention them. They are self-determination; sovereignty; Statehood; territorial dispositions; the right of self-defence; and whether the Council can require a State to become, or remain, party to a treaty. No doubt those present can think of others.

VI. CHECKS AND BALANCES ON THE ACTIONS OF THE COUNCIL

52. Perhaps the most fundamental question for lawyers is whether and, if so, to what extent the Council is subject to controls. The Council has extensive powers; these are nevertheless subject to certain legal limits; but the Council is not clearly subject to any effective procedures by which the legality of it acts can be tested. Some see in this a grave flaw. For others, it is an important element in an effective collective security system. I shall try to show that the current position is not as bleak as some suggest.

53. Even if the legal limits on the Council are few, both in theory and more especially in practice, and the opportunities for them to be tested sporadic and uncertain, that does not mean that the Council is likely to act in an untrammelled and wilful manner. There are checks and balances within the system, perhaps not as widely understood as they should be, sometimes perhaps deliberately overlooked.

54. Even before a proposal is put to Council members, there is (usually) a degree of self-restraint. It must frequently happen that those in capitals, assisted by their New York Missions (and lawyers in capitals and New York), conclude that it would not be sensible to propose a particular course of action to the Council. The reasons are many: that the action will not secure the requisite majority, or will be vetoed; that the action, even though it might pass, would set an unfortunate precedent; that it might weaken the legitimacy of the Council, not be effective, and/or tend to undermine the Council's authority; or that the proposed action would, or would be widely seen to be, outside the Council's powers.

55. A principal check, indeed day-to-day *the* principal check, is the Council's decision-making procedure. This too is not always appreciated outside the Council. Even if they were agreed among themselves, the permanent members would need a minimum of nine out of the 15 votes is needed for a decision, which means that any seven members can block. Even if they are agreed among themselves, the permanent members need the support of at least four of the ten non-permanent members. In any event, most Council resolutions are adopted unanimously, or with very high majorities, and Presidential statements must in practice command unanimous support.

56. The second aspect of decision-making is, of course, the veto of each of the five permanent members. There have been far fewer vetoes cast since the end of the Cold War than in previous decades. But the "hidden" veto – the threat to veto - is doubtless still deployed behind the scenes, though even there it may be unspoken or only hinted at. The veto is no doubt most often deployed for reasons of immediate national interest, but it may also be used for reasons of principle, including a permanent member's view of the proper role of the Council.

57. A possible legal constraint on the Council is that, as an organ of the United Nations, its actions may involve the international (or domestic) responsibility of the Organization or, under certain circumstances, possibly even the responsibility of individual Members of the United Nations (including, but not limited to, the members of the Security Council). As the Council becomes more interventionist, the occasions on which the international responsibility of the United Nations may be incurred will increase. What is, of course, generally lacking is any procedure to enforce that responsibility – the same is still largely true of State responsibility. The current work of the International Law Commission on the responsibility of international organisations, under its Special Rapporteur, Professor Giorgio Gaja, may be of particular significance. Among other things, the International Law Commission has under consideration the question whether a Member of the United Nations may be liable as a result of acts of the Security Council.

58. There have been a number of attempts to challenge, directly or indirectly, decisions of the Security Council in international and domestic courts. The question of a possible 'judicial review' of Security Council resolutions by the International Court of Justice

has, as we have already seen, occasioned much debate. As Sir Eli Lauterpacht pointed out as early as 1965 –

> "[Municipal law analogies are] more misleading than enlightening in the context of a Court that which cannot make the Council a party to a binding judgment, whose judgments are binding only as to the States parties to a contentious case and which can only be enforced by the very party it would be criticising (namely the Security Council)."[9]

It seems to be widely accepted that the International Court has no power of direct judicial review such as is found in many national legal systems; but it may have some power of indirect review, where the legality of the Council's actions arises incidentally in the course of deciding the case or giving the opinion before it. That remains controversial.

