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'I'll Take Manhattan': The International Rule of Law and the United Nations Security Council

*Simon Chesterman**

Frequent agreement on the rule of law in theory is possible in large part because of divergent views on what it means in practice. This essay briefly addresses the content of the rule of law at the international level before discussing the challenge to this idea presently posed by the United Nations Security Council — the one international body with the power to enforce the law, but which is nevertheless loath to submit to it.

It seems peculiarly appropriate that *The Hague Journal on the Rule of Law* consider the nature and possibility of the rule of law at the international level. As home to the International Court of Justice, the International Criminal Court, and some 150 other international legal organizations, The Hague's skyline encapsulates efforts through the twentieth century to subject international affairs to judicial rather than merely political or military processes. And yet these institutions exercise a jurisdiction that is essentially voluntary. Does it make sense, then, to speak of moves towards the rule of law at the international level?

Predictably, that depends what one means by 'rule of law'. In theory, at least, there is little dissent to the *idea* of the rule of law. Reflecting academic endorsement of the rule of law on the left and right, the term is embraced by both the World Social Forum and the World Bank. Most prominently, at UN Headquarters in New York in September 2005 every member state of the United Nations acknowledged the need for 'universal adherence to and implementation of the rule of law at both the national and international levels' and reaffirmed its commitment to 'an international order based on the rule of law and international law'.¹

What, if anything, did the entire world agree on? Secretary-General Kofi Annan, a year earlier, had offered a very broad definition of the rule of law, which he described as 'a concept at the very heart of the Organization's mission':

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¹ 2005 World Summit Outcome Document, UN Doc. A/RES/60/1 (16 September 2005), available at <http://www.un.org/summit2005>, para. 134.

It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.²

This expansive definition — thick with human rights, fairness, participation — almost certainly goes beyond what states would actually implement, and is suggestive of the conceptual and political hurdles confronting the rule of law at the international level.

Conceptually, one might distinguish between three separate meanings of the rule of law.³ In the first place, the *international rule of law* might be understood as the application of rule of law principles to relations between states and other subjects of international law. This is how the term is typically understood and was memorably invoked by U.S. President George H.W. Bush in 1990 prior to the expulsion of Iraq from occupied Kuwait. The end of the Cold War, he asserted, had made possible a world in which ‘the rule of law would supplant the rule of the jungle.’⁴ (The irony of the impact on the rule of law of his son’s adventures in Iraq need not be laboured.)

Secondly, however, the *rule of international law* could be seen as privileging international law over national law, establishing, for example, the primacy of ‘human rights norms and standards’ over domestic legal arrangements. This might apply to certain regional organizations, most notably the European Union, or perhaps be read into the doctrine of Responsibility to Protect, according to which the ‘international community’ reserves the right to act when states are ‘manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.’⁵ That doctrine, like the rule of law, was unanimously endorsed at the September 2005 UN

² The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (Report of the Secretary-General), UN Doc. S/2004/616 (3 August 2004), available at <http://documents.un.org>, para. 6.

³ This essay will not examine efforts in international forums to promote the rule of law at the domestic level. On this topic, see S. Chesterman, ‘An International Rule of Law?’, 56 *American Journal of Comparative Law* (2008), pp. 343-350 and sources there cited.

⁴ G.H.W. Bush, ‘Address Before a Joint Session of the Congress on the Persian Gulf Crisis and the Federal Budget Deficit’ (Washington, DC, 11 September 1990), available at http://millercenter.virginia.edu/scripps/diglibrary/prezspeeches/ghbush/ghb_1990_0911.html.

⁵ World Summit Outcome Document, *supra* n. 1, para. 139. See generally International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre, Ottawa, December 2001), available at <http://www.iciss.ca>.

Summit — though when it was invoked by name in Darfur and Myanmar some governments appeared to express degrees of buyer's remorse.

Thirdly, a *global rule of law* might denote the emergence of a normative regime that touches individuals directly without formal mediation through existing national institutions. This has been suggested by the rise of governance regimes that fall outside traditional domestic and international legal categories and has been the subject of considerable study under the title 'global administrative law'.⁶ It remains at an early stage of development, however. For the time being, justice and order will continue to be pursued — at least in the first instance — through the global organization of well-ordered states.

Typically it is the first meaning that is intended, but these questions are additional to the ones that usually bog down theoretical examinations of the rule of law — the thick/substantive, thin/formal debates and variations thereon; the relationship between law and development; and so on. At the international level, a relatively 'thin' conception seems both most likely to gain widespread acceptance across cultures as well as being more precisely attuned to the distinct problems confronting law at the international as opposed to domestic level. Whereas the historic challenge in domestic legal orders has been to rein in the powers of a sovereign and protect the interests of natural persons, for international law the challenge is to coordinate states that enjoy sovereign equality. Attempting to incorporate substantive norms of human rights, democracy, or particular economic policies as a kind of Trojan horse has tended to cultivate misunderstanding, while also ignoring the specific benefits that a pared down understanding of the rule of law offers.

