The Powers of the United Nations Security Council
under Law

by

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Faculty of Law
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Abstract

In the light of concern about the growing levels of power which the United Nations Security Council has begun to exercise in recent years, this thesis aims to establish the limits of the Council’s powers under law. It does so through a study of the two main elements of the Council’s anti-terrorism programme, approached through the lens of the legal philosophy of Lon Fuller, as adapted to international law by Jutta Brunnée and Stephen Toope.

The thesis sets out the two anti-terrorism programmes, “listing” and “legislation”, and analyzes the reaction to them of other actors in the international legal system. It shows that the former phenomenon, listing, still faces considerable resistance, but that Council legislation has generally been accepted over time. In terms of the traditional, positivist account of international law, these responses might suggest that listing is unlawful and that legislation is valid, and that the Council therefore has the capacity to produce new, general legal norms. However, Brunnée and Toope’s legal theory suggests otherwise: that listing has moved closer to compliance with law over time, but that both the substance of the Council’s legislative resolutions and the process by which it adopts them fail to meet the requirements of law.
This thesis is structured, first, to propose the applicable theoretical framework (chapter two), and then to consider a set of cases that provided the tools for some of the challenges to the anti-terrorism measures (chapter three). The two sets of anti-terrorism measures, and the responses to them, are then explored in detail (listing in chapter four and legislation in chapter five). Chapter six, the conclusion, compares the differing histories of the two anti-terrorism measures, and considers, in particular, the prognosis that the Council might develop the capacity to legislate.
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A doctoral thesis entails both an academic and a personal journey. In my case, both journeys presented obstacles which often seemed insurmountable. Without the concern and assistance of a large number of people, I would not have got to the finishing line.

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Chapter 1
The United Nations Security Council under Law

Introduction

The United Nations Security Council was meant to be powerful. It was conceived as the organ with the primary responsibility for one of the chief aims of the United Nations: to prevent armed conflicts.¹ To enable the Council to carry out this responsibility, the United Nations Charter confers on it an extraordinary power to take any measure it deems appropriate to preserve or restore peace, including sanctions, blockades and the use of force.² To trigger this power under Chapter VII of the Charter, the Council must find that there is a threat to the peace, a breach of the peace or an act of aggression,³ whereupon all UN member states are bound to carry out the decisions that the Council takes to address the issue it has identified.⁴

However, this extraordinary power lay largely dormant for the first 45 years of the United Nations’ existence. Throughout the Cold War, the five permanent members of the Council - the USA, the Soviet Union, the United Kingdom, France and China - made use of their veto power to block a range of Security Council resolutions.⁵ The USA and the Soviet Union, in particular, vetoed each other’s proposals, each

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¹ The idea of a new international organization to replace the League of Nations was first mooted in a declaration by the Allies in the closing years of World War Two. See Joint Four-Nation Declaration (1944) 38 AJIL supplement 3; article 1 and 24(1) of the Charter of the United Nations, 24 October 1945, 1 UNTS XVI (hereafter: UN Charter).
² This body will be referred to in this thesis as the “Security Council” or the “Council”.
³ Article 39 of the UN Charter (n 1).
⁴ Article 25 of the UN Charter (n 1).
⁵ The veto power originates in article 27(3) of the UN Charter (n 1).
attempting to pursue its own political interests through this body, or at least to frustrate the other party’s.  

The end of the Cold War awakened the hope that the Council would finally start fulfilling its primary function of maintaining and restoring the peace, and, in doing so, give effect to the purposes of the UN Charter, including the promotion of human rights and fundamental freedoms. When the Council authorized force against Iraq in response to Iraq’s invasion of Kuwait on 29 November 1990, the hope seemed realized; the Council had identified a situation as a breach of international peace and security and, having done so, was able to provide the force necessary to restore the peace - this with the help of some of its permanent members, who took a key role in offering troops and supplies for the military operation that drove Saddam Hussein’s forces out of Kuwait. 

But the fact that the Council can now exercise the powers conferred on it by the Charter does not mean that it will use them in the service of the Charter’s aims, and attention has now shifted from stalemate to safeguards. The Council has seldom authorized force since the action against Iraq in 1990, but it has taken a range of

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6 The veto was used 279 times between 1945 and 1985 (Christine Gray, *International Law and the Use of Force*, 3rd ed. (Oxford: Oxford University Press, 2008) 196), and very few “Chapter VII” resolutions - resolutions that impose obligations on member states - were issued during this Cold War period (David A. Malone, “The Security Council in the Post-Cold War Era: A Study in the Creative Interpretation of the UN Charter” (2003) 35 N.Y.U. Journal of International Law and Politics 487 at 492 (hereafter: Malone)).

7 Article 1(3) of the UN Charter (n 1).

8 SCR 678 (UN Doc S/RES/678 (1990)) authorized UN member states to use “all necessary means to uphold and implement SC Resolution 660 and all subsequent relevant resolutions”. SCR 660 (UN Doc S/RES/660 (1990)) had demanded immediate withdrawal of Iraqi forces from Kuwait.

9 SCR 660 (UN Doc S/RES/660 (1990)) paragraph 2 of the preamble.

10 Of the top ten contributing states, the USA provided the most troops; its forces constituted the vast majority of the entire military contingent. The UK provided the third most troops and France the fifth. These three states were the only non-Muslim contributors in the top ten contributing states. See http://www.nationmaster.com/country-info/stats/Military/Gulf-War-Coalition-Forces. [accessed 17 June 2016]

11 Examples of the kinds of force authorized by the Council can be found at http://www.un.org/en/sc/about/faq.shtml#measures and include naval blockades to enforce sanctions and limited use of force by peacekeepers. [accessed 17 June 2016]
other measures that have raised serious concerns about the increasing levels of power that it is exercising, and the possible impact that this might have on human rights and state sovereignty.\textsuperscript{12}

The focus of this thesis is on two sets of measures that form the kernel of the Security Council’s anti-terrorism programme - “listing” and “legislation”. They have received considerable attention from commentators, courts, states and other non-state actors in the global sphere, and each raises, in a different way, the question of whether the Council is constrained by law. Listing refers to a “smart sanctions” programme dating back to 1999.\textsuperscript{13} Set up initially to address the situation in Afghanistan, it has evolved into a programme whereby a Council committee identifies individuals and entities that it considers to be associated with Al-Qaeda and ISIL/Daesh. The Council has used its Chapter VII powers to oblige states to impose a range of severe restrictions on people listed by the committee - a step which the case studies will demonstrate can impact on individual rights to a devastating degree.

The second set of measures present perhaps the most radical change in Council activity. A practice rather than a programme, these measures began in 2001, when the Council departed from its previous practice of issuing instructions limited to specific situations, states or non-state entities. Instead, it issued new, general, norms which states were bound to implement as law in their own jurisdictions and follow in their interaction with one another.\textsuperscript{14} I describe these measures as “legislation,” a term that some commentators have used to emphasize the incongruity of this new practice with the understanding of the Security Council as a police-like, or executive, organ.\textsuperscript{15}


The first contribution offered by this thesis is an analysis of the reaction of other actors in the international legal system to these Security Council measures. I sketch the growing resistance to listing, and reveal how this led to incremental changes to the listing process introduced by the Security Council over time. In the case of legislation, the response was very different. States supported the first legislative resolution, passed in the wake of the terrorist attacks of 9/11. They resisted the Council’s second legislative resolution, seeing it as the usurping of a capacity which had traditionally been understood to vest in states as a collectivity, namely, the creation of international law. In the light of the concerns that states had raised, the Council appeared for a while to abandon legislation. But, when it resorted to legislation again in 2014, it was met with no resistance at all. Further legislation is not unlikely in the light of this response. The Council has also made no appreciable changes to the process it adopts in legislating. Unlike listing, therefore, legislation has not been “reined in” by resistance.

I analyze these patterns of response in the light of Lon Fuller’s philosophy of law, as adapted by Jutta Brunnée and Stephen Toope’s “interactional” theory of international law. This presents the second contribution of this thesis, as these anti-terrorism measures, and the responses to them, have not yet been considered in terms of this theory.

Brunnée and Toope suggest that law develops out of the “shared understandings” within a community - a community arising from the mutual engagement of its members. In their account, subjects of law “learn” their collective understandings by participating in society; these understandings then affect the subjects’ subsequent experience and mould their further experiences as well as their sense of identity. Norms then develop from the shared understandings of the community, and take on


16 Jutta Brunnée & Stephen Toope, Legitimacy and Legality in International Law (Cambridge: Cambridge University Press, 2010) at 80 (hereafter: Brunnée & Toope, Legitimacy).

17 Brunnée & Toope, *Legitimacy* (n 16) 62.
the quality of law when they fulfill Lon Fuller’s requirements of the rule of law. For Fuller, a norm’s binding force did not come from its location in any of the formal sources of law, but from the fidelity which it generated by promoting the agency of those who were subject to it; a function it could fulfill when it met the requirements of the rule of law.\(^\text{18}\) Law was not “merely the imposition of authority ... from above”,\(^\text{19}\) because it depended “for its existence ‘on effective interaction and cooperation between citizens and lawmaking and law-applying officials.’”\(^\text{20}\) Fuller used the term “interaction” to describe the reciprocal process which shapes the content of the law.\(^\text{21}\) Following Fuller, Brunnée and Toope argue that norms which meet Fuller’s requirements generate their own fidelity.\(^\text{22}\)

Brunnée and Toope describe their account as “interactional international law”,\(^\text{23}\) emphasizing the ongoing process of interaction required in the creation of the law. We will see that the case of listing presents something of an interactional law success story. The Council, which had not initially been interested in interacting with those affected by its decisions, began to reform the listing system when it encountered resistance from states and other entities outside of itself. The Council’s decision-making body - the 1267 Committee - was remoulded through interaction with states and non-state actors so that the listing mechanism itself eventually accommodated such interaction. Although the legality of listing is still controversial, it is clear that the pushback and, in turn, the incremental changes introduced by the


\(^{20}\) Brunnée & Toope, *Legitimacy* (n 16) 29, citing Fuller, *The Morality of Law* (n 19) 221 and 233.


\(^{22}\) Brunnée & Toope, *Legitimacy* (n 16) 26, paraphrasing Fuller, *The Morality of Law* (n 19) 39.

\(^{23}\) Brunnée & Toope, *Legitimacy* (n 16) 53.
Security Council over time have edged closer to Fuller’s account of the requirements of law and recognized the agency of those affected by listing.

The case of legislation presents an intriguing counterpoint to that of listing. As noted above, legislation has, by and large, been accepted by states. In the traditional, and still dominant, positivist conception of international law, a norm finds its legal authority in the consent of states. The general acceptance by states of Council legislation would, in these terms, indicate that the Council has the capacity to legislate and that its legislative resolutions have produced law. However, interactional international law helps us understand why state consent is inadequate to produce law on its own. I will argue that the states’ acceptance of the Council’s legislative action cannot redeem the defects of these acts. This is both because the resolutions themselves fail to meet Fuller’s requirements of legality, and also because the process whereby the Council purports to create law prevents interaction with all non-state actors and almost all states. State acceptance of these resolutions therefore does not indicate their legal quality, but instead masks their deep flaws.

Listing, despite – or, indeed, because of – the strong resistance it has received and continues to receive, has been able to evolve to a point at which some might argue that it meets the requirements of the rule of law. Legislation, by contrast, has promoted a system of arbitrary power which, in Fuller’s terms, we would call managerial direction, rather than law. This is because law is built on a “relatively stable reciprocity of expectations between lawgiver and subject”,24 while managerial direction functions for the benefit of the superior.25

The third contribution of this thesis is thus an assessment of the legal quality of Council legislation in the light of the approach of Fuller, Brunnée and Toope. As noted above, I argue that the existing legislative resolutions have not created law. I then consider whether legislation has the potential to move from managerialism towards law in the way that listing has done. I claim that as a type of decision-

24  Fuller, Morality of Law (n 19) 209.
25  Fuller, Morality of Law (n 19) 209.
making, legislation is different from listing. I argue that legislation is a radical departure not only from previous Council practice, but also from the way in which international law-making is currently understood. Moreover, I suggest that legislation is not amenable to reform in the same way that listing is. As a result, it poses a more insidious and far-reaching threat to individuals than does listing, as it has the potential to give states cover for their own potentially severe anti-terrorism measures.

This thesis is structured, first, to propose the applicable theoretical framework (chapter two), and then to consider a set of cases that provided the tools for some of the challenges to the anti-terrorism measures (chapter three). The two sets of anti-terrorism measures, and the responses to them, are then explored in detail (listing in chapter four and legislation in chapter five). Chapter six, the conclusion, compares the differing histories of the two anti-terrorism measures, and considers, in particular, the prognosis that the Council might develop the capacity to legislate.

The central purpose of chapter two is to set out the approach taken by interactional international law, touching on the fundamental features of Fuller’s legal philosophy and exploring how Brunnée and Toope have incorporated this philosophy into their account of international law. However, before interactional international law can be explored in any depth, it is necessary to survey the main legal frameworks that currently address - or fail to address - Security Council powers. These approaches differ in a number of respects, but they are all based, or purport to be based, on a positivist conception of international law. It is here that the most fundamental problem emerges: those frameworks which do limit Security Council powers to any extent cannot demonstrate a coherent link between the principles which they suggest and the positivist sources of law on which they claim to be drawing. To establish this anomaly, chapter two discusses of the positivist account of international law, its inherent limitations and its relationship with the legal frameworks currently applied to Security Council powers.

Interactional international law provides a solution to the problems presented by the other frameworks. It does not claim to be based on the positivist sources of laws and I will argue that it avoids the failings of the other approaches set out in the
chapter. In the rest of chapter two, I then set out the conceptual tools which the work of Fuller, Brunnée and Toope offer for an analysis of the two types of anti-terrorism measures which are the centre of this study. The toolbox includes the eight rule-of-law requirements which Fuller saw as the internal morality of law, or the morality that makes law possible, and his focus on law as an ongoing enterprise based on reciprocal interaction. To this notion of reciprocal interaction, Brunnée and Toope add insights from constructivist international relations theory to highlight the role of “mutual generative activity” or “communicative action” in the creation of law.

Both Fuller’s vision of law and Brunnée and Toope’s account of interactional international law see reasoned argument as indispensable to the legal process, and chapter two concludes with a brief discussion of how institutions might be designed or adapted to promote such a process. This in turn requires a consideration of Etienne Mureinik’s notion of a “culture of justification”.26 I use the concept both to underline that the rule of law requires an institution wielding power to offer reasoned argument to justify its exercise of power, and to suggest some design elements which might facilitate this process of justification.

We then need to take a step back and consider some European case law which laid the ground for the challenges to the Council’s anti-terrorism activities. The cases in chapter three provide, to some degree, two essential tools for the challenge of Security Council action. First, they show how domestic and regional courts might form part of a feedback loop to the Security Council, as, without their participation, there can be no interaction between courts and the Security Council.27 While domestic and regional judicial decisions may not constitute “review” in the direct


sense of judicial review in a single legal system, such decisions may nevertheless serve that function if the domestic and regional courts engage with Security Council action. Second, these cases explore the possibility of creating a culture of justification in the area of Security Council activities. This is a particular challenge, as the Security Council, like many executives, is loath to justify itself when it claims to be ensuring security. The case law shows a gradual progression, in which courts become ever more willing to demand account from the Security Council for its actions, requiring not only the Council’s reasons but also the evidence supporting them.

Chapters four and five deal with listing and legislation respectively. As set out briefly above, the evolution of listing seems to show interactional law at work, not just because the reformed listing system complies in significant ways with the rule of law, but also because the kind of interaction by states and non-state actors that brought that reform about demonstrates the process which Fuller saw as necessary for law-making. Chapter four thus establishes some of the substantive legal principles binding on the Council and also reveals law as a process, one which constrains the Council in practice.

In chapter five, I examine the Council’s legislative resolutions in detail. I argue that they fail to meet Fuller’s rule of law requirements and therefore lack the quality of law, but I also critique the Council’s decision-making process when it produces legislation, demonstrating how it falls short of the requirements of interactional law. This means that, although Council legislation has been widely accepted by states, it has not created law. I explore the reasons for state support for these measures and conclude that the Council itself as well as the states that embrace its legislative resolutions are in fact adopting the form of social ordering which Fuller called managerial direction. The chapter reveals how the Council and states, particularly the executive branches, use the anti-terrorism programme to increase their power against non-state actors, particularly their political opponents, and that they use these powers without justifying their actions under law. This presents a particular, and ominous, problem, because the purported legislation clothes the increase of power and its arbitrary use with the mantle of law.
Chapter six concludes by considering whether legislation might possibly be reformed in a manner similar to that which transformed listing. Arguing that it is unlikely, I identify a range of factors that obstruct the process of reasoned argument that law-making requires. Some of these factors bedevil listing as well (such as the Council’s reluctance to share its information with other parties), but I also suggest that the process of law-making presents unique problems. I submit that legislation might require a different form of interaction to that of listing, and I identify particular difficulties with establishing a legal regime around the concept of terrorism.

Setting out their position that law is an ongoing process, Brunnée and Toope refer to the “hard work” of international law. The formal sources may provide a starting point, but it is the work of individuals and organizations that “build and uphold international law” by opening up spaces where “sustained mutual engagement and robust interaction can take place.” There may be a corollary to this idea: that those who wish to uphold international law identify clearly when a process is not law. Failure to challenge the legal nature of Security Council legislation facilitates a power-grab by an unaccountable body and undermines the rule of law, two consequences which scupper a coherent, law-based and effective response to the phenomenon and have severe implications for the individuals caught up in the anti-terrorism programme.

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28 Brunnée & Toope, Legitimacy (n 16) 355.
29 Brunnée & Toope, Legitimacy (n 16) 356.
Chapter 2

Alternative Legal Frameworks for the Constraint of the United Nations Security Council

A. Introduction

The central purpose of this chapter is to present interactional international law as the best approach to the question of the Security Council’s powers under law, and to set out the main principles it offers to constrain the Council. However, my recourse to this account of international law can be understood only in the context of an examination of the main legal frameworks that currently address - or fail to address - Security Council power.

I begin by setting out the main Charter provisions which establish the powers of the Security Council (section B). As will be clear from the text, the Charter confers wide powers on the Council and does not appear to limit these powers in any significant way.

The main frameworks which I then discuss show how legal scholars have responded to this generous bestowal (section C). As we will see, most of these frameworks do suggest that law binds the Security Council and limits its powers in some way. In setting out these frameworks, I highlight their approaches to three central questions. The first question is the role which each accords to the text itself. As we will see, one of the earliest frameworks offered to determine the question of the Council’s powers is strictly textual, that is, it purports to find all the applicable legal principles in the Charter itself, whereas the main alternative frameworks incorporate principles of law which are not referred to in the Charter.

The second question concerns the kind of principles which the alternative frameworks introduce when they move beyond the Charter to find the applicable law. Here the main issue to be decided is whether public law should be applied to the global arena, and the United Nations in particular. Private law governs relationships
between equals and this outlook formed the basis of early international law. The question is whether the international law has developed to deal in some way with unequal power relationships, as public law attempts to do within domestic systems. We will see that the frameworks that reach beyond the Charter all draw on public law principles.

The third question goes to a matter which can most succinctly be described as the limits of law. This concerns the capacity of international law, or indeed of law as such, to deal with the kinds of issues that the Council claims to handle. Some scholars claim that law has no role to play in two particular areas: the first is a state of emergency, and the second is in ordering those aspects of society that are, or should be, determined by the political process instead of law. The frameworks take differing positions both on what bearing law has on aspects of society such as its values and policies, and whether the Security Council should be allowed to act outside of the law in order to restore peace and security.

In section C of this chapter, I set out each framework briefly and consider its position on the first two questions - on the role of the text and the use of public law. I then consider how effectively these frameworks might constrain the Security Council. To explore this issue, I set out the principles which each framework suggests for the constraint of the Council, but also examine more closely the third question set out above, namely, what each framework takes to be the limits of law. I will also investigate what traction these frameworks might have in practice in the global arena.

I will conclude by identifying a range of shortcomings in all the frameworks, which range from a complete absence of principles to constrain the Security Council, to the uncertain ambit of some of the principles, to the lack of norms to govern central areas of Security Council action, to the difficulty of bringing the norms to bear on the activity of the Council in practice. However, the most fundamental problem that emerges from an analysis of those frameworks which do limit Security Council powers to any extent is that they cannot demonstrate a coherent link between the principles which they suggest and the sources of law on which they claim to be drawing.
The theoretical basis for the frameworks is explored in section D. While all the frameworks purport to be based on the still dominant, positivist account of international law, a closer examination will reveal that, to the extent that they offer meaningful limits on the powers of the Security Council, the frameworks do not remain within the positivist orthodoxy. Instead, they build on principles and values which cannot be traced back to the sources acknowledged by positivist international law. To investigate this issue more closely, I will set out the main features of the positivist account before showing how relevant frameworks depart from this account when they suggest meaningful limitations on the Council’s powers.

By the end of section D, we will have found numerous hints about the legal tools which could constrain the Security Council, but no coherent basis on which to ground them in the international legal system. To find such a basis, we need to move beyond the positivist account of international law. At this point, I move to interactional international law, the alternative account based on the philosophy of Lon Fuller, as adapted to international law by Jutta Brunnée and Stephen Toope. I suggest that this account provides a coherent basis for the constraint of Security Council powers, and suggests a workable approach to the three main questions set out in this introduction.

In section E, I therefore explore interactional international law, examine its approach to the three central questions posed above, and argue that it is provides the best approach to determining the powers of the United Nations Security Council under law. Section F then examines what interactional international law requires for a lawful exercise of Council powers. This leads, in turn, to a brief discussion of the legal culture which such an approach might require of institutions. In this respect, Etienne Mureinik’s concept of a “culture of justification”¹ and its treatment by

Dyzenhaus\(^2\) and other scholars\(^3\) provides a useful basis to explore the design elements which can enable institutions to engage in the process of interaction, or “reasoning through law”\(^4\) which is central to both Fuller’s and Brunnée and Toope’s theory.

The last section (G) draws together the main conclusions of the chapter.

B. The Text of the Charter

The instrument that created the Council, the United Nations Charter, does not appear to limit its powers. The Charter’s treatment of the Council’s power is, at the very least, capable of widely differing interpretations. These powers are conferred by five central provisions, three of which bear quoting in full:

Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.
3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Article 25

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

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\(^4\) Jutta Brunnée & Stephen Toope, Legitimacy and Legality in International Law (Cambridge: Cambridge University Press, 2010) at 43 (hereafter: Brunnée & Toope, Legitimacy).
Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.\(^5\)

Articles 41 and 42 provide a non-exhaustive list of the measures which the Council can take once it has found a threat to, or breach of, the peace, or an act of aggression. Article 41 makes it clear that this list is not exhaustive; it "includes complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."\(^6\) Article 42 empowers the Security Council to use force if it considers "that measures provided for in Article 41 would be inadequate or have proved to be inadequate".\(^7\) Forceful action "may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations".\(^8\)

C. The Frameworks

C.1. The “Plain Text” Framework: Private Contract, Limited Law

Commentators working within the “plain text” framework determine the powers of the UN Security Council almost solely from the text of the UN Charter. Furthermore, they interpret this document within a private-law paradigm, treating it as a contract between equal, sovereign states. In dealing with the Charter, the “plain text” framework resists reading principles of public law into the text, even when the text reveals gaps and ambiguities. As a result, this framework acknowledges only the most negligible constraints on Council power.

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\(^6\) UN Charter (n 5) article 41. Emphasis added.

\(^7\) UN Charter (n 5) article 42.

\(^8\) UN Charter (n 5) article 42.
The “private law” paradigm arises from the history of international law, which had generally borrowed from private law concepts.\textsuperscript{9} Karl Zemanek noted in the 1960s that public law had, by comparison, received little attention. He suggested that this neglect arose from the relatively late development of public law, the wide variety of domestic manifestations of public law concepts, and the fact that international law had, until the time of writing, been seen as a legal system governing equals and therefore was better suited to the private law paradigm.\textsuperscript{10}

As the Security Council began to use its Chapter VII powers more freely, and a clearer institutional hierarchy emerged in the international sphere, some commentators opposed the extension of the Council’s powers by calling on aspects of domestic public law which limit governmental powers. Defenders of the new Security Council activity, on the other hand, rejected the apparent insertion of these public law concepts into the Charter and argued that the Council’s powers should be determined with reference to the text of the Charter alone.

The best example of this clash of paradigms is seen in the debate around Council legislation. In this instance, we have the clearest example of an executive body doing what many domestic systems would prevent it from doing, namely, producing legislation. A literal interpretation of the Charter, however, would allow the Council to pass whatever kind of measures it pleases: Where the Council “decides” measures, states are obligated under article 25 of the Charter to carry them out.\textsuperscript{11} Moreover, Chapter VII, which confers on the Council the power to “decide” measures, sets as a precondition for the use of this power merely that the Council find a threat to the peace, a breach of the peace, or an act of aggression.\textsuperscript{12} None of these terms is defined in the Charter, nor is any other body empowered to review the Council’s finding for accuracy or reasonableness. There are also no


\textsuperscript{10} Zemanek (n 9) 454, 470.

\textsuperscript{11} See the text of article 25 set out above. UN Charter (n 5) article 25.

\textsuperscript{12} See the text of article 39 set out above. UN Charter (n 5) article 39.
express limits on what it can do.\textsuperscript{13} Just as with the Council’s finding that the preconditions for Chapter VII actions exist, there is no provision for review of its decisions under Chapter VII by any other body.

The stage was therefore set for a debate between those who wanted to read some limitations on Council powers into the text of the Charter and those who wanted a “plain text” reading of the Charter. The objectors to Security Council legislation proposed a number of limitations on Security Council powers in arguments that reveal a concern for how a legitimate government is structured and functions. Thus some complained that the Security Council was a policeman, not a legislature,\textsuperscript{14} or that it should respond only to individual threats to, or breaches of, the peace, rather than prescribing general norms for all situations.\textsuperscript{15} From this perspective, the Security Council would have been acting within its powers when it set up various sanctions to put pressure on the minority government of Southern Rhodesia to end minority rule.\textsuperscript{16} This was because the the Council was responding to a specific situation in that case, emanating from the Unilateral Declaration of Independence of the white minority government in Southern Rhodesia. However, it would not have the power to instruct states to carry out such sanctions against \textit{all} minority or racist governments, because,

\begin{flushleft}
\textsuperscript{13} Articles 40 to 42 of the United Nations Charter. UN Charter (n 5) articles 40, 41 and 42.
\end{flushleft}
by doing so, it would be creating norms to address a general problem unrelated to any specific situation.

One of the strongest objections to Security Council legislation was that the Council did not have the consent of states to legislate. This objection could be rooted in the traditional, horizontal view of the international community, in terms of which no individual body may legislate, but it could also refer to the constitutional idea that legislatures need democratic legitimacy.

All these arguments have been dismissed with reference to the plain text of the UN Charter. Stefan Talmon met the objection that the SC is a policeman, not a legislature, with the remark that the SC’s powers should be determined not by reference to its general role but “on the basis of the provisions of the UN Charter”. Further, Talmon, Rosand and Wood all rejected the argument that the Council may respond only to particular instances of breaches or threats to the peace on the basis that the Charter does not expressly limit the Council to individual situations.

On the question of state consent, both Talmon and Rosand also used the Charter as proof that states have, in fact, consented to Security Council legislation - that is, they relied on the fact that states have consented through article 25 to carry out all decisions of the Security Council. Talmon also used the delegated power in article 25 to link Security Council action to a treaty - the UN Charter - thereby bringing Council resolutions under the auspices of a source of law recognized by the

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17 See the statements of the representatives of Paraguay, UN Doc. A/56/PV.36 (2001) at 2.
18 See the statement by the representative of Cuba at the 4956th meeting. UN Doc. S/PV.4950 (2004) at 30; Statements by the representatives of India, Indonesia, Namibia, Nepal and South Africa from the 4950th meeting of the Security Council. UN Doc. S/PV.4950 (2004) at 23, 31; 17; 14; and 21 respectively.
19 Talmon (n 14) 179.
20 Rosand (n 15) 545, Talmon (n 14) 179, Wood Lauterpacht lectures (n 15), lecture one paragraph 25.
ICJ statute. He countered the argument that the Council has no democratic legitimacy to legislate in the following terms:

It can hardly be maintained that authorizing the use of force requires less democratic legitimacy than imposing an obligation to prevent and suppress the financing of terrorist acts.

In equating these two functions - authorizing individual force and imposing general obligations on all states - Talmon conflated what constitutional lawyers would call the executive, or police, function, and the legislative function. Because the Charter does not distinguish between legislative and executive functions, he could claim that there is no difference between them. Wood rejected the public-law analogy more directly. He argued against a constitutional reading of the UN Charter by emphasizing that this instrument embodies international, rather than domestic, law. He pointed out that international law is of a completely different nature to domestic constitutional law and countered the democracy-based objection to Security Council legislation by rejecting its “false premise”.

Of course, a public-law approach could take issue with all of these counterarguments. The difference between authorizing the use of force in a specific situation and imposing a general obligation to suppress the financing of terrorism goes to the legal control of executive action. The executive action is a one-off event, carried out within the framework of a law that the Security Council has not itself made. To use a municipal analogy, it would be equivalent to the police carrying out an arrest. By contrast, a legislative measure is permanent, changing the legal

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22 Talmon (n 14) 179.
23 Talmon (n 14) 179.
24 Wood Lauterpacht lectures (n 15), lecture one, paragraph 17.
25 Wood Lauterpacht lectures (n 15), lecture one, paragraph 18.
26 Wood Lauterpacht lectures (n 15), lecture one, paragraph 30. Wood refers disparagingly not to public law analogies but to “domestic analogies” when he warns against the use of terms like democracy in relation to the Council. However, the objection cannot be to domestic law as such; since its Roman law origins, international law has frequently used domestic analogies (See generally Zemanek (n 9) 454). Furthermore, article 38 (1) (c) refers expressly to general principles of domestic legal systems as sources of international law. Instead, Wood is rejecting the use of domestic public law in international law.
landscape. It would be equivalent to the police defining the circumstances in which they may make an arrest.  

These observations do not in themselves dispose of the private-law paradigm, because they do not decide which paradigm is more appropriate. But they do point to the need to identify and justify this paradigm before any debate can usefully be held.

We should, at the outset, note that the claim that any text has an objective, set meaning, independent of its interpretation by the reader, is contested. The idea that the meaning of the text is dependent, in whole or in part, on the interpretation of the reader obviously creates a problem of linguistic indeterminacy which both literary and legal theory have addressed. Central contributions to this scholarship are presented by Stanley Fish and Ronald Dworkin, both of whom suggest an approach to meaning and interpretation which steers some sort of middle path between “the belief, held by literary formalists and legal positivists, that interpretation is constrained by what is in the text [and] the belief, held by skeptics and some legal realists, that interpretation is just a rationalization of subjective desires and motives.”

The mere existence of theories of interpretation raises the possibility that plain-text readings, rather than reflecting the purely objective meaning of the text, rest on a number of unstated premises. The “private-law”, contractual reading is itself a premise, and it is a premise that may no longer be appropriate. The global community has been changing and it may no longer be accurate, if it ever was, to

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27 Of course, this analogy suggests that the Security Council is acting under an authorizing norm when it acts as executive. Quite where this norm might be located is a matter of debate, although most commentators agree that the Security Council, which obtains its powers from the Charter, is therefore bound to act within the Charter’s authorizing norms (see the discussion below at section C). As noted above, however, it has also been argued that the Security Council is not subject to law at all (see further the discussion on the “limits of law” below at section E.3.2).


treat all the members of the UN as equal partners to a private contract. At the very least, the private-law model needs to be substantiated, rather than taken as a given.

For present purposes, it is sufficient to note that a “plain-text” reading of the Charter is inconclusive. It will inevitably produce a range of different and conflicting interpretations. A good example is provided by the very different meanings that could be given to article 24(1) of the UN Charter. This provision, which was quoted in full at the beginning of the chapter, confers on the Security Council the “primary responsibility for the maintenance of international peace and security”. It adds that states “agree that in carrying out its duties under this responsibility the Security Council acts on their behalf”. In Security Council and General Assembly debates on Council powers, speakers read this provision as empowering member states against the Security Council, thereby binding it to act in their interests.31 However, those commentators who rely on article 25 to provide member states’ blanket consent for Security Council legislation would see article 24(1) quite differently; that is, as a provision binding the states, rather than the Security Council. Under this reading, article 24(1) establishes that member states have accepted in advance that the Council acts on their behalf. Such a reading might even suggest they are now precluded from claiming otherwise.

Secondly, a “plain text” reading of the Charter leads to some impossible results. The notion of blanket consent under article 25 is perhaps the best example of this. As set out above, member states of the UN agree under article 25 “to accept and carry out the decisions of the Security Council in accordance with the present Charter”.32 This provision has been used to dismiss the objection that legislation by the Security Council overrides state consent.33

But the last phrase in the sentence (“in accordance with the present Charter”) is ambiguous. It could be read to qualify the noun “decisions”. On this reading, the

31 See chapter five for a full discussion of these debates.
32 UN Charter (n 5) article 25.
33 Talmon (n 14) 179; Rosand (n 15) 542. See also James D. Fry, Legal Resolution of Nuclear Non-Proliferation Disputes (Cambridge: Cambridge University Press, 2013) at 173.
phrase inserts a condition for compliance with Security Council decisions, namely, that the Security Council decisions themselves be “in accordance with the present Charter”. But the phrase could also qualify the verbs “accept and carry out”; that is, they could simply be a way of expressing that such acceptance and compliance is itself “in accordance with the present Charter”. The “plain text” reading adopted by Talmon takes the latter approach; it abjures any consideration of whether the Security Council decision is, in fact, “in accordance with” the Charter. At face value, then, article 25 excludes any restriction on the Security Council’s powers. There are no express restrictions, and a “plain text” reading does not admit implicit restrictions. On such a reading, all member states are legally obligated to do whatever the Security Council decides they must do, even if it is to increase their carbon emissions or commit genocide.

This is a ludicrous and impossible result. There is no corresponding concept of consent in comparative private law. Relationships that arise from agency and contract all vest some form of control in the consent giver, either by including terms in the initial contract or by imposing strict fiduciary duties on the person controlling another’s assets. Ironically, some public law constructions might assist a more generous interpretation of the powers of a body acting on behalf of another body. An example would be the concept of delegated legislation, which, in a Westminster-type constitutional system, allows the executive broad discretion because the executive is answerable to the legislature. However, the point is that some sort of framework is needed before this term, and others in the Charter, can be given a plausible interpretation.

C.2. Public Law

A very different reading emerges if public law concepts are applied to the UN. This section will discuss two well-known variants of the public-law approach, namely Constitutionalism and Global Administrative Law (GAL), but it will conclude with a discussion of a third approach to Security Council powers which ostensibly rejects the application of public law to Security Council powers. A closer examination will
suggest that even this approach relies on certain public law concepts and acknowledges that the imbalance of power between the Security Council and other international actors is one of the problems which international law has to address. The overview of public-law frameworks thus suggests that some elements of public law are indispensable for a system meaningfully to constrain the Security Council.

C.2.1 Universal Law: Constitutionalism

Domestic systems of law have developed detailed rules to determine which governmental body enjoys which powers, and how its powers are constrained. This body of law, domestic constitutional law, would therefore seem an obvious candidate as a source of constraint for entities at the international or global level. International Constitutionalism takes many forms, suggesting the application of a range of constitutional principles in varying degrees of detail. At its most fundamental, it is an argument for the application of public law principles to the international sphere, but, as the discussion below will demonstrate, most constitutionalists attempt to apply public law principles to the international community as a whole, rather than to smaller, disaggregated units. Rainer Wahl describes Constitutionalism as the normative position that states should “be subject to duties that arise independent of, or against, their will” and that the higher norms to which they are subject “add up to

36 This description does not deal with pluralist accounts of constitutionalism (see N. Walker, “The Idea of Constitutional Pluralism” (2002) 65 Modern Law Rev 317), but I am focusing in this account on the variant of Constitutionalism that claims to address the powers of the Security Council - a claim that generally entails a unitary picture of the international order.
a whole, to a constitution (or at least add up to larger orders).”\textsuperscript{37} He notes that constitutional thinking is “often directed specifically at the UN Charter as the constitution of the international community; in this variant, the focus is on the constitutionalization of the entire order of international law.”\textsuperscript{38}

Scholars in this field generally suggest that there is a normative unity, or a political hierarchy, or both, at the international level.\textsuperscript{39} These two factors enable them to argue first, that the international community is already in fact (partly) constitutionalized, and second, that it should be (further) constitutionalized.

In the first argument, constitutionalists attempt to find in state practice and opinio juris proof of an already existing normative hierarchy; that is, that the international community is based on a universal value system\textsuperscript{40} with commonly held norms,\textsuperscript{41} which include obligations that are owed to the international community as a whole.\textsuperscript{42} Constitutionalists also argue that the increasing power of supra- and international organizations needs to be constrained by constitutional principles drawn from domestic legal systems.\textsuperscript{43} This latter argument is aspirational, that is, constitutionalists do not claim that their suggestions reflect the lex lata of positivist international law. Nonetheless, they offer proposals for how international law should develop on the basis of moral or ideological considerations which do not fall within the positivist sources of law. Thus Erika De Wet notes that “public decision-making” is no longer located within the state,\textsuperscript{44} and Christian Tomuschat calls for common


\textsuperscript{38} Wahl (n 37) 225.

\textsuperscript{39} Wahl (n 37) 226-229 provides a number of examples of cases and incidents which, he suggests, show a universal set of norms developing across the globe.

\textsuperscript{40} De Wet (n 35) 53; von Bogdandy (n 35) 226.

\textsuperscript{41} De Wet (n 35) 74.

\textsuperscript{42} De Wet (n 35) 54-55.

\textsuperscript{43} Von Bogdandy finds it necessary to explain why his constitutionalist vision should be striven for even if it is unattainable. See von Bogdandy (n 35) 242.

\textsuperscript{44} De Wet (n 35) 53.
institutions at regional levels or a universal level to compensate for the extent to which “the State forgoes or is compelled to relinquish its role as guarantor of the common interest of its citizens”.  

As the discussion below will demonstrate, quite which public law principles this framework suggests for the global level has not been resolved. At a minimum, Constitutionalism would hold the Council subject to the core of the human rights treaties (although what the core might be is itself subject to debate), or at least those human rights which have found their way into customary international law. Within this framework, the Council would be bound to respect the right to life, dignity, freedom of the person, due process rights and, possibly, the right to property when it passes measures which affect individuals. But other constitutional principles also come into play: the doctrine of separation of powers could restrict the functions and powers of the Council when it moves beyond purely administrative measures; administrative law might be applied to particular decisions of the Council or its delegated organs, and the Council could even be subject to judicial review by the ICJ or some other body set up for this particular purpose.

C.2.2. Limited Law: Global Administrative Law (GAL)

Adherents of the Global Administrative Law (GAL) Project suggest that the Council fulfils the function of “international administration” and identify a range of administrative law principles that constrain international and supranational bodies, including the Security Council. The GAL vision is consciously not holistic - that is to say, GAL scholars distance themselves expressly from the constitutionalist vision of a unified global system based on a common set of foundational values. GAL has also been described as a pluralist project, that identifies and analyzes the principles of

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45 Tomuschat, Recueil des Cours (n 35) 226.
47 Pluralism is discussed more fully in chapter three.
administrative law that are emerging in various global fields without presuming to
determine the relationship between the different fields, or to integrate them into a
single system.

Through their analyses, GAL scholars identify a range of principles of
administrative law that play a role in the work of these bodies. The core principles
that emerge echo the main features of domestic administrative law and are generally
procedural: “the right to a hearing before a decision is made, the right to have the
decision made in an unbiased and impartial fashion, the right to know the basis of the
decision so that it can be contested [and] the right to reasons for the official’s
decision”.48 The “right to a decision that is reasonably justified by all relevant legal
and factual considerations,”49 is more controversial because it includes the right to a
“substantively sound decision”,50 thus shifting the enquiry beyond merely procedural
questions. In line with the domestic package of administrative law protections, global
administrative lawyers suggest requirements for valid administrative action such as
transparency, consultation, participation, and effective review of the rules and
decisions of the decision-maker, while also mooting more cautiously a substantive
conception of rationality.51 Finally, some GAL scholars treat legality as a central
requirement, although it is not certain that the term has the same meaning in
different texts. Generally, scholars suggest a procedural interpretation of the term52
- an interpretation that would require that there is a legal rule underlying action that
affects individual rights.53

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48 David Dyzenhaus, “The Rule of (Administrative) Law in International Law” (2005) 68 Law and
Contemp. Probs. 127 at 129 (hereafter: Dyzenhaus, Law & Contemp. Probs.).

49 Dyzenhaus, Law & Contemp. Probs. (n 48) 129.

50 Dyzenhaus, Law & Contemp. Probs. (n 48) 129-130.


52 Kingsbury, Krisch & Stewart (n 46) 298-299.

53 In its broadest sense, this understanding of the term equates to what Chesterman calls the
“government of laws” in his argument for a non-substantive approach to the rule of law in
Comp. L. 331. See also Andrea Bianchi, “Security Council’s Anti-Terror Resolutions and their
C.2.3 “Traditional” International Law: Accountability as Responsibility

From the two frameworks set out above, we might conclude that it is only through public law that some meaningful level of constraint of the Council’s powers can be attained. This view is strengthened by an approach which, ironically, expressly rejects public law norms in the international sphere. In his 2011 monograph, *Disobeying the Security Council*, Antonios Tzanakopoulos warns against public law terminology, emphasizing the different structures of domestic governments and the United Nations, reminding readers that the UN is not a world government and rejecting the notion that the Security Council has produced “legislation”.

He also prefers the term “responsibility” to “accountability”, thus sticking to a concept which has traditionally been applied to relationships between parties of equal power and avoiding a term which, in his own description, requires that an organ exercising power must be subjected to control for the exercise of that power.

Tzanakopoulos approaches his topic through the lens of state responsibility and its application to international organizations, suggesting that states may, as a countermeasure, disobey illegal Council decisions. As most of his argument is

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54 Antonios Tzanakopoulos, *Disobeying the Security Council* (Oxford: Oxford University Press, 2011) at 79-80 (hereafter: Tzanakopoulos). Here the analogy is rejected in order to argue for greater constraint on the Council than the municipal police would have.

55 Tzanakopoulos (n 54) 7, 8.


57 Tzanakopoulos (n 54) 4.

58 Tzanakopoulos references both the Draft Articles on State Responsibility and the Draft Articles on the Responsibility of International Organizations “which must be seen as reflecting both customary law and the predominant view in literature”. Tzanakopoulos (n 54) 33, n 122.

59 Tzanakopoulos (n 54). Tzanakopoulos focuses on mandatory measures (decisions) taken under article 41, and therefore not involving force.
devoted to the applicable secondary norms (the attribution of acts and omissions to the Security Council and the criteria for permissible countermeasures), the question of which norms actually bind the Council receives less attention. However, Tzanakopoulos does suggest some substantive law - the primary obligations to which the rules of state responsibility would be applied. Thus he argues that the United Nations, like every International Organization (IO), is subject to its own constitutive document, which can create international obligations. Each IO is also subject to general international law, to the extent that the general obligations have not been abrogated by the *lex specialis* of its constitutive document.

Tzanakopoulos then finds in the Charter text an obligation for the Council to determine the existence of a threat to the peace before it may take action under Chapter VII. The action taken must be proportional to the danger and must be preceded by efforts to resolve the crisis peacefully. Tzanakopoulos declines to determine the content of the notion “threat to the peace”, but emphasizes that the concept is a legal one which the Council does not have the power authoritatively to interpret. He further argues that the Council’s discretion under article 39 “can only exist within the law”. He adds that the Council’s interpretation of the term “threat to the peace” “cannot but conform to the well-established rules (the ordinary

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60 Tzanakopoulos (n 54) 56.
61 Tzanakopoulos (n 54) 57.
62 Tzanakopoulos (n 54) 60-64
63 Tzanakopoulos (n 54) 64-6.
64 Tzanakopoulos (n 54) 67.
65 Tzanakopoulos (n 54) 62.
meaning to be given to the terms in the light of the Charter’s object and purpose)"\(^68\) and claims that, at the very least, it cannot be interpreted ‘‘contra legem’’, that is, so broadly that the term no longer has any meaning.\(^69\) He also points out that the Charter prohibits the Council from impinging on the functions and powers of other organs of the UN\(^70\) and prescribes certain procedures for taking decisions and passing resolutions.\(^71\)

Dealing with the norms which originate outside of the Charter, Tzanakopoulos argues that the Council is bound by general international law by virtue of the fact that it is a creation of that law, and a subject of it.\(^72\) Chief amongst the obligations originating in this body of law are the norms of *jus cogens* status, which Tzanakopoulos argues are also binding on the Council because they were binding on the states which drew up the UN Charter. As treaty provisions which derogate from *jus cogens* norms are invalid, the states would not have been able to confer on the Council the right to violate any norms in that category.\(^73\) Where other norms of general international law are concerned, Tzanakopoulos concedes that the Council, like individual states, may abrogate from general international law,\(^74\) but that such abrogations should not be lightly presumed.\(^75\) With respect to specific areas of general international law, Tzanakopoulos goes on to argue, the Council is bound by customary international human rights law (whether of *jus cogens* status or not) and the principle of proportionality.\(^76\)

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\(^68\) Tzanakopoulos (n 54) 61.
\(^69\) Tzanakopoulos (n 54) 61-62.
\(^70\) Tzanakopoulos (n 54) 67-68.
\(^71\) Tzanakopoulos (n 54) 68-69.
\(^72\) Tzanakopoulos (n 54) 70.
\(^73\) Tzanakopoulos (n 54) 71. Tzanakopoulos does concede in footnote 161 that the *Vienna Convention on the Law of Treaties* does not apply as a treaty to the UN Charter.
\(^74\) Tzanakopoulos (n 54) 72-74.
\(^75\) Tzanakopoulos (n 54) 74-75.
\(^76\) Tzanakopoulos (n 54) 79-83.
Despite his rejection of public law principles, Tzanakopoulos’ framework cannot be seen as a purely private-law framework. His very statement of the problem - the potential abuse of power by the United Nations Security Council\(^{77}\) - indicates that the horizontal model of traditional international law is no longer apposite. Tzanakopoulos notes the inequality of power between the various players in the global sphere, pointing out that international organizations now exercise sovereign powers which states have lost. His analysis eschews the traditional, purely horizontal model of international law. Unlike the “plain text” commentators, Tzanakopoulos accepts that he is not (merely) interpreting a contract between states.\(^{78}\) He is addressing the phenomenon of public power in the global sphere.

