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The Security Council as a Legal Hegemon

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ARTICLES

THE SECURITY COUNCIL AS A LEGAL HEGEMON

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This article will examine the United Nations Security Council's efforts to implement, preserve, and universalize the obligations of the 1968 Nuclear Nonproliferation Treaty. This discussion will lead to questions regarding the Security Council's role and authority in the international legal system, and ultimately to a consideration of how the international legal system can better guarantee that the Security Council does not exercise an unwarranted degree of legal power at the expense of the member states of the United Nations.

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INTRODUCTION

In this Article I will discuss the United Nations Security Council's efforts to implement, preserve, and universalize the obligations of the 1968 Nuclear Nonproliferation Treaty (NPT). This discussion will lead to questions regarding the Security Council's role and authority in the international legal system, and ultimately to a consideration of how the international legal system can better guarantee that the Security Council does not exercise an unwarranted degree of legal power at the expense of the member states of the United Nations.

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The Security Council currently sees itself at the apex of authority in international security law, with essentially unlimited power to address situations that its controlling permanent members determine to be a threat to international peace and security, and to fashion whatever compulsory remedy it deems appropriate to this end. This is in fact a fairly recent development. For the first fifty-six years of its existence, the Security Council's own understanding of its role and authority under Chapter VII of the United Nations Charter was much more modest; analogous to that of an executive body, entrusted by all UN members with the responsibility and authority to maintain and restore international peace and security, primarily in cases where the generalized obligations of the UN Charter or other rules of international law had been breached. It understood that it was to use its powers under Chapter VII to authorize effective collective measures on a case by case basis, responding to the dynamics of international relations as they occurred, and through the passage of resolutions which authorized forceful or non-forceful measures, to be applied for a temporary duration as against the specific authors of threats to international peace.[1]

This more recent understanding by the Security Council of the scope of its authority is that the Council is empowered not only to act as an *executive body*, but rather also to act as a *legislative body* crafting proactive and permanent legal edicts covering important areas of international relations including terrorism (UNSC Resolution 1373[2]) and weapons of mass destruction proliferation (UNSC Resolution 1540[3]), and even further to act as a *judicial body* determining the legal rights and obligations of UN members (UNSC Resolutions 1874[4] and 1929[5]). This more recent understanding can be seen in embryonic form in the activity of the Security Council through the 1990s, for example in the creation of two *ad hoc* international criminal tribunals.[6] However, it began to be most obviously demonstrated after the attacks on September 11, 2001, with the passage of Security Council Resolution 1373.[7]

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1. DANIEL H. JOYNER, INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION 176-81 (2009).

2. *See* S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

3. *See* S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

4. *See* S.C. Res. 1874, U.N. Doc. S/RES/1874 (June 12, 2009).

5. *See* S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010).

6. The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

7. See Matthew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations*, 16 LEIDEN J. INT'L L. 593 (2003).

Indeed, as we will see in the case studies below in the issue area of nuclear nonproliferation and the NPT, the Security Council appears now to consider itself to possess ultimate and essentially unlimited legal authority—i.e. to represent something of a legal hegemon—by virtue of its UN Charter mandate to maintain and restore international peace and security. Authority, for example, to command a state to re-accede to a treaty from which that state has duly withdrawn, according to the treaty's terms. Authority to command a state not to take action that is recognized by a broadly subscribed treaty to be that state's "inalienable right." Indeed, the Security Council has for the past few years been so bullish in its attitude toward its own authority, and has ostensibly used that authority to trample on so many of the most important underlying principles of the international legal system, that we may need to begin seriously considering how the international legal system can protect states from the authoritarian Security Council, which the end of the Cold War, and the beginning of the War on Terror, have unleashed.

This paper will proceed with three case studies of Security Council activity in the nuclear weapons proliferation issue area, in which the Security Council will be argued to have demonstrated an understanding of its own unlimited legal authority, by acting in disharmony with fundamental principles of the international legal system. These case studies will include the passage of Security Council Resolution 1540 in 2004, as well as the respective state-specific cases of the nuclear programs of Iran and North Korea. The paper will then conclude with a consideration of how international law should respond to the Security Council's demonstrated claim to being essentially *legibus solutus* (unbound by law) in its exercise of its Chapter VII authority to maintain and restore international peace and security.

I. RESOLUTION 1540

The first case study to be considered is that of the passage of UN Security Council Resolution 1540, which was adopted by the Security Council on April 28, 2004. This resolution was passed, not coincidentally, shortly after the revelation in February 2004 of the existence of a long-standing clandestine nuclear materials smuggling ring headed by the father of Pakistan's gas centrifuge program, Dr. Abdul Qadeer Khan.[8] In Resolution 1540, the Security Council undertook to address a number of fundamental limitations of the existing weapons of mass

8. *See* Daniel Joyner, *International Legal Responses to WMD Proliferation*, *in* The GLOBALIZATION OF POLITICAL VIOLENCE 86, 96-97 (Christopher Hughes & Richard Devetak eds., 2007).

destruction (WMD) nonproliferation treaties and regimes system.[9]

In the Security Council meetings leading up to the passage of Resolution 1540, some of which were opened to comment from non-Council members, many states noted the need for such a resolution to close "gaps" in the coverage of existing nonproliferation treaty instruments.[10] One such gap identified by states during these meetings was the problem of the non-universality of the system, a result of the fact that nonproliferation treaties, as all treaties, are adopted only voluntarily by states, and that for a variety of reasons many states, including some of significant proliferation concern, have remained outside the nonproliferation legal and organizational system.[11]

A second major challenge to the nonproliferation treaties and regimes system is the fact that all existing restrictions within the regimes upon manufacture, possession, and trafficking in weapons-related technologies are addressed to states themselves.[12] Thus, at the international level there is no substantive restriction on private parties, including business entities as well as other non-state actors, engaging in any of these activities. The utility of Resolution 1540 in addressing this non-state actor gap in the nonproliferation treaties and regimes system was noted by numerous states, particularly in the context of international efforts to combat the phenomenon of terrorism.[13]

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9. *See* Masahiko Asada, *Security Council Resolution 1540 to Combat WMD Terrorism: Effectiveness and Legitimacy in International Legislation*, 13 J. CONFLICT & SECURITY L. 303, 313 (2009).

10. As a representative of New Zealand noted:

> [W]e place importance on the fact that the draft resolution would also impose restraints on those States that have deliberately chosen to stand outside the major disarmament and non-proliferation treaties to which most States, including my own, have committed themselves. This is a major gap that the draft resolution can begin to fill.

U.N. SCOR, 59th Sess., 4950 mtg. at 21, U.N. Doc. S/PV.4950 (Apr. 22, 2004) [hereinafter 4950th Meeting].

11. *See* Seema Gahlaut & Victor Zaborsky, *Do Export Control Regimes Have Member They Really Need?*, 23 COMP. STRATEGY 73 (2004); Barry Kellman, *Criminalization and Control of WMD Proliferation: The Security Council Acts*, NONPROLIFERATION REV., Summer 2004, at 143, 159; Jean du Preez, *The 2005 NPT Review Conference: Can It Meet the Nuclear Challenge?*, ARMS CONTROL TODAY, April 2005, at 6; Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 YALE J. INT'L L. 507, 518 (2005) [hereinafter Joyner *Initiative*]; *cf.* Asada, *supra* note 9.

12. *See* Joyner *Initiative*, *supra* note 11, at 519.

13. As a representative of Benin stated:

> I would like to thank the States that have requested the holding of this open meeting, which makes it possible for us to open to all Member States the debate on the danger of the acquisition and use of weapons of mass destruction (WMD) by non-State actors. This

The resolution addresses the non-state actor problem described above in operative paragraph 1, in which it provides that "all States shall refrain from providing any form of support to non-state actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery."[14] Furthermore, operative paragraph 2 provides that "all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them."[15]

It then addresses in operative paragraph 3 the problem of non-universality of nonproliferation law by directly imposing an obligation upon states to establish and maintain effective export control laws and regulations at the national level, "including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing . . . as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations."[16]

As in Resolution 1373 on international terrorism, passed in 2002, Resolution 1540 in operative paragraph 4 establishes a Committee of the Security Council to monitor the implementation by states of the obligations imposed by the resolution.[17] Although Resolution 1373 and Resolution 1540 were adopted in very different contexts and are meant to cover quite different, although of course related, areas of law, they share important similarities in structure as well as in legal import. These two resolutions have been claimed by some commentators to have ushered in a new age of Security Council jurisprudence and to

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danger relates above all to the emergence of non-State actors that vie with States for dominance in the area of violent force, a new phenomenon, a phenomenon that also highlights the existence of a legal void in the arsenal of contemporary international law and that calls for the community of nations to cooperate without delay to provide the means to prevent the danger.