Those benefits include avoiding arbitrariness in the exercise of power, submitting international coercive processes to judicial review, and more general and consistent application of the law.⁷ The need for such principles to be applied at the international level — and the political barriers to doing so — can be seen in the crisis of legitimacy that has been developing in the past decade around the UN Security Council.⁸

The UN Charter established the Security Council as a political organ with primary responsibility for international peace and security. Like other institutions in the UN system, it was given the responsibility for determining its own competence: its decisions are binding on all states but not subject to formal review by any other institution. It is generally regarded as the most powerful and important international institution, though for many years the political tensions of the Cold War made those powers more theoretical

⁶ See B. Kingsbury, N. Krisch, and R.B. Stewart, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* 68 (2005).

⁷ Chesterman, *supra* n. 3, pp. 359-360.

⁸ See generally The UN Security Council and the Rule of Law, UN Doc. A/63/69-S/2008/270 (2008), available at <http://documents.un.org>. The following text draws on a few passages first written by the author for this report.

than real. In its first 44 years, for example, 24 Council resolutions cited or used the enforcement powers contained in Chapter VII of the UN Charter; by 1993 the Council was adopting that many such resolutions every year. The Council has also expanded the range of its activities, including the establishment of international criminal tribunals, the maintenance of complex sanctions regimes, the protection of civilians, and the temporary administration of territory. Following the September 11, 2001, attacks in the United States, the Council assumed even greater importance in combating terrorism and the proliferation of weapons of mass destruction.

In this way the Security Council has grown beyond its initial role as a political forum and frequently serves important legal functions: establishing binding rules of general application, making determinations of law or fact, and overseeing the implementation of its decisions. These new roles — as legislator, judge, and executive — have made possible swift and decisive action in response to perceived threats to international peace and security on the basis of international law. At the same time, however, they have raised questions about the legal parameters that determine the limits of the Council's powers and what restrictions, if any, apply to its exercise of discretion.

One area of particular concern has been the use of targeted sanctions. First used in the 1990s to limit the collateral impact of economic sanctions — notably the humanitarian consequences of the embargo on trade with Iraq through that decade — these are intended to put pressure on specific individuals or limit their ability to undermine international peace and security, such as through the financing of terrorism.

The regimes successfully reduced humanitarian concerns but came to be criticized for the manner in which individuals are selected for such measures without either transparency or the possibility of formal review: utilitarian anxiety was replaced by questions of natural justice. Challenges have arisen in a number of forums, most prominently the European Courts. In *Yusuf, Kadi*, and other cases, 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 and Taliban Sanctions Committee violated their rights. The Court of First Instance decided in 2005 it could review decisions of the Security Council only within the narrow parameters of *jus cogens*. Beyond that, the judges noted that there was no international review mechanism available to the applicants.⁹ In September 2008, however, the European Court of Justice held that, while it did not purport to review Council resolutions as a matter of international law —

⁹ *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (Court of First Instance of the European Communities, Case T-306/01, 21 September 2005); *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* (Court of First Instance of the European Communities, Case T-315/01, 21 September 2005); *Faraj Hassan v. Council of the European Union and Commission of the European Communities* (Court of First Instance of the European Communities, Case T 49/04, 12 July 2006); *Chafiq Ayadi v. Council of the European Union* (Court of First Instance of the European Communities, Case T-253/02, 12 July 2006). Cases available at <http://curia.eu.int>.

even with respect to norms of *jus cogens* — it could nevertheless review the lawfulness of the Community act intended to give effect to those resolutions.¹⁰ As the European regulation in question violated fundamental rights (effective judicial protection and respect for property) it was struck down. Nevertheless, as annulment with immediate effect ‘would be capable of seriously and irreversibly prejudicing the effectiveness’ of the measures imposed by the Council, the effects of the regulation would be maintained for three months.

The Court's decision can be seen as an attempt to increase the leverage on the Security Council to improve its procedures. At the 2005 World Summit, states had called upon the Council to ensure that ‘fair and clear’ procedures exist for the listing and delisting of individuals and entities on targeted sanctions lists.¹¹ In 2006 Secretary-General Annan cautioned that such sanctions will only remain useful to the extent that they are effective and seen to be legitimate; that legitimacy depends on procedural fairness and the availability of a remedy to persons wrongly harmed by such lists. He noted four basic elements that should serve as minimum standards for such a regime: the right to be informed of the case against a targeted individual, the right of that individual to be heard in response to that case, the right to review by an effective mechanism, and a requirement of periodic review of all such sanctions.¹²

Subsequent Council resolutions marked modest progress. Resolutions adopted in 2006 established a focal point to receive delisting requests and required a person to be informed of their designation on a list and outlining criteria to be considered in a request to be removed.¹³ None of these moves addressed the foundational concern that individuals were having their assets frozen without any formal process for review of how that decision was made, or the circumstances in which it could be revoked.