Secondly, Tzanakopoulos does not restrict his argument to the plain text of the Charter. Instead, he applies a range of goals and principles which he seems to see as implicit either in the Charter, or in international law. One of these is the goal of constraining bodies - and the Security Council in particular - to prevent them from exercising power arbitrarily. This goal plays a major part in his reasoning, such as when he argues that the Council does not have the sole power to determine when there is a “threat to the peace”:

> It is exactly this kind of broad discretionary power that runs the danger of being exercised arbitrarily. The Council is *thus* not unfettered in interpreting the notion of ‘threat to the peace’, although it may have wide discretion.\(^{79}\)

It seems, then, that we must turn to public law to find meaningful constraints on the powers of the Security Council. But, as we have seen, there are a wide variety of public law options. The following section examines what the efficacy of the different approaches could be.

\(^{77}\) Tzanakopoulos (n 54) 2.

\(^{78}\) Acknowledging that the “constitutional nature” of the Charter affects his analysis, Tzanakopoulos also points out that it is not “simply” a contract between States, but rather an instrument establishing an international organization. See Tzanakopoulos (n 54) 55.

\(^{79}\) Tzanakopoulos (n 54) 61 (emphasis added).
C.3. The Frameworks Compared

This section considers the extent to which these frameworks do, in fact, offer meaningful limits on the powers of the Security Council. This involves two enquiries. The first is whether the legal principles of each framework constrain the Council, and this question includes a consideration of what each framework considers the limits of law to be. The second is how likely the frameworks are to be put into practice at all. No matter how coherent or powerful they might be in theory, they need also to have some chance of application in the global sphere.

C.3.1. The Frameworks in Theory: Principles and Gaps

For the sake of completeness, we should note at the outset that the “plain text” framework does not limit Council powers at all - or it does so in terms that are too vague to have any real impact. As we will see in chapter four, even jus cogens norms, which are accepted as binding on the Council by most “plain text” scholars, produce a negligible result if that category of norms is interpreted narrowly. Where the Charter leaves gaps - for example, where it does not state what constitutes a “threat to the peace” - proponents of the “plain text” approach take that gap as the limit of international law, at least insofar as it applies to the Council. There are therefore no legal parameters to guide or limit the Council when it determines that there is a threat to the peace. Law ends where the Charter is silent. The focus of this section is therefore those frameworks which present significant constraint on Security Council

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81 See the treatment of the concept in Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities Case T-315/01, Court of First Instance, judgment of 21 September 2005 at paragraphs 279-280, 282-289, 291.
powers. These are Constitutionalism, GAL and the “traditional” approach of accountability as responsibility.

Constitutionalism has the potential to impose upon the Security Council the full range of constraints which limit the powers of domestic executives and legislatures. At its most extreme, it connotes a system in which the Council is subject to a judicially reviewable bill of rights, with additional domestic principles, such as the doctrine of separation of powers, further constraining its functions and powers. However, Constitutionalism presents two main problems: vagueness, and the danger that it will create a coercive hierarchy that stifles or even represses many of the actors in the global sphere.

While all legal norms require interpretation to be applied to a specific set of facts, one of the questions facing Constitutionality is whether it does, in fact, provide a set of positive norms rather than a “discourse and a vocabulary with a symbolic value”.

Anne Peters comments that “[t]he supposedly constitutionalist principles might be too general and imprecise to solve any concrete political problem or to guide legal reform.”

Tomuschat describes the constitutional concept as “no more than an academic research tool suited to focus attention on the substantive specificities of a particular group of legal norms”, and adds that Constitutionalism

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83 Peters, Encyclopedia (n 82) 2.

has “no additional legal consequences”. Koskenniemi, more damningly, comments that constitutionalists “have a vocabulary ... but nothing definite to say with it.”

On the other hand, were Constitutionalism to guide global legal reform, it has the potential to facilitate dictatorship rather than good governance. Any form of centralized or integrated government may impose values on the global population that are not widely shared by the global community. As Krisch notes:

> [S]eeking to establish a coherent, well-ordered structure of political institutions in the global realm today may not only exceed our abilities to understand the parameters in which it would have to operate, or predict how these parameters will develop in the future; it might also play into the hands of those actors that dominate current global politics and are thus likely to shape any new institutional order.

Constitutional principles both enable and constrain the institutions to which they apply. The critiques set out above alert us to the danger that a constitutional programme could also empower global bodies without adequately constraining them, thereby facilitating, rather than preventing, the abuse of its own value system.

The content of GAL is consciously narrower, focusing on the procedure by which administrative bodies reach decisions. It could thus overturn decisions by the Council which affect individual rights without justification. The justification would have to be grounded in the procedure followed to reach the decision, but might also have to meet some substantive yardsticks (for example, that the disadvantage suffered by the individual is rationally connected to the goal that the Council is attempting to attain). Finally, some results may be unjustifiable even if the proper procedure is followed, such as, for example, an anti-terrorism measure requiring states to shoot certain suspects on sight. GAL would not tackle the substantive

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85 Tomuschat, *Recueil des Cours* (n 35) 88, cited by Fassbender (n 84) 280, n 55.


powers of the Council, however, but merely ensure that its use of them follows certain procedural requirements and protects individual rights to a certain level.

GAL also limits its reach and thus leaves areas of the global arena evidently unregulated by law:

Apart from its more analytical and systematising aspects, GAL has a strong normative component, but its normative ambition operates on a (relatively) small scale. It does not aim at a full account of the conditions under which global governance, or global administration, would be legitimate or justified but instead aims at elucidating the respective normative values and presuppositions of particular institutional alternatives.89

In support of this limited approach, Krisch cites Carol Harlow’s warning that “the imbalanced growth of legal, judicial accountability mechanisms may lead to a “juridification” of global governance, narrowing further the space for democratic political engagement”.90

GAL scholars therefore critique the holistic approach of Constitutionalism for “forcing [the global order] into a coherent, unified framework.”91 This is problematic, they say, as it tends “to downplay the extent of legitimate diversity in the global polity”.92

This critique rests on a view of the global sphere as a highly political field with an incomplete network of legal principles. Scholars working from this perspective sometimes situate certain areas of the international and global arena outside the field of law completely. They argue that the common values, and the unified demos, that would be needed to legitimate any overarching legal system are missing. Imposing too many legal principles on an area that should be shaped by the choice of its participants “rigidifies” a space that should be left open and flexible for politics.

89 Krisch, “Constitutional Ambition” (n 88).
90 Krisch, “Constitutional Ambition” (n 88) 257.
92 Krisch, “Pluralism” (n 91) 248.
Thus Aman warns against machinery that “remove[s] decisions from the political arena for substantial periods of time” and Harlow emphasizes the danger of:

... a global space in which citizens no longer have ‘the freedom -- and the forums -- to maximize opportunities for experiment and change’. Instead, they will be presented with juridified institutions and forums in which ‘politics become the politics of procedure, a struggle for the power to define, for jurisdiction: the question is not so much whether a weighing of interests has to take place, but rather which authority in the final analysis is empowered to do the weighing.

GAL therefore proposes a more pluralist approach which focusses on the procedure by which bodies in power take decisions.

Quite where the line should be drawn between law and politics, or law and policy, is a matter of fierce debate. GAL itself has also been criticized for “judicializing” a law-free area, thereby foreclosing on political debate. Further, by introducing legal principles to evaluate and possibly validate the existing politically-driven mechanisms of the international sphere, GAL has been criticized for providing legitimacy to illegitimate processes by giving them the mantle of law.

The last framework discussed above employs the principles of state responsibility to hold the Security Council to account. In his discussion of the primary rules with which the Council must comply, Tzanakopoulos suggests a wide range of legal limits to the Council’s powers, including customary international human rights law and the principle of proportionality. His suggestion of the applicable norms would restrict, quite severely, individual coercive measures which the Council might take. As a matter of substantive law, the primary rules identified by Tzanakopoulos tend to restrict individual acts by the Council, but he expressly limits his argument to Council

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94 Harlow (n 93) 213-214; references removed.

95 Pluralism is discussed in more detail in chapter three.

96 Harlow (n 93) 213.

97 Harlow (n 93) 213.
measures which impose sanctions, not those which purport to change the law or to increase its own powers.

C.3.2. Application of the Frameworks in Practice

The plain text approach denies that there are any significant principles to apply to the Security Council, which at least means that the application mirrors the theory.

On the whole, the traction of the other frameworks in practice have an inverse relationship with the degree of constraint they propose for the Security Council. Thus Constitutionalism could, if put into effect, subject the Council to all the substantive and procedural constraints imposed on legislatures in a constitutional democracy. And yet the structural changes which would be needed to bring the Council, and other powerful bodies, into compliance with all these principles remain a pipe dream.  

GAL, on the other hand, is built of a study of the practice of courts and administrative tribunals, so the principles it suggests, although more limited, are undeniably being applied in the global arena. Finally, Tzanakopoulos’s theory requires no new institutions, but merely offers a legal justification for states to disobey the Security Council when it issues unlawful decisions. It is thus intensely practical, although it suffers from the limitation that it can provide redress only after a norm has been breached. As in traditional international law, states have to assume that enough disobedience will, over time, discourage the Council from breaching the norm in question. There is nothing built into the institution to compel or even assist it to consider the legal view of member states in its decisions. GAL and Constitutionalism, on the other hand, can suggest a range of consultative procedures that could prevent the decision-maker from breaching the norm at all.

98 Thus Anne Peters identifies as a fundamental critique of Constitutionalism that it is “intrinsically impossible, because the preconditions are lacking in the international sphere (such as the lack of political power of global governance institutions).” Peters, Encyclopedia (n 82) 3.

In summary, then, Constitutionalism has the largest potential impact of the public law frameworks, depending on which constitutional principles are transported to the global sphere. GAL is more cautious, generally avoiding questions of substance and setting only procedural requirements for the decision-making of global bodies. In addition, GAL suggests principles to govern the Council’s *administrative* action only, which means there are areas of Council activity to which GAL would not apply any norms at all. Tzanakopoulos’s reading similarly suggests both substantive and procedural requirements for the exercise of power by the Council, but limits these requirements to the imposition of sanctions.

However, as the next section will show, all the public law frameworks share the problem that their theoretical basis is unstable.

D. The Frameworks and Their Sources

As explained in the introduction, the most fundamental problem presented by the public-law frameworks is the uncertain basis of the principles they propose. As we will see below, all of the frameworks offered by the scholarship on Security Council powers purport to draw on the positivist account of international law to support their approaches.  

It is necessary, therefore, to set out the traditional, formal sources of international law before we look at the frameworks in any detail.

D.1 Positivism

International law continues to be dominated by a positivist mindset, reflecting the legal philosophy of the time it emerged as a distinct legal discipline - that is, the 19th century.  

Without purporting in any way to cover the subsequent development of
legal positivism, it is necessary to explain, briefly, how early forms of the philosophy led to the traditional and still dominant conception of international law.

International law adopted positivism’s requirement of a sovereign ruler by replacing the sovereign with the collectivity of sovereign and equal states. The logic of positivism, and its emphasis on a factual, rather than reason-based, source of law, is also borne out by the sources theory of international law, which reveals specific, factual methods to find the formal expressions of states’ consent to international law rules. These sources - treaty, custom and general principles - are discussed further below.

Also known as the “voluntarist” or “consensual” theory of international law, the dominant positivist approach in international law takes state consent as the source of law’s binding force. In this way, it also lays the foundation for an “ascending” theory of international law; that is, it takes the existence of states as the starting point and attempts to construct the legal order on the basis of the behavior and legal views of the states. This feature of positivism stands in contrast to a “descending” model, which draws the binding force of law from something other than the state’s consent. Depending on the factor that is seen to found or validate the legal system - Koskenniemi refers broadly to “justice, common interest, progress, nature of the world community or other similar ideas”102 - law could effectively precede the state and dictate state behaviour. The descending approach is based on some sort of value that the legal society should promote; the ascending approach, by contrast, is strictly factual and, like many versions of domestic legal positivism, expressly places questions of values and morality outside of the law.103

The sources of international law are said to be set out in article 38 of the statute of the International Court of Justice (ICJ), which mirrors the statute of its


103 David Harris, Cases and Materials on International Law, 7th ed. (London: Sweet & Maxwell, 2010) at 27 (hereafter: Harris, 7th ed.).
predecessor, the Permanent Court of International Justice (PCIJ). According to article 38, the Court, in deciding a case under international law, must look to any applicable treaties that the parties before it have signed, to customary international law, with its twin elements of state practice and *opinio juris*, to general principles of civilized nations and, as a subsidiary source of evidence of practice, to judicial decisions and the writings of publicists. Treaty and customary international law play the most important role in international legal argument.

The first source to which article 38 refers is treaties, that is, formal agreements between states. Treaties play an important role in disputes before the international courts and tribunals, and are capable of overriding custom, but they are not, in themselves, sources of law. They function instead as sources of obligation - that is, they create rights and duties for the states parties to them, but have no effect on third parties and therefore do not create norms that are binding on the wider international community. The norms contained in a treaty might pass into customary international law and thereby bind non-signatories, but they would in that case be binding by virtue of their status as custom, not as treaty.

The second traditional source of international law is custom. Article 38 of the Statute of the International Court of Justice describes this source of law as “international custom, as evidence of a general practice accepted as law”.

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106 The only exception is provided by the category of peremptory norms, or *jus cogens*, from which no derogation is permitted. See article 53 of the *Vienna Convention on the Law of Treaties* 23 May 1969, 1155 U.N.T.S. 331.

107 Gerald Fitzmaurice, (1958) *Symbolae Verzijl* 153, as cited in Harris, 7th ed. (n 103) 34 (hereafter: Fitzmaurice).


109 Fitzmaurice (n 107).

110 *Statute of the International Court of Justice*, article 38.
formulation reveals two definitional elements: first, a general practice and, second, a sense that this practice is law - an element usually referred to as *opinio juris*. Designed in this way - as a balance between objective activity and subjective opinion - custom supports the positivist conception of international law with its ostensibly “factual” basis, allowing international law an apparently separate existence from questions of morality or values. In theory at least, the two elements to be established, whether material or psychological, are simply matters of fact that indicate what the state has consented to. However, this conception of custom manages to maintain some element of normativity by factoring into international law what states themselves think they ought to be doing. In Koskenniemi’s analysis, the twin elements of practice and *opinio juris* are needed to provide a balance between the descriptive (practice-related) and the normative (*opinio juris*) elements of international law. Together, these elements are meant to prevent international law from becoming either a mere apology for state practice or a utopian ideal with no relevance to state practice at all. As a mere description, the “rules” of international law would serve to validate whatever measures states wish to take anyway by according them the status of law. Restricted to *opinio juris* - that is, to what states ought to be doing - international law would reflect an ideal system which bears no relation to factual events.\(^{111}\)

The attempt to balance the descriptive and normative elements can succeed only if their respective anchors exist independently of each other. Koskenniemi suggests, however, that practice and *opinio juris* blend into one another, because each is necessary to determine the existence of the other, and that a clear distinction therefore cannot be made between them. The presence of the psychological element can only be ascertained by reference to the material element, and vice versa.\(^{112}\) As a

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\(^{111}\) Koskenniemi (n 102) chapter six.

\(^{112}\) Koskenniemi (n 102) 410-411 and “The Normative Force of Habit: International Custom and Social Theory” (1990) 1 Finnish Yearbook of International Law 93.
result, he argues that the definition of custom is self-referential and the concept itself indeterminate and incoherent.

The lack of determinacy in the traditional conception of custom is borne out by scholarship and jurisprudence, which often seems to veer from the “practice” to the “opinio juris” side of the scale. Sometimes the jurisprudence and academic literature seems to insist on strong evidence of practice;\(^\text{113}\) at other times, practice seems to be almost entirely jettisoned in favour of \textit{opinio juris}.\(^\text{114}\) Custom has also seen two phenomena that seem to move beyond the strictures of article 38. First, some have argued for opening customary law formation to international organizations,\(^\text{115}\) individuals\(^\text{116}\) and other non-state actors.\(^\text{117}\) This has, however, been met with resistance.\(^\text{118}\)

\(^{113}\) See, for example, the \textit{Anglo-Norwegian Fisheries Case} (UK v Norway) [1951] I.C.J. Rep. 191 and the \textit{Asylum Case} (Columbia v Peru) [1950] I.C.J. Rep. 266.


Secondly, international law authorities occasionally rely directly on the moral value of a rule, jettisoning the consent requirement entirely.\(^{119}\) Moral principles have an authority of their own in international case law, with famous instances in the Nuremberg judgments, the appeal to the “most elementary principles of morality” in the Reservations to the Genocide Convention Case,\(^{120}\) and the use of similar phrases by the ICTY\(^{121}\) and the ICJ.\(^{122}\) Domestic cases similarly rely not just on state consent when they investigate international law, but occasionally on the inherent importance of certain moral principles.\(^{123}\) Sometimes these alternative devices are used without any acknowledgement that the original conception of custom is being stretched beyond its orthodox understanding or that the norms proposed do not satisfy the requirements of practice and opinio juris. In such cases, the existence of a rule as custom is simply stated, without any evidence to back its status.\(^{124}\)

Contemporary commentators on international law may acknowledge that the consent-based, positivist approach to international law lacks theoretical coherence,

\(^{119}\) The reliance on moral values could be seen as a form of application of “general principles” (the third source of international law mentioned in article 38 of the ICJ Statute), although this interpretation of “general principles” does not tally with the negotiation history of the term. In the travaux préparatoires, “general principles” are understood as the general legal principles of municipal legal systems, which would mean they would serve to fill the gaps in customary international law. See Diversion of Water from the River Meuse Case (1937) PCIJ (Ser A/B) No 70, at 76-77 (hereafter: River Meuse Case). However, such an interpretation leaves little distinction between general principles and customary international law, as the legal practice of states also can also be seen to provide both state practice and the opinio juris of that state.

\(^{120}\) 18 International Law Reports 364 at 370.

\(^{121}\) An excellent example is the statement of the International Criminal Tribunal for the former Yugoslavia in the case of Prosecutor v Dusko Tadic (Jurisdiction) (Appeal) 1996 (35) I.L.M. 32 at 52: “It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights.”

\(^{122}\) See the role of ‘humanitarian considerations’ in the Corfu Channel Case 16 International Law Reports 155 at 158 and the Nicaragua Case (n 114) paragraph 215.


but they nonetheless stick to the positivist process in ascertaining the content of a rule:

The above materials concerning custom are based upon the voluntarist or consensual theory of the nature of international law, by which states are bound only by that to which they consent. Although this is a theory that presents certain theoretical problems, it remains the one to which the [International Court of Justice] adheres and one from which, not surprisingly, states do not appear to dissent in their practice. If the theory may involve an element of fiction, it is not easy to find a substitute that is both more intellectually defensible and as serviceable as a working hypothesis.\textsuperscript{125}

It is, therefore, not surprising that all three frameworks set out below are grounded in positivism, relying largely on treaty and custom as their sources of law.

### D.2 The Frameworks as Creatures of Positivism

Despite the claim by all the frameworks set out above to work within the traditional, positivist conception of international law, it is only the first framework - the plain text framework - that sits comfortably on its positivist foundation. Given that the formal sources require state practice and evidence of state consent to a rule, the lack of activity in this general area - at least at the time that the debate arose - and the lack of specific norms in the Charter lead easily to the conclusion that there are no norms restraining the Security Council. While this conclusion feels intuitively unsatisfying, it at least follows soundly from its premise - namely, the international law is built purely on the consent of states.

The positivist foundation does, however, create problems for approaches based on public law, as they attempt to integrate a normative structure into an ostensibly practice- or consent-based account of law. The following sections examine the pedigree of both the public law frameworks from a positivist perspective.

\textsuperscript{125} Harris, 7\textsuperscript{th} ed. (n 103) 33.
D.2.1 Constitutionalism

The positivist methodology of Constitutionalism surveyed in section C.2.1 has allowed it to anchor itself within (European) “mainstream” legal thought. Thus Fassbender comments that the discipline is taken seriously because it is “[r]ooted in positivism and determined not to lose touch with actual state practice”. However, the formal sources do not support Constitutionalism as strongly as the positivists claim, as the following survey reveals.

Treaty law provides scant resources for the application of constitutional principles to the international sphere and particularly to the bodies operating at the international level. With regard to the Security Council in particular, the UN Charter does not expressly limit its powers. As noted above, article 1 sets the general goal for the UN of achieving:

international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

This set of goals has been argued to import human rights norms into the UN’s obligations. However, the Charter does not specify which human rights are binding on the UN. This leaves the organization as a whole, and the Security Council in particular, subject to customary law norms of uncertain ambit. The Security Council is not itself a party to any human rights treaties and, as noted above, many commentators accord the Security Council freedom from all human rights norms but *jus cogens*.

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126 Fassbender (n 84) 280.
127 Article 1(3) of the UN Charter (n 5).
In any event, the relationship between human rights and constitutional principles, particularly principles that structure institutions of government, is unclear. While the structure of government obviously affects its ability to realize substantive rights, a separate theory is needed to explain why one particular structure would realize these rights better than another.

Scholars who argue that customary international law now includes constitutional principles claim that a hierarchy of norms has emerged in the international order, and that existing institutions have developed the capacity - or at least potential - to enforce these norms. Thus a number of authors identify “different categories of rules of positive law” as the basis of an “international constitution.” De Wet claims, for example, that the “universal” body of jus cogens norms constitutes a “fundamental yardstick” against which the international constitution can be measured. Tomuschat sees in the “international community” some of the elements of a constitutional system, including a “social substratum” and “an ensemble of rules, procedures and mechanisms designed to protect collective interests of humankind, based on a perception of commonly shared values.” Finally, Fassbender insists that the UN Charter provides the international community with a constitution. These scholars also suggest that the existing institutions of the international arena reflect or support this normative system. De Wet reminds us that the Security Council has “taken extensive measures in support of the international

129; Al-Jedda: R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent) [2007] UKHL 58, paragraphs 26-39 and 150-152; Simma (n 14) 1299-1300.
130 Kingsbury, “The Concept of Law” (n 87) 34-35.
131 Fassbender (n 84) 276-277.
132 Fassbender (n 84) 276-277.
133 De Wet (n 35) 57ff; see also Fassbender (n 84) 276-281.
134 Tomuschat, Recueil des Cours (n 35) 88, cited by von Bogdandy (n 35) 224.
135 Fassbender (n 84) 281ff.
value system”,

partly by treating widespread and systematic human rights violations as threats to international peace and security.

But this foundation is a somewhat uncomfortable one for the system that is built on it. First, it is often unclear what the basis of the constitutional proposal is. To some extent, the impression is created that international law should be constitutionalized because it is slightly constitutionalized already. The argument seems to be based on the fact that states have cast off some of their sovereignty by agreeing to be part of a hierarchical system. From this fact, it concludes that states should abandon their sovereignty entirely. It is not clear why any process should be carried to completion just because it has started. There is no evidence that states want the process to continue any further than it has. The constitutionalist attempt to pull itself up by its own bootstraps hints at a problem discussed in more detail below, namely, that the proposed constitutional hierarchy is based on norms at which constitutionalists have arrived independently of state practice.

The attempt to ground Constitutionalism in the formal source of custom creates problems of its own. Constitutionalism runs the risk of becoming a mere description of the current arrangement if it relies too heavily on the current arrangement of rules and institutions. Because practice-based accounts tend towards apology, positivist proposals of constitutionalization convey a sense of approval of current international institutions. They assume the goodwill particularly of the UN, as though the current institutions will automatically use their powers to enforce the normative hierarchy that the constitutional proposal has found to be embedded in the international legal system. This is a curiously apolitical vision of current international institutions, and it means that the effort to ground the

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136 De Wet (n 35) 64.
137 De Wet (n 35) 65.
138 Koskenniemi reminds us that a legal system that simply describes the behaviour of its subjects collapses into a mere apology for that behaviour. See the discussion above in section D.1.
139 It is noteworthy that De Wet supports “supervision” of the SC by the GA only in the event that the former does not act. See De Wet (n 35) 65.
constitutional proposal in state practice has, ironically, led instead to an idealistic and unrealistic view of the current constitutional arrangement.\textsuperscript{140}

On the other hand, value-centred bases for the constitutionalist proposal are vulnerable to other critiques. If constitutionalists want to stay within the positivist methodology that I described above, they have to find their foundational values - those values that will have a higher constitutional status - in the \textit{opinio juris} of states, not in their own political or moral convictions. Generally, these proposals are human rights-based, relying on “some basic understanding of the common good”.\textsuperscript{141} However, critics of Constitutionalism question whether such a basic understanding exists, pointing out that human rights constitute but one fragmented international regime amidst a range of others, such as trade and security.\textsuperscript{142} Some additional argument is needed to establish the primacy of the constitutionalist values.

Several constitutionalist scholars do propose arguments for the primacy of their system, relying on moral and political considerations, such as resisting the hegemony of a dominant state, or making a conscious choice for one particular, cosmopolitan vision of the international community over others.\textsuperscript{143} But, once such considerations

\textsuperscript{140} In this regard, it is worth noting that Habermas “proposal” for a “reformed” Security Council describes almost to a T the legal capacity of the Security Council of today. In \textit{The Divided West}, Habermas suggests that the Security Council should have the monopoly over force and should protect human rights in its enforcement measures. Jürgen Habermas, \textit{The Divided West} (Cambridge: Polity Press, 2006) (hereafter: Habermas). Under Chapter VII of the UN Charter, only the Security Council has the right to authorize the use of force and it has claimed that gross violations of human rights trigger its enforcement powers under Chapter VII (see De Wet (n 35) 64). Admittedly, article 51 of the UN Charter still preserves the “inherent right of self-defence”, but the Security Council is treated in practice as the judge of whether that right has been properly exercised (see the discussion in chapter five). The current powers of the Security Council therefore closely match the powers that Habermas proposes for it. However, states continue to use force in defiance of the Security Council’s monopoly, they continue to violate human rights, and the Security Council continues, for largely political reasons, to respond selectively to violations by states. Habermas fails to notice that his proposal has already failed in practice.

\textsuperscript{141} Koskenniemi (n 102) 16.

\textsuperscript{142} Koskenniemi (n 102) 15-16; Kingsbury “Concept of Law” (n 87) 36.

\textsuperscript{143} See De Wet (n 35) 76; Habermas (n 140) 216-218; von Bogdandy (n 35) 223; and Fassbender (n 84) 284. See also Anne Peters, “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures” (2006) 19 Leiden J. Int’l L. 579 at 599-600 (hereafter: Peters).
are taken on board, the strictly positivist argument has been lost. The constitutionalist proposal has instead come to rest on a value system of the authors’ own choosing.

The problem of evidence leaves human rights-based Constitutionalism in something of a dilemma. In trying to rely on practice, it tends towards apology: by reflecting merely the (limited) extent to which human rights are currently supported by state practice, human-rights based Constitutionalism can provide a misleadingly approving depiction of current international practice. But if it downplays practice and focuses on *opinio juris*, it lacks a convincing, formalist basis to prioritize the human rights regime over other regimes in international law. It becomes merely an aspirational vision, based not on state consent, but on a moral or political basis that needs to be argued for independently.

The need for some foundational value, independent of the consent of states, reminds us that Constitutionalism conflicts with a strictly voluntarist, ascending view of international law. By its very nature, Constitutionalism threatens the horizontal and consent-based model of international law. With some variations, constitutionalist proposals generally suggest a hierarchy, at least of norms and often also of institutions. Within such a constitutional, hierarchical structure, states have less - or perhaps no - opportunity to opt out of the foundational norms, which minimizes the role of their consent within the normative system. They may also become subject to other, international or global bodies. The proponents of constitutionalization attempt to show, inductively - that is, by reference to state practice - that states have

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144 The prohibition on torture provides one of the most obvious examples of the disjunction between *opinio juris* and practice in the area of human rights. While the prohibition on torture is confidently claimed to be part of *jus cogens*, it was estimated by Amnesty International to have been practiced by at least 141 states in a 2014 report. See Amnesty International, *Torture in 2014: 30 Years of Broken Promises* at 10, available at: http://www.amnestyusa.org/research/reports/torture-in-2014-30-years-of-broken-promises [accessed 21 June 2016].

145 Particularly if the norm in question is a human rights norm. Generally, arguments for the customary status of human rights focus more strongly on the *opinio juris* element of the rule. See, for example, Kirgis (n 114) and *Prosecutor v Tadic* 35 I.L.M. (1996) 32 at paragraph 99.
themselves accepted the diminishing role of their own consent. But they also argue that national sovereignty can and should be overridden in any event where certain values are concerned. Once again, we are not sure that these values are in fact treated as foundational by most states.

The orthodox understanding of custom therefore does not provide a coherent foundation for the development of clear, detailed principles that could constrain the power of international bodies.

The third potential anchor for formally valid law under article 38 is general principles, a category that was created to allow principles from domestic legal systems to apply at the international level. However, some special justification would still be needed to apply, for example, the doctrine of separation of powers to the UN simply because it exists in many, or even most, legal systems. The first problem is the bewildering variety of forms that this doctrine takes from jurisdiction to jurisdiction - the boundary between the executive and the legislature is particularly varied. The other problem is simply one of “fit”. Article 38(1)(c) has generally been used to fill a “private law” gap in international jurisprudence, when the problem faced by the parties resembles closely the situation for which the domestic principle was designed. But the UN bears no relation to the trias politicas of most domestic systems - that is, there is no court with compulsory jurisdiction over all subjects and the government, no legislature and no general executive authority. If the institutional design of the two levels - domestic and global

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146 De Wet, for example, insists that the foundational norms of international law, which have an “ethical underpinning”, have been integrated by States into positive law and have “acquired a special hierarchical standing through State practice”. See De Wet (n 35) 57.

147 Peters (n 143) 587ff; De Wet (n 35) 58-59; von Bogdandy (n 35) 228; Tomuschat, Recueil des Cours (n 35) 95.

148 See the review of national approaches to this issue in Executive Council of the Western Cape Legislature v President of the Republic of South Africa 1995 (4) SA 877 (CC) (South Africa), especially paragraph 55.

149 River Meuse Case (n 119).
- are so different, why should the principles of one level have any purchase in the other?

D.2.2 GAL

Benedict Kingsbury and Nico Krisch identify a range of sources for the emerging discipline of global administrative law,\textsuperscript{150} including the traditional international law sources of treaties, custom and general principles. However, the authors argue that the normative practice in the field goes beyond the principles contained in these sources, and that a better source for the existing normative practice could be seen as a revived \textit{ius gentium}, which “could encompass norms emerging among a wide variety of actors and in very diverse settings, rather than any kind of \textit{ius inter gentes} built upon agreements among states”.\textsuperscript{151} GAL scholars analyze the practices of a range of global bodies – including international,\textsuperscript{152} transnational,\textsuperscript{153} multilevel,\textsuperscript{154} informal and quasi-judicial entities\textsuperscript{155} - that work in areas such as security, finance, environmental protection, investment and development.

Kingsbury subsequently analyzed GAL’s claim to the status of law in more detail, setting out criteria by which he suggests legal norms be recognized as such in this field. By his own account, it is a positivist, Hartian approach, relying on a rule of recognition.\textsuperscript{156} However, his approach does not lead to the traditional, positivist

\textsuperscript{150} Krisch & Kingsbury (n 51) 29-30.
\textsuperscript{151} Krisch & Kingsbury (n 51) 29.
\textsuperscript{152} For example, United Nations agencies, the World Trade Organization and the International Monetary Fund.
\textsuperscript{153} For example, the World Bank and Strategic Air Command.
\textsuperscript{154} For example, the Internet Corporation for Assigned Names and Numbers and the World Anti-Doping Agency.
\textsuperscript{155} For example, the International Tribunal for the Law of the Sea and the World Bank Inspection Panel.
\textsuperscript{156} In Hart’s theory, the rule of recognition provided the criteria by which the validity of the other rules of the legal system could be determined. This meta-rule is established by the convention of officials who accept it and follow it in their administration of the law. It is thus a purely
international law sources of article 38, for two reasons. First, Kingsbury widens the society in which he seeks the “social fact” of the rule of recognition of GAL. Instead of looking to inter-state discourse and practice, he examines the activities of the officials of the wide range of bodies set out above.\textsuperscript{157} Second, Kingsbury pronounces the Hartian system for identification of a legal rule “necessary but not sufficient”.\textsuperscript{158} He adopts what he considers the central aspects of Hart’s theory - that is, Hart’s “emphasis on social practices, sources of law, and recognition”\textsuperscript{159} but requires that legal rules also meet the additional criterion of “publicness”. Through this addition, a number of values, including human rights, become definitional requirements for law.

Kingsbury suggests that a global governance entity or regime should be assessed “by reference to the attributes, constraints and normative commitments that are immanent in public law”.\textsuperscript{160} Although he relies on Jeremy Waldron\textsuperscript{161} for the claim that the quality of publicness is “necessary to the concept of law in an era of democratic jurisprudence”,\textsuperscript{162} his own treatment of publicness is wider than Waldron’s. For Waldron, the essence of publicness is that a rule purports to be for the good of the community; that is, that it is a rule that most people in that community would like to see, not only for themselves but for everyone. In Waldron’s democratic model, it is sufficient that the rule \textit{purports} to be for the public good. However, Kingsbury suggests a (non-exhaustive) list of requirements for publicness,

\begin{itemize}
\item\textsuperscript{157} Kingsbury acknowledges that the rule of recognition will be “fragmented”, differing from one global body to the next. See section D.2.2 below.
\item\textsuperscript{158} Kingsbury, “The Concept of Law” (n 87) 30.
\item\textsuperscript{159} Kingsbury, “The Concept of Law” (n 87) 29.
\item\textsuperscript{160} Kingsbury, “The Concept of Law” (n 87) 30.
\item\textsuperscript{162} Kingsbury, “The Concept of Law” (n 87) 31.
\end{itemize}
which include the principle of legality,\textsuperscript{163} the principle of rationality (seen as a requirement to give reasons for decisions), the principle of proportionality, the rule of law (understood in proceduralist terms)\textsuperscript{164} and human rights. This last category includes bodily integrity, privacy and personality.\textsuperscript{165}

However, this argument runs into similar difficulties to those faced by constitutionalists because it is trying to introduce foundational values into an ostensibly value-neutral model of law. Waldron’s concept of publicness is expressly value-based because he claims publicness as an attribute of democratic jurisprudence. Kingsbury’s concept is similarly value-based, including some central human rights.\textsuperscript{166} But Kingsbury is not making a claim for democracy in international law. Indeed, he expressly distinguishes between democracy and publicness in the international arena.\textsuperscript{167} Where, then, do the values come from?

Kingsbury claims that publicness is “immanent” in law,\textsuperscript{168} which seems to suggest that he is drawing on the practice of lawyers in the public sphere. He thus refers to comparative domestic public law as a source of the principles of publicness, and his argument for the particular requirements of publicness draws on “what many public lawyers in common law systems argue is a distinct set of public law values”.\textsuperscript{169} But the reference to “common law systems” hints at the weakness of this argument - its reference to domestic practice is selective, preferring those systems in which

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{163} This is narrowly defined, to denote that “actors within the power system are constrained to act in accordance with the rules of the system”. Kingsbury, “The Concept of Law” (n 87) 32.
\item \textsuperscript{164} That is, “a general acceptance among officials (and in the society) of particular deliberative and decisional procedures, including the publicity maxim”. Kingsbury, “The Concept of Law” (n 87) 33.
\item \textsuperscript{165} Kingsbury, “The Concept of Law” (n 87) 33.
\item \textsuperscript{166} See discussion in section D.2.2 below.
\item \textsuperscript{168} Although Kingsbury seems to accept Waldron’s argument that publicness is immanent in all law, his own treatment of the concept focuses on the public law aspects developed in GAL. Kingsbury, “The Concept of Law” (n 87) 30-31.
\item \textsuperscript{169} Kingsbury, NOMOS (n 167) 177.
\end{itemize}
\end{footnotesize}
public law serves specific purposes such as the constraint of power, social insurance and the liberty of the individual. As Scheuerman comments:

In [Kingsbury’s] view, public international law needs to rest on normative principles of legality, rationality, proportionality, the rule of law, and human rights .... Yet, this arguably represents a no less demanding model for an emerging ‘global rule of law’ than we encounter in prominent cosmopolitan theories... If I understand Kingsbury’s redefinition of international public law correctly, it would require - or perhaps presuppose - significant agreement on many controversial matters concerning the legitimacy of law, not the least of which are much contested ideas of the rule of law and human rights.171

Like Constitutionalism, then, GAL may be relying on “some basic understanding of the common good” without establishing that the understanding is shared at a global level;172 or that the “common good” of a liberal domestic society equates to the common good of the global society which GAL is meant to serve.

D.2.3 “Traditional” International Law: Accountability as Responsibility

The positivist, consent-based interpretation of the Charter focuses on giving effect to the intention of the drafters, as the consent of the drafters is the basis of the legal instrument. As discussed above, this is an “ascending” approach to international law, based on the will of the member states. By deriving their norms from “some basic understanding of the common good”, Constitutionalism and GAL take a contrasting, “descending” approach. Given Tzanakopoulos’ emphasis on the Charter and “traditional law”, and his rejection of public-law concepts, we would expect him to follow the ascending, textual approach, building his normative system on the consent of states.

However, there is a strong “descending” element to Tzanakopoulos’ analysis, particularly when he incorporates a range of presumptions, purposes and interpretive tools which are not mandated by the text of the Charter. His analysis often draws on

170 Kingsbury, NOMOS (n 167) 177.
172 Koskenniemi (n 102) 16.
the innate qualities of law, which means that the focus shifts from what the drafters intended or even what the text “means” to what the legal system requires within which the instrument was created and must be given effect. The member states thus do not create the only applicable law. They are themselves subject to law when they negotiate, sign or ratify treaties, and their treaty creations are similarly subject to the legal system which constrains their creators.

Tzanakopoulos draws on a number of assumptions which he seems to find inherent in law rather than the intention of the drafters of the Charter, including the notion that “a discretion can only exist within the law”,\(^\text{173}\) and that “power entails accountability”.\(^\text{174}\) His interpretation of particular terms of the Charter is informed by the need to maintain the integrity of the legal system,\(^\text{175}\) and, like the scholars of Constitutionalism and GAL, he seems to buttress his vision of law with some basic intuitions about the common good, including the simple human intuition that “it is almost inconceivable” that there could be no legal limits to the power of the SC.\(^\text{176}\)

Various other aspects of Tzanakopoulos’ reasoning do not sit comfortably with the positivist sources theory and suggest that factors outside of the formal sources are playing a role in his reasoning. Thus he relies heavily on two sets of Draft Articles produced by the International Law Commission; namely, the Draft Articles on State Responsibility (DASR)\(^\text{177}\) and the Draft Articles on International Organizations (DARIO). He claims that both have the status of custom. However, this claim is highly

\(^{173}\) Tzanakopoulos (n 54) 61, citing Ian Brownlie, “Political Organs” (n 67). It is perhaps worth noting that these two sources do not, in positivist terms, provide strong support for the notion that discretion can be exercised only within law. Both the sources cited are subsidiary, not primary, sources of law.

\(^{174}\) Tzanakopoulos (n 54) 1.

\(^{175}\) Tzanakopoulos (n 54) 72-75 and 78, in which Tzanakopoulos draws an analogy between countermeasures and sanctions. Note, also, Tzanakopoulos’ comment at 63 that the ICC could not logically “(and thus legally)” be determined to be a threat to the peace under article 39 of the UN Charter. Emphasis added.

\(^{176}\) Tzanakopoulos (n 54) 56.

questionable in the case of the second set of draft articles. DARIO is largely untested and has been criticized for its scant support in state practice.\textsuperscript{178} The norms set out in DARIO are based largely on \textit{obiter dicta} in the case law, scholarly writings\textsuperscript{179} and the DASR. It is also new. It was recommended to the GA as the basis of a convention only five years ago in 2011.\textsuperscript{180} The DASR articles, by contrast, were adopted in 2001, drew on earlier practice, and have been cited with approval in international case law.\textsuperscript{181}

Finally, while there is long-standing precedent for treating international organizations as subjects of law, Tzanakopoulos departs from this precedent in a number of respects. In the \textit{Reparations for Injuries Case}, the ICJ accepted that the UN itself had limited legal personality, based largely on the functions which its member states wanted it to perform. In this form, the legal personality of IOs is grounded directly in the consent of states. However, Tzanakopoulos does not carry out an inquiry into what states intended for the UN when he determines the level of its legal personality. He treats the UN, and other IOs, as full legal subjects - an approach also reflected in the ILC’s view that an international organization can argue self-defence to preclude the wrongfulness of its conduct.\textsuperscript{182} Moreover, as shown above, he sees the UN as bound by general international law on the basis that it is a creation of that law, and a subject of it.\textsuperscript{183} But there are enormous differences between states - the traditional full subjects of international law - and IOs.

\begin{itemize}
\item \textsuperscript{179} Alvarez (n 104) 345.
\item \textsuperscript{180} Boon (n 178) 8. The full report of the ILC, with the text of DARIO, is available at http://untreaty.un.org/ilc/reports/2011/All%20languages/A_66_10_E.pdf. [accessed 21 June 2016]
\item \textsuperscript{181} See, for example, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Rep 43 paragraph 401.
\item \textsuperscript{182} Article 21 DARIO. One of the comments on this article suggests that “self-defence” should be taken to include defence of a population. This suggestion - which, in any event, would make self-defence overlap with distress or necessity - does not quite erase the impression that the ILC is suggesting that an IO has the right under international law to defend its very existence, as an organization.
\item \textsuperscript{183} Tzanakopoulos (n 54) 70.
\end{itemize}
Positivist, ascending law regards IOs as merely the instruments whereby the wills of states are realized. From this perspective, it is open to debate whether IO’s are subject to all of international law, as states could wish to create bodies which are not subject to international law. Furthermore, and whatever their primary obligations, the capacity of IO’s to bear liability in their own right has also been questioned.\textsuperscript{184}

E. Lon Fuller and the Rule of (International) Law

The discussions in sections C and D above leave us in something of a conundrum: the principles which appear to provide the only meaningful constraint on Security Council powers do not have a coherent basis in the traditional, and dominant, positivist account of international law. If we are going to argue that law does constrain the Security Council, then, we are going to have to find a theory which accommodates the principles that do the job.

We can find this in the legal philosophy of Lon Fuller, and its application to international law by Jutta Brunnée and Stephen Toope. After setting out Lon Fuller’s theory briefly, I will discuss how he tackles the three themes which emerge in the three frameworks discussed above. Finally, I consider what Fuller’s theory means for law’s constraint of the United Nations Security Council.

E.1. The Rule of Law

The concept of the rule of law is multi-faceted and contested, but it has a central core in legal philosophy that most legal theorists share. This shared core can be extracted from what Waldron has called the “laundry lists” of the rule of law, that is, the list of qualities which each philosopher argues is required before a social system

\textsuperscript{184} Boon (n 178) 3.
can be seen to include the rule of law. Thus Fuller’s list, set out below, corresponds in general terms with those of other rule of law theorists.

Fuller’s vision of the rule of law consisted of eight distinct features: that there be (1) rules, which are (2) publicized, (3) understandable, (4) not retroactive and (5) internally consistent (that is, not contradictory). The rules must also be (6) relatively consistent over time, that is, they may not change so frequently that the legal subjects can no longer orient their conduct in compliance with the rules. In addition, (7) compliance must not be physically impossible - that is, law cannot demand that legal subjects act beyond their powers. Finally, the (8) administration of law must reflect the rules as announced.

These eight requirements boil down to two basic ideas: first, that law must have a form which allows its subject to understand what it demands of them and to ensure that their behavior complies with it; second, that the law as laid down must be the law that is applied to them. To fulfil the first requirement, law must be general, publicized, understandable, consistent, and not impossible to comply with. To fulfil the second, it must be prospective, reasonably stable, and faithfully enforced. With this general understanding of the “lists”, Fuller’s vision of the rule of law accords with much of the prominent rule-of-law scholarship.

Thus Dicey, Hayek, Raz, Finnis and Rawls all accept that law binds the government, as well as the legal subjects. Many require that law applies equally


186 Fuller also described this requirement as a requirement of “generality”. See Lon L. Fuller, The Morality of Law (revised edition) (New Haven and London: Yale University Press, 1969) at 46 (hereafter: Fuller, Morality of Law).

187 Fuller, Morality of Law (n 186) 39.


to all citizens. Many rule-of-law theorists focus furthermore on the predictability of law in their vision of the rule of law, a requirement which entails that rules be prospective, stable, open and clear.

Where Fuller differed from many scholars was, first, in seeing a deeper, moral function in the rule of law, and, second, in seeing the rule of law as constitutive of legality - that is, the quality of being law. In contrast to scholars who viewed the rule of law requirements as a wish list for an optimal legal system, Fuller saw the rule of law as an essential component of law as such. Should any of his eight requirements be missing completely, he argued that what would be left would not just be bad law; it would not be law at all. In other words, for Fuller, the rule of law is constitutive of law. To understand this claim properly, we need to see the rule of law not as a laundry list, nor even as a system which ensures reliable guidance for individual action. We need to consider Fuller’s view that the rule of law carried out the central, moral function of protecting and promoting human agency.

E.2. The Moral Basis of Law

For Fuller, the central moral element that law both protected and relied on was human agency:

I have repeatedly observed that legal morality can be said to be neutral over a wide range of ethical issues. It cannot be neutral in its view of man himself. To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and

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Raz, “Rule of Law” (n 190) 214-218.


Fuller, Morality of Law (n 186) 39. Fuller did acknowledge an exception in the case of retroactive legislation. See 51ff.
In Fuller’s view, two further, underlying elements of legality ensure that humans are able to act as agents: congruence and reciprocity. The first term is one of the items in Fuller’s list (and the list of other rule of law theorists), but it has a broader function in Fuller’s theory than the list alone would suggest.

