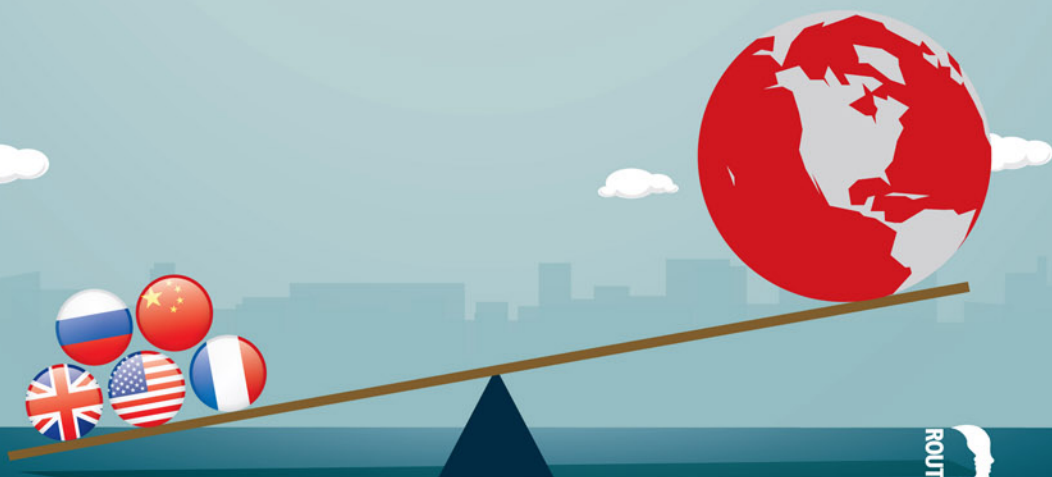


THE RULE OF LAW IN THE UNITED NATIONS SECURITY COUNCIL DECISION-MAKING PROCESS

Turning the Focus Inwards

SHERIF A ELGEBEILY



The Rule of Law in the United Nations Security Council Decision-making Process

The UN Security Council is entrusted under the UN Charter with primary responsibility for the maintenance and restoration of international peace; it is the only body with the power to authorise military intervention legally and impose international sanctions where it decides. However, its decision-making process has hitherto been obscure and allegations of political bias have been made against the Security Council in its responses to potential international threats. Despite the rule of law featuring on the Security Council's agenda for over a decade and a UN General Assembly declaration in 2012 establishing that the rule of law should apply internally to the UN, the Security Council has yet to formulate or incorporate a rule of law framework that would govern its decision-making process.

This book explains the necessity of a rule of law framework for the Security Council before analysing existing literature and UN documents on the domestic and international rule of law in search of concepts suitable for transposition to the arena of the Security Council. It emerges with eight core components, which form a bespoke rule of law framework for the Security Council. Against this framework, the Security Council's decision-making process, since the end of the Cold War, is meticulously evaluated, illustrating explicitly where and how the rule of law has been undermined or neglected in its behaviour. Ultimately, this book concludes that the Security Council and other bodies are unwilling or unable to adequately regulate the decision-making process against a suitable rule of law framework, and argues that there exists a need for the external regulation of Council practice and judicial review of its decisions.

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*To the one who arrived last first;
And the one to whom belongs my future;
And the ones to whom I owe my beginning;
And the shadow who shall follow me forever.*



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Definitions and abbreviations

Assembly/UNGA	United Nations General Assembly
Chapter VII	United Nations Charter, Chapter VII
Charter	United Nations Charter (1945)
Council/UNSC	United Nations Security Council
CTC	United Nations Counter Terrorism Committee
Daesh	Al-Dawla Al-Islamiya fi al-Iraq wa al-Sham (Islamic State in Iraq and the Levant), also referred to as Islamic State or ISIS
DPRK	Democratic People's Republic of Korea
DRC	Democratic Republic of Congo
EU	European Union
GDP	Gross Domestic Product
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
MONUSCO	UN Stabilization Mission in the Democratic Republic of the Congo
NGO	Non Governmental Organisation
OHCHR	Office of the High Commissioner for Human Rights
P5	Permanent Five
Res	Resolution
Russia	The Russian Federation
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNJHRO	United Nations Joint Human Rights Office (DRC)
UNMIBH	United Nations Mission in Bosnia Herzegovina
UNMIL	United Nations Mission in Liberia
US	United States of America
USSR	Union of Soviet Socialist Republics