4950th Meeting, *supra* note 10, at 12.

14. S.C. Res. 1540, *supra* note 3, ¶ 1.

15. *Id.* ¶ 2.

16. *Id.* ¶ 3(d).

17. *See* Happold, *supra* note 7, at 594; Asada, *supra* note 9, at 314.

have signaled an intent by the Council to act as a legislative body, in supplementation of its executive functions.[18]

There had before the passage of Resolution 1373 been other controversial acts of the Security Council which had caused debate on the topic of the proper role and powers of the Council.[19] Notable in this regard were the actions before the International Court of Justice stemming from the explosion of Pan Am flight 103 over Lockerbie, Scotland in 1988. However, although in the *Lockerbie* cases there was an allegation that the Council had overstepped its prerogatives under the Charter, there was no hint of legislative aspirations in the Council's actions.[20] The resolutions involved were clearly targeted against the acts and omissions of one state, Libya, and they set clear demands which, if met, would bring about the end of the mandate for exercise of Council authority. Thus, they were in keeping with the Council's understood role, if perhaps excessively bold in construction.

Because of the predominantly non-legislative characteristics of this and virtually all other Security Council decisions, it can be concluded that at the end of the decade of the 1990s, the Security Council had not yet passed a true piece of international legislation.[21] However, in the swelling of outrage and concern following the attacks of September 11, 2001, and, as has been alleged, with little foresight of the legal import of what they were doing, the Council passed Resolution 1373.[22] The Council passed this resolution not to respond specifically to the September 11 acts of terror themselves, nor to mete out any measure of punishment upon its perpetrators, nor to specifically target them or those states that aided and abetted them. The Council rather used the attacks as a backdrop and a catalyst for the establishment of a much broader and temporally indefinite normative regime addressing the subject of international terrorism.

The context of the passage of Resolution 1540 offers even less evidence of a specific situation of threat to international peace and

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18. *See* Happold, *supra* note 7, at 595; Paul Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 901-02 (2002).

19. *See e.g.*, Martii Koskenniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT'L L. 325 (1995); Keith Harper, *Does the United Nations Security Council Have the Competence to Act as a Court and Legislature?*, 27 N.Y.U. J. INT'L L. & POL. 103 (1994); Bernd Martenczuk, *The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?*, 10 EUR. J. INT'L L. 517 (1999) (discussing the validity of Chapter VII resolution in the *Lockerbie* cases).

20. *See* Martenczuk, *supra* note 19, at 525.

21. *See* Szasz, *supra* note 18, at 901-02; Happold, *supra* note 7, at 596; Martti Koskenniemi, *International Legislation Today: Limits and Possibilities*, 23 WISC. INT'L L. J. 61, 74 (2005).

22. *See* Happold, *supra* note 7, at 595.

security against which it is to be understood that the resolution operates, and to which it is to be understood to respond. Again, the revelation of the Khan network provided a circumstantial pretext which seemed to explain the prioritization of the subject of WMD proliferation and its address by the Council in Resolution 1540, but the resolution itself went far beyond simply responding to the existence of this network. It newly imposed a broad set of obligations upon all UN member states, which were purposed in changing permanently the structure and content of national legal systems.

These resolutions, simply put, cannot be described as *ad hoc* responses to events urgently arising in international politics. They are rather calculated, proactive, forward-looking normative creations. In both cases the Security Council simply determined that an entire class of actions, which have been and which may be in the future committed potentially by any state, constitute a threat to international peace and security. The Council then decided in each case that all UN member states shall take extensive measures, broadly prescribed in the resolutions, including changes to their national legal systems, in order to combat these ill-defined present and future threats. The obligations imposed under both Resolutions 1373 and 1540 are not temporally limited, either explicitly or implicitly. Their duration is clearly meant to be indefinite. Moreover, there are no specifically targeted states. The obligations imposed in the resolutions are stated in an abstract manner, so as to make their application clearly universal.

A. *The UN Charter and WMD Nonproliferation Law*

The United Nations Charter makes no mention of the term "proliferation" and makes no distinction in the language of its provisions as between conventional and non-conventional (i.e. nuclear, chemical, and biological) weapons. The Charter rather uses the terms "disarmament" and the "regulation of armaments" in three of its articles; Article 11(1), Article 26, and Article 47.[23] These provisions address the subject of the regulation of military armaments generally through international law, as such technologies existed and were maintained in national arsenals at the time of the drafting of the Charter.[24] The UN Charter system that these provisions comprise was constructed to address issues of international arms control and to facilitate the generation of international law to regulate this issue-area.

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23. U.N. Charter arts. 11, 26, 47.

24. *See* Daniel Cheever, *The U.N. and Disarmament*, 19 INT'L ORG. 463 (1965).

Article 11(1) is a further specification of the general powers of consideration and recommendation granted to the General Assembly in Article 10.[25] The General Assembly under Article 11(1) is to consider "general principles of cooperation in the maintenance of international peace and security," a power that should be read to include consideration of abstract, general ideas about how member states should work together, and fundamental principles that should underpin the legal relationships that bind states in this area.[26] This power is apposite the General Assembly due to its character as the essential deliberative organ of the UN, and the only UN body comprised of all members of the organization, thus allowing the broadest possible spectrum of interests and perspectives to have input into the formulation of these basic principles governing state cooperation in international arms control efforts.[27]

The role of the Security Council in this system is specified in Article 26, which provides:

> In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.[28]

A number of points regarding the Security Council's role under Article 26 bear mention. First is to observe that Article 26, in addition to conferring powers and function upon the Security Council, also establishes responsibilities for the Council in carrying out its complementary role with the General Assembly in the exercise of its Article 11(1) powers.[29] The Council is given responsibility, on the basis of the recommendations of "general principles of cooperation" it receives from the General Assembly, and with the assistance of the Military Staff

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25. *See* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 277-78 (Bruno Simma et al. eds., 2d ed. 2002) [hereinafter U.N. COMMENTARY].

26. *See id.* at 277-80.

27. *See generally* Louis B. Sohn, *Enhancing the Role of the General Assembly of the United Nations in Crystallizing International Law, in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY 549, 557-58 (Jerzy Makararczyk ed., 1975).

28. U.N. Charter art. 26.

29. *Id.*

Committee, to formulate concrete plans in order to implement the general principles recommended by the Assembly.[30] These plans are to compose a coherent "system" for the regulation of armaments, which would imply that the plans to be authored by the Council using this power are not to be situation-specific, as in the case of an *ad hoc* response to a discrete event in international affairs. Rather, these plans are to form the basis for a universally applicable, enduring system of "practical and effective" international arms control.[31]

It should be emphasized that the Security Council under Article 26 only has the power to formulate plans. It must then submit those plans to the member states of the United Nations for their approval and for establishment through multilateral treaty as actual legal principles governing their relationships with each other.[32] The Security Council's plans in and of themselves have no binding force upon members and are merely hortatory offerings, although endowed with the gravitas of having been generated through the Charter system for creation of arms control law.[33] Members may however choose either to accept or reject these plans, in analogous fashion to the ratification of UN-approved treaties by member states. As Hans Kelsen has observed:

> [W]ith respect to Article 26 of the Charter . . . the "plans" formulated by the Security Council "for the establishment of a system for the regulation of armaments" may provide for reduction of armaments; they must be "submitted to the members of the United nations." That means that they are binding upon the members only if accepted by them. The obligation is established by a treaty concluded by the members with the organization. Unlike Article 8, paragraph 4 of the [League of Nations] Covenant, Article 26 does not provide expressly for the "adoption" of the plan by the members, but if the plan of the Security Council is to be submitted to the members, it can be only for the purpose of being adopted by them.[34]

Thus under the Charter system, member states retain their full sovereignty over decisions to enter into legal relationships in the area

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30. *Id.*

31. *See* BERNHARD G. BECHHOEFER, POSTWAR NEGOTIATIONS FOR ARMS CONTROL (1961); O. V. Bogdanov, *Outlawry of War, and Disarmament*, 133.2 RECUEIL DES COURS 15 (1971); U.N. COMMENTARY, *supra* note 25, at 466-68.