Following the European Court of Justice decision, there is now pressure on the Council to adopt such a process. The alternative is that sanctions will become ineffective and not be applied rigorously; indeed, the fact that some states are hesitant to submit new names to be included on sanctions lists and others are not seeking formal humanitarian exemptions may be evidence that this is happening already.¹⁴

Past practice of the Council offers a variety of possible forms the process might take. It could include a full appeal to a specially constituted tribunal (comparable to the

¹⁰ *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (European Court of Justice, Cases C-402/05 P and C-415/05, 3 September 2008), available at <http://curia.eu.int>, paras. 286-288.

¹¹ GA Res. 60/1 (2005), para. 109.

¹² The unpublished letter by the Secretary-General dated 15 June 2006 was referred to in the Security Council debate on 22 June 2006: UN Doc. S/PV.5474 (2006), p. 5.

¹³ SC Res 1730 (2006); SC Res 1732 (2006); SC Res 1735 (2006).

¹⁴ See, e.g., UN Doc. S/2007/677 (2007), para. 26; UN Doc. S/2006/154 (2006), Annex, para. 57.

various international criminal tribunals established by the Council), a form of administrative review (comparable to the UN Compensation Commission), a confidential review process (comparable to the Detention Review Commission created by the UN Mission in Kosovo in 2001), or an ombudsman institution (comparable to those established in Kosovo and East Timor).¹⁵ Given the political sensitivities involved, however, in practice the establishment of an independent quasi-judicial or administrative review seems difficult to achieve. In the short term, the most likely advance would be to support the decision-making process of the relevant sanctions committees in conducting their own review of listing and delisting decisions. This might include establishment of a small review panel of experts to examine delisting requests and make a recommendation to the Security Council committee.¹⁶ It is far from clear that this will satisfy the European Court of Justice, however, which called for the availability of ‘the review, in principle the full review, of the lawfulness’ of such measures.¹⁷

These difficulties are suggestive of problems that go well beyond the specific question of targeted financial sanctions. In the absence of political institutions with coercive powers comparable to the centralization of legal authority in the modern state, global challenges have fallen to the imperfect institutions that exist, most notably the Security Council. It has proven an extremely powerful instrument for promoting the rule of law, yet its members remain ambivalent about the application of that principle to its own activities.

This is not to say that the Council operates free of legal constraint. In strict legal terms, the Council’s 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 — respect for its decisions depends on respect for the Charter and international law more generally. The most important limitation on the Council’s powers is therefore self-restraint. In the absence of a constitutional court to sit in judgment of how that restraint is exercised, accountability, such as it is, tends to be exercised only through the possibility of extreme reactions: cutting off funding or disregarding Council resolutions.

¹⁵ Cf., Strengthening UN Targeted Sanctions Through Fair and Clear Procedures (Watson Institute for International Studies, Providence, RI, 30 March 2006), at <http://www.watsoninstitute.org/TFS>.

¹⁶ Cf., the initiative to strengthen targeted sanctions and due process by Denmark Liechtenstein, Sweden and Switzerland, which have put forward a proposal inspired by the example of the World Bank inspection panels to establish a review panel of three independent, impartial, and judicially qualified persons to review listing decisions. Petitioners may request a delisting decision through the focal point. The review panel may recommend to the sanctions committee either delisting or the rejection of the petition. The recommendations of the panel are to be made public. The final decision, however, would rest with the sanctions committee. See Discussion Paper on Supplementary Guidelines for the Review of Sanctions Committees’ Listing Decisions and Explanatory Memorandum (presented by Professor Michael Bothe at a Roundtable in New York on 8 November 2007).

¹⁷ *Yusuf and Al Barakaat*, *supra* n. 10, para. 326.

Such challenges to Council authority are blunt instruments and not to be entertained lightly. But they highlight the function of law in the context of Council action: not to serve as a wall but as a hedgerow; not to block Council decisions but to channel them away from danger.¹⁸ These challenges also suggest the work to be done at the international level if the rule of law is to be more than a slogan.

The dynamic that pushed these questions onto the international agenda, that set New York's institutions of global politics in opposition to The Hague's institutions of global law, can be traced in part to Manhattan's skyline, and the scars left there by terrorists in 2001. The work required at the international level reflects, in many ways, work still underway in even the most robust liberal democracies. For the rule of law, if it means anything, embodies a commitment to political ideals that apply in times of quiet but also — though it may tie our hands and frustrate our desire for action — in times of crisis.

In the case of the Security Council, considerations of effectiveness are more likely to move the key decision-makers. Yet the Council's effectiveness as a political actor and its legitimacy as a legal actor are connected: member states' preparedness to recognize the authority of the Council depends on how responsible and accountable it is, and is seen to be, in the use of its extraordinary powers. The playing out of this tension between effectiveness and legitimacy — between, one might say, Manhattan and The Hague — will determine the fate of an international rule of law.

¹⁸ I am grateful to David Caron for sharing his observations on these questions at a panel at UN Headquarters in New York in October 2005, and to the participants in a series of panels organized at the UN from 2004-2008. See further *The UN Security Council and the Rule of Law*, *supra* n. 8.