59. In both the *Expenses* and the *Namibia* Advisory Opinions, the International Court was invited to consider the lawfulness of acts of the political organs of the United Nations. But it was only following the Provisional Measures phase of the *Lockerbie* cases that academic writings on the subject proliferated. The Court declined to exercise a power of review over a Security Council resolution, but some read its Order as suggesting that the possibility of review is not excluded. The issue was not decided before the proceedings were discontinued. There were nevertheless some interesting things said. For example, Judge *ad hoc* Sir Robert Jennings, in his Dissenting Opinion at the Jurisdiction and Admissibility stage, said:

> "When, therefore, as in the present case, the Security Council, exercising the discretionary competence given to it by Article 39 of the Charter, has decided that there exists a "threat to the peace", it is not for the principal judicial organ of the United Nations to question that decision, much less to substitute a decision of its own, but to state the plain meaning and intention of Article 39, and to *protect* the Security Council's exercise of that body's power and duty conferred upon it by the law; and to protect the exercise of the discretion of the Security Council to

[9] E Lauterpacht, "The Legal Effect of Illegal Acts of International Organizations", *Cambridge Essays in International Law* (1965), 88.

> "decide what measures not involving the use of armed force are to be employed to give effect to its decisions".”

60. The question arose also in the *Genocide Convention* case brought by Bosnia against Serbia. Again the Court was not called upon to decide the issue. However, Judge *ad hoc* Lauterpacht took the opportunity to say –

> “that the Court’s power of judicial review is limited. That the Court has some power of this kind can hardly be doubted, though there can be no less doubt that it does not embrace any right of the Court to substitute its own discretion for that of the Security Council in determining a threat to the peace, a breach of the peace or an act of aggression, or the political steps to be taken following such a determination.”

61. While the question has not arisen in other proceedings before the International Court, it has before other international tribunals. In *Tadić*, the first case before the Yugoslav Tribunal, the Trial Chamber (not unreasonably) found that it did not have jurisdiction to determine the lawfulness of the resolution by which it was established, while nevertheless saying that it clearly was lawful (thus adopting an approach similar to that of the Nuremberg Tribunal). The Appeals Chamber took a different line, claiming that it was empowered to determine the lawfulness of its founding resolution. The Court of First Instance of the European Communities in the *Kadi* line of cases also seemed to think it had the power to determine, for the purpose of the case before it, the lawfulness of a Security Council resolution, though only as regards its conformity with *jus cogens* norms.

62. There have been a number of attempts to challenge Council acts in domestic courts. I have time to mention only one, the challenge by Milosević in the Dutch courts in 2001 to the legality of the establishment of the Yugoslav Tribunal, which received short shrift. Nevertheless, the District Court in The Hague, unnecessarily it has been suggested, examined briefly whether the Tribunal had been lawfully established by the Security Council, and whether it was an impartial tribunal within the meaning of Article 6 of the European Convention on Human Rights.

63. Successful judicial review of Security Council actions in domestic courts (including among "domestic courts" for this purpose the courts in Luxembourg) seems unlikely in practice. More likely is review of national measures implementing resolutions. Nevertheless, the possibility of judicial review by domestic courts raises an important issue of principle. If the system of collective security is to be effective, it cannot be for individual States (or entities like the European Community) to determine for themselves whether a resolution of the Council is valid or not. And that is true for their courts, just as much as for the executive and the legislature.

64. The ultimate check on the Council would be if States simply refused to carry out its decisions, either because they considered them to be illegal and so not binding, or for other reasons (that the Council is "illegitimate", for example). Some commentators even seem to encourage such a course. Fortunately, examples have been rare in practice, but the issue involved is crucial. In particular, do Members of the United Nations (including their courts) have the right to make their own assessment of the legality of decisions of the Council and, if they conclude that they are not lawful, ignore them? If they do have that right, where does that leave the collective security system established by the Charter? My response would be that States do not have the right to do this, and would be acting unlawfully if they purported to exercise such a right. But they do, of course, have the ultimate option as a matter of policy of simply disregarding obligations imposed by the Council, with all the consequences, political and legal, that might flow from such a course of action. That is why the Council needs to exercise self-restraint and use its undoubted powers responsibly and only where it really is necessary to do so in order to ensure prompt and effective action to maintain international peace and security.

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