32. U.N. Charter art. 26.

33. *See* U.N. COMMENTARY, *supra* note 25, at 466-68.

34. HANS KELSEN, COLLECTIVE SECURITY UNDER INTERNATIONAL LAW 214 (2001 ed. 1957).

of international arms control. This right is not presumptively subsumed under the Council's binding decision-making powers under Article 25, nor under its broad powers to maintain international peace and security under the articles of Chapter VII.[35]

B. *The Limits of Chapter VII*

The UN Charter in Article 24 confers upon the Security Council "primary responsibility for the maintenance of international peace and security."[36] In the same paragraph the members of the United Nations "agree that in carrying out its duties under this responsibility, the Security Council acts on their behalf."[37] This statement is the closest the Charter comes to attempting to remedy the non-democratic reality, made requisite by geo-political circumstances in 1945, that the most powerful organ of the UN and the only organ capable of issuing decisions binding upon all UN members, is composed of only fifteen of those members (who now total 191), five of whom are given permanent status and have an effective veto power over every decision of the Council.

In this language seeming to imply a representative relationship between the Council and the rest of the UN membership, the Charter attempts to legitimize the declaration in Article 25 by the membership, that all UN members "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[38] Thus, Article 25 establishes the binding character of Security Council decisions upon the entirety of the UN membership.[39]

Although the specific powers granted to the Security Council under the Charter, and particularly in the articles of Chapter VII, are both broadly and vaguely worded, the Charter does provide limits upon the discretion of the Council in its exercise of these powers. As the Council derives its powers from the Charter's terms, it is by the same process bound by the constraints and limitations of those terms. As the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has observed:

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35. Hans Kelson, No. 11, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 293-95 (George W. Keeton & Georg Schwarzenberger eds., 2d ed. 1951).

36. U.N. Charter art. 24.

37. *Id.*

38. U.N. Charter art. 25.

39. See the discussion of Article 24 as an independent source of authority for binding decisions of the Security Council in Happold, *supra* note 7, at 604.

> The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus 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 may 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).[40]

One such limiting provision upon the Council's power is Article 24(2), which provides that "[i]n discharging these duties the Security Council shall act in accordance with the purposes and principles of the United Nations."[41] The purposes and principles of the United Nations to which this article refers are to be found in Articles 1 and 2 of the Charter, and include the right of states to self-determination, respect for human rights, the principle of sovereign equality, an obligation to act in good faith, and an obligation not to intervene in matters "essentially within the domestic jurisdiction" of member states.[42] As the International Court of Justice stated in the *Certain Expenses* advisory opinion in 1962:

> When the organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the organization.[43]

Another limiting provision is Article 25. As previously stated, perhaps the greatest import of the text of this article is the establishment of the universally binding character of Security Council decisions.[44] However, the fact that, under this provision, members agree to accept and carry

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40. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 28 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

41. *See* DAVID SCHWEIGMAN, THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE U.N. CHARTER 29-33 (2001).

42. U.N. Charter arts. 1-2.

43. Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 168 (July 20).

44. *See* Rosalyn Higgins, *The Advisory Opinion on Namibia: Which UN Resolutions are Binding Under Article 25 of the Charter?*, 32 INT'L & COMP. L.Q. 270, 275 (1972).

out the decisions of the Security Council "in accordance with the present charter"[45] suggests that the measure of this obedience should be contingent upon the validity of the Council's decisions and actions as held up to the standard of the provisions of the Charter, and further that it is conceivable that other provisions of the Charter might in some cases take precedence over conflicting Security Council decisions.[46] To paraphrase the article's meaning in this regard, UN members are not obligated to comply with the decisions of the Council one whit further than those decisions themselves comply with the provisions of the Charter.[47]

Although the general purposes and principles of the United Nations are difficult to apply in a meaningful way so as to provide justiciable limitations on the powers of the Security Council under Article 24(2), in the nonproliferation issue area the process for creation of new nonproliferation law contained in Articles 11(1) and 26 described above does provide a clear, authoritative lawmaking procedure which can properly be called the UN Charter system for creation of nonproliferation law. As this explicitly-provided system involves a clearly delineated division of roles and authorities between the organs of the UN, it thus comprises a limitation upon the authority of the Security Council deriving from "the internal division of power within the organization."[48] This limitation is therefore a part of the substantive law of the Charter in accordance with which, under Article 25, the Security Council is bound to act.[49]

Thus, while the provisions of the Charter in many instances provide limitations upon the powers of the Council which, though valid, are difficult to apply unambiguously, due to the presence of the lawmaking system contained in Articles 11(1) and 26, the nonproliferation law creation issue area fortunately does not labor under the same difficulty. I argue that the Article 25 limitations on the Council's powers can be applied in the nonproliferation law issue area because of the presence of the criteria for legitimate lawmaking by UN bodies contained in

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45. U.N. Charter art. 25.

46. *See* J. Delbruck, *Article 25, in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 407-418 (Bruno Simma et al. eds., 1st ed. 1994); ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 375-78 (2004); PETER ROSGEN, RECHTSETZUNGSAKTE DER VEREINTEN NATIONEN UND IHRER SONDERORGANISATIONEN: BESTANDSAUFNAHME UND VOLLZUG IN DER BUNDESREPUBLIK DEUTSCHLAND 157 (1985).

47. *See* DE WET, *supra* note 46, at 377.

48. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 28 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

49. *See id.*

Articles 11(1) and 26 of the UN Charter. Accordingly, any act by the Security Council which attempts to create "a system for the regulation of armaments" outside of the Article 11(1) and Article 26 institutional process is in breach of Article 25, and is thus an act *ultra vires* the Council's authority.[50]

I argue that Security Council Resolution 1540 meets this test precisely. This resolution clearly attempts to establish a system for the regulation of WMD, which includes a universalized export control law requirement and a universalized requirement to enact laws on the subject of non-state actors. Therefore, to be valid as a source of binding obligation upon UN member states, I argue that this system of obligations cannot be established through the Council's use of its Chapter VII powers, but must rather be constructed through the procedures provided for in Articles 11(1) and 26.

My essential argument regarding Resolution 1540 is that in passing what can only be viewed as an ostensible piece of international legislation in this resolution, the Security Council has confused the proper scope of its enforcement powers under Chapter VII with the proper scope of its long unused, limited lawmaking powers under Article 26, and has taken to itself by unilateral exercise of its Chapter VII powers a role which, under the Charter system, it is to share both with the General Assembly in the exercise of its Article 11(1) powers, as well as with the general membership of the United Nations, to whom it is directed under Article 26 to submit proposals for the creation of new international laws in the area of weapons proliferation.

The added political, legal, and chronological efficiency of the path chosen by the Security Council is not denied. For the members of the Security Council, and particularly for the permanent members who enjoy the most power from their positions on the Council, when considering the establishment of the obligations contained in Resolution 1540, the long-unused Charter system for creation of nonproliferation law would certainly have looked less attractive, particularly as the amount of control they would have been able to exercise over the outcome of the approval process under the Charter system would have been severely diluted from that they would wield through the Chapter VII process.

However, none of these reasons of expedition and control give sufficient justification for going around the Charter system and assuming a lawmaking authority which was never intended to be exercised by the Council under the Charter. The Charter system in Articles 11(1)

50. *See* Happold, *supra* note 7, at 604-05.

and 26 is the authoritative system for the creation of new nonproliferation law for good reasons. The system in Articles 11(1) and 26 divides roles among the political organs of the UN, leaving the final and most important role of actual establishment as law of the principles generated through this institutional process, to the member states of the UN themselves. This system was created by the Charter framers in maintenance of the classical principles of state sovereignty and sovereign equality in international lawmaking, and was consistent with the resulting idea that the consent of states to be bound underlies the validity of all of the sources of international law, in the positivist tradition.[51] This system was informed by the understanding that the consent given to Council authority in the first instance by states in Article 25 of the Charter does not equate to direct consent of states at the second instance to every substantive decision of the Council. And while this distinction is less troublesome in the domestic context under most theories of the positivist social compact, it is troubling to states in the international legal system which more jealously guard their sovereign autonomy under the sometimes maligned, but still quite virile Westphalian sovereignty paradigm.[52]

In adopting Resolution 1540, the Security Council, whose role in the Charter system for nonproliferation law creation is really a facilitative and definitional one, effectively bypassed the steps assigned to the General Assembly and to the member states by taking the issue to itself and acting both in the deliberative role assigned to the General Assembly, as well as the law creation role assigned to the members collectively. In doing so, the Council acted in disharmony with the fundamental international legal principle of state sovereignty, and the derivative principle of the consensual foundation of the sources of international law. In short, it acted as a legal hegemon, unbound by the fundamental rules and principles of international law, and the limited nature of its own authority under the Charter.