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Introduction

The rule of law has become synonymous with principles of democracy, equality, freedom, good governance and other elements of a civilised society, which are generally agreed to be beneficial to mankind. Similarly, the United Nations may conjure up images for many of a utopian ideal that values strength in diversity and leads the way in impartiality of procedure and composition. After all, the General Assembly offers in its structure, amongst other benefits, a means of placing less developed nations on a par with industrialised states: Nauru and China on the same stage despite their massive size difference; the DRC alongside the United States despite their divergent respective GDPs; and states openly hostile towards one another such as Iran and Israel viewed equally in the Assembly chamber and granted equal rights. Indeed, even the seating arrangement of states, ordered alphabetically and in proximity to the front rotated based on a ballot, is swimming in even-handedness and fairness. However, whereas UN member states in the General Assembly are equally represented, meaning each has a single vote irrespective of size, population, economic size or other distinguishing feature, the Security Council is an inherently different system altogether.

Although not in contradiction to international principles of state sovereignty owing to the fact that all members of the UN have voluntarily chosen to be bound by the UN Charter, which itself regulates the Security Council mechanism, the Council can appear this way at first glance. The Council is formed of 15 members,¹ only 10 of which are alternated every two years on a staggered basis: five each year. The remaining five permanent members are equipped with the power unilaterally to prevent a resolution from even coming into existence through the power of veto.² Furthermore, the Council has been mandated by the UN Charter to maintain the international peace and security by any means necessary, including, but not limited to, the use of sanctions and the use of force. Recent decades have seen the definition of international *peace and security* expand, although not without concern by member states, non-governmental organisations and scholars.³

Thus, with one-third of seats within the organ occupied by permanent members wielding the veto and the Security Council's apparently unfettered powers to subject UN member states to legally binding obligations without their consent,⁴ the Council is far from proportionally representative or equal in its composition. Calls for reform have fallen on deaf ears for decades, with the exception of token

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changes such as the 1963 expansion of the number of non-permanent seats on the Council from 6 to 10, bringing the total from 11 to 15 members.⁵

It would seem, then, that despite purporting to be an organ that claims to represent the entirety of the United Nations member states, the Council must be accepted as a flawed system, at least from the perspective of the proportional representation, standards of equality and other democratic principles that the General Assembly displays. Perhaps more concerning than the flawed system itself is the notion that Council action is not subject to any adjudication, review, standards of accountability or other elements of what those involved in the fields of law, politics and international relations might term *the rule of law*.

However, this situation seemed to be on the cusp of change earlier this decade when, on 24 September 2012, the UN General Assembly adopted a landmark declaration that ‘the rule of law applies to all states equally, and to international organisations, *including the United Nations and its principal organs*, and that *respect for and promotion of the rule of law and justice should guide all of their activities* and accord predictability and legitimacy to their actions’.⁶ After years of debate on UN reform and discussion on how the rule of law can be internationalised, the question transitioned from *whether* the rule of law should be applied to the United Nations and its organs to *how* this can be done.

The UN Charter allows the Security Council to set its own agenda in maintaining international peace and security, without defining the term or giving it a specific mandate with respect to armed conflict or any other definition. While the expansive nature of a ‘threat to the peace’⁷ can be argued to have evolved since 1945 – when the Council was established – from the perspective of an inquisitive and legal researcher, the lack of oversight or monitoring of its decisions is a metaphorical thorn in the side. The competence of the Council to self-regulate as well as regulating others, such as appointments to the International Court of Justice⁸ and the post of Secretary-General of the UN,⁹ allows it a great deal of freedom without the type of review one may traditionally associate with comparable domestic organisations.¹⁰ Similarly, as arguably the closest organisation to a ‘world government’, with the power to impose economic sanctions, military intervention and, most recently, criminal sentences,¹¹ the Council does not benefit from the impartiality and separation of powers that a domestic government that abides by the principles of a rule of law might.

To add to this situation, the focus of the United Nations, as well as other international organisations and governments, has shifted increasingly towards the establishment of the rule of law. It is found in the doctrines, resolutions, statements and official records of the United Nations at all levels and has been cited as one of the core foundations for peace and security. Indeed, since 2004, the rule of law has increasingly featured on the agenda of the Security Council itself and held numerous thematic debates on the subject;¹² yet it was only recently that the United Nations began looking internally when discussing the rule of law and even more recently that any action was taken in moving the United Nations towards compliance with a rule of law. In the aftermath of the General Assembly’s 2012

declaration on the rule of law, I examine how the rule of law can be applied to the Security Council, what it would be comprised of, how it can inform decisions taken under Chapter VII of the UN Charter dealing with threats to the international peace and the extent to which it has shaped Council policy in recent years and decades.