As set out in Fuller’s eight principles, congruence requires that the lawmaker, and its officials, comply with their own law, as pronounced, when they administer it.

Surely the very essence of the Rule of Law is that in acting upon the citizen (by putting him in jail, for example, or by declaring invalid a deed under which he claims title to property), a government will faithfully apply rules previously declared as those to be followed by the citizen and as being determinative of his rights and duties. If the Rule of Law does not mean this, it means nothing.\(^\text{195}\)

Postema identifies a deeper meaning of congruence in his discussion of Fuller’s “congruence thesis”.\(^\text{196}\) He points out that Fuller also required “legal norms and authoritative directives” to be broadly congruent with “practices and patterns of interaction in the society generally”.\(^\text{197}\) This is in line with Fuller’s emphasis on “implicit law” - law emerging from “the network of tacit understandings and unwritten conventions, rooted in the soil of social interaction”.\(^\text{198}\) Under this understanding of congruence, the proclaimed rules (and official administration of these rules) must also be reasonably consistent with the broader legal and social system into which they are introduced.\(^\text{199}\)

The value of congruence for human agency is that individuals know what the consequences of their behaviour will be. They thus have a stable basis for planning

\(^{194}\) Rundle (n 192) 106 (footnotes omitted), citing the last chapter of the original edition of Fuller’s *Morality of Law*.


\(^{197}\) Postema “Implicit Law” (n 196) 265.


\(^{199}\) Brunnée & Toope, *Legitimacy* (n 4) 97.
their own conduct. Because congruence allows the subjects of law to reason with it and “make choices about their own lives”, it supports individual autonomy and agency.

The second element by which law promotes human agency is closely connected to congruence, and that is reciprocity. Once again, the term can be understood at a number of levels. On one level, reciprocity refers to Fuller’s argument that law is mutually beneficial, that is, it has a benefit for both the law-giver and the subject. The discussion of congruence set out above has already suggested what the benefits can be for the subjects of law, and in this respect reciprocity, congruence and agency are mutually reinforcing. The interrelationship is well illustrated by Fuller’s distinction between managerial direction and law:

Managerial direction, [Fuller] explains, is a form of social ordering characterized by a top-down projection of power that is directed to serve the interests of the superior, rather than, as he claims is the case with legality, the reciprocal interests of both. Within a managerial relation, therefore, ‘the subordinate has no justification for complaint if, in a particular case, the superior directs him to depart from the procedures prescribed by some general order,’ not only because the principle of generality has no necessary place within managerial direction but also because the demand of congruence equally has no such constitutive role. Thus there can be no expectation on the part of the subordinate within the managerial relation that the actions of the superior should conform to previously announced rules.

Reciprocity in this form can be seen as granting the subject of law the right to expect congruence. For Fuller, this kind of reciprocity was the basis of the subject’s duty to comply with the law. In a reciprocal system, there is an expectation on the part of government that the subject will comply with the law, and an expectation on the part of the subject that such compliance will have the expected result. When this reciprocity is “completely ruptured” by government, Fuller claimed, “nothing is left on which to ground the citizen’s duty to observe the rules”. But reciprocity must also be seen as part of the process by which law is formed. In this regard, Fuller used the term “interaction” to describe the reciprocal

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200 Brunnée & Tooke, *Legitimacy* (n 4) 29-30.
201 Rundle (n 192) 81-82 (footnotes omitted).
202 Fuller “A reply to critics” in Fuller, *Morality of Law* (n 186) 209.
203 Fuller, *Morality of Law* (n 186) 40.
process which shapes the very content of the law. Implicit law - law arising from the interaction of subjects with one another - formed a central component of a legal system, but Fuller claimed that interaction was part of all other law-making as well, “even … those [forms] apparently dominated by enacted law and formal law-making and law-applying institutions.” This was both because there is a horizontal element in apparently “vertical” law-making procedures, such as adjudication or even the drafting of legislation, and also because the subjects of law are engaged in a “vertical” process of interaction with the law-giver. Brunnée and Toope note that Fuller’s “interactional theory” of law is regarded by current legal theorists as his most fruitful insight.

E.3 Fuller and the Questions of Text, Public Law and the Limits of Law

E.3.1. Public v Private

Fuller’s legal theory was meant to apply to a legal system, rather than one sub-category of law. While he did not directly attack the theoretical divide between public and private law, he did point out that the seemingly state-free domain of private law was an area created and maintained by broader society:

If A and B sign articles of partnership we have little difficulty in seeing the analogy between their act and that of a legislature. But if A contracts to buy a ton of coal from B for eight dollars, it seems absurd to conceive of this act as species of private law making. This is only

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204 Postema, “Implicit Law” (n 196) 259.
206 See Postema’s discussion of the different aspects of interaction in Postema, “Implicit Law” (n 196) 259-65.
because we have come to view the distribution of goods through private contract as a part of
the order of nature, and we forget that it is only one of several possible ways of accomplishing
the same general objective. Coal does not have to be bought and sold; it can be distributed by
the decrees of a dictator, or of an elected rationing board. When we allow it to be bought and
sold by private agreement, we are, within certain limits, allowing individuals to set their own
legal relations with regard to coal.\(^{209}\)

For Fuller, the essence of (all) law is found in how it facilitates reciprocity and
interaction between governors and the governed. It can therefore be seen to mediate
between the wielder of power and the subject of law. In Fuller’s view, law constrains
power because the rule of law requires that an ongoing process of interaction
between law-giver and subject shape the content of the law while the reciprocal
fulfillment of obligations by both law-giver and subject sustains fidelity to the law.
This formula applies no matter what the power differential is between subject and
law-giver. From this perspective, therefore, there is no difference between the
“public” and the “private” sphere; because the rule of law sets the same
requirements for both, no strict distinction between the two spheres is necessary.

So what role does the imbalance of power play in Fuller’s theory? Unequal
power remains important because it increases the risk that the law-giver - whether
that entity is a human being or an institution - will avoid a reciprocal engagement
with those who are governed. If it is powerful enough, the power-wielder has the
option of making rulings for its own benefit alone. Because it can force the less
powerful to adhere to the measures it passes, its interaction with those less powerful
take on the character of managerial direction rather than law. Even though he did
not address public law as a separate phenomenon, then, power was central to Fuller’s
theory. As Kristen Rundle explains:

> For Fuller, there can be no meaningful concept of law that does not include a meaningful
limitation on the lawgiver’s power in favour of the agency of the subject.\(^{210}\)

The global arena has traditionally been seen as a flat structure between equal and

\(^{209}\) Lon L. Fuller, “Williston on Contracts” (1939) 18 N.C.L. Rev. 1 at 809-810, cited by James Boyle,

\(^{210}\) Kristen Rundle, Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller (Oxford: Hart
souvereign states. But hierarchies of power are emerging over time. Although both individual states and institutions can wield power in the global arena, the particular power-wielder in this study is an institution, the United Nations Security Council. It is, moreover, the only institution with the formal power to issue binding commands on states without their specific consent, so its power is considerable.

The imbalance of power increases the likelihood that the reciprocal interaction between law-giver and subject could be lost. Therefore, if the power-wielder is an institution, the rule of law requires that the institution facilitate interaction with those affected by its decisions. This in turn requires a particular design, under which processes of communication and feedback can be directed between the parties. As institutions develop, the principles of legality become an essential testing ground for their design and practice.

E.3.2. Limits of Law

Fuller’s notion of the inner morality of law necessarily rejected the argument that law and morality were completely separate domains. A closer look at his theory of law will show that it also blurred the boundaries which other lawyers placed between “law” and “non-law” of other types. In this section, I examine how Fuller’s view of law allowed for overlaps between law and other domains of social ordering, such as politics.

Applying Fuller’s philosophy to International Law, Brunnée and Toope identify three interlinked stages in the creation of legal norms. The first is a “shared understanding” which develops within a community - a community arising from the mutual engagement of its members. The consequence of this construction of “community” is that its members are all those who do in fact engage with the community, rather than just those entities with a particular status (such as statehood

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211 See also Kingsbury, “Concept of Law” (n 87) 52.
212 Brunnée & Toope, Legitimacy (n 4) 80.
itself). Norms will form from the shared understandings of this community, but they
will be legal norms only if they meet Fuller’s eight “rule of law” criteria. To these
criteria, Brunnée and Toope add one more step before we can speak of
“interactional” international law: there has to be an ongoing practice of legality
which confirms and sustains the norm which the community has created.

This three-stage process recognizes a “pre-law” stage. There can be no law if
there are no shared understandings, and even these shared understandings do not
crystallize into legal norms until these norms satisfy the criteria of the rule of law.
And Brunnée and Toope also make it clear that law can be lost; there can be a “post-
law” stage. Fuller therefore does not argue that law covers all human experience in a
seamless web. As Brunnée and Toope note, Fuller recognized that “law is only
possible within specific times and places where actors have developed certain basic
understandings about what they hope to achieve together”.213

However, Fuller’s “law-free” areas do not map onto those normative systems
and areas of social ordering which other theorists would describe as morality or
politics. Fuller questioned the very notion of a bright line between many different
systems of social ordering, and saw what we might call an overlap between law and
both morality and politics. Fuller’s view of law and other social or normative systems
can best be explored with reference to his discussion of the “two moralities” - what
he termed the morality of duty and the morality of aspiration.214 The first morality
consists of specific, clear obligations, providing a minimum standard to which the
subjects of law have to adhere. The second morality reflects a broader body of
values and ideals. These may be seen as goals which the subjects should aspire to,
but it may not be possible to realize them.215

213 Brunnée & Toope, Legitimacy (n 4) 42.
214 Fuller, Morality of Law (n 186) 5.
215 Fuller, Morality of Law (n 186) 9.
For Fuller, these two moralities appeared on a continuum, which Wibren van der Burg illustrates with an example from the rules governing medical practice.\textsuperscript{216} Starting in the realm of the morality of aspiration, he suggests an applicable ideal - the highest, most abstract aspiration: respect for the autonomy of human beings. Still in the area of aspirational morality, he suggests a principle and policies which support this idea. In this case, the principle is that doctors should not treat patients without their informed consent, and various policies might be put in place to “foster conditions for autonomous decision-making”,\textsuperscript{217} such as providing access to information and counselling services. We are still in the realm of the morality of aspiration because the principles and policies are not realizable in every instance. Within the morality of duty, we would find specific rules that detail which information has to be provided for a medical procedure or a category of procedures, how the patient is to indicate consent, and when the requirement of informed consent may be disregarded.\textsuperscript{218} While occupying different places on the moral continuum, each obligation is informed by the related obligations elsewhere on the continuum. For example, in cases of ambiguity, the rule allowing the requirement of consent to be disregarded will need to be interpreted in the light of the general principle to which it is meant to give effect, and the value it is meant to promote.

Despite his description of law as the “enterprise of subjecting human conduct to the governance of legal rules”,\textsuperscript{219} Fuller did not limit his vision of law to a morality of duty.\textsuperscript{220} He himself categorized the inner morality of law as a morality of aspiration, as it can seldom be perfectly realized.\textsuperscript{221} And it is clear from Van der

\textsuperscript{216} Wibren van der Burg, “The Morality of Aspiration: A Neglected Dimension of Law and Morality” in Willem Witteveen & Wibren van der Burg, eds., Rediscovering Fuller (Amsterdam: Amsterdam University Press, 1999) 169 at 180 (hereafter: Van der Burg, Rediscovering Fuller).
\textsuperscript{217} Van der Burg, Rediscovering Fuller (n 216) 180.
\textsuperscript{218} Van der Burg does not, in fact, suggest specific obligations falling under the morality of duty in this case - he seems to suggest that specific rules may be inappropriate because they are too inflexible.
\textsuperscript{219} Fuller, Morality of Law (n 186) 209.
\textsuperscript{220} Van der Burg, Rediscovering Fuller (n 216) 185-186.
\textsuperscript{221} Fuller, Morality of Law (n 186) 41-44.
Burg’s example, above, that the principle requiring informed consent before medical treatment is a legal principle. Nonetheless, it is vaguer than a rule, allowing for unnamed exceptions.

It is in the aspirational aspects that we are most likely to find those normative and purposive elements which are often distinguished from law, and considered political instead, or perhaps an issue of value judgments and morality which law cannot determine. Such a division is not possible under Fuller’s approach, because the aspirational and regulatory aspects inform one another. In addition, the interactional process central to the creation of law has to facilitate the development of norms throughout the spectrum.

**E.3.3. Sources of Law**

In contrast to positivist international law, Fuller locates legality in something other than the formal sources. A norm’s binding force does not come from its location in any of the formal sources indicating state consent. It comes, instead, from the fidelity which it generates by promoting the agency of those who are subject to it. The core moral quality of law, its capacity to allow its subjects to “reason with law and make choices about their own lives”,\(^\text{222}\) generates fidelity “to the rule of law itself and not merely to specific rules”.\(^\text{223}\)

As a result, the formal sources are merely the start of the process whereby a norm can become law. They may not be enough to create law, as one of the elements of legality may be missing. And they might not even be necessary for law, as legal norms can form outside of the formal sources if the subjects of law develop fidelity to a particular norm through some process outside of the formal law-making avenues. Legality will therefore overlap with formal validity, but formal validity is neither necessary nor sufficient for law. As Brunnée and Toope point out:

\(^\text{222}\) [Brunnée & Toope, *Legitimacy* (n 4) 29-30.]
\(^\text{223}\) [Brunnée & Toope, *Legitimacy* (n 4) 53.]
Fuller’s theory ... shows that the formal and hierarchical manifestations typically associated with domestic law, such as tests of “validity,” are not sufficient to characterize “law,” domestic or international, and indeed may not always be required.\(^2\) I argued above that the positivist approaches to international law lost both descriptive and normative clarity by attempting to separate law and morality. Fuller retains a central moral element in his conception of law, and bases law’s binding force on this rather than the consent of states. However, I will argue that his approach is both normatively coherent and a better reflection of the actual behaviour and views of the global sphere. This is because state “consent” is not excluded from Fuller’s analysis. Indeed, the central moral element of legality ensures that states participate in the creation of the norms because it gives rise to fidelity. Their compliance with these norms then forms part of the practice of legality by which law is sustained.

There is one further aspect to consider where the sources of law are concerned. Fuller’s theory allows for a wider pool of participants in the law-making process. This is a necessary consequence of his focus on the purpose and process of law rather than any formal requirements for either personality or validity.\(^2\) If law arises from interaction, then the actual participants in that interaction will all have a role in shaping the law. It is not the formal status of a body as a state which determines its ability to create and mould law in co-operation with other actors, but its engagement in the global community and its role in creating and sustaining the shared understandings from which law arises. Thus, as Brunnée and Toope point out, “although states remain fully dominant within the system, they are influenced (admittedly in different ways and to different extents) by the persuasive activities of less obviously powerful actors”.\(^2\) They suggest that international lawyers pay close

\(^2\) Brunnée & Toope, Legitimacy (n 4) 4-5.
\(^2\) Writing in the context of domestic law, Fuller did not need to consider in any detail how the subject of law was constituted, so we must infer what his theory would require when applied to the global sphere. For further discussion of the subject as a legal person in Fuller’s philosophy, see Kristen Rundle, “Legal Subjects and Juridical Persons: Developing Public Legal Theory Through Fuller and Arendt” (2014) 43 Netherlands Journal of Legal Philosophy 212.
\(^2\) Brunnée & Toope, “International Law and Constructivism” (n 207) 70.
attention to “NGOs, corporations, informal intergovernmental expert networks, and a variety of other groups ... actively engaged in the creation of shared understandings and the promotion of learning amongst states”. Barker adds formal intergovernmental expert networks to this list, including “the judges of the International Court of Justice, treaty-monitoring bodies, such as the Human Rights Committee, and other formal groups of experts.”

There is a second aspect of Fuller’s philosophy - apart from his emphasis on law as an interactive process - that directs our gaze beyond the state. Fuller argued that the fundamental moral purpose of law was to protect human agency, and this purpose is not displaced by a shift to the global sphere. As Waldron notes:

It is worth laboring the point that states are not themselves human individuals. In the last resort, states are not the bearers of ultimate value. They exist for the sake of human individuals. To use Kant’s terminology, they are not ends in themselves, but means for the nurture, protection, and freedom of those who are ends in themselves. This is acknowledged in the philosophy of municipal law, when it is said that the state exists for the sake of its citizens, not the other way around. The same is true in the international arena, where states are recognized by international law as trustees for the people committed to their care. As trustees, they are supposed to operate lawfully and in a way that is mindful that the peaceful and ordered world that is sought in international law—a world in which violence is restrained or mitigated, a world in which travel, trade, and cooperation are possible—is something sought not for the sake of national sovereigns themselves, but for the sake of the millions of men, women, communities, and businesses who are committed to their care. These millions are the ones who are likely to suffer if the international order is disrupted; they are the ones whose prosperity is secure when the international order is secure. Their well-being, not the well-being of sovereign nation-states, is the ultimate end of international law.

The case studies in this thesis will underline the dominant role of states in the formation of international law. However, there are several points at which the contribution of non-state actors, and particularly individuals, will need to be considered as well. This is not only because non-state actors have, in fact, managed

227 Brunnée & Toope, “International Law and Constructivism” (n 207) 70.
229 See the discussion above at E.2.
to resist some of the Council’s measures even in the absence of support by their states of nationality. It is also because this thesis focuses on the Council’s anti-terrorism programme, which targets non-state actors specifically. I will argue in chapter five that some level of participation and engagement by these non-state actors is necessary for the creation of anti-terrorism law.

F. Fuller, Interactional Law and the United Nations Security Council

If we adopt Fuller’s vision of law, we understand it as a process “dependent upon the mutual generative activity and acceptance of the governing and the governed.” To explore the implications of such a vision, we need to look at the kind of interaction that constitutes a “mutual generative activity”, and also consider how institutions would look and function within a system of interactional law.

F.1. Mutual Generative Activity

Brunnée and Toope draw on the constructivist school of International Relations scholarship to depict how Fuller’s interactional theory of law applies in the global sphere. Central to both Fuller’s approach and constructivist theory is communication, or rhetorical activity. For Fuller, communication had a pivotal moral function, because he saw “maintaining communication with our fellows” as the overriding aim of human aspiration. Its further moral value lay in its role in creating law. In Fuller’s theory, “law is constructed through rhetorical activity producing increasingly influential mutual expectations or shared understandings of actors.”

\[\text{References}\]

231 Brunnée & Toope, “International Law and Constructivism” (n 207) 48.
232 Barker (n 228) 24.
233 Fuller, Morality of Law (n 186) 185.
234 Brunnée & Toope, “International Law and Constructivism” (n 207) 65.
constructivists, such communicative interaction leads to the social construction of the actors’ very identities, shaping how they see themselves and their interests.\textsuperscript{235} Through interaction and “rhetorical activity”,\textsuperscript{236} actors are also able to “generate shared knowledge and shared understandings that become the background for subsequent interactions.”\textsuperscript{237}

As Barker warns, communication and rhetorical activity must be more than cheap talk to be meaningful,\textsuperscript{238} so we need to consider what kind of communication creates shared understandings and legal norms. Cornelieu Bjola, drawing on Habermas’ notion of communicative action, suggests that communication moves beyond “instrumental bargaining on the basis of fixed preferences” to a more reasoned process, including “a mode of interaction between actors based on the logic of arguing, that is, of convincing each other to change their causal or principled beliefs in order to reach a reasoned consensus.”\textsuperscript{239} Similarly, Ian Johnstone points out that “[d]eliberation is not a communicative free-for-all, in which any argument is as good as any other; the felt need to offer reasons others can accept in principle sets the parameters of discourse.” Seen in this way, communicative action involves two, interrelated notions. The first is that of persuasion rather than bargaining, which suggests that the communication must be based on reason and principle. The second is that the communication - what is being persuaded - relates to some common good, and is not restricted to the self-interest of the person bringing the argument.

As we will see in chapters three to six, the ideas of deliberation, reason and persuasion loom large in discussions of legitimacy and legality. Thus Johnstone, for example, suggests that “public-policy decision making succeeds best when voting and

\begin{footnotes}
\item[235] Brunnée & Toope, \textit{Legitimacy} (n 4) 13.
\item[236] Brunnée & Toope, \textit{Legitimacy} (n 4) 31.
\item[237] Brunnée & Toope, \textit{Legitimacy} (n 4) 13.
\item[238] Barker (n 228) 27.
\item[239] Corneliu Bjola, “Legitimating the Use of Force in International Politics: A Communicative Action Perspective” (2005) 11 European Journal of International Relations 266, cited by Barker (n 228) 27.
\end{footnotes}
bargaining are accompanied by reasoned argumentation”\textsuperscript{240} and that the legitimacy of the Council’s anti-terrorism activity depends on the “quality of its deliberations”.\textsuperscript{241} Similarly, Devika Hovell praises the role of the Ombudsperson in the Security Council’s “listing” system for promoting reasoned argument:\textsuperscript{242}

The input of the Ombudsperson serves to remove the discussion a step away from a conversation defined by a clash of self-interests between Security Council members, and provide recommendations and justifications oriented toward the development of a set of common guiding principles. The Council is encouraged to enhance the legitimacy and effectiveness of its decision-making through an appeal not to power politics, but to public reason.\textsuperscript{243}

F.2. Institutions

The term “culture of justification” was coined by Etienne Mureinik in an article describing the kind of change which South Africa needed to achieve in its move from an apartheid state to a democracy.\textsuperscript{244} In contrast to a culture of authority, which had flourished under apartheid, a culture of justification requires that “every exercise of power is expected to be justified”, and “the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command”.\textsuperscript{245}

As Dyzenhaus remarks, a culture of justification is a necessary feature of the rule of law.\textsuperscript{246} We should recall, at this point, that Fuller viewed the central “rule of

\begin{itemize}
\item \textsuperscript{241} Johnstone (n 240) 308.
\item \textsuperscript{242} Listing is discussed fully in chapter four below.
\item \textsuperscript{244} Dyzenhaus on Mureinik (n 2) 33. In a later piece, he refers to these positions as democratic positivism, liberalism and a culture of justification respectively. See Dyzenhaus, “Deference (n 2) 138-139.
\item \textsuperscript{245} Mureinik (n 1) 31-32.
\item \textsuperscript{246} Dyzenhaus on Mureinik (n 2) 33.
\end{itemize}
“law” requirements as the internal morality of the law;\textsuperscript{247} that is, as the morality that makes law possible.\textsuperscript{248} And law, in his view, relied on an ongoing process of interaction, a communicative understanding of law which Brunnée and Toope also describe as “reasoning through law”.\textsuperscript{249} A culture of justification is therefore indeed an indispensable feature of the rule of law, and the scholarship which draws on it offers a useful perspective on how the communicative and deliberative aspect of Fuller’s theory and interactional international law may be applied to institutions. Indeed, the concept can be described in terms redolent of all the characteristics emphasized in section F.1 above:

\begin{quote}
[The crucial component in the legitimacy and legality of governmental action is that it is justified in terms of its “cogency” and its capacity for “persuasion,” that is, in terms of its rationality and reasonableness.\textsuperscript{250}
\end{quote}

As noted above, an imbalance of power brings with it the risk that the reciprocal interaction between law-giver and subject could be lost. Governmental institutions therefore present a particular challenge, as their design must accommodate and promote the processes of communicative action which sustain a reciprocal relationship between themselves, as wielders of power, and those subjected to their power.

The scholarship examined under section F.1 above already suggests that institutions should be designed to encourage inclusive consultations, so that the reasoned argument which fosters interactional law can take place.\textsuperscript{251} Consultation, which generally takes place before the institution makes a decision, may not by itself be sufficient, not only because ongoing communication is required - including feedback after a decision has been taken and implemented - but also because

\begin{footnotes}
\item[247] See the discussion in part E.2 above.
\item[249] Brunnée & Toope, \textit{Legitimacy} (n 4) 43.
\item[250] Cohen-Aliya & Iddo Porat (n 3) 475.
\item[251] Johnstone (n 240) 303. See the discussion of deliberation in law-making in chapter six.
\end{footnotes}
institutions by their nature, and global institutions in particular, cannot engage directly with all parties who may be affected by them. The scholarship examined above therefore suggests that institutions need to justify their actions to the wider community, and one of the ways that this can be achieved is through review by other institutions.\(^{252}\)

Public justification can, of course, be provided partly in the form of public statements by the institution, and by a decision-making process that is kept as transparent as possible. But many authors suggest that other institutions are needed to ensure public justification, and that these institutions must therefore be empowered, at the very least, to carry out some form of vetting process over Council activities, or even to subject it to independent review.\(^{253}\) At this point, the notion of a culture of justification provides further guidance because, as Dyzenhaus argues, it entails ongoing dialogue about the requirements of law between the institutions of the legal system.\(^{254}\)

To Fuller, and domestic Rule of Law theorists generally, the courts played a pivotal institutional role in holding officials and rulers to the law. The judiciary is the only institution to receive fairly detailed treatment in their rule of law lists and most Rule of Law theorists, from Dicey onwards, have required that courts with jurisdiction over both subjects and law-makers be accessible and independent, and follow certain

\(^{252}\) Johnstone (n 240) 303.

\(^{253}\) See chapters 4 and 5 below.

procedures that ensure justice in individual cases. However, the justification needs to be addressed to all other public institutions, not just a judicial body.

There are two important consequences of this requirement for justification. The first is that every public institution has a responsibility to interpret the law and, with that responsibility, an “onus of justifying why that decision represents a reasonable interpretation of the law”. Within a domestic system, the obligation is owed to not just to the judiciary, but to other branches as well - and these branches have a corresponding duty to demand account. Thus Dyzenhaus suggests a range of practical and institutional implications of a culture of justification for all three branches of domestic government to establish that each has access to sufficient information to scrutinize executive measures taken in the name of security, and to ensure that the executive as well as parliament constantly account for their actions in terms of law.

The second consequence arises from the supremacy of reason in the process of justification. At this point, we must recall the discussion of Fuller’s approach to the question of the limits of law (section E.3.2 above). This discussion focussed on the boundaries between law and other, normative or principled areas of social concern. We saw that Fuller approached the issue of law’s limits differently from the other frameworks considered in this chapter. He not only allowed for a more expansive

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256 *A v Secretary of State for the Home Department* [2005] 2 WLR 87; Dyzenhaus, “Deference” (n 2) 143; Carolan (n 3) 220.

257 Including the legislature: “[W]ithin a culture of justification the members of a legislature are not merely representatives of political parties but also legal officials who have, like other legal officials, an obligation of fidelity to law in the expansive sense.” Dyzenhaus, “Deference” (n 2) 143.

258 Dyzenhaus on Mureinik (n 2) 29. See Hooper (n 3) 104 and 105.

259 Dyzenhaus, “Deference” (n 2) 146-155.
domain of law than the other approaches, but resisted drawing any bright line between legal norms and, for example, moral or political considerations.

The case studies will show that a claim is often made by bodies wielding power that law gives way, or ceases to apply, when the power-wielder claims to be acting in the service of security. However, a culture of justification requires that the wielder of power provide not only the reasons for its exercise of power but also the information on which those reasons were based, even when it is seeking to resolve a threat to security.\textsuperscript{260} The two elements of reasons and information form the essential foundation for proportionality review by courts but are also indispensable for the type of reasoned argument that was discussed in section F.1 above.\textsuperscript{261}

And yet courts and legislatures have a long history of deferring to a claim from the executive branch of government both that a threat to security exists and that the executive alone has the expertise to deal with it.\textsuperscript{262} As we will see in the following chapters, the Security Council, in particular, has resisted offering any reasons or information when it takes measures in the name of security, and it has opposed any form of review from, or even dialogue with, any other institution to which it could justify itself.

G. Concluding Observations

In sections C to D of this chapter, I considered four main frameworks for constraint of the Security Council. Constitutionalism, which suggested the most powerful constraints, has little chance of being brought to bear on the Council, while other frameworks have a firm basis in the current practice of the global community, but do

\textsuperscript{260} Dyzenhaus, “Deference” (n 2) 146-155; Carolan (n 3) 220.

\textsuperscript{261} Cohen-Aliya & Porat (n 3); Dyzenhaus, “Proportionality” (n 254). Dyzenhaus also suggests that proportionality is the main device that maintains Fuller’s requirement of “congruence”.

\textsuperscript{262} Dyzenhaus Deference (n 2) 127, citing R v Halliday, ex parte Zadig [1917] AC 260, Liversidge v Anderson [1942] AC 206 and Rehman [2002] 1 All ER 123.
not offer legal principles to cover all of the Council’s activity. Furthermore, none of the frameworks which suggest constraints for Security Council powers are securely grounded in the positivist sources on which they seem to rely.

In suggesting Lon Fuller’s approach, as realized in interactional international law, I am suggesting a comprehensive normative scheme which can address the full range of anti-terrorism measures dealt with in the following chapters. But the chapters will also reveal the extent to which the Security Council resists the demands of interactional law. The case studies are therefore an illustration of Fuller’s notion that law is to be seen as a process, rather than a finished product, and demonstrates the purchase of Fuller’s legal theory in practice. We will see, at the outset, that the Council claimed the authority to exercise power free from any review, justification or deliberation. The cases demonstrate the various ways in which interactional law asserted itself, even in the absence of any formal legal mechanisms.

Almost all of the cases in chapter three predate the Council’s anti-terrorism measures discussed in chapters four and five. They serve to show a progression towards interactional law in two main respects. First, they develop a methodology by which domestic and regional courts can provide feedback to the Security Council - and thereby initiate interaction with it - even when the Council has made no formal provision for any form of review, dialogue or interaction. Secondly, they slowly come to confront the demands of a culture of justification in an area which courts have traditionally either held to be non-justiciable, or have exercised a form of review which was so superficial as to be meaningless. In so doing, the cases in chapter three provide some of the legal tools which courts and states could employ when they tackled listing, covered in chapter four.

While chapter four will show the development and effectiveness of interactional law, chapters five and six will consider the more complex challenge of legislation, and consider the extent to which the gains of interactional law in the area of listing might lead to a similar progression towards law in the case of Security Council legislation.
Chapter Three
Judicial Review of the Security Council as a Challenge for Domestic and Regional Courts

A. Introduction
Almost all the cases in this chapter pre-date the Council’s main anti-terrorism measures, and as such they provide a form of pre-history to these measures, and to the responses they received, all of which are discussed more fully in chapters four, five and six. These early encounters all involve challenges in the European domestic and regional courts to Security Council action, or inaction, that have impacted directly on individual human rights.

The encounters provide us with some useful tools for the analysis of both listing and legislation that follows in the last three chapters of the thesis. First, they introduce the institutional apparatus through which such Security Council measures can be reviewed by courts. This is an important step, as courts are one of the main institutional mechanisms by which individuals are able to engage with a power-wielder’s decision in domestic and regional systems. There is no such court at the global level, where Security Council decisions are made. But the Council’s decisions have to be implemented at the regional and domestic levels, and it is at these levels that they have been challenged. While domestic and regional judicial decisions may not constitute “review” in the direct sense of judicial review in a single legal system, such decisions may nevertheless serve that function if the domestic and regional courts engage with Security Council action.¹ Because they develop a methodology by which to do so, the cases in this chapter show how domestic and regional courts might provide feedback to the Security Council, even when the Council has made no formal provision for any form of review, dialogue or interaction. As we will see, the legal

principles developed by the European courts in this regard formed the basis of the challenges to the Council’s listing decisions (discussed in chapter four), but they also have implications for challenges to the domestic and regional implementation of Security Council legislation.  

The cases discussed in this chapter also serve to show a progression towards interactional law. First, as mentioned above, they demonstrate how domestic and regional courts can insert themselves into a feedback loop to the Security Council, thereby initiating interaction with it. Secondly, they slowly come to confront the demands of a culture of justification in an area - security - in which the Security Council, like many domestic executives, strongly resists justifying its action, and which courts have often held to be non-justiciable. The case law reveals a gradual evolution, in which courts become ever more willing to demand account from the Security Council for its actions, requiring not only the Council’s reasons but also the evidence supporting them.

In this chapter, I discuss four cases which originate from national and supranational courts of the European Union and Council of Europe: Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland, Behrami v. France and Saramati v. France, Germany and Norway, the UK case of R. (Al-Jedda) v. Secretary of State for Defence as well as its appeal before the European Court of Human Rights, and, briefly, the judgment of the European Court of Human Rights Second Chamber and its appeal in the Grand Chamber in the case of Al-Dulimi and Montana Management Inc v

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2 See, in particular, section D of chapter six.


4 Behrami v. France, application no. 71412/01 and Saramati v. France, Germany and Norway, application no. 78166/01 (Admissibility) (hereafter: Behrami).


6 Al-Jedda v United Kingdom ((2011), 53 E.H.R.R. 23 (ECtHR (Grand Chamber)) (hereafter: Al-Jedda ECtHR)
Switzerland. Bosphorus involved a challenge by a company against Ireland’s seizure of an aircraft it was leasing. Ireland had seized the aircraft in compliance with a Security Council resolution. In the joined cases of Behrami and Saramati, claims were brought against France, Germany and Norway for their actions and inactions in administering Kosovo under the auspices of the United Nations (UN). Al-Jedda involved a challenge to the UK’s detention, without charge or trial, of a UK citizen in Iraq, again while the UK forces in question were acting under a UN mandate. And, finally, Al-Dulimi, decided after the listing cases in chapter four had already been considered, dealt with a claim against the Swiss implementation of a Security Council measure that Al-Dulimi’s assets be seized and transferred to the new government of Iraq after the UN administration of that state had ended.

To understand these cases, a brief explanation is needed of the relationship between the various European institutions involved in them, and a clarification of some of the terms used in the chapter. This is provided in section B, after which section C deals with the cases in detail. In section D, I tease out the main ways in which the European courts have managed to engage with Security Council decisions, and examine whether these approaches promote legality and interactional law. The assessment demonstrates mixed success: on the one hand, the case law provides a foothold for the rule of law by providing a forum through which persons can seek redress. This foothold supports the agency of the affected persons and also opens up with possibility of ongoing interaction between the Security Council, states and non-state actors on the Council’s decision. The engagement of these parties is a step towards interactional law. On the other hand, the case law generally falls short of creating a culture of justification, in that it leaves the Security Council an area in which it does not have to justify its actions under law.

7 Al-Dulimi and Montana Management Inc, case no. 5809/08, Second Chamber, judgment of 26 November 2013 (hereafter: Al-Dulimi Second Chamber); Grand Chamber, judgment of 21 June 2016 (hereafter: Al-Dulimi Grand Chamber).

8 The same terms (e.g. “council” and “commission”) are used by both structures, so a brief explanation is necessary to avoid confusion in the use of the terms.
B. The Security Council in European Courts

The judicial decisions discussed in this chapter take place within a complex web of institutions which form part of two separate, but overlapping, European structures. The following excursus briefly explains the relationship between the various institutions.

B.1. The European Institutional Landscape

The Council of Europe was founded in 1949 by Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom. The founding treaty, the Treaty of London, created an intergovernmental organization with a focus on European integration. Today, with 47 members, its membership spans the entire continent of Europe. It consists of two main statutory bodies, the Committee of Ministers and the Parliamentary Assembly, served by a Secretariat.

The Convention for the Protection of Human Rights and Fundamental Freedoms was drawn up under the auspices of the Council of Europe in 1950. This document is commonly known as the European Convention on Human Rights and will be referred to as the Convention, or the ECHR, in this study. All member states of the Council of Europe are parties to it, and all new members are expected to ratify it as soon as possible. In its first decade, two institutions were set up to enforce the Convention:

11 Excluding Belarus. Joris (n 10) 5.
the European Commission of Human Rights in 1954 (HR Commission) and the European Court of Human Rights in 1959. In 1998, Protocol no. 11 to the Convention replaced these two institutions with a single European Court of Human Rights (ECtHR), to which individuals have direct access if their rights are infringed.\(^\text{14}\)

The European Union was established in 1993 by the Treaty of Maastricht.\(^\text{15}\) It brought together and transformed a number of existing institutions into a single but complex institutional structure. The new structure consisted of three “pillars,” each with its own powers and jurisdiction. The first pillar consolidated previously distinct bodies aimed at integrating particular aspects of the European community. These predecessor bodies were the European Coal and Steel Community, the European Atomic Energy Community and, in particular, the European Economic Community, which was itself transformed into the European Community (EC) through the Maastricht Treaty. The European Coal and Steel Community Treaty was concluded in 1951 while the European Atomic Energy Community (Euratom) and European Economic Community (EEC) Treaties were both signed on the same day in 1957.\(^\text{16}\)

The second and third pillars are Common Foreign and Security Policy, and Police and Judicial Co-operation in Criminal Matters\(^\text{17}\) respectively. While these two pillars function mainly as policy bodies, making decisions on an intergovernmental level, the first pillar - the European Communities - include a number of institutions with the capacity to make decisions directly binding within member states of the EU. Four first pillar institutions - the European Commission (E Commission), the Council of the European Union (Council EU), the European Parliament and the European Court of Justice - have their origin in the founding treaties of the EU's predecessor communities (the European Coal and Steel Community Treaty, European Atomic

\(^{14}\) As the acronym ECHR is often used for the Convention, I will follow the common practice of referring to the European Court of Human Rights as the ECtHR to avoid confusion between the Convention and the Court.


\(^{17}\) Previously known as Justice and Home Affairs.
Energy Community Treaty and the European Economic Community Treaty).\textsuperscript{18} Although they now form part of the EU, these institutions are still referred to as institutions of the “European Communities”, and the Court of Justice has retained its designation as the Court of Justice of the European Communities. In this study, unless the context requires more detail, the term ‘EU’ will refer to the European Union as well as the European Communities.

Although all EU member states are also parties to the European Convention on Human Rights,\textsuperscript{19} the EU itself has not ratified it.\textsuperscript{20} As the EU is not bound by the Convention, it is possible that it may issue decisions to its member states which are valid and binding under EU law but in conflict with the Convention. Their overlapping membership of the EU and the Convention exposes states to the parallel jurisdictions of the ECtHR and the ECJ. As a result, there is a potential for conflict between the judicial bodies as well as the law they enforce.

A particular problem arises from the supranational nature of the EU, as its governing organs create law that may be directly applicable in its member states, without the individual consent of or implementation by the EU member states. The ECtHR is therefore put in the position of having to censure member states to the Convention when these states are in breach of their Convention obligations due to decisions of the EU organs that these states cannot control or reject.


\textsuperscript{19} The 28 member states of the EU are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. These states are also all parties to the \textit{ECHR}, to which Albania, Andorra, Armenia, Azerbaijan, Bosnia & Herzegovina, Georgia, Liechtenstein, Macedonia, Moldova, Monaco, Montenegro, Norway, the Russian Federation, San Marino, Serbia, Switzerland, Turkey and the Ukraine are also a party. See http://europa.eu/about-eu/countries/index_en.htm [accessed 3 March 2016] and http://www.coe.int/en/web/conventions/search-on-treaties/-/-conventions/chartSignature/3 [accessed 21 June 2016].

\textsuperscript{20} Had the European Constitution been passed, it would have allowed for accession by the EU to the \textit{ECHR}. As the Constitution was defeated, the status quo remains, whereby the ECJ applies the \textit{ECHR} “indirectly”. See the discussion further below.
B.2 Comity and Co-operation in the Case-Law

By the time Bosphorus, our first case, was heard, the ECtHR and the ECJ had developed a sophisticated approach to the problem of overlapping jurisdictions. For its part, the ECJ, while not subject to either the Convention or the ECtHR, accepted that the Convention is part of Community law. In holding that fundamental rights are enshrined in the general principles of Community law, the ECJ has also looked to international human rights treaties ratified by these member States to interpret and realize these rights. Of these treaties, the Convention, first referred to expressly in 1975, has gained a more prominent position. The ECJ has also used the jurisprudence of the ECtHR as persuasive authority, helping to minimize the substantive conflict between the two legal systems.

The ECtHR, for its part, has avoided exercising review functions over the EU and its organs, while maintaining in principle that States could not avoid their

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24 Rutili (n 21); see also paragraph 10 of Opinion no. 256/2003 of the European Commission for Democracy through Law (Venice Commission) on the implications of a legally binding EU Charter of Fundamental Rights on human rights protection in Europe.


obligations under the Convention through acceding to other treaties or joining
international organizations. In *M v Federal Republic of Germany*, the HR
Commission explained that the Convention did not, on its terms, prevent member
states from transferring sovereign powers to international organizations. However,
states could not, by transferring such powers, avoid their own liability for breaches of
the Convention:

> Under Article 1 of the Convention the member States are responsible for all acts and omissions
of their domestic organs allegedly violating the Convention regardless of whether the act or
omission in question is a consequence of domestic law or regulations or of the necessity to
comply with international obligations.

The HR Commission noted that “the guarantees of the Convention could wantonly be
limited or excluded and thus be deprived of their peremptory character” if states
were allowed to rely on their obligations under other treaties in order to avoid
liability for human rights infringements. The “transfer of powers to an international
organization” was therefore compatible with the Convention only in so far as
fundamental rights received “equivalent protection” within that international
organization.

*M* created a sophisticated compromise which manages to preserve comity
between the two legal structures, protect the integrity of the Convention - at least at
a fundamental level if not in every detail - and allow European states to co-operate
closely with one another and develop regional structures.

However, the reasoning in *M* protects the member state from review by the
EChr only to the extent that the protection offered by the international organization
is “equivalent” to that offered by itself under the Convention. Where it finds

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27 (1990) 64 DR 138 (hereafter: *M*).
28 One of the two enforcement bodies set up for the ECHR; it has now been completely replaced by
the EChr. See above at section B.1.
29 *M* (n 27) 8. See also Costello (n 21) 93.
30 *M* (n 27) 8.
31 *M* (n 27) 9.
“equivalent protection”, the ECtHR will declare the case inadmissible, thereby relying on the other organization to protect the complainant’s rights under the Convention. Where, on the other hand, the protection offered by the other international organization is not at least equivalent to that under the Convention, the ECtHR must hear the case, even at the cost of embarrassing the other organization.

For many years, however, M remained a largely symbolic step, as the Commission and ECtHR avoided such review in practice. There were theoretical limitations to M as well: it relies on a general review of the other international organization (in today’s terms, usually the EU) - focusing on its procedural mechanisms for safeguarding rights - rather than a review of the particular case brought by the complainant. Nonetheless, the way was now open for the ECtHR to review states’ implementation of EU obligations, and the passing of legislative and executive decisions by organs of the EU itself.

Such was the case of Matthews, in which the ECtHR reviewed an Act of the European Parliament. The Act in question had been ratified by all the EC member states, which accorded it a status akin to primary law - that is, law not reviewable by the ECJ. As there were no organs within the EU that could review this act, the EU could not be said to grant “equivalent protection” to the Convention with respect to this measure. The ECtHR found the case admissible and, examining the substance of the case itself, further found a violation of the Convention.

A few aspects of the pre-Bosphorus jurisprudence bear noting at this point. In evaluating the rights protection of the other sphere, the question was whether the rights could be realized in practice, not merely whether the substantive rights regime

32 Costello (n 21) 91-2 discusses ways in which the ECtHR managed to decide cases on other grounds, and also demonstrates the ECtHR’s ongoing support for the procedure and structures of the EU.

33 This is will be considered further below.


35 Costello (n 21) 91-3.
recognized by the other sphere reflected the rights system of the Convention. The jurisprudence did not insist on courts for this purpose; but it did require a process whereby an independent body could consider an alleged violation and grant a remedy where necessary.

The second important aspect was found in the emphasis which the judgments place on the discretion - or lack thereof - which states exercised when they implemented decisions of the EU. Some decisions of the EU have to be implemented in the exact terms required by the EU. In cases such as these, the jurisprudence preceding Bosphorus was willing to transfer responsibility for the protection of human rights to the EU as a body. In this way, the complaint against the measure became inadmissible before the ECtHR on the basis that the EU provided equivalent protection to the complainant’s rights. If, on the other hand, the member state had exercised some discretion in its implementation of the EU measure, then the ECtHR reviewed the state’s action for infringement of the ECHR. The ECtHR was, in such cases, holding states responsible for their own choices rather than for compliance with EU directives.

Thus, in Matthews, the UK argued that it should not be held responsible for implementing an EU measure over which it had no control. As noted above, the ECtHR declared this case admissible on the basis that the EU did not provide

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36 See the Bosphorus judgment of the ECtHR (n 3) paragraph 156, and the discussion below.

37 Article 6(1) of the Convention protects the right of review in these terms: “1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” In Kennedy and Waite v Germany (2000), Germany had granted the European Space Agency immunity from its courts. The ECtHR held that Germany may do so on the basis that the European Space Agency Convention provided for the settlement of disputes by independent Appeals Board. See Kennedy and Waite v Germany (2000) 30 E.H.R.R. 261 (hereafter: Kennedy).

38 See, however, Sebastien Platon “The “equivalent protection test”: from European Union to United Nations, from Solange II to Solange I (with reference to the Al-Dulimi and Montana Management Inc v Switzerland judgment of the European Court of Human Rights)” 2014 (10) E.C.L. Review 226 for a discussion of how the “equivalent protection” test sometimes functions as a question of admissibility and sometimes forms part of the limitations analysis.

39 Matthews (n 34) paragraph 26. The measure in question was the E. Council decision 76/787, which had the status of a primary treaty and could thus not be reviewed by the ECJ.
“equivalent protection” of the applicant’s rights. The ECtHR did, however, also note that the UK had “freely” entered into all the obligations which it was now implementing.40

The third major factor is that the reasoning of this jurisprudence, while developed to deal with the ECtHR-EC relationship, is not restricted to European bodies. When they had to deal with Security Council decisions, the courts were able to draw on this line of reasoning.41

C. The Cases

C. 1. *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*42

In *Bosphorus*, the ECtHR faced a challenge to an EU implementation of a Security Council resolution. The resolution in question (SCR 820 of 1993) had been adopted as part of a sanctions programme against the Federal Republic of Yugoslavia (FRY) during the armed conflict in the territory of the former Socialist Republic of Yugoslavia. Passed under Chapter VII of the UN Charter, this resolution required States to impound all aircraft in their territories “in which a majority or controlling interest is held by a person or undertaking in or operating from the [FRY]”. The European implementing regulation (Regulation (EEC) no. 990/93) came into force on 28 April 1993.