II. IRAN

A. *Resolution 1737*

The Second case study to be considered is that of Iran's nuclear program. In late 2002, the world learned from Iranian opposition

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51. *See* S. Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 12 EUR. J. INT'L L. 269 (2001).

52. *See generally* STEPHEN KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY? (1999) (discussing Westphalian system).

groups in exile that Iran had concealed from the International Atomic Energy Agency (IAEA) for eighteen years the existence of facilities at Natanz and Arak engaged in experiments involving uranium enrichment and plutonium separation.[53] Upon a report by IAEA inspectors detailing their findings of the undeclared activities, the IAEA Board of Governors reached the conclusion in a resolution passed November 26, 2003 that, due to this concealment and to other reporting omissions, Iran had "in a number of instances" failed to meet its obligations under its safeguards agreement with the agency.[54] In its resolution the Board further recognized that Iran had a particular onus of cooperation and transparency in order to "provide and maintain the assurances required by Member States" and "restore confidence."[55] Iran subsequently agreed upon a temporary suspension of its uranium enrichment activities and in December 2003 signed the IAEA Additional Protocol.[56]

Despite these concessions, Iran has continuously maintained that all of its work with fissile materials and related technologies, including work at these undeclared sites, has been aimed at furthering its capacity to produce civilian nuclear energy.[57] They have thus argued, notwithstanding their failure to comply with reporting requirements under their safeguards agreement, that they have always been in compliance with their substantive obligations under the NPT. In this argument, they have relied specifically upon the "inalienable right" of all states to engage in peaceful uses of nuclear technologies recognized in Article IV, paragraph 1, of the NPT.[58]

However, suspicions have become widespread particularly among Western states and Israel, that Iran does indeed have nuclear weapons ambitions, and that particularly the uranium enrichment work which Iran has carried out is intended not solely for use in peaceful energy production, but for the creation of nuclear weapons.[59] Notwithstanding these suspicions, IAEA inspectors have to date found no conclusive

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53. *See* Greg Bruno, *Iran's Nuclear Program*, COUNCIL ON FOREIGN REL. (Mar. 10, 2010), http://www.cfr.org/iran/irans-nuclear-program/p16811.

54. Int'l Atomic Energy Agency [IAEA], *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, at 2, IAEA Doc. GOV/2003/81 (Nov. 26, 2003).

55. *See id.* at 2.

56. *See* Bruno, *supra* note 53.

57. *See id.*

58. Joyner, *supra* note 1, at 51. For an analysis of the legal arguments surrounding Iran's nuclear program, see *id.* at 50-55.

59. *See* Bruno, *supra* note 53.

evidence to support allegations of a clandestine nuclear weapons program in Iran.[60]

Despite this lack of evidence of a weapons program, the IAEA Board of Governors took the decision on February 4, 2006 to refer Iran's case to the UN Security Council.[61] This referral, without a supporting report by IAEA inspectors providing evidence that Iran was in breach of its substantive NPT obligations, or that it was in continuing breach of its safeguards agreement, has led some to criticize the Board's decision as premature.[62] However, notwithstanding these concerns, on July 31, 2006 the Security Council passed Resolution 1696 in which, acting under Article 40 of Chapter VII of the UN Charter, it demanded that Iran suspend all uranium enrichment-related and reprocessing activities, and requested a report from the IAEA Director-General by August 31 to confirm this suspension.[63] The Council followed up Resolution 1696 on December 23, 2006 with Resolution 1737, in which it acted under Article 41 of the Charter and made binding the demands of Resolution 1696.[64]

Iran's failure to abide by the terms of these resolutions, insisting that its activities are firmly within its rights under NPT Article IV, has led to the issuance of further Security Council resolutions under Chapter VII, including a number of resolutions imposing trade restrictions and other economic sanctions upon Iran and upon specified Iranian individuals and business entities.[65]

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60. *See* IAEA, *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions in the Islamic Republic of Iran*, ¶ 35, IAEA Doc. GOV/2011/29 (June 9, 2011) (listing suspicious but indefinitive Iranian nuclear activities); *see also* NAT'L INTELLIGENCE COUNCIL, IRAN: NUCLEAR INTENTIONS AND CAPABILITIES 5 (2007), *available at* http://www.dni.gov/press_releases/20071203_release.pdf. For a fuller discussion of the question of evidence of an Iranian nuclear weapons program, see Daniel H. Joyner, *Why Less is More: Law and Policy Considerations on the Iranian Nuclear Issue*, HARV. L. & POL'Y REV. (Mar. 23, 2010, 9:29 PM), http://hlpronline.com/2010/03/joyner_iran/.

61. IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, IAEA Doc. GOV/2006/14 (Feb. 4, 2006).

62. *See* Gareth Smyth & Daniel Dombey, *Iran Offers Cautious Response to Nuclear Call*, FIN. TIMES, January 14, 2006 ("Jean-Baptiste Mattei, French foreign ministry spokesman, said any demand for sanctions against Iran was "premature for the moment.").

63. S.C. Res. 1696, U.N. Doc. S/RES/1696 (July 31, 2006).

64. S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006).

65. *See, e.g.*, S.C. Res. 1747, U.N. Doc. 5/RES/1747 (Mar. 24, 2007); S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008); S.C. Res. 1835, U.N. Doc. S/RES/1835 (Sept. 27, 2008); S.C. Res. 1887, U.N. Doc. S/RES/1887 (Sep. 24, 2009); S.C. Res. 1929, *supra* note 5.

B. *Resolution 1929*

Tensions between Iran and Western powers were aggravated by Iran's disclosure in September 2009 that it had for some years been constructing a facility near Qom intended as an additional uranium enrichment facility to supplement its primary enrichment facility at Natanz.[66] Since this disclosure by Iran, one of the points of debate among international observers has been whether in the timing of this disclosure, Iran violated its obligations under its legal agreements with the IAEA.[67]

Iran has argued that its disclosure was perfectly consistent with its legal obligations under its Safeguards Agreement with the IAEA (INFCIRC/214), as implemented through a Subsidiary Arrangements agreement which Iran entered into with the IAEA in 1976.[68] Under the provisions of this Subsidiary Arrangements agreement known as "Code 3.1," Iran has argued that it is only obligated to disclose the existence of new enrichment facilities "normally not later than 180 days before the facility is scheduled to receive nuclear material for the first time."[69]

Some observers, however, argue that Iran did in fact violate its international obligations by not disclosing the existence of the Qom facility earlier.[70] They argue that Iran agreed by exchange of letters with the IAEA in 2003 to a new and revised set of Subsidiary Arrangements, known as "modified Code 3.1," which provide that preliminary design information on new enrichment facilities is to be provided "as soon as the decision to construct or to authorize construction has been taken, whichever is earlier."[71]

The crux of the dispute regarding which of the versions of Code 3.1 is applicable to Iran's actions in and around September 2009 centers on Iran's March 29, 2007 letter to the IAEA in which Iran declared its

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66. *See* Bruno, *supra* note 53.

67. *See* James Acton, *Iran Violated International Obligations on Qom Facility*, CARNEGIE ENDOWMENT (Sep. 25, 2009), http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=23884.

68. *See IAEA: Iran Broke Law by Not Revealing Nuclear Facility*, CNN (Sep. 30, 2009), http://articles.cnn.com/2009-09-30/world/iran.iaea.nuclear_1_iranian-atomic-energy-agency-ali-akbar-salehi-united-nation-s-nuclear-watchdog?_s=PM:WORLD.

69. *See* IAEA, *Communication Dated 29 March 2007 from the Resident Representative of the Islamic Republic of Iran and the Secretariat's Response*, at 3, IAEA Doc. GOV/INF/2007/8 (Mar. 30, 2007).