This book does not primarily seek explicitly to trace an evolution in practice, although evolving practices will indicate a willingness of the Security Council to change its approach to responding to threats to the international peace as well as the UN's – and by extension the Council's – ability to self-reflect on the most appropriate methods of upholding its responsibilities under the UN Charter. Rather, this book primarily focuses on the establishment of a bespoke rule of law for the Council and the comparison of Council behaviour with this rule of law. Therefore, owing to the concept of peace and security and its development throughout the decades since the establishment of the United Nations, I have chosen primarily to limit the scope of this book to resolutions dating from 1990 – after the fall of communism and the collapse of the USSR – which over the course of my research I have found to be more illustrative of modern Council practice.¹³

First, the end of the Cold War appears to be a point that scholars agree constituted a great shift in Security Council politics and heralded the beginning of an increased activity on its part in the maintenance of international peace and security.¹⁴ The impact of the Cold War on the work of the Council is starkly contrasted with a post-Soviet Security Council, exemplified most clearly by the juxtaposition of the paralysis suffered prior to 1990 to the cascade of Council-mandated and related activity on the front of peacekeeping activities,¹⁵ adopted Council resolutions,¹⁶ proliferation of subsidiary bodies¹⁷ and significant decline in the number of vetoes used by P5 member states;¹⁸ this increased cooperation of the Council members after 1990 is sure to have impacted on the stance and behaviour of its decision-making process.

Secondly, to discuss the threat to international peace from the early 20th century, in the aftermath of the Second World War, at the height of the Cold War or prior to the expansion of the definition of a *threat* by the Security Council would be irrelevant; ultimately, the emergence of new threats to international peace¹⁹ and a greater focus on the impact of intra-state conflict on regional stability rather than the now antiquated inter-state conflicts²⁰ highlights that the international arena the peace of which the Council is tasked to maintain or restore has change drastically.

Thirdly, this work must endeavour to remain relevant and contemporary – the decision-making process of the Security Council may well have changed over the course of 70 years and to identify a pattern in the mid-20th century that no longer exists would produce no answers as to the extent to which the Council maintains the rule of law today. As a result, the focus of this research must be relatively recent and (just over) a quarter of a decade appears a naturally suitable period of time for examination, while also allowing sufficient scope for detailed and varied illustrations of Council behaviour.

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Finally, it would be remiss to attempt to impose a standard of the rule of law, mention of which as a concept itself only appeared on the Security Council agenda at the advent of the new millennium, with the standards of the Charter drafters at San Francisco in 1945; as a concept only recently acknowledged as applying internally to the UN system, there would be little use in measuring the decision-making process of the Council against a standard that did not exist a quarter of a century ago. Such analysis would attempt an *ex post facto* critique of the Council that violates the principle of *nullem crimen sine lege*.

Nonetheless, there remains a vast quantity of Security Council material for comparison and numerous conflicts and threats that are ripe for discussion. Even within the period 1990 onwards the Council has passed over 1600 resolutions,²¹ which seems a wealthy pool of resources from which to derive patterns of behaviour and, most importantly, timely, relevant and pertinent examples.

Notes

- 1 UN Charter (1945) art 23(1).
- 2 *ibid* art 17(3).
- 3 See eg Jacob Cogan, 'Noncompliance and the International Rule of Law' (2006) 31 *Tale Journal of International Law* 189; Simon Chesterman, 'The UN Security Council and the rule of law: the role of the Security Council in strengthening a rules-based international system: final report and recommendations from the Austrian Initiative, 2004–2008' (Institute for International Law and Justice 2008) 33; Jared Schott, 'Chapter VII as exception: Security Council action and the regulative ideal of emergency' (2008) 6(1) *Northwestern Journal of International Human Rights* 24; Björn Elberling, 'The *ultra vires* character of legislative action by the Security Council' (2005) 2 *IOLR* 337.
- 4 See eg UNSC Res 2304 (12 August 2016) UN Doc S/RES/2304; UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970; UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593; and UNSC Res 955 (8 November 1994) UN Doc S/RES/955.
- 5 UNGA Res 1991A (1963) UN Doc A/RES/17/1991A.
- 6 Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UNGA Res 67/1 (2012) UN Doc A/RES/67/1 para 2 (emphasis added).
- 7 UN Charter (n 1) art 39.
- 8 Statute of the International Court of Justice (1945) art 4(1).
- 9 UN Charter (n 1) art 97.
- 10 Domestic governments are traditionally subject to checks and balances to ensure that the rule of law is maintained effectively.
- 11 The subsidiary organs of the ICTY and ICTR, in addition to the ICC to which the Council may refer situations under Rome statute art 16, are enabled with the power to hand down criminal sentences to convicted parties. This is attributable to the Security Council and thus, indirectly, the Security Council has granted itself the power to hand down criminal sentences. For imputability of actions of a subsidiary to an organ back to the parent organ, see generally, Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press 2011) and Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford University Press 1999).