The claimant company in this case, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi* had rented two aircraft from the Yugoslav Airlines before the Security Council imposed any sanctions on property owned or controlled by FRY nationals. When the SCR 820 of 1993 was passed, the company sought the assistance of the

40 Matthews (n 34) paragraph 33.
41 See the discussion of *Al-Dulimi and Montana Management Inc* below, which explicitly applies the equivalent protection test to the UN Security Council. This case is discussed further in chapter four.
42 *Bosphorus* (n 3).
Turkish government and, following its advice, ensured that the Yugoslav Airlines received no financial benefit from the lease arrangement. Nonetheless, when one of the aircraft was sent to Ireland in May 1993, it was impounded by the Irish government in purported compliance with SCR 820.

Bosphorus brought a challenge to the Irish High Court, which released the aircraft. On appeal, the Irish Supreme Court referred the interpretation of the regulation to the ECJ. After an ECJ finding that the EEC regulation was to be interpreted to require the impounding of the aircraft, the Irish Supreme Court allowed the government’s appeal against the High Court decision. Bosphorus then brought a complaint to the ECtHR that its right to property, guaranteed by the Convention, had been infringed by Ireland.

The validity of the Security Council Resolution was never in question. The applicants themselves, the High Court of Ireland and the ECtHR, all treated the issue in Bosphorus as one of interpretation of the European regulation in the light of Convention requirements.

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43 Rentals were paid into a blocked bank account set up in Turkey.

44 After the High Court quashed the impoundment in June 1994, the Minister of Transport impounded the aircraft a second time on different grounds while appealing the first judgment. There was therefore a second High Court challenge by Bosphorus, and the High Court once again quashed the impoundment in September 1994. However, the fate of the aircraft was ultimately decided by the first series of proceedings (in the High Court in June 1994) and subsequent appeals and referrals (to the SC and ECJ).

45 The ECJ decided the question from the Irish Supreme Court in the following terms: “Article 8 of Council Regulation (EEC) no. 990/93 of 26 April 1993 concerning trade between the European Economic Community and the [FRY] applies to an aircraft which is owned by an undertaking based in or operating from the [FRY], even though the owner has leased it for four years to another undertaking, neither based in nor operating from [the FRY] and in which no person or undertaking based in or operating from [the FRY] has a majority or controlling interest.” Quoted in ECtHR judgment (n 3) paragraph 55.

46 Despite pages and pages on the SCR’s.
C.1.1 The Ruling of the ECtHR

As in M and Matthews, this case presented the ECtHR with a claim arising from an EU regulation. In line with the case law, the court in Bosphorus examined whether Ireland had exercised any discretion in its implementation of the EU regulation and, if not, whether the EU provided “equivalent protection” to the rights in question. On the question of discretion, the majority in Bosphorus held that Ireland had not had discretion - that is, that Ireland had been bound by EC law to interfere with the property rights of the applicant company.47 Turning then to the level of human rights protection, the ECtHR found that the EU provided an equivalent level of protection to that provided by the ECtHR in both substance and procedure.

To establish the substantive human rights provisions, the ECtHR noted the ECJ’s statement that respect for human rights was “a condition of the lawfulness of Community acts”.48 It also sketched the historical development of the growing role of human rights in ECJ jurisprudence to establish that the Convention was the most important reference point for the ECJ when it established the substantive content of these rights. It emphasized that fundamental rights were enshrined in the general principles of Community law protected by the ECJ,49 which followed both the constitutional traditions of the member States and international human rights treaties ratified by these member States,50 especially the Convention, in realizing these rights.51 In addition, the ECJ took note of the jurisprudence of the ECtHR.52

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47 Although this conclusion is questioned by some of the minority opinions and by academic comment, the discussion relates largely to the inner workings of EU law and will not be considered further here.


49 See Stauder (n 16), cited by Bosphorus (n 15) paragraph 73.


51 Hauer (n 25).

52 The Court referred to a battery of cases, including Hacene Akrich (n 26) (article 8); K.B. (n 26) (article 12); Herbert Karner (n 26) (article 10); Orfanopoulos (n 26) (Article 8); and JFE Engineering (n 26) (Article 6). See paragraph 73 of the Bosphorus judgment (n 3).
conclusion was therefore clearly that the ECtHR and the EU recognized the same body of human rights law, anchored in the Convention.

On the procedure, the ECtHR emphasized the complementary role of the national courts and the ECJ in ensuring that the rights in the Convention are in fact protected.\(^{53}\) It acknowledged some gaps, in particular, the lack of individual access to the ECJ, but held that individuals nevertheless benefited indirectly from actions brought to the ECJ by Community institutions or other states.\(^{54}\)

Having found that the EU provided “equivalent protection” in this area, the ECtHR went on to hold:

> Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the European Community.\(^{55}\)

In the opinion of the majority, this presumption could be rebutted if the protection offered in the particular base before it was “manifestly deficient”.\(^{56}\) The minority judgments expressed uneasiness over the standard of “manifest” deficiency, and this standard has been criticized.\(^{57}\) But the investigation for manifest deficiency does mark a significant change in ECtHR scrutiny of EU jurisprudence, because it provides for an investigation of the particular case and not just the general human rights protections of the EU system as a whole. However, the ECtHR had set a very high standard for rebutting the presumption in Ireland’s favour and, in the event, took barely a moment to find that the standard had not been met.\(^{58}\)

\(^{53}\) Bosphorus (n 3) paragraphs 160-165.  
\(^{54}\) Bosphorus (n 3) paragraphs 162-3.  
\(^{55}\) Bosphorus (n 3) paragraph 165.  
\(^{56}\) Bosphorus (n 3) paragraph 156.  
\(^{57}\) Costello (n 21) 102.  
\(^{58}\) Bosphorus (n 3) paragraph 166. This paragraph is discussed further below.
C.1.2. Development of the Law

The reasoning in Bosphorus allows for a closer scrutiny of the EU’s compliance with the Convention. First, whether the international organization in question offers “equivalent protection” to that in the ECHR is determined with reference to the “protection offered from time to time”. Thus the court in Bosphorus examined the case law of the ECJ, and not merely the mechanisms it provided for the protection of Convention rights. This reading of equivalent protection means that any consideration of the protection offered by the international organization must be revisited in the light of the circumstances of each case, and in the light of any changes that may have occurred to the law which the international organization applies. Through this approach, the ECtHR is more easily able to supplement the human rights protection of the EU should the latter fail. Secondly, although a finding of “equivalent protection” creates a presumption of compliance with the Convention, this finding is rebuttable.

And yet the ruling in Bosphorus provides no relief for the complainant company at all. To understand why, we need to examine the role which the UN Security Council plays in the judgment.

M and Matthews dealt with an overlapping competence of two legal structures: the Convention, and the system of obligations under EU law. To determine whether equivalent protection was provided by the second structure, the ECtHR needed merely to examine the rights system of the EU. Bosphorus dealt with these two structures as well, but, in this case, the EU was itself implementing the requirements of a third structure: that is, the system of obligations issuing from the UN Security Council. It was these obligations that threatened the rights on which the applicants relied. If we were to apply the equivalent protection test, then, we would expect the ECJ to scrutinize the UN’s human rights protection (or lack thereof). If it were to find

59 Costello (n 21) 103.
60 Costello notes the contrast between this investigation and M, where the mere existence of review mechanisms was considered sufficient. See Costello (n 21) 103.
that the UN provides equivalent protection to that of the EU, it should decline to review the EU measures which implemented the Security Council’s decision. If not, it should proceed to review those measures against the requirements of EU law.

The ECJ did not apply - or even mention - the equivalent protection test, but it did review the EU measure which implemented the UN’s decision. This meant that, in order to determine whether the EU provided “equivalent protection” to that which the ECHR would have done, the ECtHR considered this particular ECJ judgment, in effect reviewing the ECJ’s review. In this way, the “equivalent protection” test became incorporated into an analysis of the merits of Bosphorus’s claim, as considered by the ECJ. Central to this discussion was whether Bosphorus’s right to property had been unjustifiably limited by the EU measure.

Rights analysis proceeds in two main steps. The first asks whether a Convention right has been limited or reduced; the second step consists of a limitations analysis to determine whether the limitation identified in the first step is justifiable. Only if the limitation is not justifiable will the court conclude that the right has been infringed. To be justifiable, the limitation must pursue a legitimate aim, and there must be a “reasonable relationship of proportionality” between the means employed (the limitation) and the aim pursued.61

Protocol 1 to the Convention protects the right to property in the following terms:

61 See, for example, Kennedy (n 37) 273, which saw the criteria of a justifiable rights limitation to be that a) the very essence of the right is not impaired, b) the limitation pursues a legitimate aim, and c) there is a reasonable relationship of proportionality between the means employed and the aim pursued. See Peter Gutherie, “Security Council Sanctions and the Protection of Individual Rights” (2004) New York University Annual Survey of American Law 491. On proportionality in ECtHR jurisprudence, see Julian Rivers, “Proportionality and Variable Intensity of Review” (2006) 65 Cambridge L.J. 174; and Tom Hickman, “The Substance and Structure of Proportionality” (2008) P.L. 694.
Article 1. Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.62 Ireland did not contend that the property rights of Bosphorus had not been interfered with.63 Instead, the respondents claimed either that the action was not admissible or that the interference was justified under human rights law.64 To conduct the second enquiry - the enquiry into whether the rights limitation was justifiable - both European courts were required to determine whether the limitation of the claimant company’s property rights was proportional to the goal it was meant to achieve.

The ECJ did ostensibly conduct a proportionality analysis, but it was restricted to a recital of how important the goal of the Security Council’s sanctions programme was - that is, the restoration of peace and security in the territory of the former Yugoslavia. This is a mere nod in the direction of a proportionality enquiry, as it does not establish the weight of the two interests that are meant to be in proportion to one another - that is, the right to property, and the broader community interest which the limitation on the property right is meant to serve:

As compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question, which is owned by an undertaking based in or operating from the [FRY], cannot be regarded as inappropriate or disproportionate.65

Because the ECJ elevates the importance of the aim pursued in this way, without considering the actual damage suffered, it suggests that all damage suffered would pale in significance when compared to the general interest promoted. This means

63 Bosphorus (n 3) paragraphs 112-13. A similar stance was taken by the E Commission (paragraph 128) and the United Kingdom (paragraph 132).
64 Bosphorus (n 3) paragraphs 109 and 113 (Ireland), paragraphs 125 and 128 (E Commission), paragraphs 129-130 (Italy) and paragraph 132 (United Kingdom).
65 Bosphorus (n 3) paragraph 54, quoting the ECJ decision.
that a thorough proportionality test can be avoided; in effect, only one side of the scale needs to be considered. This tendency persists in the other cases; as we will see, security is often allowed immediately to outweigh any other factors in a limitations analysis. As part of this approach, the other factors are often barely considered. As a result, the limitations analysis can be reduced to an empty shell; the authority limiting the right is not required to justify itself at all.

The second failing in the ECJ’s proportionality analysis is that there is no investigation of whether a measure such as this – impounding the aircraft of this type – would in fact contribute to the cessation of violence.66 The Security Council’s opinion that these measures are necessary is taken as conclusive. The ECJ therefore leaves out all the steps that would make a thorough proportionality analysis possible: it fails to investigate the relationship between the rights limitation and the goal it is meant to achieve, and it fails to compare the importance of the goal to the severity of the rights limitation.

Had the ECtHR found the proportionality analysis of the ECJ decision inadequate, it could have held that the EU was not providing the necessary “equivalent protection” for Convention rights, and it could have proceeded to review the case itself. But it did not. It neither engaged with the ECJ analysis in any depth, nor conducted a proportionality analysis of its own. It dismisses the airline company’s complaint in a few lines:

The Court has had regard to the nature of the interference, to the general interest pursued by the impoundment and by the sanctions regime and to the ruling of the ECJ (in the light of the opinion of the Advocate General), a ruling with which the Supreme Court was obliged to and did comply. It considers it clear that there was no dysfunction of the mechanisms of control of the observance of Convention rights.
In the Court’s view, therefore, it cannot be said that the protection of the applicant company’s Convention rights was manifestly deficient, with the consequence that the relevant presumption of Convention compliance by the respondent State has not been rebutted.67

66 For the necessity requirement of the proportionality test, see Paul Craig & de Búrca (n 16) 531. The necessity and effect of this particular impounding is open to question because Bosphorus’ lease of the aircraft did not bring any financial benefit to the Yugoslav Airlines or, through them, the Yugoslav authorities that were meant to be subjected to sanctions. See n 43 above.

67 Paragraph 166 of Bosphorus (n 3).
The advantage of the *Bosphorus* decision is that it establishes a test that allows one legal system (that of the European states under the *ECHR*) to admit and implement measures from another legal system (that of the EU), even though the latter interfere, to some extent, with the rights guaranteed by the former. However, the test failed to protect Bosphorus against Security Council measures because of the wide latitude that both the ECtHR and the ECJ gave to the Security Council to determine what is necessary to maintain peace and security. The failure of both the ECtHR and the EU engage in depth with the Security Council’s claim resulted in a situation which David Dyzenhaus has elsewhere termed a “grey hole”:

A grey hole is a legal space in which there are some legal constraints on executive action—it is not a lawless void—but the constraints are so insubstantial that they pretty well permit government to do as it pleases.\(^68\)

The problem is worth highlighting at this stage of the argument, but will be considered in more detail after the remaining case studies have been discussed.

**C.2. *Behrami v. France* and *Saramati v. France, Germany and Norway***

In June 1999, the Federal Republic of Yugoslavia agreed to withdraw its troops from Kosovo, one of its provinces. The United Nations Security Council issued a resolution, 1244 of 10 June 1999, to provide for UN administration of Kosovo, including a security presence. The security forces (KFOR) were provided by UN member states, and operated under UN auspices with “substantial NATO participation”. The interim administration, known as UNMIK, also operated under the auspices of the UN and coordinated closely with KFOR.

This case involved two, joined claims against the KFOR/UNMIK administration of Kosovo. The first claim (*Behrami*) was brought by the father of two young boys.

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\(^{68}\) David Dyzenhaus, “*Schmitt v Dicey: Are States of Emergency Inside or Outside the Legal Order?*” (2006) 27 Cardozo L. Rev. 2005 at 2018 (hereafter: Dyzenhaus, “*Schmitt v Dicey*”). In this article, Dyzenhaus uses this term to describe a proposed response to a state of emergency, rather than the result of an interpretation of the “normal” law. I submit that a refusal by a court rigorously to review executive measures under the “normal” law has the same effect.
who had found, and accidentally detonated, a cluster bomb unit. One boy was killed and the second disfigured and blinded. The father brought a complaint on his own behalf, and on behalf of his two sons, against the French KFOR troops which had administered the area where they lived and where the bomb was found.

The second case (Saramati) involved a claim against France and Norway for their role in the unlawful detention of the applicant. In this case, the applicant had been arrested and detained by UNMIK police in April 2001, and charged with a number of offences. Although he was released on the order of the Supreme Court of Kosovo in June 2001, he was re-arrested one month later (in July 2001) and detained for another six months, on the decision of the Command of KFOR, which was held by both France and Norway during the relevant period. When challenged by Saramati’s representatives, KFOR’s legal advisor claimed that “KFOR had information concerning Mr Saramati’s alleged involvement with armed groups operating in the border region between Kosovo and the Former Yugoslav Republic of Macedonia” and that KFOR was “satisfied that Mr Saramati represented a threat to the security of KFOR and to those residing in Kosovo”. Saramati’s conviction for murder in January 2002 was quashed by the Supreme Court on 9 October 2002. By the date of the ECtHR hearing in 2007, the case had been sent back for re-trial, but was not yet heard or even scheduled.

Saramati brought a complaint against France and Norway for his detention. Joining the two cases, the ECtHR refused jurisdiction over all the claims. It concluded that the impugned actions were attributable to KFOR and UNMIK and therefore to the UN. As the UN was not a contracting party to the Convention, the Court lacked jurisdiction *ratione personae* to examine the impugned actions.

The ECtHR’s treatment of attribution is curious in many respects. The first anomaly is that it does not acknowledge that states may remain responsible for their military forces even if the UN bears responsibility for their actions as well.69

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69 Messineo comments: “[T]he Court analyzed the question of attribution as if there were a dichotomy between attribution to the UN and attribution to a member state, i.e., as if one excluded the other. This is a misconception. Nothing in principle prevents an act from being attributable both to an international organization and to a state, another international organization, or any other subject of international law. This is quite an obvious statement (at
Distinguishing *Bosphorus*, the Court emphasized that the act impugned in *Bosphorus* (seizure of the aircraft) had been “carried out by the respondent State authorities, on its territory and following a decision by one of its Ministers.” It contrasted this situation with the case before it, in which the troops put at the disposal of the UN were carrying out their functions outside the territory of the states which sent them. It held that the impugned acts and omissions of KFOR and UNMIK in *Behrami* could not be attributed to the respondent states and did not take place on the territory of those states, or by virtue of a decision of their authorities. There was, as a result, no question of the Court’s competence with respect to the respondent State.

The Court’s reasoning assumes that a state cannot be liable for acts carried out extra-territorially and without the express order of its authorities. This assumption is questionable, and it is notable that the point was argued before the Court. The Court, however, treated this argument as irrelevant:

The Court … considers that the question raised by the present cases is, less whether the respondent States exercised extra-territorial jurisdiction in Kosovo but far more centrally, whether this Court is competent to examine under the Convention those States’ contribution to the civil and security presences which did exercise the relevant control of Kosovo.

The second curious feature of *Behrami* is the test which the ECtHR adopts for attribution - a test which seems to be at odds with the position under customary

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70 *Behrami* (n 4) paragraph 151.
71 *Messineo* (n 69) 52.
72 *Messineo* (n 69) 52.
73 *Behrami* (n 4) paragraph 71.
international law. Drawing on academic opinion and state practice, the ILC draft Articles on the Responsibility of International Organizations (DARIO) use a factual test when determining whether the act of an organ placed at the disposal of an international organization can be attributed to the latter. It allows the international organization to be held responsible for the acts over which it exercises “effective control”. However, the ECtHR adopted the test of “ultimate authority and control”, without explaining why or identifying a source for this unique approach. Applying this criterion to the facts, it found that UNMIK and KFOR were both forces that were operating under authority derived from Chapter VII and carrying out the purposes of UNSC Resolution 1244 (1999), namely, a security presence and a civilian administration. The United Nations Security Council retained control “in principle” over both bodies and, through this finding, the ECtHR managed to release

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76 Messineo argues that this criterion would have produced a different finding in the Behrami and Saramati cases: Applying the criterion of “effective control” to the situation in Behrami it is evident that a difference should be drawn between K-FOR and UNMIK. While doubts may legitimately be cast regarding the latter, as a matter of fact it is not possible to speak of “effective control” of the UN over the impugned acts by K-FOR. Messineo (n 69) 42.

77 Behrami (n 4) paragraph 133.

78 Behrami (n 4) paragraphs 141, 142, 143 and 144.
France and Norway from all liability for the actions of their troops and administrators.\textsuperscript{79}

The third anomaly of the Court’s concept of attribution is the broad overlap between this concept and the concept of sovereignty. The level of control applied in Behrami for the purposes of attribution seems to be simply another way of describing sovereignty. The Court looks for overall control and “ultimate authority” over the decision-making behind an activity, rather than factual control over a particular act. Under a test formulated in this way, an international body would become responsible for the act when it assumes sovereignty over functions previously held by the state; in other words, once attribution has shifted from a state to an international organization, sovereignty will have shifted too. This overlap seems to put Behrami and Bosphorus into direct contradiction: Bosphorus would not have allowed France and Norway to escape liability merely by transferring their sovereignty over the acts in question to the UN. The line of cases from M to Bosphorus was designed to prevent states which have ratified the Convention from transferring their responsibility for human rights protection to an international organization which does not protect human rights. In Behrami, however, that very transfer derailed an investigation into whether the UN provided equivalent protection to the Convention rights that France and Norway had undertaken to protect. Whereas the Bosphorus Court allowed states to transfer sovereignty but retained control over these states, the Court in Behrami allowed states to transfer sovereignty and thereby remove themselves from enforcement of the Convention.

Behrami did claim, however, to be following the Bosphorus precedent. It noted that the UN’s responsibility had arisen from the transfer by the member states, Norway and France, of their troops to the UN. Alluding to Bosphorus, the ECtHR held that such a transfer to an international organization created a presumption that Convention rights are protected by that international organization; a presumption

\textsuperscript{79} Behrami (n 4) paragraphs 128-152.
that can be rebutted only if “in the circumstances of a particular case, it [is] considered that the protection of Convention rights [is] manifestly deficient”.\textsuperscript{80}

However, in this case, the ECtHR refused to proceed with an investigation into the rights protection provided by the United Nations. Its refusal is based on two main ideas: first, that the UN Security Council is supreme and, second, that the area of security is not subject to legal regulation. Part of this idea is the notion that legal analysis of security measures and their consequences are somehow inimical to the success of such measures.

The ECtHR justifies its deference to the UN-based security system by investigating the international obligations of the States Parties to the Convention. It emphasizes that the UN Charter was a prior treaty obligation for nine of the original twelve original signatory parties to the Convention in 1950\textsuperscript{81} and that “the great majority of the current Contracting Parties joined the UN before they signed the Convention and that currently all Contracting Parties are members of the UN”.\textsuperscript{82} It also notes that one of the Convention aims is “the collective enforcement of rights in the Universal Declaration of Human Rights of the General Assembly of the UN”.\textsuperscript{83} The Court proceeds to emphasize that the Convention has to be interpreted in the light of any relevant rules and principles of international law applicable amongst its contracting parties.\textsuperscript{84} Having established this bridge to the UN Charter as a binding source of law, the Court then turns to articles 25 and 103, as well as the jurisprudence on these articles from the International Court of Justice to give obligations arising from the UNSC primacy over all other obligations.\textsuperscript{85}

The second leg of the Court’s argument is that, within the UN-based system, the Security Council resolutions have primacy over human rights considerations,
despite the UN’s own, stated respect for human rights. This is because of the “imperative collective security objective” of the Charter.  

After reflecting that the UNSC supports human rights mainly through coercive measures, the Court briefly repeats the background to UNSC Resolution 1244 to conclude:

Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including ... with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim.

There are significant differences between Bosphorus and Behrami. The former attempts to accommodate separate legal structures, such that each maintains its own force and integrity. Behrami, on the other hand, seems to put the Convention and the Court itself into a subordinate position within one, UN-based legal structure. Indeed, in the paragraph quoted above, the Security Council resolutions gain such primacy in its argument that the Court seems to view its job as interpreting and giving effect to the SCR, rather than to the Convention.

But what Bosphorus and Behrami do have in common is the creation of a grey hole. Like Bosphorus, Behrami refuses to subject measures taken in the name of security to legal scrutiny. In Bosphorus, the Court does not claim to be moving outside of the normal law for the sake of security. Instead, it claims to be applying this law. But its proportionality analysis defers so strongly to the Security Council’s

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86 Behrami (n 4) paragraph 151.  
87 Behrami (n 4) paragraph 148.  
88 Behrami (n 4) paragraph 149.  
89 The most telling phrase is probably “It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself.” Behrami (n 4) paragraph 149.
opinion of what is needed to maintain peace and security that its constraint of the
Council is negligible. In Behrami, the refusal is express, as the Court defers to the
UN’s “fundamental” mission to “secure international peace and security”. 90

C.3.  R. (Al-Jedda) v. Secretary of State for Defence
British involvement in Iraq had begun with its participation in the US-led invasion of
Iraq on 20 March 2003. On defeating the Iraqi forces, the USA and the UK became
occupying powers in Iraq within the meaning of the Fourth Geneva Convention. In
April 2003, a Coalition Provisional Authority was set up. In October 2003, the UN
Security Council passed SCR 1511, which authorized a “multinational force” (MNF) “to
take all necessary measures to contribute to the maintenance of security and stability
in Iraq in accordance with the letters annexed to this resolution”. As a result of this
resolution, the UK troops in Iraq became part of the UN-sanctioned security authority,
the MNF.

In June 2004, the interim government of Iraq and the US Secretary of State
each sent letters to the Security Council. The interim prime minister asked for
continued assistance in assuring the security of Iraq. US Secretary of State, Colin
Powell, offered the continued “contribution” of the coalition troops:

Recognizing the request of the government of Iraq for the continued presence of the Multi-
National Force (MNF) in Iraq, and following consultations with Prime Minister Ayad Allawi of the
Iraqi Interim Government, I am writing to confirm that the MNF under unified command is
prepared to continue to contribute to the maintenance of security in Iraq, including by
preventing and deterring terrorism and protecting the territory of Iraq. The goal of the MNF
will be to help the Iraqi people to complete the political transition and will permit the United
Nations and the international community to work to facilitate Iraq’s reconstruction. 91

The responsibilities that Colin Powell assumed on behalf of the MNF included
internment where “necessary for imperative reasons of security”. 92

90  Behrami (n 4) paragraph 149.
91  Cited in Al-Jedda HL (n 5) paragraph 74.
These two letters resulted in SCR 1546, which authorized the MNF “to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution”. In June 2004, the Coalition Provisional Authority issued an order that granted members of the MNF immunity from Iraqi legal process and held that they were subject to the exclusive jurisdiction of the sending states. Power was then formally transferred to the interim Iraqi government and the Coalition Provisional Authority dissolved. This was the legal position when, four months later, Hilal Abdul-Razzaq Ali Al-Jedda arrived in Baghdad and was detained.

Al-Jedda was an Iraqi national who had arrived in the UK in the early 1990s and been granted asylum there. He later gained UK citizenship. He visited Baghdad in October 2004 to see his family. There he was arrested and taken into MNF custody. He was detained for over three years without charge or trial. The only basis offered for his imprisonment by the MNF in Iraq was that his internment was necessary for imperative security reasons. Al-Jedda consistently denied MNF findings that he was involved in terrorist activity, and no evidence was provided of the security risk that Mr. Al-Jedda posed. The UK courts which heard the application for relief nonetheless proceeded on the assumption that the security basis for his internment was sound.

Al-Jedda’s application relied on the Human Rights Act of 1998 (HRA) of the UK, the legislation that enacts the Convention into UK domestic law. He argued that his rights to liberty and security of the person had been violated by the action of UK officials in Iraq. His application and appeals were rejected by the Divisional Court, the Court of Appeal and the House of Lords. This discussion begins with the House of Lords decision, which was handed down after the ECtHR had released its Behrami judgment.

In its argument, the UK government relied on Behrami to argue that the actions of the British members of the MNF were attributable to the UN, and not the UK. As a

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result, said the UK government, the British courts had no jurisdiction over the matter as they had no jurisdiction over the UN. Rejecting this argument, most of the five speeches agreed that the UK bore responsibility for the actions of the British troops in the MNF. They nonetheless decided that they could not review the case, as the UK was bound by the articles 25 and 103 of the UN Charter to carry out the decisions of the Security Council in this matter.

To attribute the detention of Al-Jedda to the UK rather than the UN, most of the judges distinguished *Behrami* on its facts:

> The analogy with the situation in Kosovo breaks down, in my opinion, at almost every point. The international security and civil presences in Kosovo were established at the express behest of the UN and operated under its auspices, with UNMIK a subsidiary organ of the UN. The multinational force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN. There was no delegation of UN power in Iraq. It is quite true that duties to report were imposed in Iraq as in Kosovo. But the UN’s proper concern for the protection of human rights and observance of humanitarian law called for no less, and it is one thing to receive reports, another to exercise effective command and control. It does not seem to me significant that in each case the UN reserved power to revoke its authority, since it could clearly do so whether or not it reserved power to do so.  

This position was set out by Lord Bingham and had the support of the majority, although most of the judges distinguished the *Behrami* precedent for different reasons. Lord Rodger of Earlsferry, by contrast, rejected any legal distinction between the facts in *Behrami* and the facts in the case before him. He reasoned that the history of the two resolutions in question played no role in the comparison; what mattered was the legal position at the time of the impugned activity. At this stage, he argued, the legal position of the UK forces in Al-Jedda’s detention was analogous to those of KFOR in the case of Saramati. The fact that Resolution 1511 did
not create the MNF, but merely authorized it to carry out its functions, was also irrelevant, as the mandate set out in this resolution asserted and exercised control over the MNF in a manner similar to the control exercised over KFOR and UNMIK by the UN. The “effective control” criterion in the draft articles could not distinguish Al-Jedda from Behrami and Saramati, as the ECtHR had held the detention of Saramati attributable to UN notwithstanding the fact that the UN had not exercised effective control over practical management of that case. Finally, both resolutions authorize the relevant military bodies to intern people “where this is necessary for imperative reasons of security”.  

Messineo agrees with Lord Rodger’s arguments that the factual differences between the two situations are legally irrelevant. In Messineo’s opinion, some of the difficulties faced by the House of Lords in this case originate in the mistakes of the Behrami judgment; indeed, he even suggests that the majority “went as far as it could in sending a subtle message to Strasbourg that something was wrong in the Behrami case”. But, having resolved the procedural question in favour of the appellant, the House of Lords nonetheless refused to review Al-Jedda’s detention. This was because the substantive law had been overridden by the obligations under articles 25 and 103 of the UN Charter and, in particular, by the security imperative of the UN Security Council.

The ratio is difficult to discern. The majority expressed itself in agreement with Lord Bingham, although some of the judges did so with reservations or additional comments which detract from his reasoning. The starting point for Lord Bingham was that Al-Jedda’s rights under article 5(1) of the Convention - the right to liberty and security of the person - had been infringed by the UK authorities in Iraq. He then

98 Al-Jedda HL (n 5) paragraphs 63, 65 and 67 (per Lord Rodgers).
99 Messineo (n 69) 47.
100 These provisions are discussed in more detail below.
101 Article 5 of the Convention reads:
Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the
looked for an “exonerating condition” or supervening obligation that would justify the detention, and held that he had found it in the UN Charter. He relied, in particular, on article 25 of the UN Charter, under which all UN member states agree to carry out decisions of the United Nations Security Council, and article 103 of the UN Charter, which reads:

In 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.

The UK government had argued that the various UNSC resolutions obliged it to detain Mr. Al-Jedda, thereby bringing article 103 into play. The appellant’s counterargument had been that the relevant SC resolutions had authorized, but not obliged, the MNF to carry out its security measures in Iraq. For Lord Bingham, the first major question was therefore whether the UK was obliged under article 103 to detain Al-Jedda. He found that the UK was indeed obliged to do so, relying on “three main reasons”. First, he held that the UNSC had intended by its resolutions on Iraq to extend the existing the legal regime in Iraq, not impose new ones. He then

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102 Al-Jedda HL (n 5) paragraph 27 (per Lord Bingham).
103 Charter of the United Nations, 24 October 1945, 1 U.N.T.S. XVI, article 103.
105 Al-Jedda HL (n 5) (per Lord Bingham) paragraph 32.
described the existing regime as one obliging occupying powers to detain persons when it considers such detention necessary for reasons of security.

The existing regime was found in international humanitarian law. Relying on the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949, Lord Bingham cited a number of provisions circumscribing the sanctions which may be applied by occupying states to protected persons. Lord Bingham acknowledged that these provisions bore no relation to Al-Jedda who, as a British citizen, did not qualify as a “protected person” under the Geneva Conventions. But he argued that the provisions “show plainly” that occupying forces have the power to detain persons who are not protected under the Convention. From this, he concluded further that the occupying power would be under an obligation to detain a person if it considered such detention necessary to protect the security of the occupied area.

Secondly, Lord Bingham held that article 103 is applicable whether the language of the SCR is couched as a decision or an authorization. He relied here on academic opinion which argues that Security Council authorizations are treated as

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107 Article 4 defines “protected person” as “those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of persons a Party to the conflict or Occupying Power of which they are not nationals.” It adds that nationals of a State which is not bound by the Convention are not protected by it and that nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are. See *Geneva Convention Relative to the Protection of Civilians in Time of War*, 12 August 1949, 75 U.N.T.S. 287, article 4.

108 *Al-Jedda HL* (n 5) (per Lord Bingham) paragraph 32. Lord Bingham relied here on *Democratic Republic of the Congo v Uganda*, [2005] I.C.J. Rep. 168 at paragraph 178, in which the ICJ reads article 43 of the Hague Regulations as imposing an obligation on Uganda to protect the security of Ituri, the territory it had occupied. The ICJ held: “[The occupying power] was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.”
mandatory in state practice, at least where military activity is concerned. In addition, he equated authorization with a binding mandate in the specific context of military or security operations “overseas”. This reading of the Charter attaches legal consequences to the fact that no forces have ever been placed at the long-term disposal of the Security Council, as envisaged by article 43 of the Charter. Therefore, according to Lord Bingham, the Security Council cannot itself carry out the military operations that it decides are necessary. It has, instead, to authorize the military action by states willing to assist it. Lord Bingham contrasted this situation with a mandatory resolution imposing a sanction, such as SCR 820 of 1993, which “decided” that all States had to impound vessels belonging to the former FRY. Such mandatory resolutions, he said, “cause no difficulty in principle, since member states can comply with them within their own borders and are bound by article 25 of the UN Charter to comply”.

It is unclear what the significance is of the geographical point at which the Security Council Resolution is to take effect. States are always obliged to give effect to Security Council Resolutions, particularly if they were passed under Chapter VII of the UN Charter. Chapter VII obligations are binding irrespective of where the obligation is to be discharged. Furthermore, the Security Council never has the executive resources at its disposal to give effect to its decisions – whether these are to impose sanctions, provide humanitarian relief or use force. It is always reliant, in practical terms, on the co-operation of UN member states. The absence of article 43 troops creates no distinction between military and other decisions of the Council. Indeed, had article 43 agreements been concluded, these agreements would have

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109 One of the opinions, cited at length, also argues that authorizations should be treated as obligations for the purposes of article 103 even in the case of economic sanctions. This argument (found in Jochen A. Frowein & Nico Krisch, “Article 103” in Bruno Simma et al., eds., The Charter of the United Nations: A Commentary, 2nd ed. (Oxford: Oxford University Press, 2002) at 729) relies on a purposive interpretation, arguing that the SC would lose some of its flexibility and effectiveness if its authorizations were not given this force. See Al-Jedda HL (n 5) paragraph 33 (per Lord Bingham).

110 Al-Jedda HL (n 5) paragraph 33 (per Lord Bingham).

111 See chapter one.
provided a factual distinction between resolutions deciding on military action (which
the Council would have been able to discharge itself) and resolutions deciding on any
other form of enforcement tool (for which the Council would have had to rely on
member states). As it is, there is no difference between resolutions ordering or
authorizing military action and any other kind of sanction. The legal argument that
relies on this distinction is therefore tenuous.

Lord Bingham’s third reason for the application of article 103 was policy-based,
and may well have informed the other two. He held that the term “obligations” in
article 103 “should not in any event be given a narrow, contract-based, meaning”.112
Instead, Lord Bingham suggested an interpretation that recognized “importance of
maintaining peace and security”.113 Having made a policy choice for security, Lord
Bingham further relied on a textual argument for the supremacy of the UN (security-
based) obligation over the Convention. He held that the “the special character of the
European Convention as a human rights instrument” could not be used against article
103, because the reference in the latter to “any other international agreement” did
not allow for exceptions.114

Up to this point, Lord Bingham clearly read article 103 of the UN Charter to
allow the Security Council to override any conflicting obligations from regional and
domestic systems. However, his judgment then took an unexplained turn, when he
recognized that the effects of the Convention were frustrated by the Council’s
programme and tried somehow to give effect to the Convention as well:

Thus there is a clash between on the one hand a power or duty to detain exercisable on the
express authority of the Security Council and, on the other, a fundamental human right which
the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are
these to be reconciled? There is in my opinion only one way in which they can be reconciled: by
ruling that the UK may lawfully, where it is necessary for imperative reasons of security,

112 Al-Jedda HL (n 5) paragraph 34 (per Lord Bingham).
113 Al-Jedda HL (n 5) paragraph 34 (per Lord Bingham).
114 Al-Jedda HL (n 5) paragraph 34 (per Lord Bingham). On this point, Lord Bingham also relied on
academic opinion and ICJ jurisprudence (Lockerbie and Case Concerning the Application of the
Convention on the Prevention and Punishment of the Crime of Genocide) to conclude that only
jus cogens obligations had precedence over article 103 commitments. Interestingly, he did not
rely on the CFI judgment of Kadi, which had reached the same conclusion. See chapter four.
exercise the power to detain authorised by SCR 1546 and successive resolutions, but must ensure that the detainee’s rights under article 5 are not infringed to any greater extent than is inherent in such detention.\textsuperscript{115}

Messineo explains why this paragraph conflicts with the rest of Lord Bingham’s argument:

First, Lord Bingham set out at length the reasons why according to him the UK was not merely authorized, but under an obligation to intern Mr Al-Jedda. But in his last paragraph he abruptly recast the ‘obligation’ as something that the UK ‘may’ lawfully do, with the added caveat of having to apply some unspecified compatible elements from Article 5 \textit{ECHR}, or what remained thereof. Nothing else was said on the matter: and one was left wondering how this could in practice be reconciled with the arguments on relative normativity energetically made before, which seemed to indicate a complete displacement (rather than a qualification) of Article 5 \textit{ECHR} rights by virtue of Articles 103 and 25 \textit{UN Charter}.\textsuperscript{116}

This tension emerges throughout the judgments, as the Law Lords attempt to uphold the Convention rights while simultaneously declaring that the Security Council resolutions have primacy over them. The full bench declared itself in agreement with Lord Bingham on his finding that the Security Council resolutions had primacy, without challenging his statement that this primacy did not completely displace article 5 of the Convention. Baroness Hale and Lord Carswell attempted to accord a stronger position to the Convention. Both judges started their speeches with a firm statement on the iniquity of detention without trial,\textsuperscript{117} and Baroness Hale also noted that it was precisely those people who had been accused of the gravest crimes who needed the protection of the rule of law.\textsuperscript{118} She further noted the distinction between “displacing” and “qualifying” of the rights in article 5 of the Convention, and criticized the other members of the bench for using the two terms “in one breath”.\textsuperscript{119} The distinction between the two terms, she remarked, “is an important distinction, insufficiently explored in the all or nothing arguments with which we were presented. We can go no further than the UN has implicitly required us to go in

\textsuperscript{115} \textit{Al-Jedda} HL (n 5) paragraph 39 (per Lord Bingham).
\textsuperscript{116} Messineo (n 69) 50-51; references omitted.
\textsuperscript{117} \textit{Al-Jedda} HL (n 5) paragraph 122 (per Baroness Hale).
\textsuperscript{118} \textit{Al-Jedda} HL (n 5) paragraph 122 (per Baroness Hale).
\textsuperscript{119} \textit{Al-Jedda} HL (n 5) paragraph 129 (per Baroness Hale).
restoring peace and security to a troubled land. The right is qualified only to the extent required or authorized by the resolution. What remains of it thereafter must be observed. This may have both substantive and procedural consequences.”

Yet Baroness Hale, like the other members of the bench, did not examine how far UNSC Resolution 1546 (2004) actually went in authorizing internment.

In his speech, Lord Carswell set out a number of safeguards that states should adopt in detaining people. He required “the compilation of intelligence about such persons which is as accurate and reliable as possible, the regular review of the continuing need to detain each person and a system whereby that need and the underlying evidence can be checked and challenged by representatives on behalf of the detained persons, so far as is practicable and consistent with the needs of national security and the safety of other persons.” However, he proceeded to agree in principle that there was an obligation to carry out the internment in the present case, without examining whether these safeguards had been met. Indeed, his safeguards occupy a tenuous legal position somewhere between a legal obligation and a policy objective. While Lord Carswell held that states “have to” implement his safeguards, he also conceded that this obligation is limited by the circumstances. His suggested safeguards must therefore be implemented “to the fullest practicable extent”.

The problem with all the speeches in this case, however, is that they leave the determination of what actually is practicable to the UK military authorities. They do so by not applying the relevant legal principles to the facts of the case before them. Even though most of the judgments recognize that there are legal requirements which inevitably entail a closer scrutiny of the UK authorities’ actions, they fail to exercise the scrutiny they themselves have suggested is required by law. Thus, as we have seen, Lord Carswell and Baroness Hale recognize that Al-Jedda has rights under article

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120  *Al-Jedda* HL (n 5) paragraph 126 (per Baroness Hale).
121  *Al-Jedda* HL (n 5) paragraph 130 (per Lord Carswell).
122  *Al-Jedda* HL (n 5) paragraph 136 (per Lord Carswell).
5 to the extent that these are not excluded by the UN Security Council Resolution. But they do not investigate what these rights are. In fact, none of the speeches examine the requirements of article 5 of the Convention in any depth. They limit themselves to article 5(1), leaving out the procedure and factual enquiries which the rest of article 5 would require.\textsuperscript{123} Both sets of “opposing” obligations - the obligation to intern for security reasons and the obligation to respect Al-Jedda’s rights under article 5 - are therefore covered briefly and “at the margins of the judgment”;\textsuperscript{124} and it is simply assumed that there is a clash between them.\textsuperscript{125}

When Al-Jedda reached the ECtHR on appeal, that court had to decide the question of attribution before it could determine whether the UK was responsible for breaching its obligations under article 5 of the \textit{ECHR}. The ECtHR agreed that the actions of the UK forces were attributable to the UK, distinguishing \textit{Behrami} on the facts in a similar fashion to that adopted by the SCA.\textsuperscript{126} On whether the detention could be attributed to the UN instead of the UK, the ECtHR did not address the discrepancy between the test for attribution in its own case law (ultimate authority and control)\textsuperscript{127} and that in article 5 of DARIO, merely noting that neither test for attribution was met in this case.\textsuperscript{128} As a result, the Court held that the actions of the UK in Iraq were attributable to the UK and not the UN.\textsuperscript{129}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{123} Messineo (n 69) 51. See Messineo 52ff for an in-depth discussion of the requirements of article 5 as a whole. Messineo argues that the relevant SCR’s and the \textit{ECHR} do not have to be seen as clashing in this case.
\item \textsuperscript{124} Messineo’s term. See Messineo (n 69) 51.
\item \textsuperscript{125} Messineo (n 69) 51.
\item \textsuperscript{126} Al-Jedda ECtHR (n 6) paragraphs 80-83. One of the factors which played a role in the ECtHR’s decision that the UK, and not the UN, was responsible for the acts of the UK forces was that the UN had objected to the frequent use of detention by the UK and US. See paragraph 82 of the judgment. For a critique of the ECtHR’s treatment of attribution, see Marko Milanovic, “Al-Skeini and Al-Jedda in Strasbourg” (2012) 23 E.J.I.L. 121 at 136 (hereafter: Milanovic).
\item \textsuperscript{127} \textit{Behrami} (n 4).
\item \textsuperscript{128} Al-Jedda ECtHR (n 6) paragraphs 84-86.
\item \textsuperscript{129} The court’s reasoning did, however, leave open the possibility that both the UN and the UK could bear responsibility for the acts of the British soldiers.
\end{enumerate}
\end{footnotesize}
The Court then turns to the question of whether the UK was bound by article 5 of the *ECHR* in this case, or whether this convention had been overridden by article 103 of the UN Charter. We saw above that the majority of the Supreme Court of Appeal had held that the Security Council Resolutions in question obliged the UK to detain people if the detention was necessary for imperative reasons of security. While attempting to leave room for article 5 of the *ECHR* in some limited way, all the judgments from the SCA allow article 5 to be overridden by security considerations which could be traced back to a resolution of the UN Security Council.

The ECtHR similarly assumed a single legal structure, with the UN at the apex and the regional and domestic systems subject to UN law. But it emphasized that the obligations set out in the Security Council Resolutions formed part of the broader system of international law, and that the *ECHR* was part of international law.\(^\text{130}\) It further suggested that the mandate of the Security Council was wider than merely ensuring peace and security:

> In addition, the Court must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first subparagraph of Article 1 of the United Nations Charter, the third subparagraph provides that the United Nations was established to “achieve international cooperation in ... promoting and encouraging respect for human rights and fundamental freedoms”. Article 24(2) of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to “act in accordance with the Purposes and Principles of the United Nations”.\(^\text{131}\)

In the light of this broader mandate, the Court introduced a presumption into the Security Council Resolutions that the Council “does not intend to impose any obligation on Member States to breach fundamental principles of human rights”.\(^\text{132}\) This led the Court to interpret the Security Council’s Resolutions such that they did not conflict with the obligations in the *ECHR*. Any ambiguity in a resolution had to be interpreted in such a way as to avoid conflict with the Resolution and the *ECHR*. This admittedly left the door open for an express authorization of human rights abuses by

\(^{130}\) *Al-Jedda* ECtHR (n 6) paragraph 105.

\(^{131}\) *Al-Jedda* ECtHR (n 6) paragraph 102.

\(^{132}\) *Al-Jedda* ECtHR (n 6) paragraph 102.
the Security Council,\textsuperscript{133} but required such an express authorization before the rights in the \textit{ECHR} can be limited:

In conclusion, therefore, the Court considers that United Nations Security Council Resolution 1546, in paragraph 10, authorised the United Kingdom to take measures to contribute to the maintenance of security and stability in Iraq. However, neither Resolution 1546 nor any other United Nations Security Council resolution explicitly or implicitly required the United Kingdom to place an individual whom its authorities considered to constitute a risk to the security of Iraq in indefinite detention without charge. In these circumstances, in the absence of a binding obligation to use internment, there was no conflict between the United Kingdom’s obligations under the Charter of the United Nations and its obligations under Article 5 § 1 of the Convention.\textsuperscript{134}

In this judgment, it was technically the UK which was found to be in breach of its obligations. But the finding rests on a reading of UN law which restricts the powers of the Security Council.

\textbf{C.4. \textit{Al-Dulimi v Montana Management Inc v Switzerland}}\textsuperscript{135}

Unlike the other cases in this chapter, \textit{Al-Dulimi} does not predate the listing measures discussed in chapter four. It deals with a form of “smart sanctions” similar to the listing system discussed in that chapter, and the judgment relies on many of the listing cases as precedent. The \textit{Al-Dulimi} case will therefore also be discussed at the end of the chapter four. It needs to be mentioned here too, however, as it presents a major step in the development of the European courts’ general tools for dealing with measures emanating from the Security Council. This is because the Second Chamber takes the “equivalent protection” test from the \textit{Bosphorus} case and applies it, for the very first time, to the UN Security Council. While the Grand Chamber overruled this element of the Second Chamber’s judgment, holding the \textit{Bosphorus} test

\textsuperscript{133} For this and other implications of the judgment, see Milanovic (n 126) 138. See also \textit{Nada v. Switzerland} ([GC], no. 10593/08, \textit{ECHR} 2012), in which the ECtHR found such an express authorization.