70. Acton, *supra* note 67.

71. *IAEA Complains of Iran's "Inconsistent" Adherence to Nuclear Reporting Requirements,"* GLOBAL SECURITY NEWSWIRE, (Mar. 6, 2009), http://www.nti.org/gsn/article/iaea-complains-of-irans-inconsistent-adherence-to-nuclear-reporting-requirements/.

intention to "revert" to the original 1976 Code 3.1 formulation.[72] The IAEA Legal Advisor's office issued an opinion in March 2009 in which it rejected Iran's unilateral declaration of reversion, and maintained that the agreed modified Code 3.1 provisions remained in force between Iran and the IAEA.[73] As the Legal Advisor's office concluded:

> The implementation of the provisions of Subsidiary Arrangements can only be amended or suspended with the agreement of both parties to them . . . The provisions cannot be amended or suspended unilaterally by the state. Thus Iran's failure to provide design information in accordance with the modified Code 3.1 as agreed to by Iran in 2003 is inconsistent with Iran's obligations under the Subsidiary Arrangements to its Safeguards Agreement.[74]

The UN Security Council entered the fray of this essentially legal debate on June 9, 2010 with the passage of Resolution 1929, in which it acted under Article 41 of the Charter and decided that Iran:

> shall without delay comply fully and without qualification with its IAEA Safeguards Agreement, including through the application of modified Code 3.1 of the Subsidiary Arrangement to its Safeguards Agreement . . . .[75]

C. *Legal Analysis*

1. Resolution 1737

In consideration of the legal merits of Iran's claim of justification of its nuclear activities by reference to Article IV of the NPT, it is important first to note that uranium enrichment, when declared, is not an NPT violation per se. Certainly when uranium is enriched to a U-235 presence of less than 20%, and can thus still be classified as Low-Enriched Uranium (LEU), that enrichment activity is one that is fully includable within the Article IV inalienable right to engage in peaceful

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72. IAEA, *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions in the Islamic Republic of Iran*, at 3, IAEA Doc. GOV/2007/22 (May 23, 2007).

73. IAEA, *Statement of the Legal Adviser, IAEA Mtg. of the Board of Governors* (Mar. 2009), *available at* http://www.armscontrolwonk.com/file_download/162/Legal_Adviser_Iran.pdf.

74. *Id.*

75. S.C. Res. 1929, *supra* note 5, ¶ 5.

uses of nuclear technologies.[76] This understanding was clear at the time of the drafting of the NPT. As the Director of the U.S. Arms Control and Disarmament Agency told the Senate Foreign Relations Committee in 1968:

> It may be useful to point out, for illustrative purposes, several activities which the United States would not consider per se to be violations of the prohibitions in Article II. Neither uranium enrichment nor the stockpiling of fissionable material in connection with a peaceful program would violate Article II so long as these activities were safeguarded under Article III. Also clearly permitted would be the development, under safeguards, of plutonium fueled power reactors, including research on the properties of metallic plutonium, nor would Article II interfere with the development or use of fast breeder reactors under safeguards.[77]

Japan and a number of other Non-nuclear Weapon State (NNWS) parties to the NPT have carried out enrichment of uranium for the purpose of nuclear power generation for many years without complaint from the IAEA Board of Governors. Japan has in fact separated and stockpiled at least 43.1 tons of plutonium, as well as having a robust and productive gas centrifuge program for uranium enrichment at its facility in Rokkasho, Aomori prefecture, thus illustrating that even the overproduction and stockpiling of fissile materials is deemed permissible by the IAEA.[78] It is only when this enrichment activity by an NNWS is undeclared to the IAEA that a violation of an IAEA safeguards agreement results. Even this, however, is not a violation of the NPT per se. Only if enrichment proceeds to the production of Highly-Enriched Uranium (HEU), at approximately 20% presence of U-235, does it produce a weapons-usable material.[79] Undeclared enrichment of weapons-usable HEU would create a prima facie case of breach of Article II

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76. *See* RAYMOND MURRAY, NUCLEAR ENERGY: AN INTRODUCTION TO THE CONCEPTS, SYSTEMS AND APPLICATIONS OF NUCLEAR PROCESSES 453 (6th ed. 2009).

77. *Treaty on the Nonproliferation of Nuclear Weapons: Hearing Before the S. Comm. on Foreign Relations*, 90th Cong. 39 (July 10–12, 17, 1968) (extension of remarks by Mr. Foster in response to question regarding nuclear explosive devices).

78. *Japan's "Separated" Plutonium Stockpile Increases to 43 Tons*, KYOTO NEWS AGENCY (Sep. 6, 2005), http://www.redorbit.com/news/science/231519/japans_separated_plutonium_stockpile_increases_to_43_tons/index.html.

79. *See* MURRAY, *supra* note 76, at 456.

of the NPT, and such activity would not be justifiable by reference to Article IV.

In my view, as a matter of law Iran was therefore quite correct in its interpretation of the coverage of its uranium enrichment activities by Article IV of the NPT at least until December 23, 2006.[80] The basis of its case was not altered by previous IAEA urgings that Iran cease uranium enrichment, as the IAEA's only legal competence is in the administration of safeguards agreements, and the continuation of uranium enrichment in declared sites, under IAEA safeguards, poses no challenge to the provisions of Iran's safeguards agreement. The legal landscape did change, however, on December 23, 2006 with the passage of Security Council Resolution 1737, under which the Council exercised its authority under Chapter VII of the UN Charter to order Iran to cease uranium enrichment.

Regardless of the prudence or other merit of this demand by the Council, in passing this resolution the Council likely did change the legal underpinnings of Iran's case for justifying its enrichment activities by reference to NPT Article IV. This issue can be approached legally under a number of different theories. The most often cited theory focuses on the provisions of the UN Charter, of which Iran is a member, which in Article 103 specifies that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[81] The obligations of the Charter are thus declared superior to all other treaty rights and obligations by its own terms. One of the substantive obligations United Nations members undertake in the Charter is spelled out in Article 25, which states that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

Thus, under this analysis, with the passage of Resolution 1737, the Council invoked Iran's obligation as a UN member to abide by the Council's decisions under Article 25, which is an obligation superior to all other treaty obligations pursuant to Article 103, inclusive of the rights and duties contained in the NPT. Iran thus became legally obligated to comply with Resolution 1737, as well as with all other resolutions passed by the Security Council under its Chapter VII

80. For a fuller consideration of the scope and meaning of NPT Article IV, see DANIEL H. JOYNER, INTERPRETING THE NUCLEAR NONPROLIFERATION TREATY 40, 47-50, 64-68 (2011).

81. U.N. Charter art. 103.

authority, and unable to rely upon its right to peaceful use of nuclear technologies in NPT Article IV to justify actions in disharmony with such Council decisions.

The problem with this analysis, however, is that it would empower the UN Security Council to trump any of the rights held by states by virtue of their statehood. The implications of this theory are far reaching and unsettling. Article IV of the NPT, to which 187 states are currently parties, recognizes the residual entitlement of NNWS treaty parties to possess and use nuclear technologies and materials for peaceful purposes, notwithstanding the obligations not to pursue nuclear weapons which they were to undertake in Article II.[82] This residual entitlement is termed by the treaty to be an "inalienable right." This is strong language intended to convey deep legal meaning, analogous to the recognition in Article 51 of the UN Charter of an "inherent right" of self-defense.[83] This phrasing is intent upon characterizing the right guaranteed by this provision not simply as a right created by the present positive conventional instrument, but rather as a pre-existing right independent of the treaty, and only recognized by its terms.[84] Like the inherent right to self-defense recognized by the UN Charter, this inalienable right to possess and use nuclear technologies and materials for peaceful purposes would appear to be recognized by the 187 states party to the NPT as comprising one of the bundle of rights inuring to a state by virtue of its statehood, and recognized in both customary and conventional international law.

It can be argued (as I have done elsewhere) that one theory for the superiority of Chapter VII resolutions over the rights of NPT Article IV is simply to be found in the reasoning that, as noted above, the rights defined in Article IV are not creations alone of the treaty terms of the NPT, but are rather rights recognized by the terms of the treaty yet existing independently within the bundle of rights inherent in the attributes of a state.[85] Under this reasoning, while the Article IV rights

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82. Treaty on the Non-Proliferation of Nuclear Weapons, art. 4, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970).

83. On the recognition of the customary right of self-defense in UN Charter Article 51, see DEREK BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 185 (1958) ("It is . . . fallacious to assume that members have only those rights which the Charter accords to them; on the contrary they have those rights which general international law accords to them except in so far as they have surrendered them under the Charter . . . . [T]he view of Committee I at San Francisco was that this prohibition [Article 2(4)] left the right of self-defense unimpaired.").

84. *See* Hall, *supra* note 51, at 284-89. On the question of the relationship between this right and Articles I & II of the NPT, see JOYNER, *supra* note 1, at 45-50.