- 12 See eg UNSC Presidential Statement 15 (2003) UN Doc S/PRST/2003/15; UNSC Presidential Statement 2 (2004) UN Doc S/PRST/2004/2; UNSC Presidential Statement 32 (2004) UN Doc S/PRST/2004/32; UNSC Presidential Statement 30 (2005) UN Doc S/PRST/2005/30; UNSC Presidential Statement 28 (2006) UN Doc S/PRST/2006/28.
- 13 Some analysis of resolutions prior to this will be necessary to derive Council interpretation of its mandate and powers at the time of and shortly after its establishment. For example, the Council's approach to its reform, its transparency, its interaction with other UN organs and the use of the veto are not issues that must be necessarily temporally limited.
- 14 See eg Susan Lamb, 'Legal limits to UN Security Council powers' in Guy Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford University Press 1999) 361; Antonios Tzanakopoulos, 'Transparency in the Security Council' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2012) 368; Björn Elberling, 'The *ultra vires* character of legislative action by the Security Council' (2005) 2(2) *International Organizations Law Review* 337; John Dunbabin, 'The Security Council in the wings: exploring the Security Council's non-involvement in war' in Vaughan Lowe and others (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945* (Oxford University Press 2010) 495.
- 15 Between 1990 and 1994, the UN's annual peacekeeping budget rose from US\$500 million to over US\$3 billion; during the same period, the number of peacekeepers deployed rose from 10,000 to 70,000 troops. See Security Council Report, 'UN peacekeeping: deployments and budgets, 1946–2013' (2014).
- 16 In the years 1985–89, 87 resolutions were passed – an average of 17 every year; in the period 1990–1994, a total of 323 resolutions were passed – around 64 every year.
- 17 There are only a handful of existing subsidiary organs that date back prior to 1990: three standing committees (the Committee of Experts (1946); the Committee on Admission of New Member States (1946); and the Committee on Meetings away from UN Headquarters (1972)) and one Charter-mandated subsidiary body (the Military Staff Committee (1946)). Since 1990 the Council has created three ad hoc committees (the UN Compensation Committee (1991), the Counter-Terrorism Committee (2001) and the Weapons of Mass Destruction Committee (2004)), three ad hoc International Tribunals (the ICTY (1993), the ICTR (1994) and the International Residual Mechanism (2010)), six working groups (on Peacekeeping operations (2001), on Resolution 1566 (2004), on Children and Armed Conflict (2005), on Conflict Prevention and Resolution in Africa (2002), on Documentation and other Procedural Questions (1993), on International Tribunals (2000)) and 13 sanctions committees (on Somalia and Eritrea (2002, 2009), Al-Qaeda (1999, 2011), the Taliban (2011), Iraq (2003), Liberia (2003), Democratic Republic of Congo (2003), Côte d'Ivoire (2004), Sudan (2005), Lebanon (2005), Democratic People's Republic of Korea (2006), Iran (2006), Libya (2011) and Guinea-Bissau (2012)).
- 18 In 1989 the same number of veto votes were cast as throughout the entire decade of the 1990s (9 in total); the 1970s saw 51 vetoes and the 1980s saw 72, while the 1990s saw only 9 and the 2000s saw 16.
- 19 See eg non-proliferation, international terrorism, climate change, gender inequality and others.
- 20 Typified by the discussions and responses of the Council on and to the former Yugoslavia, Rwanda, Libya, Syria, Kosovo, Iraq, Haiti and numerous other internal state conflicts.

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- 21 Figures calculated through the author's own analysis of UN documents. There were 646 resolutions passed between the years 1946 and 1989; since then there have been over 1600 resolutions passed.

Part I

Defining the rule of law for the Security Council: how, why and what?



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