\textsuperscript{134} \textit{Al-Jedda} ECtHR (n 6) paragraph 109.

\textsuperscript{135} \textit{Al-Dulimi} Second Chamber (n 7).
to be unnecessary, we may nonetheless draw certain advances for the culture of justification from this case as a whole.

Al-Dulimi and the company, Montana Management Inc, of which Al-Dulimi was managing director, had assets in Switzerland. After Iraq’s invasion of Kuwait in 1990, the Security Council called upon UN member States and non-member States “to apply a general embargo against Iraq and on any Kuwaiti resources confiscated by the occupier”. The information held by the Security Council was that Al-Dulimi was head of finance for the Iraqi secret service under Saddam Hussein. His Swiss assets, and those of the company, were thus frozen in compliance with the Security Council resolution. In 2003, following the downfall of Saddam Hussein’s government in Iraq, a second set of Security Council measures directed states to confiscate financial assets of any members of the former Iraqi government, while SCR 1580 set up a committee to determine who these individuals were (the so-called “1580 Committee”). On 26 April 2004, Al-Dulimi was listed as a member of the former Iraqi government by this committee, and Switzerland proceeded to initiate confiscation proceedings against Al-Dulimi and his company. Al-Dulimi attempted to get the Swiss Federal Court to review his listing by the 1580 Committee, but the Court refused on the basis that Switzerland was bound under article 103 of the UN Charter to comply with decisions of the Security Council, even if these conflicted with international, regional or domestic human rights norms. In 2006, Security Council Resolution 1730 created a delisting procedure, through which Al-Dulimi also applied to be delisted. This, too, was unsuccessful. Al-Dulimi therefore brought a case

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137 Al-Dulimi Second Chamber (n 7), paragraph 10.
140 The relevant paragraphs of the Federal Court judgments are set out in paragraph 38 of the Second Section decision of Al-Dulimi (n 7).
against Switzerland before the ECtHR on the basis that his right to access to court had been violated.\footnote{Protected by article 6(1) of the \textit{ECHR}.}

This case draws on the extensive “listing” jurisprudence set out in chapter four, but there are two points that need to be emphasized at this stage. The first is that the ECtHR applied the “equivalent protection” test from the \textit{Bosphorus} case to the UN Security Council. Noting that the previous equivalent protection cases had generally concerned “the relationship between European Union law and the Convention guarantees”, the Court pointed out that it had “never ruled out the application of the equivalent protection criterion to a situation concerning the compatibility with the Convention of acts of international organizations other than the European Union.”\footnote{\textit{Al-Dulimi} Second Section decision (n 7) paragraph 116.} In the light of the fact that the relevant Security Council resolutions did not confer any discretion on states in how they were to comply with the Council’s instructions, the Court therefore had to examine whether the United Nations Security Council offered persons affected by its measures human rights protection that was equivalent to that provided by the \textit{ECHR}.\footnote{\textit{Al-Dulimi} Second Section decision (n 7) paragraph 117.} It found that the UN Security Council did not provide equivalent protection,\footnote{\textit{Al-Dulimi} Second Section decision (n 7) paragraph 118.} and that the merits of the applicants’ claim therefore had to be considered.\footnote{\textit{Al-Dulimi} Second Section decision (n 7) paragraph 122.}

The second important feature of the case is the thoroughness of the proportionality analysis. The Court identified the purpose of the 2003 measures not as responding to an imminent danger, but of “re-establishing the autonomy and sovereignty of the Iraqi Government and of securing the right of the Iraqi people freely to determine their own political future and control their own natural resources”.\footnote{\textit{Al-Dulimi} Second Section decision (n 7) paragraph 130.} It accorded this aim less weight than that of the 1990 resolutions, which had been aimed at resolving armed conflict between Iraq and neighbouring
states, and also held that “differentiated and specifically targeted measures would probably have been more conducive to the effective implementation of the resolutions.” 147 Having found the purpose of the resolutions less weighty, and having suggested that other means could have been employed to achieve it, the Court also noted the major restrictions which the measures imposed on the applicants. 148 It concluded that the applicants were entitled to have the merits of the freezing and confiscation of their assets examined by a court, and that their right to access to court had therefore been violated.

While the outcome of the Second Chamber’s judgment was confirmed by the Grand Chamber of the ECtHR, a slim majority of the judges rejected the application of the “equivalent protection” test. 149 The majority reverted instead to its position in Al-Jedda that the Security Council must be presumed not to intend to impose obligations on member states that conflict with fundamental human rights. 150 It held that the relevant Security Council resolutions could be harmonized with Switzerland’s obligations under the ECHR because these resolutions did not explicitly prevent the Swiss courts from reviewing, at the national level, the measures taken by the Swiss authorities in implementing the Council’s decisions. The Grand Chamber was thus able to find that Switzerland had violated Al-Dulimi’s rights under article 6 of the ECHR, without having to review the human rights protection provided by the United Nations Security Council. 151

As noted by Sebastien Platon, the ECtHR had, up to this point, been very reluctant to apply the equivalent protection test to the UN. 152 The reason for this, he

147 Al-Dulimi Second Section decision (n 7) paragraph 130.
148 Al-Dulimi Second Section decision (n 7) paragraph 131.
149 Al-Dulimi Grand Chamber (n 7). See the minority, concurring judgments of Judges Keller, Pinto de Albuquerque, Hajiyyev, Pejchal and Dedov, all of which proposed that the Bosphorus test be applied to some extent. See also the comment of Marko Milanovic at http://www.ejiltalk.org/grand-chamber-judgment-in-al-dulimi-v-switzerland/ [accessed 23 June 2016].
150 Al-Jedda (n 6), paragraph 102
151 Al-Dulimi Grand Chamber (n 7), paragraph 149.
152 Platon (n 38).
suggests, is practical: where the two legal orders involved do provide similar human rights protection, then the equivalent protection test establishes a situation of “peace” between the two orders, as happened between the ECtHR and the courts of the EU. However, where the second order has a level of rights protection which is far inferior to that of the reviewing court, then the test raises the possibility of open conflict and defiance. One of the benefits of the test - its facilitation of international cooperation - is thus lost.

From this perspective, the approach of the Grand Chamber can be seen as an attempt to maintain comity between the two orders (the ECtHR and the UN) while simultaneously protecting the rights of Europeans under the ECHR. The ruling is problematic, however; not just because it strains credulity to claim that the relevant Security Council resolutions allowed for any review at all,153 but also because the ECtHR seemed to pull back on the level of scrutiny that the courts should exercise when reviewing the relevant decision. According to the majority of the ECtHR, the domestic courts should scrutinize only for arbitrariness, and it justified this level of review by reference to the Council’s security imperative:

By limiting that scrutiny to arbitrariness, the Court takes account of the nature and purpose of the measures provided for by the Resolution in question, in order to strike a fair balance between the necessity of ensuring respect for human rights and the imperatives of the protection of international peace and security.154

C.5. Themes from the Cases: Pluralism and Proportionality

Two central issues emerge from these cases: how the courts treat the relationship between the legal orders (domestic, regional and international or supra-national law); and what the appropriate level of scrutiny is for governmental action taken in the name of security. Each will be considered in turn in this section.

153 See the dissenting opinion of Judge Nussberger Al-Dulimi Grand Chamber (n 7), section A.
154 Al-Dulimi Grand Chamber (n 7) paragraph 146.
The former issue - the relationship between legal orders - has long been addressed in terms of a dichotomy between “monism” and “dualism,”155 but the case law in this chapter also suggests a third approach, which has been described as pluralist. Some clarification of these terms is needed before we can establish what role the concepts played in the judgments.

The term “pluralism” denotes the co-existence of multiple legal orders in the same time and space or the recognition of different legal traditions and sources of law within a single legal system.156 As a sociological and anthropological concept, it was initially purely descriptive,157 but has more recently been used normatively, to advocate the merits of a particular approach to a multiplicity of overlapping legal orders.158 Used in this sense, pluralism promotes “agonistic, ad hoc, pragmatic, and political processes of interaction”159 rather than coordination between legal orders. But the term also has a “softer” use, in which some form of reasoned (and not merely political) interaction is acknowledged,160 or even promoted,161 between legal orders. This form of pluralism recognizes a form of dialogue between the different orders, in which each maintains its own integrity without rejecting the other order out of

156 W. Twining, Globalisation and Legal Theory (London: Butterworths, 2000) 216. See also 82-90 for a general discussion of legal and normative pluralism.
159 De Búrca (n 157) 32.
160 See Günther’s argument that a universal code of legality forms a meta-language between the disaggregated regimes of pluralism: Günther (n 157) 16-18. De Búrca contrasts forms of “rigorous” and “soft” pluralism in De Búrca (n 157) 32.
161 Devika Hovell praises the “dialogic” element of the equivalent protection test in Hovell (n 155) 157.
hand. In this case, the element of pluralism lies not in the characterization of the relationship between the orders (that is, as political rather than legal), but in the view that these orders are in an interactive rather than a hierarchical relationship.

The terms monism and dualism deal with just two legal orders, namely, the international and domestic. The terms were also initially used more narrowly; dualism, in particular, referred to the conditions under which domestic legal systems would give effect to international law. Dualism recognizes the two orders as distinct, allowing each to operate only within a sphere which is hermetically sealed from the other order. International law would therefore have to be transposed into the domestic legal system some way before it can have effect there. Under dualism, the court will apply only the law of its particular order. Norms from other legal orders, whether conflicting or not, will not technically be overridden, as they are not applicable at all.

Monism, by contrast, recognizes only one, integrated legal system, into which the norms of the various orders are understood to fit within a hierarchy. Many scholars accord international law supremacy in a monist system, which means that

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166 De Búrca & Gerstenberg (n 164).
regional or domestic law which conflicts with the international law will be overridden. However, it is also possible that the system itself can provide rules to reconcile the conflicting norms or to determine which norm has supremacy. In the cases dealing with Security Council resolutions, courts which adopt a monist approach tend to base their approach to conflict on article 103 of the UN Charter, which gives obligations under the Charter primacy over any other treaty obligations which the member states might have.

Of the cases discussed above, monism is best represented by Behrami and the *Al-Jedda* decision of both the UK House of Lords and the ECtHR, all of which held that the obligations in the ECHR were subject to international law, and, in particular, to the supremacy clause contained in article 103. However, this did not always mean that the measure implementing the Security Council decision was upheld. In its *Al-Jedda* judgment, the ECtHR pointed out that the Security Council was itself obligated to protect human rights, and took this mandate to read a presumption in favour of human rights into the Security Council measure. As a result, the detention of Al-Jedda by the UK forces was declared unlawful.

By contrast, *Bosphorus* and the Second Chamber of the ECtHR in *Al-Dulimi* adopt pluralist approaches, as the ECtHR sought a means to acknowledge and apply the norms from a second or overlapping legal order (emanating from the EU or the UN Security Council) without sacrificing the integrity and core values of its own legal order. Yet, here, too, the accommodation of separate or overlapping legal orders did not determine whether the measure implementing the Security Council resolution could successfully be challenged. As we saw, the ECtHR in *Bosphorus* accepted a very superficial proportionality analysis by the ECJ, which had itself allowed the measures which the Security Council had adopted to override the rights of the company without considering the relationship between the aim sought (the conclusion of the conflict in Yugoslavia) and the means employed (the grounding of the commercial aircraft operated by the company). By contrast, the Second Chamber, in *Al-Dulimi*,

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167 See generally Capps (n 165); Paulus (n 163).
pronounced as inadequate the Council’s procedure to determine who was to be subject to the sanctions imposed on members of the Iraqi government, and then carried out a thorough proportionality analysis of the right which had been limited in this case, namely, the right of access to court. It identified the aim pursued by the limitation, accorded it a lesser importance, as it did not relate directly to resolving the conflict, pointed out that there were other, more effective means of achieving the aim and identified how severe an intrusion the limitation placed on Al-Dulimi’s rights. It is also highly significant that the resolutions under which Al-Dulimi had been targeted were both passed under Chapter VII, and the preamble to SCR 1518 expressly declares the situation in Iraq to be a threat to international peace and security.\footnote{168} The ECtHR was therefore not only pronouncing directly on the procedural failings of the Council’s sanction system, but also evaluating the Council’s assessment of the emergency which the sanctions were meant to address.

As a result, it would appear that the second issue – the level of scrutiny to which government action should be subjected - has more influence on the outcome than the particular constellation of legal norms which are found to apply to the facts. Of the four cases in this chapter, only Al-Dulimi subjected governmental action to a meaningful proportionality analysis. The ECtHR judgment in Al-Jedda - the only other case which declared unlawful the governmental action in purported compliance with a Security Council resolution - did not need to carry out a proportionality analysis once it had decided that article 5 of the ECHR was not displaced by the Security Council’s resolution.\footnote{169} Behrami refused to carry out any limitations analysis at all, because it refused to review any action by the UN Security Council. In Bosphorus, the ECtHR was satisfied with a proportionality analysis that, as argued above, did not establish with any clarity what the relationship was between the means chosen and the end pursued. And while the House of Lords in Al-Jedda recognized, in principle, that the UN Security Council Resolution did not dispose of all of Al-Jedda’s rights, it

\footnote{168} Fourth sentence of the preamble.
\footnote{169} Al-Jedda ECtHR (n 6) paragraphs 16 and 100. The detention did not fall into any of the exceptions recognized by article 5 of the Convention, and the UK was not claiming to derogate from this article under article 15 of the Convention.
did not follow through on this finding by applying the legal principles it had identified to the security claim in this case.

**D. A Score Card: a Culture of Justification and the Rule of Law**

As argued in chapter two, the rule of law, in Fuller’s terms, entails both a culture of justification and an ongoing process of interaction between the power-wielder and the subjects of a legal system. The most significant advance of the case law in this chapter is that it offers a mechanism - review by domestic courts - which has the potential to develop into a forum for interaction between the power-wielder (the Security Council) and those affected by its decisions (individuals and entities). The main mechanism which has emerged for this purpose is the equivalent protection test, which offers domestic and regional courts a number of benefits as they attempt to balance the competing pressures which overlapping legal orders can produce. The equivalent protection test allows courts to review the law and decisions of another legal order to ensure a minimum level of congruence between that order and the court’s own before the court allows the norms originating from the other order to be given effect to within its jurisdiction. This protects the essential values of the court’s own order, but maintains cooperation and comity between the different orders and facilitates regional and international cooperation. As Devika Hovell notes, the equivalent protection test also promotes dialogue between the orders. This is the pluralist advantage: instead of excluding the second legal order entirely (as a court would do in a dualist approach), or attempting to ascertain which norm has supremacy in a single, monist legal system, the equivalent protection test allows the two legal orders to engage with and influence one another in a process of reciprocal interaction.\(^{170}\)

However, this mechanism is piecemeal and unsatisfactory for a number of reasons. First, it is obviously available only to Europeans or those with European

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\(^{170}\) See generally Hovell (n 155) and the Opinion of Advocate General Bot, delivered on 19 March 2013 on Joined Cases C-584/10 P, C-593/10 P and C-595/10 P.
It also does not ensure that the Security Council will respond to the feedback it is getting from the domestic and regional courts. If the review remains one-sided, without the participation of the Security Council, then we cannot speak of interactional law. Thirdly, in most cases, the review seems to dissipate to a point of meaninglessness when the measure being challenged purports to be necessary for security.

As the *ECHR* and other human rights instruments contain provisions expressly to govern situations of national emergency, it is clear that this area of law provides principles applicable to questions of security. The courts’ reticence to engage with security measures thus creates contradictions and tension in many of the judgments. Such contradictions can be seen in the *Al-Jedda* speeches of the House of Lords, most of which acknowledge the legal requirements of the security issue, but then omit to apply them. Thus Lord Carswell calls for a range of rule-of-law protections but does not investigate whether they have in fact been provided. Indeed, in the case of *Al-Jedda*, Messineo suggests that the tension is so strong as almost to render the judgment indeterminate. In his view:

> [W]ere it not for the repeated affirmation that the appellant’s claim had to be dismissed, one could even have wondered if the Lords actually thought his internment was lawful.

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173 *Al-Jedda* HL (n 5) paragraphs 130 and 136 (per Lord Carswell).

174 The inherent contradictions of the House of Lords decision may have contributed to later developments. *Al-Jedda’s* legal representatives saw it as akin to a release order for their client, on the basis that the House of Lords had made it clear to the government that “one, holding our client for so long is not justified as strictly necessary and, two, in any event his important rights to due process through a hearing, proper access to lawyers, and a proper right to challenge the intelligence remain intact, and appear to have been breached”. (P. Shiner, “Public Interest Lawyers, Press Release”, 12 December 2007, available at...
The failure of courts to demand justification from governments links to a question canvassed in chapter two, namely, what the limits of law are. Dyzenhaus describes as “typical” the approach of domestic governments that both the question whether there is an emergency, and the question of what the most appropriate response to that emergency might be, are “quintessentially a matter for political judgement.”

This can render the emergency and the measures taken under it as outside the domain of law completely and is best reflected by the stance of the ECtHR in *Behrami*. A second approach, mentioned above, is that of the “grey hole”, in which the formal law purports to impose some constraints over the government’s exercise of emergency powers, but the constraints are so insubstantial “that they pretty well permit government to do as it pleases”. But the third way in which governments are allowed to act unconstrained by law is when the applicable legal principles themselves are robust enough, but are not applied rigorously by the courts. The ECJ decision in *Bosphorus* and House of Lords judgment in *Al-Jedda* fall into this category.

In the next chapter, the “listing” decisions of European courts and treaty bodies build on the ideas in this chapter. These cases concern challenges to the domestic or regional implementation of decisions by the Security Council that particular persons be subjected to certain sanctions. Following *Bosphorus*, the courts in these cases assume the capacity to subject the Security Council’s decisions to some form of at least minimal review. They respond to the problem of competing legal structures with a range of approaches similar to those in this chapter. Also in line with the cases of this chapter, many of the “listing” decisions attempt to finesse what

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176 Dyzenhaus, “*Schmitt v Dicey*” (n 68) 2018. In this article, Dyzenhaus uses this term to describe a proposed response to a state of emergency, rather than the result of an interpretation of the “normal” law. I submit that a refusal by a court rigorously to review executive measures under the “normal” law has the same effect.
they seem to view as an impassable gulf between law and security. But this time, finally, a court subjects the full range of security measures to the requirements of law. The academic discussion of the ECJ’s treatment of *Kadi* focuses on its dualist nature; that is, on the extent to which the ECJ excluded the norms emanating from the UN from its analysis. However, as we have seen from the other cases in this chapter, a pluralist and even monist approach to the overlapping legal orders can also allow for review of Security Council measures. I will argue that the most important development is found not in the capacity of one legal order to maintain its own rules against competing orders, but in the capacity of legality to demand account of power.

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177 De Búrca (n 157) 41 and the discussion in chapter four.
Chapter Four

Listing

Law is not the only form of social ordering. We saw in chapter two how Fuller distinguished between law and managerial direction, both of which control human behavior and imply submission to authority, but which are nonetheless very different from one another. For the purposes of this discussion, the most important distinctions are, first, that managerial direction entails a one-way projection of authority, whereas law is built on a “relatively stable reciprocity for expectations between lawgiver and subject”;\(^1\) and, second, that managerial direction functions for the benefit of the superior, whereas law serves the needs of the subjects themselves and of broader society:

The directives issued in a managerial context are applied by the subordinate in order to serve a purpose set by his superior. The law-abiding citizen, on the other hand, does not apply legal rules to serve specific ends set by the lawgiver, but rather follows them in the conduct of his own legal affairs, the interests he is presumed to serve in following legal rules being those of society generally.\(^2\)

While Fuller complained that managerial direction tended to usurp domains more suited to other forms of social ordering,\(^3\) he did seem to assume that law has a degree of resilience, with the capacity to assert itself into a system which may have been designed as managerial direction. This view can be seen in a fable he told about a tyrant who intended to rule merely for his own benefit, but ended up discovering that he could rule better if he allowed his subjects some element of autonomy and self-actualization. Fuller suggested that people can best be used for the realization of another’s purpose if they have some power of choice within their task. He argued, further, that the tyrant is likely to realize that human beings will also perform their


\(^{2}\) Fuller, Morality of Law (n 1) 207-8.

tasks more effectively if they are satisfied with their roles, and given the opportunity to develop their powers and talents while doing so - that is, if they are given the chance to improve themselves.\footnote{Lon L. Fuller, “Freedom as a Problem of Allocating Choice” (1968) 112:2 Proc Am Philos Soc 101, online: <http://www.jstor.org/stable/985926> at 106 (hereafter: Fuller, “Freedom”). [accessed 21 June 2016].} He concludes:

Our tyrant, you will observe, has found himself caught in a kind of progression. He started by seeking engineering efficiency, he then moved at least some way toward doing what is essential for human happiness, and he may end by fostering the conditions most conducive to human development. If he traverses fully the three steps of this progression he will, of course, finish by ceasing to be a tyrant. How far he moves toward that outcome will depend less on the balance of good and evil in his soul than it does on the power of his brain to discern the conditions essential for the success of what is, by its very nature, a cooperative enterprise.\footnote{Fuller “Freedom” (n 4).}  

This chapter examines a mechanism that is undergoing a comparable transformation. We focus on the phenomenon of “listing” within the Security Council’s anti-terrorism programme - that is, sanctions targeted at specific persons or entities that the Security Council has considered linked to the Taliban, Al-Qaeda or Da’esh. As will be shown, listing was meant to be a managerial system. It was designed to instruct states to implement the measures which the Security Council had drawn up against individual human beings and entities, and it was assumed that the states so instructed would implement these decisions without discussion. Because of both its purpose and its design, it did not comply with the rule of law.

And yet, like the tyrant’s government in Fuller’s fable, listing has changed and continues to change. This chapter examines how and why it has done so. Section A sets out the evolution of the listing system, establishing how its main features have changed over the years. Section B investigates why these changes came about. As we will see, some of them resulted from domestic and regional court decisions, many of which built on the case law discussed in chapter three. The cases in chapter three presented regional and domestic courts with a number of questions: which law to apply, how to maintain comity between courts and institutions at various levels, and how much deference to give political bodies which claimed a special place for security considerations at the expense of legal principles and, especially, human
rights. The cases in this chapter build on the approaches which the cases in chapter three suggested to these central issues.

But courts were by no means the only channel of communication with the Council. Section B reveals a range of different kinds of feedback which developed with respect to listing, all of which served to draw the Security Council into a process of interaction with the global community.

Finally, section C analyzes these developments from the perspective of interactional law. I will suggest that the evolution of listing demonstrates a progression of increasingly assertive challenges to the Security Council’s decisions, and a growing recognition by the Council of the need meaningfully to engage with these challenges.

A. How Listing Changed: The Evolution of the Security Council’s Listing Mechanism

The main changes set out briefly in this section can also be found in a tabulated form in the timelines in figure 1. Particular trends and details will be further analyzed in the discussion below. At this point, the aim is simply to outline the phenomenon and identify some central themes in its metamorphosis.

In this chapter, the term “listing” is used to refer to the form of “smart sanctions” which originated in Security Council Resolution 1267 of 1999. This is not the only form of smart sanctions imposed by the Council, as we saw in the discussion of the case of Al-Dulimi in chapter three. It is, however, the form which has

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7 Al-Dulimi and Montana Management Inc, case no. 5809/08, Second Chamber, judgment of 26 November 2013 (hereafter: Al-Dulimi Second Chamber); Grand Chamber, judgment of 21 June 2016 (hereafter: Al-Dulimi Grand Chamber). The case is covered in in chapter three under section C.4 and discussed further below.
undergone the most radical changes, and it is also the only form which is purportedly aimed at preventing terrorism.

SCR 1267 imposed sanctions on individuals and entities connected to the Taliban and set up a committee to determine, or “list”, who these individuals or entities were. A later resolution, Security Council Resolution 1333 of 2000, extended the sanctions to individuals connected to Al-Qaeda. The Committee, which was also mandated to monitor states’ compliance with the sanctions, was known variously as the “Al-Qaida and Taliban Sanctions Committee”, “Sanctions Committee” or “1267 Committee”. It will be referred to as the “Sanctions Committee” or the “1267 Committee” in this thesis.

The sanctions to be applied against listed persons were consolidated by Security Council Resolution 1390. SCR 1390 adopted the three-part sanctions formula of Security Council Resolution 1373, namely, an asset freeze, a travel ban and an arms embargo. The freezing of assets applied to all the listed person’s assets within the state’s jurisdiction. States had to freeze assets controlled by the listed person, as well as those owned or controlled by persons acting on their behalf or at their direction. The travel ban was meant to prevent listed persons from entering or

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8 SCR 1333 (n 6) paragraph 8(c).
9 SCR 1267 (n 6) paragraphs 6(a), 6(b), 6(d) and 6(g) and 9.
passing through the territory of any state. The arms embargo imposed on states an obligation to prevent listed nationals from selling and supplying military equipment, even if the sales were conducted outside their territories.

Over time, changes emerged in the design of the listing mechanism, affecting how the Sanctions Committee listed and, later, delisted people. In addition, some provisions were made for humanitarian exemptions from the sanctions themselves. The latter were introduced in 2002, permitting states to allow listed persons access to their funds for basic expenses, medical treatment, legal fees and other necessary items. In 2002, the Sanctions Committee’s approval was required for these disbursements and states’ decisions to exempt listed persons were invalid until approved. In 2006, the procedure for obtaining approval was changed, such that states’ decisions remained valid unless the Sanctions Committee vetoed them. Further exemptions were later added to allow listed persons to travel to and communicate with the Ombudsperson and the “Focal Point,” both of which are discussed further below.

Changes to the design of the listing system itself were more extensive, and can briefly be summarized here under a number of headings: the provision for delisting and its procedure, information available to listed persons, definitional criteria for listing, control over decisions to delist, and access to independent review.

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13 SCR 1390 (n 11) paragraph 2(b), SCR 1526 (n 12) paragraph 1(b); SCR 1617 (n 12) paragraph 1(b); SCR 1735 (n 12) paragraph 1(b); SCR 1822 (n 12), paragraph 1(b); and SCR 1904 (n 12), paragraph 1(b).
14 SCR 1390 (n 11) paragraph 2(c), SCR 1526 (n 12) paragraph 1(c); SCR 1617 (n 12) paragraph 1(c); SCR 1735 (n 12) paragraph 1(c); SCR 1822 (n 12), paragraph 1(c); and SCR 1904 (n 12), paragraph 1(c).
15 SCR 1452 (n 12) paragraphs 1 and 2 and SCR 1735 (n 12) paragraph 15.
16 SCR 1452 (n 12) paragraphs 1 and 2.
17 SCR 1735 (n 12) paragraph 15.
18 The Ombudsperson’s role in delisting is discussed in the text to footnotes 36-38 below.
19 For further detail on the Focal Point and the Ombudsperson, see below (footnote 36 and following). The exemptions were contained in UN Doc S/RES/2083 (2012), paragraphs 36-7 (hereafter: SCR 2083).
A.1 The Provision for Delisting and its Procedure

In the early years, there was no set procedure for listing and no provision for delisting at all. The Sanctions Committee followed the normal Security Council procedure when it added names to the list. Individual members of the Committee (all the states on the Security Council at the time) could propose names, which would be added if the other states did not object. Over time, guidelines were developed for how the Committee should amend its lists and mechanisms were created to facilitate attempts by states and later by individuals to get listed individuals or entities delisted.20 States were able to apply for delisting from 2002.21 In 2006, the “Focal Point” was set up within the UN Secretariat’s Security Council Subsidiary Organs Branch.22 It served all sanctions committees of the Security Council and was designed to receive delisting requests directly from individuals.23 Once the Focal Point had been set up, listed persons and entities were able to submit their requests even in the absence of

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their governments’ diplomatic protection. Then, in 2009, the office of the Ombudsperson was established - an office set up for the listing system alone. It was meant to be independent of the Security Council, to facilitate the exchange of information between all the parties involved in a delisting request and to offer the Sanctions Committee an impartial and informed assessment of whether listed persons should be delisted.

A.2 Information Available to Listed Persons
To challenge their listing, listed persons and entities need information relating to the case they have to answer, the evidence behind the allegations, and the identity of the designating state. Initially, the system was not designed to provide listed persons with any information at all. None of the Committee members had to provide reasons for the positions they adopted, and the Committee as a whole had no obligation to communicate reasons for its decisions to bodies outside the Committee, whether these were states or listed persons. This blackout applied in the case of listing, delisting and even refusing to approve humanitarian exemptions.

Over time, states were at first encouraged, and then obligated, to provide some of the necessary information to the Security Council, to the listed person’s state of nationality, and, sometimes, to the listed person him- or herself. The first hint that the information channels might be opened was found in the suggestion of Security Council Resolution 1526 of 2004 that states inform affected persons that they are listed. Later, this suggestion was extended to include a wider list of facts that

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24 As noted above, however, such applications almost always fail.
25 SCR 1904 (n 12).
26 Only in 2009 was there a slight improvement in the information provided with respect to humanitarian exemptions: listed persons were to be informed of the possibility of applying for exemptions under SCR 1904, paragraph 19. As of June 2016, there is no requirement that listed persons get informed of the reasons why their applications for humanitarian exemptions are refused.
27 Paragraph 18. This was changed to an obligation in SCR 1822 (n 12), paragraph 23.
should be communicated, including the Committee’s guidelines and the listing and delisting procedures.\textsuperscript{28} Once it was established, the Focal Point had to provide listed persons with information on the delisting procedure and the decision on a delisting request – although not the reasons for that decision.\textsuperscript{29} Later, the state of nationality was given certain information, which it was first encouraged,\textsuperscript{30} and then required,\textsuperscript{31} to pass on to the listed person. This required information included the publically releasable part of the statement of case against the listed person,\textsuperscript{32} reasons for listing,\textsuperscript{33} effects of listing\textsuperscript{34} and the delisting procedures.\textsuperscript{35}

Once the office of the Ombudsperson was established, member states also had to inform listed persons of their opportunity to apply to the Ombudsperson for delisting. The Ombudsperson was required to provide information about the delisting procedure and also to answer questions from the listed person.\textsuperscript{36} If the delisting request was rejected, the Ombudsperson was further required to convey the publically releasable factual information that she had gathered.\textsuperscript{37} If the request was accepted, no further information was forthcoming.\textsuperscript{38}

Since the adoption of SCR 1989 of 2011, the designating state has been “strongly urged”, but never required, to allow the ombudsperson to reveal its identity to the listed person.\textsuperscript{39}

\begin{itemize}
\item \textsuperscript{28} SCR 1617 (n 12) paragraph 5.
\item \textsuperscript{29} SCR 1730 Annex 1, (n 22) paragraphs 4 and 8.
\item \textsuperscript{30} SCR 1735 (n 12) paragraphs 10-11.
\item \textsuperscript{31} SCR 1822 (n 12) paragraphs 17 and 23.
\item \textsuperscript{32} SCR 1735 (n 12) paragraph 10.
\item \textsuperscript{33} SCR 1822 (n 12) paragraph 17.
\item \textsuperscript{34} SCR 1735 (n 12) paragraph 10.
\item \textsuperscript{35} SCR 1735 (n 12) paragraph 10.
\item \textsuperscript{36} SCR 1904, annex 2 (n 12) paragraph 1.
\item \textsuperscript{37} SCR 1904, annex 2 (n 12) paragraph 13.
\item \textsuperscript{38} SCR 1904, annex 2 (n 12) paragraph 11. The listed person was merely to be informed that he or she had been delisted.
\item \textsuperscript{39} UN Doc S/RES/1989 (2011) paragraph 29 (hereafter: SCR 1989).
\end{itemize}
Later resolutions gave listed persons more access to the reasons behind the listing decisions. Security Council Resolution 2083 of 2012 required the Committee, through the ombudsperson, to provide reasons for both listing and delisting.\footnote{SCR 2083 (n 19), paragraph 11.}

The Secretariat was required to publish on its website the narrative summary of reasons for listing in 2008\footnote{SCR 1822 (n 19) paragraph 13.} and all publically releasable information in 2011.\footnote{SCR 1989 (n 39) paragraph 19.}

However, no information is made publically available on the substance of a de-listing application, including the information gathered by the Ombudsperson, the issues considered by the Ombudsperson and the Committee and the reasons for retaining a listing or granting a de-listing petition. The de-listing applicant is provided with the reasons for the decision, but these are not open to the public. Neither the applicant nor the public has access to the Ombudsperson’s comprehensive report.\footnote{See Report of the Ombudsperson to the Security Council (15 July 2015) UN Doc S/2015/533 paragraph 39.}

### A.3. Definitional Criteria for Listing

This is one area in which there has been no change, except for the almost negligible amount of clarity that was provided when the definitional criteria for listing were drawn up in 2005, six years after the listing system was instituted. However, the criteria are very broad. Under SCR 1617 of 2005, individuals or entities could be considered to be “associated with” Al-Qaeda or the Taliban if they were

- (a) participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;

- (b) supplying, selling or transferring arms and related materiel to;

- (c) recruiting for; or
(d) otherwise supporting acts or activities of;

Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.\(^{44}\)

The catch-all category in subparagraph (d) means that entire paragraph is open to widely differing interpretations, and therefore provides little guidance to persons who might want to avoid being listed or seek to be delisted.

It should, in this regard, also be noted that SCR 2253 of 2015 extended the ambit of the 1267 Committee, requiring it to identify members of ISIL (Da’esh) as well as Al-Qaida.\(^{45}\) However, no additional criteria were provided to determine whether persons or entities are, in fact, associated with the new group.

A.4 Control Over Delisting

When delisting was first envisaged by the Security Council, an application for delisting could be blocked by a single negative vote of a member of the Committee.\(^{46}\) Over the years, the Ombudsperson has been granted a number of powers and functions relating to delisting: in 2009, she merely provided a report to the Committee, canvassing the principal arguments concerning a delisting request.\(^{47}\) In 2011, the procedure was changed: the Ombudsperson now makes a recommendation on whether an applicant should be delisted or not.\(^{48}\) If she recommends delisting, it takes place automatically after 60 days unless the Committee votes, unanimously, to retain the listing. Should consensus not be attained, it is also possible that a Committee member can refer the question to the Security Council, which can decide it by its

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\(^{44}\) SCR 1617 (n 12). The paragraph alphabet markers were added by SCR 1822 of 2008, when the latter “reaffirmed” the meaning of the term “associated with Al-Qaeda or the Taliban.”

\(^{45}\) UN Doc S/RES/2253 (2015), paragraph 1.


\(^{47}\) SCR 1904, annex 2 (n 12) paragraphs 7(c) and 10.

\(^{48}\) SCR 1989 (n 39) paragraph 21.
usual procedures.\textsuperscript{49} There is also a presumption in favour of delisting if the request is made by the designating state: similarly, the delisting can be blocked by consensus of the Committee, or a reference to the Security Council.\textsuperscript{50} The Security Council as a body - which consists of exactly the same member states as the Sanctions Committee itself\textsuperscript{51} - therefore retains the power to prevent a delisting.

**A.5 Independent Review**

The review process remains the most controversial aspect of the listing system. One of the most trenchant criticisms of listing made by commentators is that the listed person is not guaranteed access to the case that he or she has to answer.

The term “independent review” refers to the situation and character of the reviewer, as well as also the reviewing process. With reference to the reviewer, the term requires that the person reviewing the case is impartial, free from undue pressure, and possibly also structurally independent.\textsuperscript{52} The review is also meant to be effective, which may not necessarily indicate that it should not be appealable, but that it should not be overturned arbitrarily.\textsuperscript{53} Some commentators see it as a definitional criterion of independence itself that the Ombudsperson’s decision should

\textsuperscript{49} SCR 1989 (n 39) paragraph 23.

\textsuperscript{50} SCR 1989 (n 39) paragraph 27.


\textsuperscript{52} Kimberly Prost, Ombudsperson until July 2015, cited a lack of structural independence as the primary challenge facing her office. Among the concerns which she highlighted were the failure to establish an actual Office of the Ombudsperson as called for in SCR 1904 of 2009, a lack of control over budgeting and staffing decisions (including the need to use consultancy contracts for staffing) and that fact that the administrative responsibility for the Ombudsperson falls within the Security Council Affairs Division, within the Department of Political Affairs. See UN Doc S/2015/533, paragraphs 55-68.

be final. With reference to the review process, the most important aspect of independent review seems to be the availability of all the facts relevant to the listing.

According to SCR 1904 of 2009, the ombudsperson must be “an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counterterrorism and sanctions” and is further expected not to seek nor receive instructions from any government. If the Ombudsperson does, in fact, meet these criteria, then the requirement of impartiality will be fulfilled. It is, however, not possible to determine whether she is doing so without a study of the practice of her office, although the general assessment of the first Ombudsperson, Kimberley Prost, has been very positive. As far as her independence is concerned, the resolution does not allow for any pressure on the Ombudsperson from the Sanctions Committee, but she lacks structural independence: her administrative arrangements - such as budgeting and staffing - lack autonomy. Her mandate has also been set up and renewed in small increments of time, such as 18 and 30 months. Finally, as is clear from the section on control over delisting above, she does not have the power to make a definitive

54 See the Report of the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, 26 September 2012 (UN Doc A/67/396) at paragraph 34: “The ‘very existence’ of an executive power to overturn the decision of a quasi-judicial body is sufficient to deprive that body of the necessary ‘appearance’ of independence however infrequently such a power is exercised, and irrespective of whether its exercise was, or even could have been, at issue in any particular case.”


57 See the Letter dated 18 June 2015 from the representatives of Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Lichtenstein, Netherlands, Norway, Sweden and Switzerland to the United Nations, addressed to the President of the Security Council (hereafter: 2015 Letter of Like-Minded States), UN Doc S/2015/289.

58 See the Letter dated 17 April 2014 from the permanent representatives of Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Lichtenstein, the Netherlands, Norway, Sweden and Switzerland to the United Nations, addressed to the President of the Security Council (hereafter: 2014 Letter of Like-Minded States), UN Doc S/2014/286. The latest extension was initially meant to last for 42 months, until December 2017, (UN Doc S/2015/531) but SCR 2253 of 2015 postponed the date of expiration of the Ombudsperson's mandate by 24 months (S/RES/2253 (2015), paragraph 54).
decision on delisting requests. Her decisions can be overturned by the Sanctions Committee or the Security Council. This does not make her less independent, but it severely undermines the effectiveness of her review and thereby threatens the rule of law. In the words of the first incumbent, Kimberley Prost:

Another challenge in terms of the fairness of the process is the possibility of a consensus overturn or a Security Council override of my recommendation. These potential actions built into the process are very concerning, particularly in the latter instance where it is unlikely that the decision would be accompanied by any reasons. Not only is that of general concern, but also in the absence of reasons there is no way to assess whether the decision was taken on the basis of the information before the Ombudsperson or whether it was influenced by other factors, including political factors.59

B. Why Listing Changed: The Interaction of the Global Community with the Security Council

In Fuller’s fable, the changes initially occur because the tyrant finds the law-like system more efficient. He discovered that government worked better through law than it did as a top-down projection of power. I will argue that the Security Council discovered that listing could not work at all unless it complied, in some minimum sense, with the rule of law. It was forced to adapt its system by the resistance it received to listing from a range of actors in the global sphere: states, international organizations, bodies within the UN itself, and the individuals and entities affected by listing.

As was shown in chapter two, Fuller saw law as something arising from the interaction between the power wielder and the subjects of the legal system. In the case of listing, the element of interaction is found in resistance that the global community brought to bear against the listing system. As we will see below, some resistance to listing was expressed through diplomatic channels, some through

domestic and regional court challenges and some through open defiance in forms not associated with the legal process - such as the media, public campaigns and sheer disobedience. This open defiance is not necessarily unlawful, however. In the listing cases, what amounts to non-compliance with the letter of the “law” set out by the Security Council was actually a response to the deficiencies (from a legality standpoint) of the Council rules, as well as a manifestation of efforts to confront the Council with the requirements of legality. As argued in chapter two, the various ways in which individuals interact with the wielder of power is part of the reciprocal process by which law is formed, upheld and reformed. From that perspective, even defiance has a relationship with the law because it can lead to amendment of the law and thus become part of the law-making process.\textsuperscript{60} Secondly, it is important to realize that none of the fora used - except, perhaps, the diplomatic channels - complied with the law that the Security Council purported to set up through the listing resolutions. The listing system, as envisaged by the Council, allowed no challenges and no review. By reviewing and overturning the implementation of listing directives, the courts acted outside of the formal obligations imposed on states by the Council. In this sense, the court cases which granted relief to listed persons are in the same category as the sanctions-busting telethons:\textsuperscript{61} they openly defy the system which the Security Council had created, a system which the Council claimed was part of international law. The courts defy the listing system in two ways: first, and most obviously, when they instruct their states or regions not to implement the Security Council directive; but, also, by allowing a review to take place at all, when the Security Council had resisted introducing any due process limitations into its original design.\textsuperscript{62}

The most immediate problem that faced those who wanted to resist the listing system, or their own listing in particular, was one of forum: there was simply nowhere

\textsuperscript{60} An example of this is the “telethon” held in Canada to support Abdelrazik, despite the Security Council’s prohibition on financial support to any listed persons. See section B.2 below.

\textsuperscript{61} See section B.2 below.

to go. In the cases surveyed below, listed people and states all attempted to approach the Security Council about a listing decision. As we have seen from the summary above, states could approach the Security Council on behalf of their nationals from 2002. Individuals, however, had no access before 2006, and were therefore dependent on the support of their states of nationality. We will see, however, that even in a case where an individual received no such support, he was eventually able to resist the Council’s listing programme.

B.1 Resistance with the Support of the State of Nationality: The Diplomatic Route

In November 2001, the USA added the three Swedish citizens, Adirisak Aden, Abdi Abdulaziz Ali and Ahmed Ali Yusuf, and one non-profit association, the Al-Barakaat Foundation, to its domestic list of “Global Terrorist Entities”. The 1267 Committee followed suit, adding these persons and the non-profit-making association to its “Consolidated List” of persons and entities associated with Al-Qaeda or the Taliban. The Council of the European Union and the Commission of the European Communities then implemented the Security Council sanctions, as a result of which Swedish financial institutions froze all the financial assets of the individuals and the institution in question.

Aden, Ali and Yusuf approached the Swedish government for assistance, arguing their innocence. The Swedish government in turn approached the 1267 Committee and the US government, requesting further information about the evidence against

63 See the discussion under section A.1. above.
64 Gutherie (n 46) 511.
67 The Swedish government did, at this stage, continue to pay social welfare benefits to the families of the affected men. See Per Cramér (n 21) 91.
the Swedish subjects. The United States provided Sweden with 27 pages of
documentation, which was not shown to the accused, but was examined by the
Swedish Security Police. They announced that they found nothing in it to substantiate
the claims against the Aden, Ali or Yusuf, and further confirmed that these men were
not suspected of any crimes under national law. 68

At this point, Aden, Ali and Yusuf also sought assistance through the EU judicial
process by bringing an action against the Council of the European Union and the
Commission of the European Communities to the European Court of First Instance
(CFI). 69 In addition, the Swedish government filed a request with the 1267 Committee
to have the names of the individuals removed from the list. 70 This request was
rejected when the United States, Russia and the United Kingdom objected, without
reasons, to the delisting. 71 Sweden then filed a new request for an examination of
the evidence supporting the accusations against the three Swedes. 72 This request was
in turn denied on the basis that no information had been given to the Committee
since it last reviewed the evidence. 73

During this fruitless process, the Swedish government and the three listed men
also approached the United States government. These negotiations focused on the
listing of the Swedish citizens on the USA’s “Global Terrorist Entities” list. The Office
of Foreign Assets Control demanded further information about the listed men,
regarding their identity, individual history, business operations and relations with a

68 Per Cramér (n 21) 91, n 39 and 40.
69 Case T-306/01, filed on 10 December 2001.
70 Per Cramér (n 21) 92. The request was filed on 12 January 2002, more than two months after
the initial listing.
71 The “no objection” procedure was used, whereby the 1267 Committee merely circulates the
delisting request. This request will be successful if no objections are received to it. It can,
however, be vetoed by the objection of any one state. See UN Doc. S/AC37/2002/NOTE/13
(2002) and Per Cramér (n 21) 93.
72 Per Cramér (n 21) 93, citing “The USA opposes removal of Swedish citizens from UN sanctions
list” at http://www.regeringen.se.
73 Per Cramér (n 21) 94.
number of particular organizations and individuals, as well as their visits to the United States, Somalia and Afghanistan.\textsuperscript{74}

At this point, the 1267 Committee introduced the process set out above, namely, a formal procedure whereby states could apply for persons to be delisted.\textsuperscript{75} The new procedure was incorporated into the 1267 Committee guidelines in November 2002.\textsuperscript{76} Within five days of the announcement of this new procedure, the US Office of Foreign Assets Control delisted two of the three Swedish applicants (Aden and Ali). Two days later, on 22 August 2002, the US and Swedish governments together requested the 1267 Committee to delist these two men. Within a week, the 1267 Committee approved these requests, and Aden and Ali were delisted.

This first instance of resistance prompted two small developments in the listing system. First of all, a forum was created whereby states could ask for relief on behalf of listed persons. This forum used the established diplomatic channels in the UN, so it did not create any new institutions, but it brought a small measure of improvement nonetheless as there was nothing in the original design of listing that suggested that any challenges would be entertained at all. In the case of Aden and Ali’s delisting, the listing system was amended in response to engagement from a body outside of the Security Council.\textsuperscript{77} Thus the Swedish intervention created a forum, which, when used, led to the delisting of two individuals. It also resulted in a process to allow for delisting - a process that the Security Council had not envisaged when it set up the system. The design of the system therefore changed to include a mechanism by which individuals could, through their states, request delisting from the Security Council.

\textsuperscript{74} Messrs. Aden and Ali provided this information immediately, while Yusuf responded to the demand within a month. Per Cramér (n 21) 94.

\textsuperscript{75} See the discussion under point A.1 above, and footnote 28.

\textsuperscript{76} See MG report of December 2002 (UN Doc S/2002/1338) paragraph 20. Per Cramér provides a summary of the position in November 2002 at 94.