85. JOYNER, *supra* note 1, at 54.

are important features of the sovereign character of all NPT parties, they are nonetheless categorizeable along with all other general state rights which are, by a state's consent to the terms of Article 25 of the Charter, made surmountable by and subject to the authority of the Security Council acting under Chapter VII. Thus far this theory may be correct, but it does not fully deal with the central question of the scope of the Charter's Article 39 grant of authority to the Security Council, and its limits. Over which of their rights did states contract discretion to the Security Council in exercise of its Article 39 authority, and over which did they not? This is a question about which books have been written (notably by David Schweigman and Erika de Wet) and I cannot do it justice here.[86] However, I will argue that there must be limits to the Council's Article 39 "powers of appreciation" and resulting authoritative discretion, lest the Council become a legal hegemon, unbound by law in the exercise of its Chapter VII powers.[87] The idea of the Security Council, with its unrepresentative makeup and proprietary rights system comprising such a legal hegemon is unlikely to be acceptable to most of the nations of the world.

In summary, then, by trampling upon a right of states recognized in a broadly subscribed treaty to be an "inalienable right," the Security Council in Resolution 1737 and subsequent related resolutions on Iran overstepped the bounds of its Chapter VII authority. It has at least in doing so pushed the limits of that authority to a point at which serious questions must be asked about the limits of its authority, and how international law should respond to this challenge in order to guarantee that there are legal limits placed upon the power of the Security

86. *See generally* SCHWEIGMAN, *supra* note 41; DE WET, *supra* note 46.

87. The term "powers of appreciation" is taken from Judge Shahubuddeen's searching query in his opinion in the *Lockerbie* case:

> The question now raised . . . is whether a decision of the Security Council may override the legal rights of states, and, if so, whether there are any limitations on the power of the Council to characterize a situation as one justifying the making of a decision entailing such consequences. Are there any limits to the Council's powers of appreciation? In the equilibrium of forces underpinning the United Nations within the evolving international order, is there a conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such overriding results? If there are any limits, what are those limits, and what body, if other than the Security Council, is competent to say what those limits are?

Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), 1992 I.C.J. 3, 142 (Apr. 14) (separate opinion of Judge Shahabuddeen).

Council, preventing it from becoming a legal hegemon unbound by law.

2. Resolution 1929

Returning to the discussion above in the context of Resolution 1540, of the limits on the Security Council's authority expressed particularly in Article 25 of the Charter, I argue that Resolution 1929 represents yet another occasion on which the Council has acted *ultra vires* its Chapter VII authority. The analysis here is very similar to that conducted above in the case of Resolution 1540. In the case of Resolution 1929, the Security Council considered what is essentially a legal question – i.e. the obligations of Iran under its Safeguards Agreement with the IAEA and whether those obligations include either the original or the modified Code 3.1 formulation with regard to the disclosure of the existence of new nuclear facilities. The Council made what can only be described as a judicial decision, accepting one legal argument or interpretation as more persuasive than another. In unmistakably judicial form, the Council then ruled on the legal question by issuing an order that the party in the dock before it must abide by its determination of the law.

Again, under the UN Charter Article 25 analysis adopted above, notwithstanding the Council's broad mandate in Articles 39, 40, and 41, there are limits to the Council's authority to act under Chapter VII. Such limitations can be most clearly determined when the Charter itself provides for an alternative decision-making process or forum. And the Charter is quite clear on the question of which forum, or organ within the institutional structure it creates, is to decide legal disputes, and perform judicial functions.

In Article 92, it provides that the International Court of Justice "shall be the principal judicial organ of the United Nations."[88] And even more specifically, in Article 36 it provides this explicit directive and reminder to the Security Council itself:

> In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.[89]

88. U.N. Charter art. 92.

89. *Id.* art. 25.

As discussed above the Security Council does have broad authority to act under the Articles of Chapter VII when it determines the existence of a threat to international peace and security. But this authority is not without bounds. The Security Council itself is bound by Article 25 to act in accordance with the Charter.[90] The Council is in this way bound to observe the order and delegations of roles provided for by the instrument from which it draws its own authority. Where, as in Articles 36 and 92, the Charter clearly delegates a role and type of authority to a separate UN organ,[91] the Security Council cannot legally usurp the authority so delegated, and arrogate it to its own use.

I argue that in passing Resolution 1929, the Council did just that. It usurped the role of the International Court of Justice in settling a legal dispute among UN member states, and in exercising an essentially judicial interpretive/determinative function to do so. This is a role which was never intended by the Charter framers for the Security Council to fulfill. The Council has neither the mandate nor the qualifications to act as an international judicial body. In passing Resolution 1929, therefore, the Council acted in contravention of Article 25 of the Charter. The operative paragraphs in Resolution 1929 which express the determinations of the Council acting in this judicial role, notably paragraph 5 quoted above, are therefore *ultra vires* the Council's authority and, like Resolution 1540, are as a result void *ab initio*.[92]

However, the fact that the Security Council, notwithstanding its lack of authority in the Charter do so, nevertheless is convinced that it can act as an international judiciary, in addition to its newly assumed legislative role, gives rise to grave concern that the Council considers itself above the law—a legal hegemon.

III. NORTH KOREA

The third and final case study to be considered will be the nuclear program of North Korea. Security Council Resolution 1874 was adopted on June 12, 2009 in response to the nuclear weapon test which had been conducted by the Democratic People's Republic of North Korea (DPRK) on May 25, 2009. This was the second nuclear weapon test conducted by the DPRK, its first having been held on October 9,

90. *Id.* arts. 36, 92.

91. *Id.*

92. JOYNER, *supra* note 1, at 195.

2006.[93] The Security Council had responded to the first nuclear test by the adoption of Resolution 1718 on October 14, 2006.[94] Resolution 1874 essentially reiterates the Security Council's condemnatory position on the DPRK's nuclear tests, and it further builds upon and supplements the sanctions imposed upon the DPRK in Resolution 1718.[95]

Resolution 1874 represented the latest in a long line of Security Council resolutions focused on the problem of the DPRK's nuclear weapons program.[96] Longstanding international concern about the DPRK's nuclear weapons program had been aggravated by three principal events: the first was the DPRK's announcement on January 10, 2003 that it would withdraw from the NPT, and the second and third were the 2006 and 2009 nuclear weapon tests.[97]

The DPRK's withdrawal from the NPT was significant on a number of levels. It represented the first and only time that a state had withdrawn its membership from the treaty, which is the cornerstone legal instrument in the nuclear non-proliferation normative regime. It also effectively removed from the DPRK any obligation of either conventional or customary international law prohibiting it from developing or possessing, or even proliferating, nuclear weapons.[98] It is within this context of the DPRK's withdrawal from the NPT, and its evidencing to the world its possession of nuclear weapons through its tests, that Resolution 1874 must be understood.

In Resolution 1874, acting under Article 41 of its Chapter VII authority, the Council first condemns "in the strongest terms" the May 25, 2009 nuclear test.[99] It then demands that the DPRK not conduct any further nuclear weapon tests, or launch of any ballistic missile technology.[100] These injunctions are clearly aimed at reiterating the prohibitions placed upon the DPRK by Resolution 1718, and at addressing the immediate symptoms of the problem of its nuclear weapons program. The Council then, however, goes on to address the more

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93. *See Chronology of U.S.-North Korean Nuclear and Missile Diplomacy*, ARMS CONTROL ASS'N, http://www.armscontrol.org/factsheets/dprkchron (last visited Nov. 4, 2011).

94. S.C. Res. 1718, U.N. Doc. S/RES/1718 (Oct. 14, 2006).

95. *See* S.C. Res. 1874, *supra* note 4.

96. *See, e.g.*, S.C. Res. 825, U.N. Doc. S/RES/825 (May 11, 1993); S.C. Res. 1695, U.N. Doc. S/RES/1695 (July 15, 2006); S.C. Res. 1718, *supra* note 94.

97. *See* ARMS CONTROL ASS'N, *supra* note 93.

98. Masahiko Asada, *Arms Control Law in Crisis? A Study of the North Korean Nuclear Issue*, 9 J. CONFLICT & SECURITY L. 331, 341-55 (2004).