The change seems less significant when we consider quite how small it was: individuals could obtain a remedy only when the state of the listed person engaged with the Security Council, sometimes at length, on the listed person’s behalf. The newly adapted listing process did not allow for any direct interaction between the listed person and the 1267 Committee; only states could bring requests for delisting. In addition, the new procedure did not require the Security Council to justify itself to those persons affected by it. Indeed, the process of justification was inverted: the 1267 Committee’s suspicion against the listed person was deemed to be valid (the listed person had to provide additional information to remove the suspicion), thus placing an onus on the listed person to justify him or herself to the Council. Such a justification was almost impossible, not only because of the logical difficulty of proving a negative, but also because the 1267 Committee was not required to state quite what the suspicion was and what the evidence was on which it was based. As noted above, it also did not have to justify its position when it turned down a delisting request. At no stage of either the listing or delisting did it have to provide reasons for its decisions.

Aden and Ali were delisted after a year of representations by Sweden, but they were not compensated by the Council in any way nor informed why they had been listed or delisted.  

Once they were delisted, Aden and Ali abandoned their cases before the CFI. Yusuf, however, remained listed by the US Office of Foreign Assets Control and remained on the 1267 Committee’s Consolidated List, and he proceeded with his case. He was finally delisted by the 1267 Committee in 2006, five years after his initial listing and shortly after the Court of First Instance had dismissed his claim. Once again, no explanation or compensation was provided.

79 http://www.un.org/News/Press/docs/2006/sc8815.doc.htm [accessed 5 March 2015]. See also “the local” (n 78).
80 See “the local” (n 78).
B.2. Individuals Not Assisted by Their States of Nationality: Civil Disobedience

Abousfian Abdelrazik was born in Sudan but fled the country after the military coup by Omar al-Bashir in 1989. He was granted refugee status in Canada and subsequently acquired Canadian citizenship. When he returned to the Sudan in August 2003, he was arrested by the Sudanese government at the request of the Canadian government, detained and tortured. After being released in July 2004, he was re-arrested in November 2005 and released again in July 2006. Immediately after his release, the United States Department of the Treasury included him in their domestic terrorist list as a supporter of Al-Qaeda. Shortly after the US’s domestic listing, the 1267 Committee followed suit and Abdelrazik was placed on its Consolidated List.

Abdelrazik took refuge in the Canadian Embassy in Khartoum, but found himself unable to travel back to Canada. One of the problems he faced was that some airlines refused to carry him lest they breach of Security Council sanctions. But his main obstacle was the refusal by the Canadian government to issue him with a passport. Abdelrazik had to mount a court challenge to force the Canadian government to allow him to travel back to Canada.

Abdelrazik was to bring a number of cases against the Canadian government. His first case represents an individual’s battle directly with his own state for using his listing against him. At least in the early stages, there was no direct challenge to the Security Council or the listing system itself, as Abdelrazik’s challenge assumed the validity of the Security Council’s measures and merely questioned Canada’s application of them. Yet both the judgment and Abdelrazik’s further battles with the

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81 Abdelrazik explained that the purpose behind this trip was to visit his sick mother. See http://beta.images.theglobeandmail.com/archive/00244/Statement_of_claim_244221a.pdf [accessed 21 June 2016] and also http://www.theglobeandmail.com/news/world/abdelraziks-lost-years/article1303360/ [accessed 21 June 2016].

82 This was the finding of Judge Zinn in the Federal Court. See Abdousfian Abdelrazik v The Minister of Foreign Affairs and the Attorney General of Canada 2009 FC 580 at paragraph 91 (hereafter: Abdelrazik).
Canadian government are highly significant for the levels of resistance that they show to listing as a system.

Judge Zinn of the Federal Court agreed with Abdelrazik that the exception to the flight ban contained in SCR 1822 (2008) allowed for Abdelrazik’s return to Canada. The provision in question holds that the travel ban may not require “any State to deny entry or require the departure from its territories of its own nationals...”⁸³ The court therefore did not need to address the listing system itself. However, Judge Zinn took a detour from the strict ratio of his argument to make some scathing comments on how listing was “untenable under the principles of human rights”.⁸⁴

There is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for basic procedural rejected by the Supreme Court in Charkaoui v Canada ... the 1267 Committee listing and de-listing processes do not even include a limited right to a hearing. It can hardly be said that the 1267 Committee process meets the requirements of independence and impartiality when, as appears may be the case involving Mr. Abdelrazik, the nation requesting the listing is one of the members of the body that decides whether to list or, equally as important, to de-list a person. The accuser is also the judge.⁸⁵

The government of Canada had also argued that Abdelrazik should seek relief directly from the Security Council, by submitting an application for delisting. Judge Zinn’s rejection of this argument is also scathing:

... [I]t is disingenuous of the respondents to submit, as they did, that if he is wrongly listed the remedy for Mr. Abdelrazik is to apply to the 1267 Committee for de-listing and not to engage this Court. The 1267 Committee regime is ... a situation for a listed person not unlike that of Josef K. in Kafka’s The Trial, who awakens one morning and, for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime.⁸⁶

The Federal Court thus found in favour of Abdelrazik. It ordered that the Canadian government issue him with a passport and allow him to travel to and enter Canada.⁸⁷

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⁸³ SCR 1822 of 2008, (n 12) paragraph 1(b).
⁸⁴ Abdelrazik (n 82) paragraph 51.
⁸⁵ Abdelrazik (n 82) paragraph 51.
⁸⁶ Abdelrazik (n 82) paragraph 53.
⁸⁷ Abdelrazik (n 82) paragraph 160. The respondents were also ordered to provide the funds for the travel if necessary.
Although the government of Canada facilitated Abdelrazik’s return, it did not assist him in any way and Abdelrazik instituted a number of other court challenges as well as applying directly to the newly created office of the Ombudsperson to be delisted. 88 He was delisted by the Security Council on 30 November 2011. 89

In this case, there was no attempt to communicate directly with the Security Council. Instead, the communication, particularly from the Canadian courts, was directed at the Canadian government. Unlike in the Swedish cases, the design of the Security Council’s listing mechanism was not changed as events unfolded; in particular, the listing mechanism did not expand to create or extend a forum for communication with the Council. But what this event does showcase is the full range of actors in the global sphere who can affect the functioning of the Security Council’s listing regime. The case shows that the agents engaging with the regime are not merely states but individuals and organizations as well. It thus bears out the position of constructivist International Relations theory, adopted by Brunnée and Toope for interactional law, that agents of the legal system are self-constituting. As noted in chapter two, legal personality under interactional law depends not on any formal status but on the engagement of the actor with the legal community. The individuals and organizations in this case became agents of the legal system, helping to shape its shared understandings and norms, simply by asserting their agency in fact. As a result of their actions, and despite the support of Abdelrazik’s state of nationality for his listing, the sanctions regime could not be applied to him in many respects. On a number of occasions, individuals either donated money for Abdelrazik (for example, to fund his flight back to Canada), or employed him for brief, symbolic periods, or took part in a nationally advertised telethon that collected money for Abdelrazik in contravention of both the Security Council’s regime and Canadian federal law. For a

88 On receiving Abdelrazik’s request for help with delisting, Foreign Minister Lawrence Cannon merely advised him of the website of the 1267 Committee. At that time, individual requests for delisting were technically possible but almost never successful without the support of the listee’s state of nationality. See http://www.theglobeandmail.com/news/politics/abdelraziks-next-challenge/article1237983/ and www.un.org/en/sc/ombudsperson/status/shtdocs [Accessed 21 June 2016].

89 UN Doc S/2015/80.
period of at least two years, the asset freeze on Abdelrazik could not be enforced effectively.

A second noteworthy aspect of this case is the myriad opportunities it demonstrates for the global community to interact with the Security Council. In this case, they all took place outside the formal, intergovernmental channels. None of the participants attempted to create a forum to address the Security Council directly, and, due to Canada’s lack of support, Abdelrazik was not represented through any diplomatic channels. Instead, a range of different actors responded through newspapers, online campaigns and civil disobedience. Even Judge Zinn’s comments on the injustice of listing was an *obiter* comment, with no role to play in the *ratio* of the case and no direct effect on the outcome.

**B.3. Individuals not Assisted by Their States of Nationality: Resistance Through the Courts and Other Adjudicative Bodies**

As noted above, the listing cases could build on the multi-level jurisprudence from the European courts, that is, cases in which the domestic implementation of an international or regional directive were challenged. The earlier European cases, discussed in chapter three, suggested tools for handling conflicting rules from different spheres, and began to address the question of the the extent to which security measures should be subject to legal review. The listing cases built on this foundation.
B.3.1 *Kadi I*[^90]

Ironically, the first major challenge to the EU’s implementation of listing came from a non-EU national, Yasin Kadi, a Saudi national who found in the EU his only forum for relief. The case of Yasin Abdullah Kadi began at the same time as those of the Swedish nationals, Aden, Ali and Yusuf, discussed above. He, too, was listed by the USA, the 1267 Committee and then the European Union.[^91] However, while the Swedish nationals were assisted by Sweden, Kadi’s state of nationality, Saudi Arabia, did not respond to his requests for help. He also approached the American authority that had listed him without success.[^92] In December 2001, he registered a case before the European Court of Justice (ECJ) with respect to assets that had been frozen in the European Union.[^93]

[^90]: This case went through the courts of the European Union twice, during which the European courts’ designations were also changed. At the time of the first round of cases (colloquially known as *Kadi I*), the first court to hear Kadi’s case was the Court of First Instance and the Appeal Court was designated the European Court of Justice. See *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* Case T-315/01, Court of First Instance, judgment of 21 September 2005 (hereafter: *Kadi I CFI*) and the appeal: *Yassin Abdullah Kadi and Al Barakaat International Foundation*, Grand Chamber, Cases C-402/05 P and C-415/05 P, decided on 3 September 2008 (hereafter: *Kadi I ECJ*). By the time of the second set of hearings, as a result of the Treaty of Lisbon, the first court had been renamed the General Court and the appeal court the Court of Justice. There is some inconsistency in the sources as to whether this appeal body was to be called the Court of Justice of the European Communities or the Court of Justice of the European Union. In this thesis, the term “Court of Justice of the European Union” will be used (CJEU).

[^91]: EC Council Regulation 467/2001 (OJ 2001 L 277, p. 25) of 6 March 2001 extended the freezing of funds and other financial resources in respect of the Taliban. It included an appendix setting out the persons whose funds were to be frozen - an appendix which the Commission amended as the 1267 Committee amended its consolidated list. On 19 October 2001, the Security Council added “Al-Qadi, Yasin (A.K.A. Kadi, Shaykh Yassin Abdullah; A.K.A. Kahdi, Yasin), Jeddah, Saudi Arabia” to its consolidated list. The EC followed suit in Commission Regulation 2062/2001 of 19 October 2001 by amending Regulation No 467/2001 and adding Kadi’s name to the appendix. See *Kadi I CFI* (n 90) paragraphs 21-24.

[^92]: A letter to the Saudi Arabian authorities, requesting help, was never answered. See *Kadi I CFI* (n 90) paragraph 271.

[^93]: *Kadi I CFI* (n 90) paragraph 37.
This case was heard together with Yusuf’s claim before the Court of First Instance, as Yusuf had not yet been delisted. The judgments in the two cases are substantially similar.94

Kadi brought two main arguments to challenge the validity of the EC regulations that listed him and limited his rights. He challenged, first, the EC’s competence under the EC treaties to adopt the listing regulation under the EC treaties. Secondly, he argued that the regulation violated his right to property, protected by article 1 of Protocol 1 to the ECHR, his right to a fair hearing, guaranteed by the case law of the ECJ, and his right to an effective judicial remedy, which falls under article 6 of the ECHR and ECJ case law. My discussion will focus solely on the second argument, that is, the rights analysis, and the Court’s jurisdiction to review the relevant regulation for rights compliance.95

As in the cases discussed in chapter three, Kadi’s claim presented a conflict between an instruction from the international sphere (the listing regime), implemented by an EU directive, and the rights protections and guarantees of the European Union. Under a dualist approach, the only law to be considered and applied to the conflict would be the EU’s implementation of the Council measure and the full range of ECHR rights. The Security Council resolution, and the supremacy granted to obligations under the Charter by article 103, would have excluded the Security Council and its instructions from the analysis completely. The respondents in the case, the EU Council and Commission, argued for a monist position: that there was a


95 The argument on the Community’s capacity to issue these regulations is dealt with in paragraphs 96-135 of the CFI judgment (n 90), paragraphs 11-16 of the Opinion of Advocate General Poiares Maduro, delivered on 16 March 2008 on Case C-402/05 P (hereafter: Kadi: Maduro) and paragraphs 168-230 of the ECJ judgment. For comment, see Michaelson (n 94); Maria Tzanou, “Case-Note on Joined Cases C-402/05 P & C-415/05 P Yassin Abdullah Kadi & al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities” (2009) 10 German Law Journal 123; Christopher Weema, “Kadi v. Council: Putting the United Nations In Its Place” (2009) 17 Tul. J. Comp. & Int’l L. 571.
single, integrated system which gave supremacy to the Security Council’s decisions by virtue of article 103. They argued that the first pillar of the EU, the European Community, was bound by international law to give effect to UN Security Council decisions, particularly if the decisions had been adopted under Chapter VII of the Charter. Under this argument, the EC court system could not claim jurisdiction over the issue, as to do so “would be tantamount to indirect and selective judicial review of the mandatory measures decided upon by the Security Council in carrying out its function of maintaining international peace and security, [and] would cause serious disruption to the international relations of the Community”.96

The respondents therefore drew on four main arguments: first, that there was a higher norm of international law that overrode Kadi’s rights in this case; second, that the Courts of Justice of the European Union had no powers of review over the Security Council; third, that, if the courts nonetheless exercised such power they would be undermining global peace and security; and, finally, that any interference by the courts in the SC’s listing system would disrupt the political process - international relations - in the Union and between the Union and the broader community. The first two arguments are based in law, focusing on the applicable rules and the jurisdiction of the courts, while the latter two claim to identify the boundaries at which law must give way to security or politics. My discussion of the judgments of the CFI and the GCEU will focus on the position which each court adopted with respect to these four arguments.

Kadi before the Court of First Instance

In the first part of its judgment, the CFI held that the EC treaties did empower the EU to pass the regulations that were in issue in this case. It then moved on to consider

96 Kadi I CFI (n 90) paragraph 162.
the validity of the listing regulations and its jurisdiction to pronounce on the regulations.

The Court’s approach to the applicable rules was expressly monist, as it positioned the EU within the broader international system. Referring to customary international law,\(^ {97}\) the UN Charter,\(^ {98}\) and the founding treaties of the European Communities,\(^ {99}\) the Court held that the EU system was subordinate to international law. Furthermore, it included the decisions of the UN Security Council in the term “international law”.\(^ {100}\) The CFI held that, while the European Community was not itself a party to the UN Charter, it was indirectly bound - through its member states and through the EC treaties\(^ {101}\) - to give effect to the Security Council resolutions.

Where jurisdiction was concerned, the CFI produced two apparently contradictory findings. It held, initially, that it had no power in law to pronounce on the European listing regulation, because the European regulation was an exact replica of the SC directive.\(^ {102}\) Reviewing the European regulation would therefore amount to reviewing the SC,\(^ {103}\) over which the CFI had no jurisdiction.\(^ {104}\) The CFI’s position on its own jurisdiction excluded even indirect judicial review of the SC:

> [T]he resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court’s judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law.\(^ {105}\)

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\(^ {97}\) See the references to the *Vienna Convention on the Law of Treaties* and the case law of the ICJ at *Kadi I CFI* (n 90) paragraphs 180-184.  
\(^ {98}\) *Kadi I CFI* (n 90) paragraphs 182-184.  
\(^ {99}\) *Kadi I CFI* (n 90) paragraphs 185-191.  
\(^ {100}\) *Kadi I CFI* (n 90) paragraphs 183 and 188.  
\(^ {101}\) *Kadi I CFI* (n 90) paragraphs 203-299.  
\(^ {102}\) *Kadi I CFI* (n 90) paragraphs 214-215.  
\(^ {103}\) *Kadi I CFI* (n 90) paragraphs 215-216.  
\(^ {104}\) *Kadi I CFI* (n 90) paragraphs 218-225.  
\(^ {105}\) *Kadi I CFI* (n 90) paragraph 225.
The CFI grounds its position on jurisdiction in two main considerations: first, as part of the EU, the CFI was bound to apply “international law”; and, second, because the EU is bound to facilitate the Council’s function of protecting security.

Having made this categorical finding, however, the CFI then produced an unexpected twist, declaring that it was “empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to jus cogens, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.”

As de Búrca notes, the claim that the Security Council is bound by jus cogens has been made previously, and the CFI substantiated this position briefly in its judgment. However, jurisdiction over the Security Council with respect to such issues is a separate legal question. De Búrca comments:

The CFI simply deduced from the argument that Security Council Resolutions must comply with the peremptory norms of international law that the CFI may ‘highly exceptionally review such resolutions for compatibility with jus cogens.’

This position does, indeed, appear anomalous. But the CFI’s apparently arbitrary distinction between its jurisdiction over jus cogens norms and its jurisdiction over other norms of international law stems from a deeper anomaly in its approach. As noted above, the Court based its lack of jurisdiction over the Security Council on the fact that it was bound to apply “international law.” However, the Court did not see international law as a body of custom, treaty and general principles emanating from the practice of states and international institutions; instead, it seems to have

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106 Kadi I CFI (n 90) paragraph 218 and 223.
107 Kadi I CFI (n 90) paragraph 219. The theme of security is revisited when the CFI considers the justifications for the limitations of Kadi’s rights, at paragraphs 226 ff.
108 Kadi I CFI (n 90) paragraph 226 and the Vienna Convention on the Law of Treaties, article 53.
109 Gráinne de Búrca, “The European Court of Justice and the International Legal Order after Kadi” (2010) 51 Harvard International Law Journal 1 at 21 (hereafter: de Búrca). See also Kadi I CFI (n 90) paragraph 231.
110 See above, n 100.
conflated “international law” - at least, all international law that did not fall within *jus cogens* - with “whatever the Security Council decrees.” In particular, it took no cognizance of the body of international human rights law or the possibility that the UN Charter might itself limit the Council’s powers.

This view of international law and of the Security Council misrepresents both institutions. The obligations which the Security Council imposes on states may conflict with other obligations of international law. It is part of the judicial function to establish which rules apply to a particular case, and this may require of a court that it identify conflicts between the rules which emerge from one organ and those which emerge from elsewhere, and resolve those conflicts. By refusing to do so, the CFI treated the Security Council not only as the only source of international law, but also as above the law. The Court was, in effect, subjecting itself not to international law but to the Security Council.\(^{111}\)

From this premise, it is logical - although incorrect - that the Court assumed jurisdiction (only) over questions of *jus cogens*. Implicit in the Court’s approach is the position that the Council is subject only to *jus cogens* and not general international law and it is thus only in this area that the Court was prepared to exercise its judicial function.

The second reason that the CFI gave for having no jurisdiction over the SC was that it was bound to support the Council’s function of promoting security. Just as it had seen the Council as the authoritative source of (almost all) law, it saw the Council as the authoritative interpreter of what security required. Given the Council’s express mandate to maintain international peace and security, this may seem more understandable than its deferral to the Council on the question of law. But, as will be argued below, it is still a dereliction of the judicial function.

Turning to the rights on which Kadi was relying, the CFI then found that these rights had not been violated, at least not in the form acknowledged as part of *jus*

\(^{111}\) See further Devika Hovell’s critique of the CFI’s “command theory” of law in Hovell, *Power of Process* (n 56) 104-105.
Here, again, its rights analysis was heavily influenced by the notion that the Council had the sole discretion to determine what security required. Thus, while the CFI rather surprisingly found that the right to property formed part of *jus cogens*, it qualified this right by according it *jus cogens* status only to the extent that individuals may not *arbitrarily* be deprived of their property. As Kadi had had his assets frozen in order to combat terrorism, his right to property, as a *jus cogens* right, had therefore not been infringed. In coming to this conclusion, the CFI emphasized that the measures were part of the international campaign against terrorism, had humanitarian exceptions, were of provisional nature and allowed for states, if not the individual, to appeal the decision to the Sanctions Committee. Turning to the rights to a fair hearing and to judicial process, the CFI also found that these were not violated, at least to the extent that they were protected as part of *jus cogens*. Here the Court emphasized a number of measures that it saw as approximating the right to a hearing and a fair trial process, including the applicant’s ability to petition his government to approach the Sanctions Committee and request de-listing. The CFI acknowledged that Kadi had had no opportunity to make representations on the correctness and relevance of any of the facts, as these remained hidden from him. But it found that this shortcoming did not violate the right to a fair hearing because human rights jurisprudence recognizes limits on the principle of access to court – for example, in the context of a public emergency or state immunity. On

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113 Kadi I CFI (n 90) paragraph 242.

114 Kadi I CFI (n 90) paragraphs 251-252.

115 Kadi I CFI (n 90) paragraphs 244-252.

116 Kadi I CFI (n 90) paragraphs 253-291.

117 Kadi I CFI (n 90) paragraphs 262-266

118 Kadi I CFI (n 90) paragraph 273.

119 Kadi I CFI (n 90) paragraphs 274 and 287.
this reasoning, the CFI held that the *jus cogens* right was not infringed as long as the Security Council considered there were international security grounds not to grant a hearing.

Ultimately, although the SC was held to be subject to *jus cogens*, its own role in defining each of the *jus cogens* norms rendered that hierarchical relationship nugatory. If the SC is the sole interpreter of the law that applies to it, it is, in effect, free of legal restraint.

In summary, then, the CFI judgment adopted a monist approach to law, while excluding some of the applicable international law from its analysis. Its lackadaisical treatment of international human rights law, and even *jus cogens*, was influenced by the authority that it accorded to the SC to determine questions of both law and security. In this, it followed in the steps of most of the cases discussed in chapter three. Nonetheless, its willingness to insert itself into the listing mechanism as a forum for review where none had been foreseen was a major step. In effect, the CFI held that the legal principles at the apex of the monist system had to be enforced, even where no provision had been made for jurisdiction or review. With this unconscious acceptance of the *ubi jus, ibi remedium* notion, the CFI provided a precedent that all the later cases were to follow in one form or another.

*Kadi* before the European Court of Justice Grand Chamber (ECJ)
The Court of Justice annulled the EC Regulations insofar as they imposed sanctions on Kadi.\textsuperscript{120} It found that the Regulations constituted an unjustified restriction of his right to property, the right to an effective legal remedy, and the right to be heard.

The Court emphasized that the EU was separate from other legal systems and from the international legal order and that it saw its own task, as chief judicial body of the EU, as determining and applying the EU’s own fundamental rules:

\textsuperscript{120} And Al-Barakaat, in the case which by now had been joined. See *Kadi I ECJ* (n 90) paragraph 372.
The Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions.\textsuperscript{121}

The ECJ thus saw itself constrained by the Rule of Law to establish whether Community organs were acting under the law, describing judicial review as “a constitutional guarantee forming part of the very foundations of the Community”.\textsuperscript{122}

Turning to examine this law in more detail, the Grand Chamber noted the central position enjoyed by human rights in the European legal order - rights derived not only from the \textit{ECHR}, but from the domestic constitutions of each European state, and from each state’s obligations under international human rights instruments.\textsuperscript{123}

The rest of the judgment constitutes a determined refusal by the ECJ to let anything interfere with its duty to hold organs of the European community to their obligations under law. Included amongst the factors that may not detract from the rule of law is “an international agreement” - a term implicitly encapsulating the United Nations Charter along with every other treaty.\textsuperscript{124} Rejecting the primacy of any non-EC source of obligation, the ECJ held that “an international agreement cannot affect the allocation of powers fixed by the Treaties”\textsuperscript{125}; and that “the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty”.\textsuperscript{126} As a result, articles 25 and 103 of the

\textsuperscript{121} \textit{Kadi I} ECJ (n 90) paragraph 281. References omitted.

\textsuperscript{122} \textit{Kadi I} ECJ (n 90) paragraph 290.

\textsuperscript{123} \textit{Kadi I} ECJ (n 90) paragraphs 282-3.

\textsuperscript{124} \textit{Kadi I} ECJ (n 90) paragraph 316. De Búrca comments: “The judgment is striking for its treatment of the UN Charter, at least insofar as its relationship to EC law in general is concerned, as no more than any other international treaty, and for the perfunctory nature of its nod to the traditional idea of the EC’s openness to international law.” \textit{de Búrca} (n 109) 23.

\textsuperscript{125} \textit{Kadi I} ECJ (n 90) paragraph 282.

\textsuperscript{126} \textit{Kadi I} ECJ (n 90) paragraph 285. See also paragraphs 305-307. The Court allows UN obligations to play a role within EU law, but in a subordinate position to the primary law of the EC. It held that the obligations imposed by the UN Charter, should they be classified as part of the “hierarchy of norms within the Community legal order” would rank higher than legislation but lower than the EC Treaties and lower than the “general principles of EC law” which include “fundamental rights”.
UN Charter could not restrict the rights which Kadi enjoyed within the European Union.

The sections of the ECJ judgment cited above therefore indicate an expressly dualist approach. Although the Court acknowledged the applicable UN Charter provisions when it identified the legal principles applicable to its judgment, these played no role in the Court’s analysis. Instead, it merely remarked that its annulment of the EC regulations that implement the Resolution would not necessarily call into question the primacy of the Resolution in international law. Its dualist separation of the regional and international legal systems allowed the Court to argue that review of the EC Regulation would not be tantamount to a review of the Security Council Resolution itself. And it insisted, categorically, that it had no power of review over the Security Council itself, not even for infringement of *jus cogens* norms.\(^\text{127}\)

And yet, on the ground, the Grand Chamber did review the Security Council. This was for two main reasons. First, its practical effect was to overturn the European regulation that implemented listing, thereby frustrating the SC’s programme. Second, it invalidated the relevant European regulation on one basis alone, and that is that the listing procedure did not provide judicial protection to the listed person.\(^\text{128}\) As the CFI had noted, the European Union implemented listing decisions without supplementing the mechanism in any way; the protection offered by the EU was therefore exactly the same protection as that offered by the SC itself.

The focus on the Security Council’s listing procedure is underlined by the fact that the Court acknowledged, in principle, that listing may be “appropriate” and “proportionate” in the light of the Security Council’s important goal of protecting security and preventing terrorism.\(^\text{129}\) The Court also emphasized that the provision

\(^{127}\) *Kadi I* ECJ (n 90) paragraph 327.

\(^{128}\) *Kadi I* ECJ (n 90) paragraph 322ff.

\(^{129}\) *Kadi I* ECJ (n 90) paragraph 363, citing *Bosphorus (Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland (Merits) (GC)*, (2006), 42 E.H.R.R.1 (hereafter: *Bosphorus*)) for authority that severe infringements of individual rights may be justifiable in the light of the purpose behind the infringement.
for exemptions and appeal to the “Focal Point” provided some relief to listees and some opportunity to challenge their listing.\textsuperscript{130} However, it found the listing disproportionate because the contested regulation was adopted without furnishing any guarantee enabling him to put his case to the competent authorities, in a situation in which the restriction of his property rights must be regarded as significant, having regard to the general application and actual continuation of the freezing measures affecting him.\textsuperscript{131}

Although the Court spoke in terms of proportionality, and claimed repeatedly that a proportionate listing process was possible in theory, it did not, in fact, carry out a proportionality analysis. The lack of judicial protection rendered the listing process unacceptable in itself.

The ECJ did keep the EU regulations in effect for a three-month period, but this was to allow the EC Council a period of time during which to remedy the due process breaches. During this three-month period, the European Commission communicated a summary of the Council’s reasons for listing Kadi to him, and he made representations to the Commission, contesting the facts alleged in the summary. The Commission nonetheless declared itself satisfied that Kadi was correctly listed, and relisted him. Kadi then began a second court challenge to his listing, returning to the CFI.\textsuperscript{132}

This second CFI case represents a pivotal point in the listing jurisprudence, for two main reasons. Looking back, we can see that it draws on earlier European jurisprudence, in particular, the case of \textit{Bosphorus}.\textsuperscript{133} In this case, as we saw in chapter three, the ECtHR allowed for a pluralist approach, which recognized the validity of both conflicting measures (the Security Council listing instruction and the rights of the \textit{ECHR}). \textit{Bosphorus} was prepared to forego a review of a European measure that implemented a directive from a different sphere if the latter sphere

\textsuperscript{130} \textit{Kadi I} ECJ (n 90) paragraphs 364-366.

\textsuperscript{131} \textit{Kadi I} ECJ (n 90) paragraph 369.

\textsuperscript{132} By this stage, the CFI had been renamed the General Court. See n 90 above and the discussion of \textit{Kadi II} below.

\textsuperscript{133} See above at chapter 3, section C.1.
provided equivalent rights protection to that in the European sphere. In Kadi, the ECJ applied this test in order to reject the Commission’s argument that the contested regulation was immune from review because it implemented a Security Council measure. The ECJ considered the review mechanisms of the Council’s 1267 Committee and found them inadequate, therefore concluding that it was obliged to carry out the review itself.

Although the ECJ judgment in Kadi I can be read as opening the door to a more pluralist approach to the implementation of Security Council measures in the EU, it was followed by a series of strongly dualist judgments and opinions, considered below, all of which subjected the listing process to judicial review while claiming to limit the effect of the sphere of influence of that court or committee. It also introduced a somewhat surprising and artificial idea: that European states have discretion in how they implement the decisions of the 1267 Committee. In chapter three, our discussion of the “M” and “Matthews” cases noted the important role that a state’s discretion plays when the state implements a directive originating from another legal structure. If the directive leaves an area of discretion open to the state, it will be held liable for any choices it makes within that discretion when it implements the directive. As the CFI noted, the SC’s listing mechanism gives states no discretion at all; they are obliged under Chapter VII to impose a specific list of sanctions on all the specific people or entities identified by the 1267 Committee as associated with Al-Qaeda or the Taliban. And yet, in Kadi the ECJ held that European states had some discretion in how they implemented the listing directives. Similarly, all of the cases below find some source of the state’s liability in smaller, related activities that the state carried out in connection with listing; activities which the courts or advisory bodies treated as the choices of the states that carried them out.
B.3.2 *Nabil Sayadi and Patricia Vinck v Belgium*¹³⁴

On 22 October 2002, the Global Relief Foundation was placed on the 1267 Committee list. The text accompanying its listing mentioned the links that the Global Relief Foundation had with its European branches, including the *Fondation Secours Mondial* in Belgium. Sayadi and Vinck, Belgian nationals, were the director and secretary, respectively, of *Fondation Secours Mondial*. On 19 November 2002, as required by the listing regime, Belgium passed Sayadi and Vinck’s names and positions in the organization on to the Sanctions Committee. On 22 January 2003, the Sanctions Committee listed Sayadi and Vinck.

In 2005, Sayadi and Vinck obtained two orders from Belgian courts, the first ordering the government of Belgium to apply for their delisting and the second affirming their innocence and dismissing all criminal charges against them. However, Sayadi and Vinck were not delisted and continued to suffer the consequences of the sanctions.¹³⁵ They proceeded to bring a complaint to the UN Human Rights Committee under the *International Covenant on Civil and Political Rights* (ICCPR). This opinion thus presents the first response to listing of a human rights body outside of Europe.

The Human Rights Committee found that Belgium had contravened provisions of the *ICCPR* through a number of its own acts that contributed to the listing of Sayadi and Vinck. These included supplying their names to the 1267 Committee without giving them a hearing¹³⁶ and before a Belgian criminal investigation into the couple had been completed.¹³⁷ By doing so, according to the Committee, Belgium rendered itself responsible for the couple’s travel ban and the attacks on their reputation.

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¹³⁴ Human Rights Committee; communication no. 1472, UN Doc CCPR/C/94/D/1472/2006 (hereafter: *Sayadi v Belgium*).

¹³⁵ Sayadi and Vinck were a married couple with four children, who were unable to access funds to defray family expenses. SCR 1452 of 2002 (n 12) empowered Belgium to release funds to the couple for humanitarian reasons, but Belgium did not do so.

¹³⁶ *Sayadi v Belgium* (n 134) paragraph 10.7

¹³⁷ *Sayadi v Belgium* (n 134) paragraph 10.13.
order to hold Belgium responsible for its role in the listing of Sayadi and Vinck, the Human Rights Committee treated as discretionary Belgium’s obligation under the listing regime to provide the names of office-bearers of listed organizations. Two dissenting opinions pointed out that the Committee had, in effect, held Belgium’s compliance with the Security Council’s listing procedure to be a violation of the ICCPR.¹³８

B.3.3 Ahmed¹³⁹

This case was the first to be heard by the newly renamed Supreme Court of the UK. In Ahmed, this Court had to decide the legality, within UK law, of two executive orders implementing both SCR 1373 and SCR 1267. It overturned both. The following discussion gives a brief overview of the UK legislation, before analyzing the Ahmed judgments. A final section summarizes the main rule of law arguments that can be extracted from the case.

The legislative background

The UK gave effect to its UN Charter obligation to implement SC measures¹⁴⁰ by passing an Act in 1946. Section 1 of this Act, the United Nations Act, provided

(1) If, under article 41 of the Charter of the United Nations signed at San Francisco on 26 June 1945, the Security Council of the United Nations call upon His Majesty's Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied, including (without prejudice to the

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¹³８ Sayadi v Belgium (n 134) separate opinion on admissibility of Rodley, Shearer and Motoc and the separate opinion on merits of Shearer.


Using this power, the executive issued orders to implement the two main sets of SC measures against terrorism. The Terrorism (UN 2001 measures) Order of 2001 ("Terrorism Order"), reissued in 2006 and 2009, implemented SCR 1373. The Al-Qaida and Taliban (UN Measures) Order of 2006 ("Al-Qaida Order") implemented SCR 1267. There was, in addition, a large body of UK parliamentary Acts dealing with terrorism, including the *Anti-Terrorism, Crime and Security Act* of 2001. This Act, which also allowed for asset forfeiture, provided that executive measures taken under it be scrutinized by Parliament. Neither of the two executive orders provided for any Parliamentary scrutiny.

**The Ahmed decision**

The appeals before the Supreme Court involved a number of men who had been listed under one or both of the UK orders. Ahmed, "K" and "M" were listed under the Terrorism Order by the UK executive; al-Ghabra ("G") was listed under both orders, and Hay was listed under the Al-Qaida and Taliban Order only. Both al-Ghabra and Hay were listed under the Al-Qaida Order to give effect to their listing by the 1267 Committee of the Security Council. However, al-Ghabra had been listed by the 1267 Committee at the request of the United Kingdom.

The challenges to the UK listings were based on a variety of grounds. Both orders were challenged for going beyond the terms of the 1946 *United Nations Act* “by reference to the principle of legality” and for incompatibility with the *Human Rights Act*. The Terrorism Order was further challenged as *ultra vires* because its

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141  *United Nations Act 1946* (United Kingdom), c.45, Regnal. 9 and 10, Geo. 6
142  *Ahmed* (n 139) paragraph 23.
143  The term is Lord Hope’s, in paragraph 41 of the judgment. See also paragraph 88 (per Lord Phillips).
144  *Ahmed* (n 139) paragraph 41 (per Lord Hope). See also paragraph 88 (per Lord Phillips).
terms went beyond what was required by SCR 1373. The listed men also objected to the lack of parliamentary approval to the listing process, the lack of legal certainty and proportionality it produced, and the absence of appeal proceedings. Finally, the Al-Qaida Order was challenged for violating the right of effective judicial review.

The judges held themselves bound by the decision of their own court in *Al-Jedda* and distinguished *Kadi I*. Thus, while the *Kadi I* court had been able to hold that the EU should apply its own human rights provisions, without reference to the instructions of the Security Council, the UK could not do so. This was because the UK, unlike the EU, was bound by the UN Charter to implement Security Council decisions. They therefore rejected *Kadi*’s dualist approach and adopted instead the monist approach of *Al-Jedda*. As we saw in chapter three, the *Al-Jedda* decision of the House of Lords held the UK court as subordinate to the Security Council, which was in turn not bound by the relevant human rights instruments, including the UK *Human Rights Act*, on which the listed men were relying. This meant that the listed men could rely only on UK domestic law, excluding the *Human Rights Act*.

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145 Ahmed (n 139) paragraph 41. See also paragraph 88 (per Lord Phillips).
146 Ahmed (n 139) paragraph 40.
147 Ahmed (n 139) paragraph 41. See also paragraph 127 (per Lord Phillips).
148 See chapter three, above, which analyzes the House of Lord’s finding in this case that the UK is bound by article 103 of the UN Charter to implement measures of the Security Council, even if these override the rights set out in the European Convention of Human Rights.
149 Ahmed (n 139) paragraphs 73-4 (per Lord Hope). See also paragraph 106 (per Lord Phillips), who does not see that any conclusion can be drawn from *Kadi* for application in the case before him.
151 Lord Mance applied some Convention rights to the Terrorism Order and also considered the *Human Rights Act* briefly with reference to the Al-Qaida Order. However, he decided that the Terrorism Order met the requirement of proportionality, and was clear enough to be accessible (paragraphs 233-236). He then decided the Al-Qaida Order challenge on the basis of the right of access to court, finding it “unnecessary” to consider the submissions based on the *European Convention on Human Rights* (paragraphs 249-250).
Rights Act.\textsuperscript{152} As a result, the judges in Ahmed reach their decisions almost exclusively on the basis of the common law. Lord Hope held:

Two fundamental rights were in issue in G’s case, and as they were to be found in domestic law his right to invoke them was not affected by article 103 of the UN Charter. One was the right to peaceful enjoyment of his property, which could only be interfered with by clear legislative words: \textit{Entick v Carrington} (1765) 19 Howell's State Trials 1029, 1066, per Lord Camden CJ. The other was his right of unimpeded access to a court: \textit{R (Anufrijeva) v Secretary of State for the Home Department} [2004] 1 AC 604, para 26, per Lord Steyn. As it was put by Viscount Simonds in \textit{Pyx Granite Co Ltd v Ministry of Housing and Local Government} [1960] AC 260, 286, the subject’s right of access to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. As Mr Singh pointed out, both of these rights are embraced by the principle of legality, which lies at the heart of the relationship between Parliament and the citizen. Fundamental rights may not be overridden by general words.\textsuperscript{153}

The speeches turn on two central ideas that the Law Lords find in the common law: what they term the “principle of legality” and the “rule of law”. While there is some uncertainty and variation in their use of the two terms, most of the Law Lords understand the “principle of legality” to mean that any infringement of individual rights has to be expressly authorized by Parliament,\textsuperscript{154} whereas, with the term, “rule of law”, they are referring to the rule that the government, particularly the executive, must be held subject to the law.\textsuperscript{155} As a result of the latter conception, the right of access to court is a necessary part of the rule of law.\textsuperscript{156}

In the judges’ analysis, the two principles (legality and the rule of law) impose constraints on Parliament as well as the executive. They limit the power of the executive by keeping subordinate legislation within the strict terms of the empowering act, and they force Parliament to express exactly the extent to which it

\textsuperscript{152} Ahmed (n 139) paragraph 75.

\textsuperscript{153} Ahmed (n 139) paragraph 75 (per Lord Hope).

\textsuperscript{154} Ahmed (n 139) paragraph 75 (per Lord Hope), paragraphs 111-116 and 138 (per Lord Phillips). The term, legality is, however, occasionally also understood as the basis for judicial review (see paragraph 79: “Mr Swift accepted that the principle of legality requires that the power to impose restrictions such as those that flow from designation under the AQO should be subject to judicial review.”).

\textsuperscript{155} Ahmed (n 139) paragraph 45 (per Lord Hope) (“If the rule of law is to mean anything, decisions as to what is necessary or expedient in this context cannot be left to the uncontrolled judgment of the executive.”); and paragraph 53 (per Lord Hope).

\textsuperscript{156} Ahmed (n 139) paragraph 146 (per Lord Phillips).
is limiting the rights of the individual. Lord Phillips quotes with approval the following statement of Lord Hoffmann in the case of Simms:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost.\(^{157}\)

Due to the rights guaranteed by the common law, and the underlying principles of legality and the rule of law, both orders were overturned - the Terrorism Order unanimously, and the Al-Qaida Order by six to one (Lord Brown dissenting). In the case of the Terrorism Order, the Law Lords held that the 1946 Act - like all UK legislation - could not be interpreted to infringe fundamental rights unless it did so in express terms. It could therefore not be read to allow the executive to infringe fundamental rights any more than the relevant SCR required. However, the Terrorism Order went beyond the express terms of SCR 1373 by allowing the sanctions regime to be applied on the reasonable suspicion, rather than proof, that a particular individual was a terrorist. By going beyond the terms of SCR 1373, the Terrorism Order was therefore ultra vires the 1946 Act.\(^{158}\) In most of the speeches, the Al-Qaida Order was quashed because it denied the common-law right of access to court.\(^{159}\)

\(^{157}\) Ahmed (n 139) paragraph 111, citing R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115 at 131.

\(^{158}\) Lord Rodger’s objection to the TO was not based on its standard of proof, but the permanent nature of the order. See Ahmed (n 139) paragraphs 174-176.

\(^{159}\) Lord Brown dissented, holding that the relevant SCR required that this right be denied to the listed men. Lord Rodger held that Parliament may be entitled to deny this right, but the executive is not. See Ahmed (n 139) paragraphs 185-186.
B.3.4 Kadi II

As mentioned in the discussion of the first set of Kadi cases, above, Kadi was relisted by the European Union after the ECJ (now the CJEU) had annulled his first listing. His relisting followed a process through which Kadi had ostensibly been allowed to present his case to the Council. On being relisted, Kadi took his case back to the CFI (now the General Court of the European Union, or GCEU).

The appeal court in Kadi I had annulled Kadi’s first listing on the basis that Kadi had not been allowed effective judicial protection. As a result, the GCEU now held itself bound to subject the now amended listing procedure - including, for the first time, an Ombudsperson, to, “in principle, the full review” of fundamental rights. Echoing Bosphorus, the GCEU held itself bound to examine the listing procedure of the Sanctions Committee as long as the Sanctions Committee itself failed to provide effective judicial protection. This full review had to extend to the merits of the contested measure. The Court had to examine the evidence and information on which the measure was based and determine whether it was accurate, reliable and consistent. It would not allow the review to be barred on the ground that the information and evidence was secret or confidential. The GCEU found that the listing procedure, even with its latest reforms, did not provide effective judicial protection to Kadi:

In essence, the Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee. Furthermore, neither the Focal Point mechanism nor the Office of the Ombudsperson affects the principle that removal of a person from the Sanctions Committee’s list requires consensus within the committee. Moreover, the evidence which may be disclosed to the person concerned continues

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160 Over the period of the Kadi case, the Court of First Instance was renamed the General Court (GCEU) and the Appeal Chamber was renamed the Court of Justice of the European Communities (CJEC). See Case T-85/09 Kadi v Commission [2010] ECR II-5177 (General Court Case) 30 September 2010 (hereafter: Kadi II GCEU) and C-584/10 P - Commission and Others v Kadi (18 July 2013), heard with C-593/10 P and C-595/10 P (hereafter Kadi II CJEU).

161 See note 90 above on the nomenclature used for the various courts.

162 The details of this process are set out in the judgment of the CJEC. See Kadi II (CJEU) (n 160) paragraphs 16-36.

163 Kadi II GCEU (n 160) paragraphs 126-7.

164 Kadi II GCEU (n 160) paragraph 127.
to be a matter entirely at the discretion of the State which proposed that he be included on the Sanctions Committee’s list and there is no mechanism to ensure that sufficient information be made available to the person concerned in order to allow him to defend himself effectively (he need not even be informed of the identity of the State which has requested his inclusion on the Sanctions Committee’s list). For those reasons at least, the creation of the Focal Point and the Office of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee.\textsuperscript{165}

The GCEU found that Kadi’s right to effective judicial protection had been violated chiefly because he and the Court were denied access to the evidence on which the allegations against him were based. The Council had not communicated to Kadi the evidence relied on against him to justify the listing and sanctions, and had also not given him the right to be informed of that evidence within a reasonable period after the listing measures were enacted. Kadi could therefore not make his own views known about this evidence.\textsuperscript{166} Furthermore, the Council had also not revealed the evidence to the Court itself.\textsuperscript{167} Kadi’s fundamental right to effective judicial protection had therefore been infringed.\textsuperscript{168}

The GCEU therefore annulled the measure imposing the listing sanctions on Kadi within the European Union. The case was appealed to the Court of Justice of the European Union.

\textit{Kadi II before the Court of Justice of the European Union}

In its judgment, the CJEU describes how the listing process should work within Europe, setting out the responsibilities of the European authority that decides whether to add a suspected terrorist to the list. These responsibilities include disclosure to the individual concerned of that evidence to which the authority itself has access. The disclosure must include, at the very least, the summary of reasons

\begin{flushleft}
\textsuperscript{165} \textit{Kadi II} GCEU (n 160) paragraph 128.
\textsuperscript{166} \textit{Kadi II} GCEU (n 160) paragraphs 344-349.
\textsuperscript{167} \textit{Kadi II} GCEU (n 160) paragraph 350.
\textsuperscript{168} \textit{Kadi II} GCEU (n 160) paragraphs 181-184.
\end{flushleft}
provided by the Sanctions Committee.\textsuperscript{169} The information must put the affected individual in a position to defend his or her rights and effectively make known his or her views on the grounds advanced by the Sanctions Committee.\textsuperscript{170} The European authority must then examine “carefully and impartially”\textsuperscript{171} whether the alleged reasons are well founded in light of the individual’s comments and any exculpatory evidence he or she may have provided. It may then be necessary for the authority to seek further information and evidence from the Sanctions Committee and the member of the UN that proposed the individual’s listing, whether this information is confidential or not.\textsuperscript{172}

The statement of reasons has to identify the “individual, specific and concrete reasons”\textsuperscript{173} why the individual concerned should be subject to sanctions. When the courts of the European Union review the decision of the European authority, they have to examine the procedure used and whether the legal basis for the action is adequate.\textsuperscript{174}

Unlike the General Court, the CJEU held that the Commission did not have to produce all the evidence behind the listing decision, but it emphasized that it would conduct its review on the basis of the evidence it had seen.\textsuperscript{175} To accommodate security considerations, it was prepared to view evidence that would remain hidden to the affected individual - if, in its own assessment, the evidence presented a security risk.\textsuperscript{176} The CJEU allowed the European authority a margin of appreciation in

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\textsuperscript{169} Kadi II CJEU (n 160) paragraph 111.