99. S.C. Res. 1874, *supra* note 4.

100. *Id.*

fundamental legal problem relating to the DPRK's nuclear weapons program—the current absence of international law prohibiting the DPRK from development, possession, and proliferation of nuclear weapons. In operative paragraphs 5 and 6, the Council demands that North Korea retract its statement of withdrawal from the NPT, and return "at an early date" to membership in the NPT and to a safeguards agreement with the IAEA.[101]

Following its demand that the DPRK rejoin the NPT, the Council proceeds in operative paragraph 8 to 'decide'—thus using its most binding and determinative language—that the DPRK shall abandon its nuclear weapons and related development program, and shall submit itself to the terms of a safeguards agreement administered by the IAEA.[102] The DPRK concluded a safeguards agreement with the IAEA on January 30, 1992 (INFCIRC/403). However, pursuant to Article 26 of the safeguards agreement, its continuance in force was limited to the term of the DPRK's membership in the NPT.[103] Thus, the DPRK's withdrawal from the NPT simultaneously worked a withdrawal from its safeguards agreement with the IAEA.[104] Operative paragraph 8 of Resolution 1874 thus purports to reverse both the DPRK's withdrawal from the NPT and its withdrawal from its IAEA safeguards agreement, by commanding the state to abide by one of the central obligations of the NPT—i.e. the obligation of Non-nuclear Weapon States not to develop or possess nuclear weapons—and to abide by the terms of its IAEA safeguards agreement.

This demand and these decisions by the Security Council are singular. First made in Resolution 1718 and then reiterated in Resolution 1874, the Council's demand that the DPRK rejoin the NPT is the only example, to my knowledge, of the Security Council demanding that a state re-accede to a treaty from which that state had duly withdrawn according to the treaty's terms. And as if that were not enough, the Council in operative paragraph 8 goes one step further and essentially

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101. *Id.* ¶¶ 5-6.

102. *Id.* ¶ 8.

103. Article 26 of the DPRK's safeguards agreement provides: "This Agreement shall remain in force as long as the Democratic People's Republic of Korea is party to the [NPT]." IAEA, *Agreement of 30 January 1992 between the Government of the Democratic People's Republic of Korea and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, at 8, IAEA Doc. INFCIRC/403 (May 1992).

104. *See* Frederic Kirgis, *North Korea's Withdrawal from the Nuclear Nonproliferation Treaty*, ASIL INSIGHT (Jan. 2003), http://www.asil.org/insigh96.cfm.

decides that, regardless of what the DPRK thinks or does, it is bound by the central obligation of the NPT and by the terms of its former IAEA safeguards agreement. Furthermore, it cannot be forgotten that, in unapologetically hypocritical fashion, the Council is deciding in operative paragraph 8 that a particular state is not allowed, apparently *in perpetuam*, to develop and possess the same weapons technologies which at least eight other states—five of whom have permanent seats on the Council itself—are known to possess.

In its NPT-related decisions concerning North Korea, therefore, the Security Council has determined that it has the authority to contravene a state's decision to withdraw from the obligations of treaties, according to those treaties' explicitly stated rights of withdrawal. It has further determined that, regardless of the will or contrary actions of a state, it has the authority to impose permanent, substantive obligations on a state with regard to its military capabilities.

These actions of the Security Council would seem to carry serious implications with regard to the consensual nature of all of the sources of international law, which is in turn intimately linked to the sovereign character of states in the international legal system. If the Security Council can order a state to enter into, or at least maintain *jus dispositivum* obligations against the will of the state concerned, what indeed can the Security Council not do? From a jurisprudential perspective, by asserting its power over the consent of states to be bound by international law, the Council's actions regarding North Korea represent an even more fundamental "authority grab" by the Council than do its actions regarding Iran. In its Resolutions 1718 and 1874, the Council appears to consider itself unbound by the fundamental rules and principles of international law and the sovereign character of the member states of the United Nations, and empowered to do anything it deems expedient to bring about international peace and security. In short, it appears to consider itself a legal hegemon.

IV. How Can International Law Protect States from the Security Council?

In the case studies above, taken from the nuclear nonproliferation issue area, I have shown what I argue to be several examples of the Security Council demonstrating its relatively recent determination that it is essentially unbound by law, whether UN Charter law or otherwise, in its fulfillment of its broad and vague mandate to maintain and restore international peace and security. I would further argue that it is also clear from the context of these case studies that in each case it was

the permanent five members of the Council, who are also not coincidentally the five Nuclear Weapon State parties to the NPT, who led the charge in getting the relevant Security Council resolutions adopted. This fact has led some in the developing world to argue that the permanent five have essentially highjacked the Security Council in order to use it as an instrument of unbridled legal authority for carrying out their own desires for international lawmaking in this area.[105] As the representative from Indonesia stated at the April 2008 NPT Preparatory Committee meeting:

> [T]he tendency for the Security Council to judge compliance and to act as an enforcer of the NPT needs to be urgently rectified. There is no doubt this inclination has a political motivation, as the Council will not in anyway act in a similar manner on non-compliance to Article VI. It has also become a source of concern that the expansion of the Security Council involvement in this field risks to undermine the authority of the IAEA.[106]

Interestingly, the Indonesian Ambassador here argues specifically that the permanent five have used the Security Council to accomplish their own political interests in the name of enforcing NPT law, yet have hypocritically ignored very significant issues of disarmament law under NPT Article VI, because this would not serve their political interests.

This realization of the permanent five's adoption of the Security Council as an instrument for carrying out their own political agendas through international lawmaking in this area, is likely to be quite disconcerting to many smaller, developing countries, who might legitimately worry whether they will be the next target of the Council's omnipotent and politically motivated attentions. It thus becomes necessary to consider what international law, and the international legal system, can or should do to protect states, particularly smaller and developing states, from the UN Security Council and its demonstrated bullish, near hegemonic attitude towards its own legal authority. I would like to explore one vein of thinking in the remainder of this

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105. *See, e.g.*, U.N. SCOR, 59th Sess., 4950th mtg. at 23-24, 30-33, U.N. Doc. S/PV.4950 (Apr. 22, 2004) (statements of India, Cuba and Iran); U.N. SCOR, 59th Sess., 4950th mtg. at 2-5, 16-17, U.N. Doc. S/PV.4950 (Resumption 1) (Apr. 22, 2004) (statements of Egypt, Mexico and Nambia).

106. Ambassador I Gusti Agung Wesaka Puja, Republic of Indon., Statement at the Second Session of the Preparatory Committee for the 2010 Review Conference of the State Parties to the Treaty on the Non-proliferation of Nuclear Weapons (Apr. 29, 2009), http://www.un.org/NPT2010/SecondSession/delegates%20statements/Indonesia.pdf.

article.[107]

In addition to the hierarchically equal *jus dispositivum* sources of international law (i.e. treaties, custom, and general principles) it has come to be generally accepted that there are a few 'higher obligations' which are universal and non-derogable for states in the international legal system. These higher-order, peremptory rules are termed *jus cogens.*[108] As Ian Brownlie has written:

> In the recent past both doctrine and judicial opinion have supported the view that certain overriding principles of international law exist, forming a body of *jus cogens* . . . . They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect. The least controversial examples of the class are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy.[109]

Jus cogens rules are the closest that the current international legal system comes to constitutional, or higher order system rules. As this enumerated list demonstrates, however, the most widely accepted rules of *jus cogens* are prohibitions of certain conduct by states, and in a very few cases by individuals, deemed universally unacceptable by the international community. There have been some indications of principles of law constituting state entitlements, or rights, in customary international law having attained *jus cogens* status, but they are considerably more controversial. These include the principle of permanent sovereignty over natural resources and the principle of self-determination.[110] Indeed, the status and substance of these principles even as

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107. In a similar vein and from an institutional perspective, I recently argued for a renaissance of attention to the International Court of Justice's role as a judicial check upon the Security Council. To avoid redundancy, I will not pursue that line of thought here. However, it does fit nicely under this theme. *See* JOYNER, *supra* note 1, at 218-25.

108. *See, e.g.*, ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 8-9 (2006).

109. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 510-11 (7th ed. 2008).

110. On natural resources, see G.A. Res. 3171 (XXVIII), U.N. Doc. A/RES/3171 (Dec. 17, 1973), and G.A. Res. 3281 (XXIX), U.N. Doc. A/RES/3281 (Dec. 12, 1974). On self-determination, see Barcelona Traction, Light and Power Company (Belg. v. Spain) 1970 I.C.J. 3, 304 (Feb. 5) (separate opinion of Judge Ammoun). The concept of self-determination is not strictly speaking a right of states, but more precisely the right of a people in a particular

rules of customary international law are disputed.[111] Thus, to date, clear *jus cogens* status has been attained almost exclusively by rules of international law which prevent states from using their authority and power to harm individuals.