\textsuperscript{170} Kadi II CJEU (n 160) paragraph 112.

\textsuperscript{171} Kadi II CJEU (n 160) paragraph 114.

\textsuperscript{172} Kadi II CJEU (n 160) paragraph 115.

\textsuperscript{173} Kadi II CJEU (n 160) paragraph 117.

\textsuperscript{174} Kadi II CJEU (n 160) paragraph 117.

\textsuperscript{175} Kadi II CJEU (n 160) paragraph 123.

\textsuperscript{176} Kadi II CJEU (n 160) paragraph 129. Should the Court decide that the information can be shown to the individual, but the European authority does not wish to disclose the information, the information will not be disclosed to the individual, but it will also not be admitted as evidence in the review. See paragraph 127.
this regard - it remarked that it needed to find merely one reason to support the listing in order not to annul the listing measure.\textsuperscript{177}

The Court then examined the reasons given for Kadi’s listing and the evidence behind them. It dismissed one of the reasons as too vague,\textsuperscript{178} but accepted the others as clear enough.\textsuperscript{179} Looking at the evidence, however, the Court found it inadequate. It held that there was no evidence at all in support of some of the reasons offered for listing, while other reasons were supported by evidence that was considerably outdated.

The CJEU therefore dismissed the appeal against the annulment of Kadi’s listing.

\textbf{B.3.5 Nada v Switzerland}

Youssef Moustafa Nada was an Egyptian and Italian national living in the Campione d’Italia, which is an Italian enclave bordered on all sides by Switzerland.\textsuperscript{180} He suffered from various serious medical ailments that required treatment outside of the enclave.\textsuperscript{181}

The Swiss prosecutor opened an investigation against him in 2001,\textsuperscript{182} the same year in which he was added to the Sanctions Committee’s list and the Swiss ordinance that implemented the Security Council’s listing system. SCR 1390 introduced a travel ban for listed persons in 2002.\textsuperscript{183} Nada began to feel the effects of this ban after the Sanctions Committee’s Monitoring Group issued a report in 2003 criticizing the fact

\begin{footnotes}
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\item[177] Kadi II CJEU (n 160) paragraph 130.
\item[178] Kadi II CJEU (n 160) paragraph 141.
\item[179] Kadi II CJEU (n 160) paragraphs 142-150.
\item[180] Nada v Switzerland [2012] E.C.H.R. 1691 (ECtHR) paragraph 11 (hereafter: Nada v Switzerland (ECtHR)).
\item[181] Nada v Switzerland (ECtHR) (n 180) paragraph 14.
\item[182] Nada v Switzerland (ECtHR) (n 180) paragraph 19.
\item[183] Nada v Switzerland (ECtHR) (n 180) paragraph 22.
\end{footnotes}
that he was allowed to move freely between Italy and Switzerland. 184 After this report, both Italy and Switzerland prevented Nada from crossing the border. 185 He applied for exemptions in order to receive medical treatment or legal advice, which were generally denied or granted for too short a period to be practicable. 186

In April 2005, the Federal Prosecutor closed the criminal investigation against Nada on the basis that the allegations against him were unsubstantiated. 187 On that basis, Nada applied to the Swiss authorities to delete his name from the Swiss ordinance that implemented the Sanctions Committee’s directives. 188 This request was refused on the basis that Nada was still listed by the Sanctions Committee. 189 His appeal against this decision was dismissed partly because only Italy, his state of nationality, and not Switzerland, was competent to apply to the Sanctions Committee for Nada’s delisting. 190

In 2007, the Swiss Federal Council, reacting to an appeal by Nada in 2006, referred his case to the Federal Court. 191 At the same time, Nada himself applied to the Focal Point for delisting. It refused his application as well as his request to be given the identity of the designating state and the reasons for his designation. He was informed merely that an undisclosed state had objected to his delisting. 192

At the domestic level, the Swiss Federal Court rejected Nada’s claim. It followed a monist approach, holding that it was bound to implement the decisions of the UN Security Council. It acknowledged that the SC was itself subject to the Charter and to jus cogens, but denied that the enjoyment of possessions, economic

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184 Nada v Switzerland (ECtHR) (n 180) paragraph 25.
185 Nada v Switzerland (ECtHR) (n 180) paragraphs 25-26.
186 Nada v Switzerland (ECtHR) (n 180) paragraphs 27, 39, 57, 143 and 192.
187 Nada v Switzerland (ECtHR) (n 180) paragraph 28.
188 Nada v Switzerland (ECtHR) (n 180) paragraph 29.
189 Nada v Switzerland (ECtHR) (n 180) paragraphs 30-31.
190 Nada v Switzerland (ECtHR) (n 180) paragraph 32.
191 Nada v Switzerland (ECtHR) (n 180) paragraph 36.
192 Nada v Switzerland (ECtHR) (n 180) paragraph 40.
freedom, the guarantees of a fair trial or the right to an effective remedy fell within
jus cogens.\textsuperscript{193} It admitted that the sanctions regime breached fundamental rights, but
denied that this gave Switzerland any right to avoid the obligations placed on it.\textsuperscript{194} Switzerland had no discretion in how it implemented the listing decisions of the
Sanctions Committee, but had to impose the specific sanctions it was directed to
impose on the specific people named in the list.\textsuperscript{195} Switzerland was, however, obliged
to give Nada what support it could in his application for delisting, by informing the
Sanctions Committee that the criminal charges against him had been discontinued.\textsuperscript{196}

At the supra-national level, the ECtHR appeared at first to be following a
monist approach to Nada’s position, tempered by the Security Council’s own
obligation to comply with international human rights law. Citing its own, earlier
decision in \textit{Al-Jedda}, it held that, while Switzerland was subject to the Security
Council, the Council was itself subject to international human rights law and
therefore presumed not to interfere with human rights unless it says so expressly.\textsuperscript{197} However, in this case, unlike in \textit{Al-Jedda}, the Council had expressly derogated from
the relevant human rights standard by imposing a travel ban and other restrictions on
listed persons.\textsuperscript{198}

At this point, one would assume that the Court would dismiss Nada’s claim.
However, in a surprising move that provoked disagreement expressed in two separate
opinions,\textsuperscript{199} the Court then held that Switzerland had discretion in how it

\textsuperscript{193} As summarized by \textit{Nada v Switzerland} (ECtHR) (n 180) paragraph 48.
\textsuperscript{194} Paragraph 8.3 of the judgment of the Swiss Federal Court, cited at \textit{Nada v Switzerland} (ECtHR)
(n 180) paragraph 50.
\textsuperscript{195} \textit{Nada v Switzerland} (ECtHR) (n 180) paragraph 50.
\textsuperscript{196} Paragraph 9 of the judgment of the Swiss Federal Court, cited at \textit{Nada v Switzerland} (ECtHR) (n
180) paragraph 51.
\textsuperscript{197} \textit{Nada v Switzerland} (ECtHR) (n 180) paragraph 171.
\textsuperscript{198} \textit{Nada v Switzerland} (ECtHR) (n 180) paragraph 172.
\textsuperscript{199} See the opinions of judges Bratza, Nicolaou and Yudkivska on the one hand and judge
Malinverni on the other hand. These judgments concurred in the overall finding but took
exception to the notion that Switzerland had any discretion in how it implemented the
Sanctions Committee obligations.
implemented the Sanctions Committee’s list, and held it responsible for its failure to do so in a human-rights friendly manner. In this regard, the Court cited Bosphorus and other case law to emphasize that States are liable for acts and omissions that violate human rights, whether these come from domestic or international law.\footnote{Nada v Switzerland (ECtHR) (n 180) paragraph 168.}

The indicia that the Court noted of Switzerland’s discretion and its failure to exercise this discretion lawfully need to be set out in some detail. First, as a sign that Switzerland did, in fact, have discretion in how it implemented the listing decisions, the Court refers to the fact that Switzerland informed the Sanctions Committee in 2010 that it would implement only those listing decisions that met certain conditions (such as regular review).\footnote{Nada v Switzerland (ECtHR) (n 180) paragraphs 176-180.} Second, Switzerland was aware that the accusations against Nada were baseless because the criminal charges against him had been withdrawn, but it did not inform the Sanctions Committee of this fact. This failure not only rendered the rights violation disproportionate (in that Switzerland did not use the least restrictive means of limiting Nada’s right) but also presented an example of an inadequate exercise of Switzerland’s discretion.\footnote{Nada v Switzerland (ECtHR) (n 180) paragraphs 187-188.}

Further, the Court emphasized that Switzerland could not rely merely on the binding nature of Security Council resolutions; it should, instead, have persuaded the Court that it had taken - or at least had attempted to take - all possible measures to adapt the sanctions regime to the applicant’s individual situation.\footnote{Nada v Switzerland (ECtHR) (n 180) paragraph 196.} The important point, from the Court’s perspective, is that the Swiss government failed to show that it had attempted to harmonize the apparently divergent obligations.\footnote{Nada v Switzerland (ECtHR) (n 180) paragraph 197.}
B.3.6  *Al-Dulimi and Montana Management Inc*

This case does not deal with the listing system discussed in the rest of this chapter. However, it deserves consideration for two main reasons: first, it demonstrates the potential of the interaction around listing to reform the Security Council’s other smart sanctions programmes; second, it offers a contrast to the listing jurisprudence discussed above by engaging head-on with the Security Council’s listing procedure and subjecting Security Council measures to a fairly rigorous proportionality analysis.

As mentioned in chapter three, *Al-Dulimi* deals with sanctions imposed on members of the former government of Iraq under Saddam Hussein.\(^{205}\) The Security Council resolutions in question were SCR 1483 of 2003, which directed states to confiscate financial assets of any members of the former Iraqi government,\(^ {206}\) and SCR 1518, which set up a committee to determine who these individuals were (the so-called “1518 Committee”).\(^ {207}\) The main facts for the purpose of this discussion is that Al-Dulimi was listed as a member of the former Iraqi government by the 1518 Committee in 2004, after which Switzerland initiated confiscation proceedings against him and Montana Management Inc. Al-Dulimi attempted to get the Swiss Federal Court to review his listing by the 1518 Committee, but the Court refused on the basis that Switzerland was bound under article 103 of the UN Charter to comply with decisions of the Security Council, even if these conflicted with international, regional or domestic human rights norms.\(^ {208}\) In 2006, Security Council Resolution 1730 created a procedure for all smart sanctions by introducing a “Focal Point” through which individual applications for delisting could be made.\(^ {209}\) Al-Dulimi applied to the Focal Point to be delisted, but his application was refused. He then brought a case against

\(^{205}\) *Al-Dulimi* Second Chamber (n 7).


\(^{208}\) The relevant paragraphs of the Federal Court judgments are set out in paragraph 38 of *Al-Dulimi* Second Chamber (n 7).

\(^{209}\) See footnote 36ff above.
Switzerland before the ECtHR on the basis that his right to access to court had been violated.\textsuperscript{210}

In chapter three, I drew attention to the fact that the ECtHR applied the equivalent protection test directly to the UN Security Council in this case.\textsuperscript{211} In contrast to the \textit{Nada} case, the Court held that Switzerland had no discretion in how it implemented the Security Council’s decision. Drawing on \textit{Bosphorus}, the Court held that it would therefore have to review Switzerland’s implementation of the UNSC measure unless the UNSC protected the applicants’ rights in a manner equivalent to that of the \textit{ECHR} and its judicial mechanisms. Thus, in \textit{Al-Dulimi}, the Court was engaging expressly with the Security Council’s sanction system.

As we have seen above,\textsuperscript{212} the listing process of the 1267 Committee was amended by SCR 1904 of 2009 to include an Ombudsperson.\textsuperscript{213} But SCR 1904 applied only to listings by the 1267 Committee; where the other smart sanctions programmes were concerned, the only way an individual could apply to be delisted was through the Focal Point.\textsuperscript{214} In its judgment, the ECtHR cited the \textit{Kadi} jurisprudence, particularly the 2010 judgment of the General Court,\textsuperscript{215} pointing out that this judgment had found even the creation of an Ombudsperson inadequate to ensure effective judicial protection of the rights in the \textit{ECHR}.\textsuperscript{216} This meant that the Focal Point, which provided even less protection, was clearly inadequate. As a result, the Court held that the UN Security Council programme did not provide equivalent

\begin{footnotesize}
\begin{enumerate}
    \item[210] Protected by article 6(1) of the \textit{ECHR}.
    \item[211] See chapter three, section C.4.
    \item[212] See footnote 36ff above.
    \item[213] See above, particularly sections A.1 and A.4
    \item[214] In this regard, see the incident related by Kimberley Prost, in which a certain individual, Mr. Jim’ale, was listed by the 1267 Committee in 2001 and eventually delisted on the recommendation of the Ombudsperson in 2012. However, he was immediately listed under the Somalia-Eritrea sanctions regime, from which he had no recourse to the Ombudsperson mechanism. See Kimberley Prost (n 53) 5.
    \item[215] \textit{Kadi II} GCEU (n 160). The judgment of the CJEU in this matter had not yet been delivered.
    \item[216] \textit{Kadi II} GCEU (n 160) paragraphs 127-128.
\end{enumerate}
\end{footnotesize}
and that the merits of the applicants’ claim had to be considered. As Switzerland had clearly limited Al-Dulimi’s access to court in its implementation of the Security Council sanctions, the Court therefore had to proceed to a proportionality enquiry.

At this point, the difference between the “1518” sanctions and the “1267” sanctions assumed heightened importance. By comparing the aims of the two sanctions regimes, the Court was able, in effect, to downplay the importance of the smart sanctions against former members of the Iraqi government:

The Court is of the view that, unlike the situation giving rise to the measures complained of by the applicant in Nada, it was not a question, in the present case, with the adoption of Resolution 1483 (2003), of responding to an imminent threat of terrorism, but of re-establishing the autonomy and sovereignty of the Iraqi Government and of securing the right of the Iraqi people freely to determine their own political future and control their own natural resources (see paragraph 4 of the preamble to Resolution 1483 (2003)).

As noted in chapter three, the ECtHR also called into question the underlying aim which the measures purported to address. While preamble to SCR 1518 declared the situation in Iraq to be a threat to international peace and security, the ECtHR saw the measures not as resolving armed conflict but as supporting a new government in Iraq. The ECtHR was therefore not only pronouncing directly on the procedural failings of the Council’s sanction system, but also evaluating the Council’s claim that it was responding to a particular emergency which required these exceptional measures. The Court then held that “differentiated and specifically targeted measures would probably have been more conducive to the effective implementation of the resolutions” and pointed out how severe the restrictions were which had been imposed on the applicants. It concluded that applicants were entitled to have the

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217 Al-Dulimi Second Chamber (n 7) paragraph 118.
218 Al-Dulimi Second Chamber (n 7) paragraph 122.
219 Protected by article 6 of the ECHR.
220 Al-Dulimi Second Chamber (n 7) paragraph 130.
221 Fourth sentence of the preamble.
222 Al-Dulimi Second Chamber (n 7) paragraph 131.
merits of the freezing and confiscation of their assets examined by a court, and that their right to access to court had therefore been violated.

However, these gains seem largely to have been reversed by the Grand Chamber. As discussed more fully in chapter three, the Grand Chamber of the ECtHR rejected the application of the “equivalent protection” test, and also did not subject the measures imposed on Al-Dulimi to a proportionality analysis. In an interpretation criticized as untenable by some, the Court found that the Security Council resolutions in question did not negate Switzerland’s obligations under the ECHR and decided, on that basis, that Switzerland had violated Al-Dulimi’s right of access to court under article 6 of the ECHR.

B.4 The Changes as Interaction and Reciprocity

There is little doubt in the literature that the changes that the Security Council made to the listing system were a response to the challenges to it, particularly those emanating from the courts. A cursory glance at the timelines supports this view.

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223 Al-Dulimi Grand Chamber decision (n 7). See the minority, concurring judgments of Judges Keller, Pinto de Albuquerque, Hajiyev, Pejchal and Dedov, all of which proposed that the Bosphorus test be applied to some extent. See also the comment of Marko Milanovic at http://www.ejiltalk.org/grand-chamber-judgment-in-al-dulimi-v-switzerland/ [accessed 23 June 2016].

224 Al-Dulimi Grand Chamber judgment (n 7) paragraph 146.

225 See the dissenting opinion of Judge Nussberger Al-Dulimi Grand Chamber judgment (n 7), section A, and Marko Milanovic’s comment at http://www.ejiltalk.org/grand-chamber-judgment-in-al-dulimi-v-switzerland/ [accessed 23 June 2016].

226 Al-Dulimi Grand Chamber judgment (n 7), paragraph 149.

227 Al-Dulimi Grand Chamber judgment (n 7) paragraph 155.

First, the timeline table shows the Security Council expressly referring to, and encouraging, dialogue with regional bodies and courts. Second, the improvements to the listing procedure all occurred while the European courts and UN rights bodies were hearing arguments, or pronouncing, on the lack of due process and access to court in the 1267 Committee. Thus, within a year after the ECJ overturned the European sanctions against Kadi on the basis that the listing procedure denied Kadi’s right to an effective remedy, the Office of the Ombudsperson was introduced, an office that had at least the potential for independent review of listing decisions. When that mechanism was also declared inadequate by both the UK Supreme Court of Appeal and the Court of Justice of the European Union, further improvements were made to the listing process, which now included a presumption that the Ombudsperson’s recommendation for a delisting would be carried out. Not all the changes were positive, however. Sometimes, the Security Council acted to close a loophole that the courts had created in its listing system in an effort to protect individual rights. As noted above, the UK SCA held in Ahmed that the UK Terrorism Order went beyond the express terms of SCR 1373 by allowing the sanctions regime to be applied on the reasonable suspicion, rather than proof, that a particular individual was a terrorist. It was therefore held to be ultra vires the United Nations Act of 1946. Evidently in response, the Security Council “[s]trongly urge[d] Member

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229 This table is found at the end of chapter four.
230 See Kadi I and the discussion above at section B.3.4.
231 See SCR 1904 of 2009 (n 12).
232 See Ahmed (n 139).
233 See Kadi II (n 160).
234 Introduced by SCR 1989 of 2011 (n 39) paragraph 23.
235 Lord Rodger’s objection to the TO was not based on its standard of proof, but the permanent nature of the order. See Ahmed (n 139) paragraphs 174-176.
States” in SCR 2083 to “apply an evidentiary standard of proof of “reasonable grounds” or “reasonable basis”...”.

At this point, we need to recall Fuller’s fable, recounted at the beginning of the chapter, about a tyrant whose form of social order evolved from tyranny to law. Fuller notes that a tyrant who changes his form of governance from tyranny to law may not be doing so because of “the balance of good and evil in his soul”, but rather because he realizes that law is one of the preconditions for the success of a cooperative enterprise. Whatever the convictions of the creators of listing - and we will see below that the Security Council, the Sanctions Committee and the monitoring bodies assisting the Sanctions Committee all came to embrace at least the rhetoric of law - it is clear that, in its original form, listing was doomed to fail for the lack of cooperation it received in the global community. Thus, with the judgment of the ECJ (Grand Chamber) in Kadi I, the EU’s refusal to implement the listing instruction created a significant gap in the implementation of the Security Council’s listing system. Any gap in the sanctions programme provides a safe haven to which sanctioned persons can transfer their assets to retain control over them, which means that the ECJ ruling effectively crippled part of the Security Council’s anti-terrorism programme. The gap covering EU states was maintained and confirmed by the second Kadi case; after Nada, it was broadened beyond the EU to cover all the states in the Council of Europe - nearly a quarter of the member states of the UN.

Furthermore, because of the court rulings, the EU and individual European states could no longer implement 1267 listing decisions automatically without running afoul of the ECJ’s finding. As a result, there were proposals to adapt European

236 SCR 2083 (n 19) paragraph 44. See also the Guidelines of the Sanctions Committee at <http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf>, paragraph 6(c) and Hovell, Power of Process (n 56) 106.

237 Fuller, Morality of Law (n 1) 106.

238 Fuller, Morality of Law (n 1) 106.

239 Un Doc S/2008/324 paragraph 40.

240 Tzanakopoulos, Falling Short (n 223) 9.
implementation of the Security Council listing decisions by subjecting them to scrutiny by an EU body. Devika Hovell calls the response to *Kadi* a shift from a “position of automatic compliance with Security Council sanctions to one of controlled compliance”.241 Under the proposed system “a duty upon the Commission to consider the appropriateness of the listing independently”242 would replace automatic listing. It would also include means to consider classified information. Hovell commented:

Due in large part to the failure of the Security Council to provide satisfactory due process protections, this proposed measure threatens to take decision-making about sanctions out of the hands of the Security Council and into the hands of a regional body.243

In another blow to the Security Council’s listing system, the Swiss legislature informed the Security Council, through its executive, that Switzerland would no longer be implementing listing decisions unconditionally.244

The Security Council therefore had little choice but to change the listing system into a form that the non-cooperating states could accept. In doing so, the Council expressly embraced law as a mechanism to cure the deficiencies of listing and render it effective.

The Council’s reforms were described by its Monitoring Team as steps to create a “more legal character”.245 The Monitoring Team also recognized the practical use of the improved legality of listing, commenting that “[w]eak listings undermine the credibility of the sanctions regime, whether or not they are subject to legal

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244 Noted by the ECtHR in *Nada v Switzerland* (ECtHR) (n 180) paragraphs 63 and 179.

245 The steps which the Monitoring Team provides as examples of this growing legality are “the addition of “associated with” criteria set out in resolution 1617 (2005) and the introduction of narrative summaries of reasons for listing and the review mechanisms of resolution 1822 (2008).” See UN Doc S/2009/502 paragraph 40.
challenge”. Moreover, the Monitoring Team suggested that even the domestic reviews of listing could support the effectiveness of the process:

It is conceivable that further decisions by regional and national courts in favour of listed individuals and entities based on a review of the case against them could cause real difficulties for Member State implementation of the sanctions measures, but the Team believes that at this stage, when combined with the focal point process and the review of listings established by resolution 1822 (2008), the involvement of national and regional courts can help the Committee to strengthen the regime as an effective response to the threat from Al-Qaeda and the Taliban, without undermining the authority of the Council.247

The chair of the 1267 Committee, Jan Grauls, later acknowledged that SCR 1822 was itself insufficient to “ensure that the right individuals and entities were targeted”248 and asserted that due respect for fair and clear procedures would increase the effectiveness of the sanctions regimes.249 In Graul’s approach, the Rule of Law was thus no longer a brake on the security sought by the listing regime but a support for the “political” work of the Council.

The next resolution, SCR 1904, particularly took note of the domestic challenges to listing, “legal and otherwise”, and went on to express its intent to “continue efforts to ensure that procedures are fair and clear”.250

Finally, it is worth noting that challenges to the listing system came not just from states, tribunals and individuals, but also from other UN bodies. Thus, for example, in the World Summit Outcome of 2005, member states called on the Security Council to ensure “fair and clear” procedures existed for the listing and delisting of individuals and entities on targeted sanctions lists.251 Similarly, then Secretary-General, Kofi Anan, argued in 2006 that targeted sanctions required four elements to be both effective and legitimate: that the person targeted should have

249 Ibid.
250 Ninth paragraph in the preamble to SCR 1904 (n 12).
(1) the right to be informed of case against him or her, (2) the right to be heard in response to the case, and (3) the right to review by an effective mechanism. To this he added a (4) requirement of periodic review of all sanctions.\textsuperscript{252} In 2012, the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism described the Security Council’s reforms in the intervening period inadequate, suggesting, in particular, that the Ombudsperson’s recommendations be made binding.\textsuperscript{253}

\textbf{C. Interaction and Legality}

We can see a general consensus from the discussion above that an interactive and reciprocal process of communication between the Security Council, the courts and other branches of domestic governments, treaty bodies, regional organizations and affected persons has led to a transformation of listing as a system, and that that transformation has generally brought listing closer to having the quality of law. The fact that the interaction between the Security Council, states and individuals has led to a transformation of listing from a completely managerial system to something with elements of legality thus bears out Fuller’s thesis that law originates in interaction.\textsuperscript{254}

There are also other aspects of this process that resonate with Fuller’s vision of law. In examining the evolution of listing in more detail, we see how the critiques of listing, and the changes to listing, support those elements that Fuller saw as prerequisites for legality.

\begin{itemize}
\item \textsuperscript{252} The unpublished letter by the Secretary-General dated 15 June 2006 was referred to in the Security Council debate on 22 June 2006: UN SCOR, 61\textsuperscript{st} Year, 5474\textsuperscript{th} Mtg., UN Doc. S/PV.5474 (2006) at 5 (hereafter: Kofi Anan Letter to Security Council).

\item \textsuperscript{253} Report of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 26 September 2012 (A/67/396), paragraph 59.

\end{itemize}
The challenges to listing focused on two aspects in particular: the violation of specific rights, and the listed persons’ lack of an effective remedy for denial of their rights. The latter aspect - the right to an effective remedy - is itself a right included in the *ECHR* and the *ICCPR*, but it fulfills a second function as a prerequisite for the enjoyment of the other rights. In the argument that I develop below, I look at the rights discourse in itself, and the insistence on the right of access to court, as indicators of the rule of law. Finally, in a third section, I examine the role of due process, and the development of listing as an application of administrative law.

**C.1. The Rights Discourse**

The rights discourse of the cases and other interactions with the Council illustrates a number of features of Fuller’s vision of law: first, the requirement that law not be internally contradictory, second, the requirement of congruence in law, and, thirdly, the role of implicit law in the understanding and application of what Fuller called “made law”. In the situations giving rise to these cases, on the instruction of an international body, a rule was introduced into the European legal order that ran counter to the principles of that legal system and what Fuller called the “practices and patterns of interaction in the society generally”. The new rule was that certain people, identified by that international body, must lose some rights guaranteed by the legal system on which the rule was imposed. This rule conflicted directly with two of Fuller’s requirements: that law not be internally contradictory, and that the administration of the law should be congruent with the rules as

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255 Article 13 of the *ECHR* and article 2 of the *ICCPR*.

256 See *Kadi, Maduro* (n 95) paragraph 49; *Kadi I ECJ* (n 90) paragraphs 369-372.


258 Postema, “Implicit Law” (n 257) 265.
announced. More fundamentally, it conflicted with the “implicit law”, in Fuller’s terms, of the systems on which it was imposed.

As noted in chapter two, Gerald Postema developed from Fuller’s notion of “implicit law” a concept which he called Fuller’s “congruence thesis”: that is, Fuller’s view that “legal norms and authoritative directives” need to be broadly congruent with “practices and patterns of interaction in the society generally”. When the listing requirements were imposed on the European Union, Canada and other areas, they conflicted not only with the established, “made” laws, but with the implicit law as well; that is, the tacit rules that arise from conduct, not from the determination of somebody in power. The ability to enforce one’s rights through a court of law was not just a feature of these states’ international treaties, constitutions and legislation, but an established, lived experience of the subjects in these states, giving rise to mutual expectations in their relations with the state and each other. This idea is expressed starkly in the opinion of Advocate General Maduro, who warned against showing respect for other institutions - in this case, the Security Council - if the relationship with the other institutions cannot be built on a “shared understanding” of “the fundamental values that lie at the basis of the Community legal order” and “a mutual commitment to protect them”.

For Fuller, common-law jurisdictions provided good examples of implicit law because what he called adjudicative law “projects its roots more deeply and intimately into human interaction than does statutory law”. In the light of this

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259 Fuller, Morality of Law (n 1) 39.
260 As explained in chapter two, the “congruence thesis” is broader than Fuller’s eighth requirement of legality. This requirement is also called congruence but focuses on the consistency between the proclaimed rules and the administration of those rules.
261 Postema, “Implicit Law” (n 257) 265.
262 Postema, “Implicit Law” (n 257) 257.
263 See footnote 273 below for a brief description of the role of the Advocate-General.
264 Kadi, Maduro (n 95) paragraph 44.
265 Fuller, Morality of Law (n 1) at 236; Fuller, HIL (n 249); see also Postema, “Implicit Law” (n 257) 268.
view, it is interesting to note the determinative role played by the common law in *Ahmed*. As seen above, the common law provides all the rights that the applicants needed for relief. Furthermore, legality, in the parlance of the Law Lords, forced Parliament to state expressly when it was limiting rights. The legislation thus had to provide express authorization for any limits, thereby ensuring congruence between the proclaimed law and its administration by officials. Finally, the term “rule of law”, used by the Law Lords to subject the government to the authority of law, became the means whereby the executive could be forced into a process of justifying its actions.

Thus, in *Ahmed*, Lord Hope cites *R v Secretary of State for the Home Department, Ex parte Pierson*\(^{266}\) in the following terms:

> It is well established that Parliament does not legislate in a vacuum: statutes are drafted on the basis that the ordinary rules and principles of the common law will apply to the express statutory provisions.

> ... 

> A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.\(^{267}\)

The case of *Nada* also shows that Fuller’s requirements of congruence and non-contradiction are borne out in the made law at the international level. Thus these principles find expression as a presumption in favour of human rights in the case law,\(^{268}\) a presumption that leads, in turn, to a rule of interpretation in favour of the established human rights law.\(^{269}\)

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\(^{266}\) *Ahmed* (n 139) paragraph 46 (per Lord Hope), citing Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, at 573.

\(^{267}\) *Ahmed* (n 139) paragraph 46, citing Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, at 573 (per Lord Hope).

\(^{268}\) *Nada v Switzerland* (ECtHR) (n 180) paragraph 171, citing the ECtHR case of *Al-Jedda*, discussed in chapter three above.

\(^{269}\) *Nada v Switzerland* (ECtHR) (n 180) paragraphs 170-1; see also the minority opinion of Rodley in *Sayadi and Vinck v Belgium* (n 134).
C.2  Access to Court and the Process of Justification

The second aspect of the listing jurisprudence that deserves particular attention is the focus on access to court. This aspect appears variously in the jurisprudence as access to court, independent review and the right to an effective judicial remedy.

In the course of the listing cases, the courts and rights bodies have shown themselves increasingly willing to engage with the executive or security arm of governance, thus forcing it to justify its exercise of power and promoting a culture of justification. We can see this development by comparing the changing standards of review applied in the Kadi cases. Thus the CFI’s decision in Kadi I accepted without question the Security Council’s assessment of what was needed for security. A similar approach was taken in the earlier cases discussed in chapter three, each of which dealt with a measure that the Security Council alleged was necessary for the sake of security. In these cases, the courts adopted so weak a standard of review that the Security Council did not have to justify its action at all.270 Similarly, in Kadi I, although the CFI found that certain jus cogens rights were applicable to Kadi, and was even prepared to take on the function of reviewing whether they had been violated, its interpretation allowed the political judgment of the body under review – the Security Council – to set the parameters of the right in question.

Thus, for example, the CFI held that the right to a hearing may be limited in the interests of security if the Security Council considers the limitation necessary. The only question a court would ask under such a test is whether the Security Council considers the limitation necessary - a criterion which ultimately renders the court’s role meaningless:

Nonetheless, in circumstances such as those of this case, in which what is at issue is a temporary precautionary measure restricting the availability of the applicant’s property, the Court of First Instance considers that observance of the fundamental rights of the person concerned does not require the facts and evidence adduced against him to be communicated to

270  Bosphorus (n 129), Behrami v. France, application no. 71412/01 and Saramati v. France, Germany and Norway, application no. 78166/01 (Admissibility) and the UK case of Al-Jedda (Al-Jedda HL (n 150)) discussed in chapter three above at section C.
him, *once the Security Council or its Sanctions Committee is of the view* that that there are grounds concerning the international community’s security that militate against it.\textsuperscript{271}

If the legality of a measure requires merely the power-wielder’s opinion that that measure is necessary, review becomes vacuous. By adopting this approach, then, the CFI allowed the Security Council the sole discretion to determine when the interests of security required the rights to be limited, and to what extent.

Dyzenhaus criticizes this type of review for creating what he terms “grey holes”\textsuperscript{272} – areas ostensibly under judicial review but not reviewed by reference to any substantive criteria that allow the courts genuinely to engage with the reasoning of the decision-maker. In cases such as these, the court does not in fact defer to the interests of security, as it makes no independent assessment of the government’s reasons for deciding that there is a threat to security and what measures are necessary to avert the threat. Instead, it defers to the expertise of the decision-maker to make such a decision alone and, by doing so, removes the element of justification central to the rule of law.

However, the jurisprudence that followed the CFI’s judgment took issue with this approach to security. The first critique came from the Advocate General, Maduro.\textsuperscript{273} He criticized the CFI’s decision to restrict itself to a review of *jus cogens* rights, as well as the way it reviewed those rights, by tackling two twin claims in support of the CFI’s approach: first, the claim that the Court should accommodate the security concerns behind listing and, second, that it should defer to the Council’s view of what security required:

The reason would be that the matters at issue are of international significance and any intervention of the Court might upset globally-coordinated efforts to combat terrorism. The argument is also closely connected with the view that courts are ill equipped to determine which measures are appropriate to prevent international terrorism. The Security Council, in contrast, presumably has the expertise to make that determination. For these reasons, the respondents conclude that the Court should treat assessments made by the Security Council

\textsuperscript{271} Kadi I CFI (n 90) paragraph 274 (emphasis added).


\textsuperscript{273} The institution of the Advocate General was created to allow for an independent opinion to the CJEU, which will represent the interests of the EU as a body. See Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (Oxford: Oxford University Press, 2015) at 61.
with the utmost deference and, if it does anything at all, should exercise a minimal review in respect of Community acts based on those assessments.\textsuperscript{274}

However, he rejected these claims, pointing to the Court’s duty to ascertain that the limitations of the applicant’s rights are, in fact, necessary for security:

The Commission rightly points out that the prevention of international terrorism may justify restrictions on the right .... However, that does not \textit{ipso facto} relieve the authorities of the requirement to demonstrate that those restrictions are justified in respect of the person concerned. Procedural safeguards are necessary precisely to ensure that that is indeed the case.\textsuperscript{275}

These procedural safeguards include both the right to be heard by the administrative body that limits the rights, and the right of independent judicial review over that body.\textsuperscript{276}

The judgment of the Grand Chamber, while ostensibly eschewing any power to review the Security Council itself, nonetheless claimed full powers to review the European measure that implemented it. It thus, by necessary implication, reviewed the decisions of the Security Council itself, particularly as its judgment includes an in-depth examination of the lack of due process protections in the Council’s listing procedure. Specifically, it rejected the Council’s delisting procedure because it was “diplomatic and intergovernmental,” providing no direct access to the listed person, and the Committee deciding a delisting request did so on the basis of consensus and subject to a veto.\textsuperscript{277} Furthermore, the Guidelines did not require the Sanctions Committee to communicate the reasons justifying the listing to the listed person, and he or she had no access to the evidence on which they were based. Finally, the Committee was not required to give reasons for delisting.\textsuperscript{278}

In \textit{Kadi II}, both the General Court and the Court of Justice held that the listing procedure was subject to full review, and that this of necessity entailed both a

\begin{itemize}
  \item \textsuperscript{274} \textit{Kadi}, Maduro (n 95) paragraph 43.
  \item \textsuperscript{275} \textit{Kadi}, Maduro (n 95) paragraph 48. See also his reliance on the minority judgment in Korematsu at paragraph 34.
  \item \textsuperscript{276} \textit{Kadi}, Maduro (n 95) paragraph 48.
  \item \textsuperscript{277} \textit{Kadi I} ECJ (n 90) paragraphs 323-324.
  \item \textsuperscript{278} \textit{Kadi I} ECJ (n 90) paragraph 325.
\end{itemize}
substantive and procedural review of the Sanctions Committee itself, that is, a review not only of the apparent merits of the contested measure but also of the evidence and information on which the findings made in that measure are based. 279 This change of approach – from jus cogens-based, limited review to full review – should not be seen as a simple switching of sides; that is, the courts of the EU did not just switch from choosing the value of security to choosing the value of human rights. 280 They moved, instead, to requiring an engagement from the Security Council on the extent to which security concerns render necessary a limitation of human rights. Thus the CJEU, unlike the GCEU, was prepared to accept that a listing might be justifiable even if not all the information on which the listing was based was provided to the Court. 281 It acknowledged that an individual’s right of access to the case against him or her might be limited by legitimate security concerns. 282 But it then engaged, item by item, with the reasons that the Commission provided for Kadi’s listing, and the evidence to support those reasons. It accepted most of the reasons offered as clear enough to serve as a basis of a listing decision, 283 but found the evidence offered for these reasons insufficient or outdated. 284

There are two aspects to this development that bear out Fuller’s vision of law. The courts’ increasing willingness to demand of the Security Council that it justify its actions promotes a culture of justification. As argued in chapter two, a culture of justification is a necessary feature of the rule of law. One of the ways that this culture is created and sustained is through the process of independent review of government decisions, whereby the wielder of power is forced to justify his or her

279 Kadi II GCEU (n 160) paragraph 127-129; Kadi II CJEU (n 160) paragraphs 117.
281 Kadi II CJEU (n 160) paragraph 122.
282 Kadi II CJEU (n 160) paragraph 125.
283 Kadi II CJEU (n 160) paragraphs 141-150.
284 Kadi II CJEU (n 160) paragraphs 152-163.
actions to an independent body. Secondly, from a Fullerian perspective, the right of access to court is a mechanism that protects human agency. When Lord Phillips refers in Ahmed to the right of access to court as “the foundation of the rule of law”, he is acknowledging that this right is the instrument through which the legal quality of a system is maintained. Individuals with access to court remain functioning agents. They can hold officials to a congruent application of the proclaimed law and enter into some form of dialogue with the government and each other on what norms the law should include. In this way, individual rights become the mechanism through which agency can be asserted, as well as the legal framework in terms of which the executive must justify itself.

Finally, the case of Al-Dulimi presents an intriguing possibility; that a Court might disagree with the Security Council on whether there is an emergency at all, or the extent of it, and therefore with the measures that have to be taken to address it. It must noted, however, that there is a significant difference in the factual backgrounds of the Al-Dulimi case and the listing cases discussed in this chapter: Al-Dulimi did not address the problem of ongoing terrorism. Instead, it concerned the process of transferring to a new government the proceeds of members of the previous government. There was no immediate emergency to be resolved. It is still significant that the Court was prepared to rule on the matter, given that SCR 1518 had declared the situation in Iraq a threat to international peace and security. But courts will be far more reluctant to demand of a government, and particularly of an executive, to prove the existence or extent of an emergency in the area of terrorism, both because only the executive is assumed to have the expertise to assess such a risk and respond to it timeously, and also because governments will resist sharing the information on which they are relying.

285 Ahmed (n 139) paragraph 146.
286 SCR 1580 of 2003 (n 232), fourth paragraph of the preamble.
287 In this regard, see the statement by Catherine Marchi-Uhel, the current Ombudsperson, on the dearth of intelligible intelligence information from states (accessible at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090001680630453). [accessed 21 June 2016]
C.3. Listing as Law

The argument that listing as a system has assumed the quality of law - or more of the quality of law - is not new. In particular, scholars in the Global Administrative Law (GAL) project have long argued that the changes in the listing process have resulted from the gradual implementation of administrative legal principles to the Security Council. Thus Mario Savino claims that GAL is “filling the legal gap [presented when global bodies affect individual rights] by promoting the gradual emergence of a Global Rule of Law”\(^{288}\) and Richard Stewart argues that NGO’s and social activists used GAL in order to resist the Security Council’s infringement of individual rights.\(^{289}\)

However, the notion that listing is, or should be, subject to law has been criticized as an inappropriate annexation of an essentially political arena by courts and lawyers. In this respect, Devika Hovell’s recent study of the move towards due process in listing requires careful consideration.\(^{290}\) Examining the growing pressure on the Council to subject listing decisions to a form of judicial review, Hovell points out that some form of deadlock has been reached, with European courts insisting on full judicial review over listing and the Council refusing to accept the authority of any other body over its decisions.\(^{291}\) Hovell identifies three main approaches to the reform of Security Council listing procedure: instrumentalist, dignitarian and public interest-based. The values she sees supported by each approach, in turn, are accuracy, protection of individual interests, and the promotion of the public interest and accountability.\(^{292}\) The first approach, she explains, sees the purpose of due

\(^{288}\) Savino (n 223) 496.
\(^{289}\) Stewart (n 223) 502.
\(^{290}\) Hovell, *Power of Process* (n 56).
\(^{291}\) Hovell, *Power of Process* (n 56) 30 and 162.
process as ensuring the accurate implementation of an underlying law. She sees the focus of the second approach as giving various parties the chance to make representations when their interests are affected, an approach which she describes as “pluralist” partly because the various fora before which the representations are made each apply their local law, and partly because the representations are ultimately based on the interests of the affected parties and not an underlying, common set of legal reasoning. The third approach, which she prefers, serves as a mechanism to “enhance respect for the public interest in decision-making”, a mechanism which operates by promoting dialogue between the Council, the Ombudsperson, and the persons affected by listing.

Hovell’s argument for a “public interest” approach might seem to suggest that law is not the appropriate tool to manage listing. In terms of the themes discussed in chapter two, she might be seen to argue that law has reached its limits at the point that listing decisions are made. Thus she rejects the “instrumentalist” approach on the basis that there are no clear and determinate legal standards for a court to apply. Moreover, she argues, this gap in the law should be maintained:

The ambiguity of the legal rules applicable to the Security Council setting is not ultimately a symptom of juridical ineptitude, but rather the by-product of a deliberate institutional choice to vest broad discretion in the Security Council. The Security Council exercises a hybrid of political and legal authority, and the relationship between law and politics in the Security Council setting is a notoriously complex one. According to the leading commentary to the UN Charter, the Council’s decision-making procedure is very different from that of courts such as the ICJ because, while “[t]he ICJ has to decide exclusively on the basis of international law (Art 38 of


Hovell, *Power of Process* (n 56) 6 and 22.

Hovell, *Power of Process* (n 56) 66-77. In this respect, Hovell adopts a view of pluralism as promoting “agonistic, ad hoc, pragmatic, and political processes of interaction” (Grainne de Búrca, “The European Court of Justice and the International Legal Order after Kadi” (2010) 51 Harv. Int’l L. J. 1 at 32). See further the discussion in chapter 3 above.


Hovell, *Power of Process* (n 56) 103 (footnotes omitted).
the ICJ Statute) . . . the S[ecurity] C[ouncil] has to decide primarily according to political criteria.”

Because of the hybrid nature of the Council, and the political factors which influence its decisions, Hovell argues that it is inappropriate for the courts to claim supremacy over the listing process. Judicial supremacy is thus the second problem which Hovell sees in due-process-based review, as it entails “a fairly radical transformation of the balance between law and politics built into the Security Council setting.”

However, the main difference between the first and third approaches which Hovell identifies is not that the first subjects listing to law and the third subjects it to politics. Both are built on law. The first, however, adopts a positivist vision of international law. As she notes, this is based on state consent and uses formal tests to determine the validity of legal rules. She warns against the consequences of this “formal state-centric approach”. She points out that it refuses to accommodate non-state actors, which, given the effect of listing on individuals, is particularly problematic; it reduces the tools for evaluation of listing to formally binding law, and it requires courts to assume an “all-or-nothing” approach of either complete deference or supremacy.

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301 Hovell uses the term “classical international law” in Hovell, *Power of Process* (n 56) 31.


Hovell’s vision of the third approach is that it “operates within a legal framework ... [but] it does not regard law as fixed. Instead, it encourages participation for the very purpose of ensuring operative legal principles informed by contributions from affected individuals and the broader public.”

Interactional international law does not have the consequences which Hovell sees as emanating from the first approach. It arises from the reciprocal interaction of all the actors in the field; it accepts the notion of a continuum of legality, and it supports a judicial approach to the exercise of public power which avoids both pitfalls of submissive deference and supremacy.

In other words, what Hovell is proposing is interactional international law, recognizing it as the only form of social order that can legitimately regulate listing. What she isolates as the achievements of the Ombudsperson process are exactly those elements of deliberation, reason and persuasion which show that the engagement between actors has moved beyond purely power-based negotiation to the communicative action which is the basis of law:

It is notable that the discourse created through the Ombudsperson process is not confined to member states of the Security Council, or even member states of the United Nations. The Ombudsperson engages in significant outreach in the course of her work, meeting regularly with states, intergovernmental organizations, UN bodies, judges of national, regional, and international courts, prosecutors, private lawyers, academics, representatives of non-governmental organizations, and civil society.

The public interest model relies on participatory procedures and ‘justificatory discourse’ over formal respect for the binding rules as a means to strengthen the legitimacy and accountability of international decision-making. Through the information-gathering process, dialogue with the petitioner, and the production of a comprehensive report containing recommendations to the Sanctions Committee, the Ombudsperson feeds into a dialogue with the Council, the petitioner, and the broader public based on contextual standards and principles. The input of the Ombudsperson serves to remove the discussion a step away from a conversation defined by a clash of self-interests between Security Council members, and provide recommendations and justifications oriented toward the development of a set of common guiding principles. The

305 Hovell, Power of Process (n 56) 165.
306 Brunnée & Toope, Legitimacy (n 249) 21-23.
308 Hovell, Power of Process (n 56) 147 (footnotes omitted).
Council is encouraged to enhance the legitimacy and effectiveness of its decision-making through an appeal not to power politics, but to public reason.  

My argument is not necessarily that the Security Council’s listing process has taken on the quality of law. But it has moved towards law through the reciprocal interaction it has been forced to have with states and non-state actors. Furthermore, any deficits in its legal character arise not because law is by its nature unsuitable in this arena but because the listing system has failed to meet the requirements of the Rule of Law.