However, an important new data point was created in this area by the European Court of Justice (ECJ) in its 2008 decision in the *Kadi* case.[112] In this case, the ECJ struck down an E.U. Council regulation which had frozen the financial assets of Mr. Kadi and Mr. Al Barakaat. This E.U. regulation was in direct implementation of UN Security Council resolutions requiring enforcement by UN member states of financial sanctions against persons designated by the Council's Sanctions Committee as being involved in international terrorism. In *Kadi*, the ECJ struck down the regulation because it determined that the regulation violated certain fundamental due process rights guaranteed to E.U. nationals under E.U. law.[113]

The *Kadi* decision constitutes an important data point for purposes of my current analysis because, *inter alia*, this case stands for the proposition that the UN Security Council cannot override domestic law when that domestic law contains fundamental legal rights. This case marks one of the first times that a tribunal, whether international or domestic, has held a Security Council resolution to be unlawful in its implementation to a domestic legal system, and thus establishes an important persuasive precedent of the principle that the power of the Security Council is not, in fact, unlimited.

This landmark case may mark the beginning of attempts by states to create and apply principles of international law which limit the Security

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geographical place to constitute a state. However, it is sufficiently similar to a state entitlement for the analytical purposes herein.

111. On natural resources see, for example, *SEDCO, Inc. v. Nat'l Iranian Oil Co.*, 10 Iran-U.S. Cl. Rep. 180 (1986). On self-determination, see, for example, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.).

112. Cases C-402/05 P, C-415/05 P, Kadi v. Council, 2008 E.C.R. I-6351, 3 C.M.L.R. 41.

113. *See generally* Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT'L L.J. 1 (2010); Katja S. Ziegler, *Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights*, 9 HUM. RTS. L. REV. 288 (2009); Jean d'Aspremont & Frédéric Dopagne, *Kadi: The ECJ's Reminder of the Elementary Divide between Legal Orders*, 5 INT'L ORG. L. REV. 371 (2008), *available at* http://ssrn.com/abstract=1341982; J. Craig Barker et al., *Kadi and Al Barakaat*, 58 INT'L & COMP. L.Q. 229 (2009); Giacinto Della Cananea, *Global Security and Procedural Due Process of Law Between the United Nations and the European Union*, 15 COLUM. J. EUR. L. 511 (2009); Pasquale De Sena & Maria C. Vitucci, *The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values*, 20 EUR. J. INT'L L. 193, 221-22 (2009).

Council's Chapter VII authority, and secure to themselves and their citizens a measure of legal protection from overly aggressive uses of the Council's authority. Perhaps this case will be the beginning of a movement to establish such legal protections for states in a more systematic and normative fashion. If so, one avenue to pursue may be the clarification of the basic rights which inure to states by virtue of their sovereignty, and the establishment of these rights as rules of *jus cogens*—supplementing and filling out the existing corpus of *jus cogens* rules which, as noted above, currently consist almost exclusively of rules prohibiting state conduct.

This notion of delineating the basic rights which states possess by virtue of their statehood is not new. As Sir Arthur Watts has explained:

> As international law developed in the second half of the nineteenth century and the first half of the twentieth it was thought useful, and perhaps even necessary, to consider whether there were some fundamental legal principles which were inherent in the relations of States as members of the international community. The search for some hierarchical structure to the many particular rules of international law seemed to require no less. The idea grew that there were certain fundamental rights which were essential and self-evident attributes of Statehood, together with certain fundamental duties.[114]

In 1949 the newly established International Law Commission adopted a draft Declaration on Rights and Duties of States. This draft Declaration consisted of fourteen draft articles which enunciated, in broad terms, some of the basic rights and duties of states. The 1949 draft Declaration was never adopted by the General Assembly, and largely fell by the wayside as geopolitical shifts over the subsequent decades—notably including the process of decolonization and the communist/capitalist rivalry between East and West—made agreement on a statement of states' 'fundamental' rights diminishingly likely.

In 1970, however, a successor statement to the 1949 draft articles was adopted by the General Assembly, entitled the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.[115] This 1970 Declaration predominantly discussed principles of states' obligations, such as the obligation not to use or

114. 3 ARTHUR WATTS, THE INTERNATIONAL LAW COMMISSION: 1949–1998, at 1645 (1999).

115. G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970).

threaten force against other states or otherwise to intervene in the affairs of other states. However, in its discussion of the principle of the sovereign equality of states, it does delineate some of the most basic rights of states, including the right "freely to choose and develop its political, social, economic and cultural systems."[116]

Both the 1949 draft Declaration and the 1970 Declaration could be described as something of a jumble of proclamations of rights and duties of states, with no clear systematic approach to either subject and certainly no claim to an exhaustive listing of either rights or duties. The lack of progress since 1970 on a clear and definitive statement of the rights of states inuring to them by virtue of their statehood is likely explained by a number of factors. The first is simply the enormity of the task of getting agreement by states as to which rights are 'fundamental' and among the bundle of rights which states inherently possess.[117] The very notion of fundamental rights of states is a jurisprudential theory question likely to be seen quite differently by developing and developed states, and by states with elementally different approaches to economics and government.

The second factor is the concern, often present in delineation of entitlements, that the listing of some rights will appear to prejudice others not listed, and have a limiting effect upon the subject. This dynamic was analogously present in the deliberations surrounding the drafting of the United States Constitution, and resulted in a compromise, approach whereunder nine amendments were added to the original document listing the rights of the constituent states of the United States, or in some cases the people of those states. Yet a tenth amendment was further added to make clear that the enumerated rights were not an exhaustive rendering, and that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[118]

However, the Security Council's newfound excess in its determination of its own authority, and the arguable use of the Council by the permanent five as an institutional instrument for hypocritically forwarding their own political interests, may make a return to this normative

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116. *Id.*

117. In the nuclear area see, for example, 1 NPT BRIEFING BOOK: THE EVOLUTION OF THE NUCLEAR NONPROLIFERATION REGIME (John Simpson & Tanya Ogilvie-White eds., 2003); Tanya Ogilvie-White, *International Responses to Iranian Nuclear Defiance: The Non-Aligned Movement and the Issue of Non-Compliance*, 18 EUR. J. INT'L L. 453 (2007).

118. *See* Gary Lawson, *A Truism with Attitude: The Tenth Amendment in Constitutional Context*, 83 NOTRE DAME L. REV. 469 (2008).

effort advisable. The International Law Commission (ILC) spent the better part of fifty years developing its Draft Articles on State Responsibility for Internationally Wrongful Acts, which it finally adopted in 2001. The development of a similar set of Draft Articles on the Fundamental Rights of States would seem to be a naturally complementary project for the ILC to now pursue. Such a normative delineation and clarification of the rights of states inherently inuring to them by virtue of their statehood, and recognized in customary international law, would be the first evolutionary step toward those rights eventually achieving *jus cogens* status and thereby constituting a set of needed limitations on the currently seemingly unlimited authority of the United Nations Security Council.

Thus, to return to the case study of Iran, if the inalienable right to peaceful nuclear energy technologies recognized in Article IV of the NPT were to be additionally recognized as among the fundamental rights of states, and thereby achieve the status of a rule of *jus cogens*, this would form an effective legal curtailment of the authority of the Security Council to restrict this fundamental right and would serve to protect developing countries in their exercise of this right. Other fundamental rights relative to the case studies reviewed herein might include the right not to be bound by international legal obligations to which a state has not expressly or impliedly consented. Such a delineation of the fundamental rights of states and their establishment as rules of *jus cogens* would constitute something of an international "bill of rights" for states, which could be structured, as the bill of rights in the U.S. Constitution, to expressly provide for the non-exhaustive nature of the delineated rights.

This notion of an international bill of rights for states is of course only one avenue whereby states can begin to draw lines in the sand setting limits upon the authority of the Security Council. Others include the more *ad hoc* approach adopted by the ECJ in the *Kadi* case, as well as the strengthening of the authorities of the International Court of Justice to more effectively act as a co-equal judicial check upon the Council.[119]

However it is pursued, it appears that the international legal system must develop effective limits upon the authority of the Security Council, lest the Council become an effective legal hegemon, unbound by law.

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119. *See* Jose Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1, 23 (1996). *See generally* ANTONIOS TZANKOPOULOS, DISOBEYING THE SECURITY COUNCIL (2011); DE WET, *supra* note 46; SCHWEIGMAN, *supra* note 41; Martenczuk, *supra* note 19, at 527; JOYNER, *supra* note 1, 218-25.