1999
UNSC 1267

2000
UNSC 1333
(2000)

2001
UNSC 1390
(2002)

2002
UNSC 1452
(2002)

2003

2004
UNSC 1526

2005
UNSC 1617

Power to Delist

Reasons Offered for (de)listing

Info Provided To Listed Person

Delisting Changed From Consensus

Dialogue With Court & Orgs

All int’l and regional orgs called upon to act consistently with resolution notwithstanding other obligations (para 17)

States ‘strongly encouraged’ to greatest extent possible to inform listees measures imposed against them (para 18)

Requests relevant States to inform listees to extent possible measures imposed on them, Committee’s guidelines, and listing/delisting procedures (para 5)

States ‘urged’ to encourage regional orgs to establish internal reporting requirements and procedures concerning trans-border currency movement (para 5); Regional orgs ‘encouraged’ to cooperate with Committee and Monitoring Team including suppling info to Committee (para 14); regional and sub-regional orgs encouraged to help with capacity building (para 24)
Adopts de-listing procedure. Establishes Focal Point to receive de-listing requests (para 1/Annex I). Power to de-list exclusively with Committee

Focal Point provides info on de-listing procedure – informs listee if delisted or remain on list but no reasons (Annex I, paras 4, 8)

Designating state to provide detailed statement of case for proposed listing with reasons for listing (para 5)

States indicate which part of statement of case may be disclosed to listee (para 6); Secretariat notify listees’s state of publicly releasable part of statement of case, listing effects and de-listing procedures and that state ‘called upon’ to take ‘reasonable steps’ to provide info to listee (paras 10,11)

Narrative Summary of reasons for listing to be placed on website (para 13)

Narrative Summary of reasons for listing to be placed on website (para 13)
2009

UNSC 1904 (2009)

Ombud to provide report with principal arguments concerning de-listing request (Annex II, para 7(c)); Committee alone decides de-listing (Annex II, para 10)

‘calls on’ Committee members to make every effort to provide reasons for opposing de-listing requests (para 25); Reasons offered for retaining listing but not for de-listing (Annex II, paras 11-13)

Detailed statement of case: releasable except parts member state deems confidential (para 11)

Committee decide de-listing using normal decision-making procedures (Annex II, para 10) – Consensus procedure set out in Committee Guidelines

Member states/ int’l orgs encouraged to inform Committee of relevant court decisions/proceedings (para 15); Monitoring Team provide Ombud w/ relevant court decisions/proceedings and relevant info from int’l orgs (Annex II, para 3(a))

2010

Ahmed SCA (January)

Kadi II GC (September)

2011

UNSC 1989 (2011)

Ombud recommends whether to delist (para 21); where Ombud/designating state recommends de-listing, listing ceases after 60 days unless Committee consensus otherwise. If no consensus, Committee member can request decision by SC and listing remains until SC decides (paras 23, 27)

States making delisting requests ‘encouraged’ to provide reasons (para 30); Committee members directed to provide reasons for opposing delisting request (para 33); Committee reasons to be shared with member states and national and regional courts (para 33)

Listing removed 60 days after Ombud report recommends (or designating state requests) delisting unless Committee consensus to retain listing or Committee member refers to SC (paras 23, 27 and 28); If Ombud recommends retaining listing BUT Committee member suggests de-listing, normal consensus procedure applies (Annex II, para 11)

‘Requests’ member states/relevant int’l orgs encourage listees challenging listing in national/regional courts to submit de-listing petition to Ombud (para 26); Committee reasons provided to national/regional courts (para 33); Designating state ‘encouraged’ to inform Monitoring Team whether national court/ other legal authority reviewed listee’s case or judicial proceedings begun (para 50); need for enhanced cooperation with relevant int’l/regional orgs/agencies (para 52)

2012

UNSC 2083 (2012)

Committee now provides reasons for both retaining listing AND de-listing (Annex II, para 14)

Committee ‘encouraged’ to meet with relevant national/regional orgs/bodies (para 34)
Nada ECtHR (September) 2013

Kadi II CJEU (July) 2014

UNSC 2161 (2014)
Chapter Five

Legislation

The preceding two chapters applied the analytical framework of chapter two to two sets of Security Council measures. In chapter three, I explored the challenges that resulted from the sweeping reach of Security Council resolutions, as they forced various courts in different jurisdictions to grapple with the tension between these resolutions and their own legal systems. Chapter four examined the outright resistance which the Security Council’s listing system received from these courts and other fora, showing how the requirements of legality came to gain a hold on the Security Council’s regime as a result.

This chapter addresses the emergence of sweeping “legislative” resolutions by the Security Council. I claim that as a type of decision-making, legislation is different from listing. Legislation by the Security Council is a radical departure from its previous practice, but also from the way in which international law-making is currently understood. Moreover, it is not amenable to reform in the same way that listing is. As a result, it poses a more insidious and far-reaching threat to individuals than listing does, as it has the potential to give states cover for their own potentially severe anti-terrorism measures.

We will see that, whereas listing continues to face resistance, legislation is currently fairly widely accepted by states. Many commentators take this general acceptance as a basis to argue that Security Council legislation is lawful. However, the legal philosophy of Lon Fuller, and the notion of interactional law developed by Jutta Brunnée and Stephen Toope, highlights several ways in which such legislation does not meet the rule of law, and this casts doubt on the capacity of the Security Council to legislate.

In the sections below, I first explain what I mean by the term “legislation” (section A), and set out the three legislative resolutions that the Council has produced thus far (section B). Section C examines how Security Council legislation has been received by states and scholars, concluding that a widespread acceptance has emerged of the legality, if not always the legitimacy, of Security Council legislation. In section D, I challenge the view that Security Council legislation is lawful by evaluating it in the light of Fuller’s requirements of legality and the notion of interactional law of Brunnée and Toope.
A. Security Council Legislation: A New Practice

Security Council Resolution 1373 of 2001, passed 17 days after the attacks of September 11 on the World Trade Centre and the Pentagon, presented a fundamental change in Security Council practice, as explained in an influential comment by Paul Szasz. Szasz identified the constraints under which the Council had previously operated, namely that its decisions have to be taken in the exercise of its “primary responsibility for maintaining international peace and security” and that the binding nature of these decisions was clearest when the Council was acting under Chapter VII - that is, when it had determined that there was a “threat to the peace, a breach of the peace or an act of aggression”.¹ He suggested that these constraints, together with the practice of the Council for more than five decades have created the impression that its powers are to be exercised almost exclusively with respect to particular conflicts or situations. In this regard the Council has frequently, especially since the end of the Cold War, imposed economic sanctions or other restrictions requiring compliance by all states - expressed by stating that the “Council decides that all States shall ....”. By their nature these restrictions are imposed for a limited purpose - to secure compliance by a target state - and explicitly or implicitly are limited in time until that purpose is accomplished. These decisions of the Council cannot, therefore, be considered as establishing new rules of international law.²

He noted that, when it did deal with more general situations, such as the protection of children in conflicts, humanitarian questions and international terrorism, the Council did not phrase the operative paragraphs of its resolutions in compulsory terms. Consequently, these resolutions did not establish new rules of international law either.³

However, in SCR 1373, the Council departed from its previous limited and cautious practice. Acting on a draft proposed by the United States and explicitly referring to Chapter VII of the Charter, the Council adopted Resolution 1373 (2001), by which it decided in two operative paragraphs “that all States shall” take certain actions against the financing of terrorist activities, as well as a miscellany of other actions designed to prevent any support for terrorists and terrorist activities... In the past, as pointed out above, the Security Council has often required states to take certain actions, such as to implement sanctions against a particular state or to cooperate with an ad hoc tribunal, but these requirements always related to a particular situation or dispute and, even though not explicitly limited in time, would naturally expire when the issue in question and all its consequences were resolved. By contrast, as Resolution 1373, while inspired by the attacks of September 11, 2001, is not specifically related to these (though they are mentioned in the preamble) and lacks any explicit or implicit time limitation, a significant portion of the resolution can be said to establish new binding rules of international law.

² Szasz (n 1) 901-2.
³ Szasz (n 1) 902.
international law - rather than mere commands relating to a particular situation-and, moreover, even creates a mechanism for monitoring compliance with them.  

I follow this approach when I suggest that there is an essential distinction between all of the Council’s previous activity – including listing – and the legislative resolutions that began with SCR 1373. As explained in chapter four, listing entails an instruction by the Council that particular action be taken against particular persons and entities identified by the Council itself, through one of its committees. In a domestic system, legislatures set up agencies to carry out specific programmes, and the measures by which they do so are considered legislation. Domestic analogies, however, are not definitive in this case. I am not defining legislation by reference to what domestic legislatures do, but by the criteria set out below and, in particular, the creation of new, general norms. Through its listing programme, the Security Council was, in essence, giving itself the right to determine which persons and entities should, in some way, be restrained and prevented from causing harm. The closest domestic analogy we could find for this is probably executive action. The resolutions discussed in this chapter, however, purport to create new rules of law and have been described as legislation. In passing these resolutions, the Council is taking on a completely different function.

In this section, I set out the main definitional criteria which the scholarship has produced to identify the phenomenon of Security Council legislation. Seen as a process, the term “legislation” denotes the creation of norms by which the Councils intends to bind all states, irrespective of their consent. As a product, the term denotes the norms so created. The central definitional requirement of the process is that it is unilateral, purporting to create law without the approval or involvement of any other actor. Where the product is concerned, three definitional requirements have been identified, namely, that the norms created by the resolution be general, new and mandatory.

If these prerequisites are met, then we can use the term “legislation” to describe the Council’s activity and the resolutions themselves. However, my use of this term should not be seen

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4 Szasz (n 1) 902.
5 The committee which the Security Council set up consists of all the states parties on the Security Council itself. It is therefore slightly artificial to see the committee as a separate agency.
7 The administration of this instruction is, of course, subject to administrative law, as established by the cases in chapter four.
to confer validity on the process or the product, as the question of the Security Council’s legislative capacity is still to be addressed. The discussion is limited at this stage to identifying the definitional criteria for the phenomenon. I will argue in chapter six that the Council will almost never create law through this “legislative” process, but I nonetheless follow the scholarship by using the term “legislation” to describe what the Council does and the resolutions it produces.

A.1 The Product: General, New, Mandatory Norms

Before a Security Council resolution can be described as legislation, almost all commentators require that the norms it creates be general. Many add that these norms must also be new - in other words, that the Security Council, in passing the resolution, must have attempted to modify existing norms and introduce new law. Finally, the resolutions must be mandatory, creating binding obligations without reference to the consent or views of states or other actors within international law.

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9 Yemin (n 8) 6; Kirgis (n 8) 520; Szasz (n 1) 901-2; Marschik (n 8) 5-6; Happold (n 8) 596-598; and Asada (n 8) 15-16.

A.1.1 Generality

Generality is the main criterion that has been isolated by commentators to distinguish between a norm and an instruction. The latter may be authorized by law, but is limited to a specific situation. The former applies throughout the legal community. However, the term “generality” has a very different meaning depending on whether it relates to the subject matter of the resolution or merely to the addressees of the resolution. Since its inception, the Security Council has sometimes addressed its resolutions to specific states or non-state actors, but it also issued instructions to all states on particular issues. If the latter category is seen to fulfil the generality requirement, then all sanctions become legislation because they are “directed to all member states and sometimes even to non-members”.\textsuperscript{11}

Although sanctions are addressed to all states, they constitute specific instructions with respect to specific problems. They are also designed to resolve the specific problem, after which they would fall away. They are therefore limited with respect both to subject matter and to period of application. In Szasz’s terms, they are not legislation but “mere commands relating to a particular situation”.\textsuperscript{12} This interpretation of generality has also been adopted by all commentators writing after 28 September 2001. Thus Marschik requires of “legislative” norms that they “do not enforce the peace in a specific political crisis, but regulate rights and obligations of States on a wider issue with long-term or indefinite effect”.\textsuperscript{13} Similarly, Happold argues that, because sanctions relate to a specific incident or problem, they are not “applicable to all persons or particular classes of persons (rather than to specified individuals), in all circumstances or in all situations where particular criteria have been satisfied (rather than to specific situations or conduct)”.\textsuperscript{14} For Happold, legislation must consist of “abstract legal propositions”.\textsuperscript{15}

\begin{footnotesize}
\footnote{Kirgis (n 8) 520.}
\footnote{Szasz (n 1) 902.}
\footnote{Marschik (n 8) 5.}
\footnote{Happold (n 8) 597.}
\footnote{Happold (n 8) 597. See also Martinez (n 10) 338.}
\end{footnotesize}
A suggestion that generality is not required for legislation relies, in part, on the fact that national legislatures produce “private” acts. However, as noted above, I am not taking the activities of a municipal legislature as the blueprint for the concept of legislation. Instead, I define (the process of) legislation as the unilateral creation of law. Furthermore, I adopt Fuller’s vision of the law so created, which of necessity requires that the norms be of general application. As we saw in chapter two, Fuller described law as the “enterprise of subjecting human conduct to the governance of legal rules”, which rules had to be general; that is, applicable to the relevant community so governed as a whole, and not to specific persons or situations identified by the governor (as, for example, in listing). To the extent that the Security Council is purporting to create law, then, its “legislation” attempts to introduce or amend those general rules by which human (and, in this instance, state) conduct is governed.

The interpretation of generality which I have suggested above means that even overt statements of law by the Security Council will not constitute legislation if they relate to a specific incident. As Happold notes, the application of abstract legal propositions to a concrete situation is a judicial, rather than a legislative, function. Two elements are central to this function: that it involves a specific case or group of cases, and that it purports to apply existing law, rather than to create new law. In Happold’s terms, any law that might be created through the judicial process

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16 Hameed (n 8). Hameed phrases his argument as a critique of Talmon’s description of legislation, and includes the point that there is an insufficient theoretical distinction between generality and abstractness and that Talmon does not distinguish between legislation and customary law. See pages 9-13.

17 See also Abi-Saab (n 8) 117.


19 Generality was the first of Fuller’s eight requirements for law. See the discussion in chapter 2 above.

20 Such statements can either purport to be general statements of the applicable law in a specific situation, or legal findings on a particular issue. Examples of the former include the Security Council’s “reaffirmation” of the right to self-defense in its two resolutions responding to September 11. Examples of the latter can be found in SCR 687 of 1991, which contained a number of legal decisions on Iraq’s invasion of Kuwait, and SCR 757 of 1992, on the conflict between Bosnia-Herzegovina and its neighbours. SCR 687 included a demand that Iraq respect a particular boundary between itself and Kuwait. Both SCR 687 and SCR 757 purported to indemnify any contractual partners who, by complying with the resolution, breached a contract with the governments on whom sanctions had been imposed. See SCR 687 of 1991, UN Doc S/RES/687 (1991) paragraph 29 and SCR 757 of 1992, UN Doc S/RES/757 (1992) paragraph 9. Kirgis describes the latter as an imposition of a “force majeure” defence. Kirgis (n 8) 524.

21 Happold (n 8) 598.
is created by “refinement and elaboration”\textsuperscript{22} of existing norms. Such decisions may, like judicial decisions, have precedential value, but they cannot be applied directly to analogous situations.\textsuperscript{23}

A.1.2 Newness

Fuller did not require that norms be “new” to have the quality of law. However, “newness” is a definitional requirement for Security Council legislation because the Council purports, by such legislation, to \textit{create} law.\textsuperscript{24} This presents another reason why general statements or “reaffirmations” of existing law do not constitute legislation. If the norms to which the Council refers are already part of international law, then such reaffirmations are merely rhetorical devices with no legal significance, although they might in some instances be intended to encourage compliance with international law.\textsuperscript{25} Resolutions do not constitute legislation if they do not attempt to modify existing law, or to introduce new norms.

However, in some cases the Security Council might refer to a norm as though it reflects customary international law when the norm is, in fact, “not (yet) part of international law”.\textsuperscript{26} A good example is provided by the Security Council’s “reaffirmation”, in the preambles of SCR 1368 and SCR 1373 of 2001, of states’ rights to self-defence. While self-defence was undeniably a right under customary international law, these two resolutions appeared to interpret it to allow for the

\begin{itemize}
\item \textsuperscript{22} Happold (n 8) 598.
\item \textsuperscript{23} This does not mean that judicial pronouncements are unrelated to law-making. As noted above, the Security Council has been treated as a court by some commentators in their treatment of the law on the use of force, and this has considerably extended the Council’s legal authority. However, the “case-law” described above developed because states, courts and commentators – the traditional primary and secondary sources of international law - chose to factor the Security Council’s views into their investigations. This forms part of the traditional law-making process and is therefore relevant to this study. Where the Council makes overt findings of law with respect to a particular event, it is arrogating the judicial function to itself, independent of the views of the wider global community. This unilateral assumption of the judicial function may be as invalid as the unilateral assumption of the legislative function, but it is outside the scope of this thesis.
\item \textsuperscript{24} Yemin (n 8) 6; Kirgis (n 8) 520; Szasz (n 1) 901-2; Marschik (n 8) 5-6; Happold (n 8) 596-598; and Asada (n 8) 15-16.
\item \textsuperscript{25} This is one of the functions that Szasz identifies as a traditional function of the Security Council. See Szasz (n 1) 901.
\item \textsuperscript{26} Marschik refers to this as a “grey area”. See Marschik, “Legislative Powers” (n 10) 461.
\end{itemize}
use of force against non-state actors in the territory of another state.\textsuperscript{27} In Marschik’s analysis, the Council could in this situation be intending to enact general rules.\textsuperscript{28}

Should such a “declaration” of customary law in fact present a new norm, then the criterion of newness is met. However, I submit that such declarations do not constitute legislation, because they do not meet the remaining criteria for legislation. This point is argued further below.

\textbf{A.1.3 The Creation of Binding Obligations}

Before a Security Council resolution can be classified as legislation, most authors require that it be mandatory.\textsuperscript{29} This binding quality is an attribute of the resolution itself - that is, legislation as a product. But it is also integrally linked to the process of legislation, as it goes hand in hand with the requirement that the Council act unilaterally when it legislates. If the Council sets out its measures as recommendations, then it is signalling that states may choose whether or not to give effect to the norm. In such cases, it is in effect inviting states to participate with it in establishing a new norm and thereby working within the traditional framework of international law-making. Its own suggestion on the law is neither binding nor unilateral.

To see whether the Council has purported to create a binding obligation, we need to examine the form of the measure it has adopted and to establish the intention of the Security Council in adopting it. When they describe Security Council legislation as mandatory, most authors mean that the resolutions must be passed under Chapter VII.\textsuperscript{30} However, when the Security Council sets out a measure as a “decision”, these are binding by virtue of states’ commitment under article 25 of the UN Charter to comply with the Council’s “decisions”, even if the Council is not acting

\begin{itemize}
  \item \textsuperscript{27} Christine Gray, \textit{International Law and the Use of Force}, 3\textsuperscript{rd} ed. (Oxford: Oxford University Press, 2008) 199 (hereafter: Gray).
  \item \textsuperscript{28} Marschik, “Legislative Powers” (n 10) 461. He points out that such a declaration of “existing” law could also be an (erroneous) attempt to apply law to a specific situation. In such a case, the Security Council would be carrying out a semi-judicial function. As explained above, its resolution would not constitute legislation because it does not meet the requirement of generality.
  \item \textsuperscript{29} Szasz (n 1) 901-2; Marschik (n 8) 5-6; Marschik, “Legislative Powers” (n 10) 461; Happold (n 8) 596-598; Martinez (n 10) 338; Dantiki (n 8) 656.
  \item \textsuperscript{30} Szasz (n 1) 901-2; Marschik (n 8) 5-6; Marschik, “Legislative Powers” (n 10) 461; Happold (n 8) 596-598; Martinez (n 10) 338; Dantiki (n 8) 656.
\end{itemize}
under Chapter VII.\(^{31}\) In addition, the fact that a resolution is passed under Chapter VII does not, in itself, indicate that its provisions are mandatory. This is because article 41 allows the Security Council to take a range of non-binding measures when it acts under Chapter VII.

The three resolutions addressed in this chapter are clearly binding, as they were not only expressly passed under Chapter VII, but also contain a number of measures phrased as “decisions”.\(^{32}\) There may, however, be more subtle instances in which a measure, though formally non-binding, is treated as binding in practice. For example, the most recent legislative resolution requests the monitoring bodies, which were created to oversee the implementation of both resolutions,\(^{33}\) to “identify principal gaps” in the capacity of states to implement the anti-terrorism resolutions.\(^{34}\) These monitoring bodies can bring a significant amount of pressure to bear on states,\(^{35}\) and they may choose to do so in respect of non-binding recommendations as well as binding decisions. One possible example of a non-binding resolution which could be shored up by considerable pressure from the Counter-Terrorism Committee (CTC) is SCR 1624 of 2005, which “calls upon” states to take a number of measures, including prohibiting the incitement of

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32 The three resolutions considered in this study are SCR 1373, UN Doc S/RES/1393 (2001) (hereafter: SCR 1373); *Non-proliferation of weapons of mass destruction* Security Council Resolution 1540, UN Doc S/RES/1540 (2004) (hereafter: SCR 1540) and Security Council Resolution 2178, UN Doc S/RES/2178 (2014) (hereinafter: SCR 2178). All of these resolutions were passed expressly under Chapter VII, and the central body of the measures are phrased as “decisions”.

33 See the discussion of the work of the CTC and Counter-Terrorism Committee Executive Directorate (CTED) below in section B.

34 SCR 2178 (n 32) paragraph 24.

35 See J. Craig Barker, “The Politics of International Law-Making: Constructing Security in Response to Global Terrorism” 2007 (3) J. Int’l L. & Int’l Rel. 5 at 19 (hereafter: Barker) for a description of the various forms of pressure which the CTC can apply to member states, including exposure through the states’ reports and the CTC’s analysis of these reports. He also points out that “the creation of the Counter-Terrorism Committee Executive Directorate (CTED) by Resolution 1535, although specifically aimed at providing technical assistance to states to enable them to comply with their obligations, has the effect of ensuring that states are unable to complain of lack of capacity as an excuse for non-compliance.” See also Kim Lane Scheppel, “The Empire of Security and the Security of Empire” (2013) 27 Temp. Int’l & Comp. L.J. 241 at 274 (hereafter: Scheppel), for an example of how Mexico was pressurised by the CTC to enact certain legislation that it initially resisted, and Laurence R. Helfer, “Nonconsensual International Lawmaking” (2008) U. Ill. L. Rev. 71 at 111 (hereafter: Helfer).
terrorism, and denying entry of suspected terrorists to their territory.\textsuperscript{36} Another is the Council’s (non-binding) definition of terrorism.\textsuperscript{37} In choosing which measure to focus on in its monitoring and supervision of states’ implementation of the resolutions, the Council thus has the capacity to ensure that a hortatory provision is given full legal effect in practice.\textsuperscript{38}

I suggested above that the mandatory nature of a resolution is closely linked to the unilateral process by which the Council claims to create new law. I also raised the problem of whether to classify one particular type of Council activity, namely, its declaratory references to (non-existent or emerging) norms of customary international law, as legislation. I suggest that such declarations should be seen in the same way as recommendations, that is, that they fail to meet the interlinked requirements of bindingness and unilateral action.

There is a crucial difference between a claim that international law already contains a particular norm and a claim unilaterally to be able to create a norm. If it declares that a particular norm forms part of customary international law, the Council is invoking the wider, consent-based process by which international law is traditionally formed. In these cases, it may be contributing to the development of the law. However, the Council has not yet claimed the authority to establish customary international law by its mere \textit{fiat} - a claim that would logically be impossible, given how customary law is defined. In declaring that a norm already forms part of international law, the Council is essentially offering an interpretation of the law to the international community. Its reading may be taken up and advanced by commentators,\textsuperscript{39} but it may also be rejected as incorrect - as in the ICJ’s findings on self-defence against non-state actors in the cases of \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian

\textsuperscript{36} UN Doc S/RES/1624 (2005), paragraphs 1 (a)-(c) (hereafter: SCR 1624). Bianchi criticizes the wording of this resolution and others for not establishing clearly whether the provisions it contains are binding. See Andrea Bianchi, “Security Council’s Anti-Terror Resolutions and their Implementation by Member States” (2006) Journal of International Criminal Justice 1044 at 1047-8 and 1050.


\textsuperscript{38} See also UN Docs S/2006/737, UN Doc S/2008/29 and UN Doc S/2012/16 for reports of the Counter-Terrorism Committee on how it monitors the implementation of SCR 1624.

\textsuperscript{39} See, for example, Gray (n 27) 134-137.
I submit, therefore, that the declaration of law should be seen as a recommendation on how the law should be interpreted.

Because these declarations invoke the traditional, consent-based process through which international law is traditionally formed and maintained, they also do not meet the requirement of unilateral law-making, as is discussed in the next section.

A.2 The Process: The Unilateral Creation of Law

International law has hitherto been created through a consensual process in which the Security Council has often played a significant role. One area in which its opinion plays a major role is in the literature and case law interpreting articles 2(4) and 51 of the UN Charter – that is, the articles prohibiting the use of force and allowing states to use force in self-defence. For example, Murphy equates Security Council resolutions with international “case law”, Franck relies on the Security Council for each of his legal propositions in justifying the invasion of Afghanistan and Harris, Bowett and Byers note Security Council approval, condemnation and even mere silence when discussing the legality of particular instances of the use of force. Byers bases part of his argument that states have attained the right to use force against state-sponsored terrorism on the Council’s changing reaction to this defence over the years, a development that has brought some states to

43 David Harris, Cases and Materials on International Law, 7th ed. (London: Sweet & Maxwell, 2010) at 889 (hereafter: Harris, 7th ed). Harris notes reaction and lack of reaction by the Security Council to armed force at pp 913, 925, 938, 930, 932 and 940 nn 71-72 and note 1 on p 940 (India’s invasion of Goa, Argentina’s invasion of the Falkland Islands, the “cumulation of events” approach to an armed attack; Israel’s raid on Beirut in December 1968; the Israeli raid of Lebanon in 1982; the Israeli bombing of PLO headquarters in Tunisia in 1985; and the Harib Fort Incident in 1964).
46 Byers (n 45).
suggest that use of force against state-sponsored terrorism is permissible only if the Security Council affirms the right in advance.47

However, in these cases, the Council has played this role because states, courts and commentators have chosen to consider its opinion in weighing up the legality of a particular activity or the development of a particular rule of law. The distinction is important; it means that it is the other parties in the creation of international law who have given the Security Council’s opinion its special place. The Council is therefore not making law alone, but in conjunction with a range of other actors, who have chosen to include it. In this way, the Security Council is already part of international law-making. Before commentators classify measures as “legislation”, however, they require that the Council step outside of the consensual process and bind states to a new rule by its fiat. This means that the Security Council is legislating only when it purports unilaterally to create new law.48

At this point, it is necessary to establish quite how much of a change is represented by the Security Council’s claim unilaterally to create binding international law. To do so, we need to see, first, whether the international community has hitherto afforded any other body the authority unilaterally to create binding norms. Secondly, we need to compare the unilateral process of law-creation with the way in which international law is otherwise formed. To carry out this comparison, we will refer back to the discussion in chapter two of the positivist concept of the sources of international law, as well as the alternative conception of international law suggested by Brunnée and Tøope.

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47 Gray notes: “Another possible restriction on this apparently very wide and, for many States, new doctrine of self-defence is that the right of self-defence against terrorism may exist only in cases where the right has been asserted by the Security Council .... Several States regarded this Security Council backing as crucial to the US claim to self-defence.” See Harris, 7th ed. (n 43) 942. See also José Alvarez, “The Security Council’s War on Terrorism: Problems and Policy Options” in Erika De Wet & André Nollkaemper, eds., Review of the Security Council by Member States (Antwerp: Intersentia, 2003) 119 at 184-189 and 207-209 (hereafter: Alvarez) for a general discussion of Security Council’s role in the development of customary international law.

48 Yemin (n 8) 6; Kirgis (n 8) 520; Szasz (n 1) 901-2; Marschik, “Legislative Powers” (n 10) 176-8; Happold (n 8) 596-598; Asada (n 8) 15-19; Tsagourias (n 8) 540.
A.2.1 Treaty-Based Law-making Bodies in the Global Sphere

Treaties have created institutionalized forms of decision-making that resemble legislative processes to some extent. However, a number of features limit the impact of these treaty-based processes, as the following brief survey will show.

So-called “law-making”\textsuperscript{49} treaties sometimes create legal norms through their own text,\textsuperscript{50} and sometimes they set up a framework by which legal norms can be created.\textsuperscript{51} A second, related type of treaty sets up an international organization that creates norms for its members on an ongoing basis.\textsuperscript{52} Both these types of treaty seem to have a legislative character, but they remain binding only on the States Parties to them, and therefore do not constitute legislation. However, they may have what Brunnée describes as a “legislative flavour”,\textsuperscript{53} which arises from the institutionalization of the norm-creation process.

Institutionalization does not in itself create legislation, but there are a number of ways in which the process of rule-making within an institution might reduce the role of each state’s consent. First, the new rule might not need the consent of all the parties to be adopted by the organization.\textsuperscript{54} Second, the ratification process, although requiring the consent of the member states, might allow this consent to be assumed or expressed tacitly, through a range of “opt-out”

\textsuperscript{49} Harris, \textit{7th ed} (n 43) 44, n 1.

\textsuperscript{50} These include treaties on particular aspects of international law, such as the \textit{Vienna Convention on the Law of Treaties}, human rights treaties such as the \textit{Convention on the Elimination of All Forms of Discrimination against Women}, 18 December 1979, G.A. Res. 34/180, U.N. Doc. A/34/46, and international criminal law treaties such as \textit{Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity}, 26 November 1968, G.A. res. 2391 (XXIII) U.N. Doc. A/7218 (1968).

\textsuperscript{51} The “framework” treaties provide for further conferences to draw up protocols covering areas of the law as the circumstances change. Examples abound in the law of armed conflict and environmental law. See, for example, the \textit{Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects}, 10 October 1980, 1342 U.N.T.S. 137, and the \textit{United Nations Framework Convention on Climate Change}, 9 May 1992, 771 U.N.T.S. 107.

\textsuperscript{52} The framework treaties (see n 51) create institutions which oversee the work of the framework convention and its protocols, setting up the meetings of the Conference of Parties for further negotiations, and monitoring compliance with the treaties. See, for example, the extensive responsibilities of the Climate Change Secretariat at http://unfccc.int/secretariat/history_of_the_secretariat/items/1218.php [accessed 21 June 2016]. Other international organizations include the United Nations itself, the European Union, the World Trade Organisation (http://www.wto.org/), and the International Postal Union (http://www.upu.int/) [accessed 21 June 2016].


\textsuperscript{54} Brunnée (n 53) paragraphs 15-19.
procedures\textsuperscript{55} - a process that allows a rule to come into force sooner, without waiting for domestic approval processes.\textsuperscript{56} Third, some systems allow a new rule to bind consenting states immediately, omitting the threshold requirement that would allow rules to come into force only when a minimum number of states have ratified it.\textsuperscript{57} And, finally, an institution might promulgate rules that bind the states directly, without any ratification.\textsuperscript{58} Such instances are rare, are generally expressly provided for in the underlying treaty,\textsuperscript{59} and restricted to specific, narrowly defined issues.\textsuperscript{60} The only exception is found in the European Community Treaty, which allows the European Union to adopt regulations directly binding in member states, without any implementation on their part. For present purposes, it is sufficient to note that the European Community Treaty balances this form of binding legislation, for which it provides expressly, with a representative and democratic process. The procedure by which the legislation is drawn up requires the participation of the plenary Council of Ministers, the administrative European Commission, and the directly elected European Parliament.\textsuperscript{61}

In summary, then, when treaties permit a body to propose new rules for the membership of the whole, the body in question is a plenary body representing all the states parties to the treaty. Secondly, although the consent of the states parties may in some cases be assumed, members of the treaty can opt out either of the rule or of the organization created by the treaty, and therefore

\textsuperscript{55} Brunnée (n 53) details a range of opt-out procedures at paragraphs 20-28.

\textsuperscript{56} Brunnée (n 53) paragraph 28.

\textsuperscript{57} For example, article 55 (6) of the Constitution of the International Telecommunication Union and article 42 (6) of its Convention. See Brunnée (n 53) paragraph 15.

\textsuperscript{58} Brunnée (n 53) paragraphs 29-31.

\textsuperscript{59} There is, however, an argument that international organizations and treaty bodies can have implied law-making powers. The idea that international institutions may have powers which are not expressly set out in their constituent documents was established by the Reparations for Injuries suffered in the Service of the United Nations Case [1949] ICJ Rep 174. It relies on the notion that international institutions have inherent authority to do whatever is required to fulfil their mandates effectively. However, as Alvarez notes, the doctrine of implied powers has, on occasions, been interpreted very expansively to allow for functions that are consonant with the founding principles of the organization, even if they are not essential to the functioning of the organization. See José E. Alvarez, International Organizations as Law-makers (Oxford: Oxford University Press, 2005) at 92-5 (hereafter: Alvarez, International Organizations); and Brunnée (n 53) paragraph 29.

\textsuperscript{60} Brunnée (n 53) paragraph 29.

\textsuperscript{61} Articles 249, 205, 251-2 of the European Community Treaty, 25 March 1957; Brunnée (n 53) paragraphs 52-54. Note that it may be slightly misleading to include the European Union amongst a survey of treaty bodies. The European Union has arguably grown into something more than an international organization, and has been described both as a “proto-European state” (Alvarez, International Organizations (n 59) 72) and as an “embryonic federation” (Trevor C. Hartley, “The European Court, Judicial Objectivity and the Constitution of the European Union” (1996) 112 Law Q. Rev. 109).
can ultimately choose not to be bound without their consent. Thirdly, the plenary bodies were created expressly to help develop the treaties and propose changes to the law that would then be adopted and brought into effect by the states parties to the treaty. Furthermore, the rules that the decision-making bodies can impose directly on states are of a technical nature, or elaborate on the already existing treaty system. Finally, the process whereby consent is expressed is also accepted by member states when they join the treaty body. The notion of a non-representative, supranational body creating legal norms which are directly binding upon states without their consent or even involvement is therefore a radical departure from treaty law.

A.2.2 International Law-making in a Non-Treaty Setting

However, international law is not made only through treaty institutions. We need also to compare Security Council legislation with the law-making process which the global community follows outside of the treaty system.

Chapter two showed that the traditional, positivist conception of customary international law (“a general practice accepted as law”), isolates two central prerequisites for a rule of custom, namely, practice and opinio juris. Together, these elements are meant to establish what legal norms the states themselves accept. We saw, however, that this formula for customary law is plagued by a number of contradictions, leading to a loose and sometimes unpredictable application of the term “customary law”. We explored Martti Koskenniemi’s analysis, which attributed the theoretical incoherence of the positivist description of custom to the fact that there is no clear distinction between its two defining elements. Practice (the material element of custom) and opinio juris (the psychological element) blend into one another, because each is necessary to determine the existence of the other.

62 Brunnée (n 53) paragraphs 30-34.
63 The European Union is something of an exception. It does allow for international legislation - that is, it allows its central organs to issue regulations that create rights directly for the citizens of each member state, without the member state’s consent. For these particular measures, states do not have the option to “opt out”. However, this legislative process is provided for by treaty and the legislation drawn up by a number of representative plenary bodies, one of which is directly elected.
64 Article 38 of the Statute of the International Court of Justice.
We then explored the consequences identified in scholarship and jurisprudence of the lack of determinacy of custom. These include an ever-shifting weighting of the one element over the other, the reference to the practice or legal opinions of actors other than states, and the occasional reliance on the moral value of a rule, which would seem to jettison the consent requirement entirely.\(^{65}\) The gap between positivist theory and law-making in practice casts some doubt not only on the particular formula by which state consent is meant to be ascertained, but also on the very notion that international law is based on the consent of states. Given the uncertainty around the role of consent, it might then be argued that unilateral legislation by the Security Council is not such a radical departure from how international law is currently formed.

To determine the magnitude of the step taken by the Security Council, we need a more compelling theory of how international law is currently formed. Chapter two introduced Brunnée and Toope’s alternative conception of “interactional law”, drawing on Lon Fuller and the work of constructivist international relations theorists. Their approach does not exclude the consent of the governed, but reframes it as a sense of obligation - of fidelity to law - which arises from the practice of legality:

> Only when the conditions of legality are met, and embraced by a community of practice, can we imagine agents feeling obliged to shape their behaviour in the light of the promulgated rules.\(^{66}\)

Under this approach, consent is still integral to law-making because law arises from a process of reciprocal interaction between the participants of the legal system. The interaction leads to shared understandings, on the basis of which norms can be formed.\(^{67}\) These norms will be legal norms, and become the source of obligation, if they meet Fuller’s eight “rule of law” criteria.\(^{68}\) Furthermore, the legal norms must be affirmed and upheld by an ongoing practice of legality, which entails ongoing buy-in from the participants of the legal system. In this sense, “consent” is indispensable to law-making.

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\(^{65}\) See section B of chapter two.


\(^{67}\) Brunnée & Toope, *Legitimacy* (n 66).

\(^{68}\) Brunnée & Toope, *Legitimacy* (n 66).
However, state consent will not be sufficient in itself. As Brunnée and Toope point out, interactional international law builds on a more diverse pool of participants than states:

[A]n interactional theory of law opens up lawmaking to a diversity of participants, indeed requires it, because of the need for reciprocity in the construction of law.\(^{69}\)

Where the subject matter of the norms is terrorism, as is the case for of all the Council’s legislative resolutions, then the norms impact on individuals and other non-state actors, and not merely on states, and the Council needs their cooperation to function. While SCR 2178 purports formally to bind individuals directly, I submit that non-state actors do not need to be the direct addressees of the resolutions to be drawn into their operation and implementation and to be affected by them. I argue that, under an interactional theory of international law, these parties also need to engage in reciprocal construction of the legal system. This point is discussed further in chapter six.\(^{70}\)

Seen against the interactional account of international law, the Security Council’s claim to create new law is therefore a worrisome shift in law-making practices. The Council is claiming to create law by its \textit{fiat}, rejecting a mutually generative, reciprocal process for an autonomous act of a non-representative body. Neither the individuals affected by the resolutions, nor the vast majority of states that are implementing the measures, have any role to play in the creation of the norms to which they are subjected.

\section*{A.3. Resolutions not Included in the Category of Legislation}

Before I set out the legislative resolutions in more detail, I need to exclude certain resolutions from the scope of this chapter. First, I am not discussing those resolutions which set up bodies to carry out either administrative or judicial functions. Resolutions which set up administrative agencies do not impose general obligations directly on the subject of law, but set up an agency

\footnote{Brunnée & Toope, \textit{Legitimacy} (n 66) 45.}

\footnote{In chapter two, I also relied on two features of Fuller’s legal theory to argue for a more generous recognition of participants in international law: first, the notion of law as an ongoing process, created and adapted by all the persons and entities who follow it in the ordering of their activities; and secondly, the notion that the moral purpose of law is to protect and even nurture individual human beings, a purpose which Waldron argues is not displaced by the operation of international law. See chapter two, footnotes 229 and 230.}
which they authorize to make specific decisions, by which the subjects of law are then bound.\(^{71}\) Such resolutions include the “listing” resolutions, which are covered in detail in chapter four.

Resolutions which set up international bodies with judicial powers are also not international legislation. In creating the International Criminal Tribunal for the Former Yugoslavia\(^{72}\) and the International Criminal Tribunal for Rwanda,\(^{73}\) the Security Council did not purport to create new law but instead established bodies to exercise functions under existing law.\(^{74}\)

In carrying out their mandates, both the administrative agencies and the judicial bodies may, over time, create law.\(^{75}\) In these cases, however, the law emanates from the bodies themselves, and not the Security Council. The topic of this chapter is those measures that impose new, general rules directly on the subjects of law.

Some authors suggest that two further resolutions constitute legislation, viz Security Council Resolutions 1422 and 1487.\(^{76}\) Both these resolutions requested the International Criminal Court (ICC) to defer, for a 12-month period, investigation or prosecution of cases involving current or former personnel from non-signatories of the Rome Statute.\(^{77}\) I will not be treating these two resolutions as legislation. Despite their general wording, their drafting history - as Alvarez notes - shows that they were passed to protect US personnel, and therefore do not meet the generality requirement.\(^{78}\)

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71 I noted above (n 5) that there is a complete overlap between the “agency” created by the Council (the 1267 Committee) and its own membership. It may be argued that the Council is not so much creating an agency as granting itself specific, executive powers.


73 UN Doc S/RES/955 (1994).

74 In the case of the criminal tribunals, or any other body established for a finite period, Marschik suggests another reason why their creation does not constitute legislation: these organs were created to deal with a specific individual crisis, with “strict temporal and regional limitations”. See Marschik (n 8) 12.

75 David Dyzenhaus suggests that administrative law contains three “law elements”: constitutive administrative law, which constitutes the authority of these bodies, “substantive administrative law”, which is the law the bodies themselves create when they make decisions, and “procedural administrative law”, which can be created by the bodies themselves or other agencies, to govern the procedure by which they reach decisions. (See David Dyzenhaus, “Accountability and the Concept of (Global) Administrative Law” (2009) *Acta Juridica* 3 at 3-4.) From this perspective, the administrative bodies created by the Security Council will then themselves create substantive and procedural administrative law.

76 Talmon (n 8) 177-8; Alvarez, *International Organizations* (n 59) 215-6, n 98; Dantiki (n 8) 658.

77 See Talmon (n 8) 177-8 and Alvarez, *International Organizations* (n 59) 215-6, n 98.

78 I will also not be treating the following resolutions as legislation: Security Council Resolution 1887, paragraphs 4, 7 and 15(b), UN Doc. S/RES/1887 (2009), described as legislation by James D. Fry, *Legal Resolution of*
B. Legislative Resolutions

The first resolutions which were widely considered to be Security Council legislation were created in the early 2000s, namely SCR 1373 of 2001, passed in the immediate aftermath of September 11, 2001, and SCR 1540 of 2004. After a ten-year gap, SCR 2178 followed in 2014.

The preambles to each of the three resolutions make it clear that they are each aimed at a general and ongoing problem. SCR 1373 was passed in the wake of the terrorist attacks of September 11, 2001 and refers to them in its preamble. However, the preamble also states that “such” attacks, as opposed to “these” attacks, are threats to international peace and security and notes the concern of the Council about the rise of terrorism globally. It reaffirms the duty of all states to refrain from supporting terrorism by referring to a resolution of the General Assembly.

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Nuclear Non-Proliferation Disputes (Cambridge: Cambridge University Press, 2013) at 57-58 (hereafter: Fry), on the basis that this resolution is not mandatory.


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80 SCR 1373 (n 32).
81 SCR 1540 (n 32).
82 SCR 2178 (n 32).
and a later resolution of its own. SCR 1540 addresses another general problem: the “proliferation of nuclear, chemical and biological weapons”, declaring the proliferation of the weapons and of their means of delivery to be threats to international peace and security. The preamble of SCR 1540 then focuses specifically on terrorism and the risk presented by non-state actors who gain access to nuclear, chemical and biological weapons. SCR 2178 addresses the ongoing problem of “foreign terrorist fighters”, whom it describes as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict”. All three resolutions then proceed expressly under Chapter VII of the UN Charter.

SCR 1373 contains three sets of general obligations for states. The first two are introduced with the wording “[The Security Council] decides” and are therefore phrased in mandatory terms; the third is phrased in a hortatory manner (“[The Security Council] calls upon all States to …”). Of the binding obligations, one deals entirely with financing, requiring states to criminalize the collection of funds that supports terrorism in any form, to freeze resources of persons who commit, or attempt to commit, terrorist acts, also freezing the funds of any entities controlled by such persons or acting on their direction; and finally to prevent their nationals and any person on their territory from providing any form of financial or related service to terrorists, attempted terrorists, or any entities under their control or direction. The second mandatory provision requires states themselves to refrain from providing any form of support to terrorists, and also to prevent terrorist acts from occurring through a number of steps set out in the paragraph. These steps include suppressing recruitment to terrorist groups, denying safe haven to anybody connected to terrorism, prosecuting terrorists and punishing them in a manner that reflects the seriousness of

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86 Preamble, paragraph 1 of SCR 1540 (n 32).
87 SCR 2178 (n 32), ninth paragraph of the preamble.
88 Paragraphs 1-2 of SCR 1373 (n 32).
89 Paragraph 3 of SCR 1373 (n 32).
90 Paragraph 1 of SCR 1373 (n 32).
91 Paragraph 2 (a) of SCR 1373 (n 32).
92 Paragraph 2(c) of SCR 1373 (n 32).
their crimes,\textsuperscript{93} and ensuring that their border controls prevent terrorists from moving between states.\textsuperscript{94} There is a strong emphasis on international co-operation, as states are required to exchange information in order to provide early warning to one other of planned acts of terrorism,\textsuperscript{95} and in order to assist one another in criminal investigations, including the gathering of evidence.\textsuperscript{96}

The third paragraph of SCR 1373, worded as a recommendation, contains a number of obligations that repeat or reinforce those contained in the two mandatory paragraphs. Thus paragraphs 3 (b) and (c) seem to mirror paragraphs 2 (b) and (f) almost exactly by urging states to exchange information and co-operate on administrative and judicial matters to prevent the commission of terrorist acts, although the provisions in paragraph 3 emphasize more strongly compliance with international and domestic law and the drawing up of international agreements. States are further urged to intensify and accelerate “the exchange of operational information”\textsuperscript{97} and called upon to become parties to the “relevant” anti-terrorism conventions; the \textit{International Convention for the Suppression of the Financing of Terrorism} is mentioned expressly.\textsuperscript{98} Two final sub-paragraphs encourage states not to allow refugee law to be abused by terrorists,\textsuperscript{99} and to deny asylum to asylum-seekers who have committed terrorist acts.\textsuperscript{100} Paragraph 3 (g) attempts expressly to override the political offence exception where extradition is requested for political offences.

SCR 1540 similarly contains a number of binding and hortatory provisions, which together focus on restricting the access of non-State actors to nuclear, chemical or biological weapons. States are bound not to support non-State actors in their attempt to develop, acquire, transfer or use such weapons,\textsuperscript{101} and to adapt their domestic laws in order effectively to block non-State actors from access to such weapons, “in particular for terrorist purposes”.\textsuperscript{102} Paragraph 2 focuses on the criminal law of states, requiring them to deal with attempt, participation, financing and

\begin{itemize}
\item \textsuperscript{93} Paragraph 2(e) of SCR 1373 (n 32).
\item \textsuperscript{94} Paragraph 2(g) of SCR 1373 (n 32).
\item \textsuperscript{95} Paragraph 2(b) of SCR 1373 (n 32).
\item \textsuperscript{96} Paragraph 2(b) and (f) of SCR 1373 (n 32).
\item \textsuperscript{97} Paragraph 3(a) of SCR 1373 (n 32).
\item \textsuperscript{98} Paragraph 3(d) of SCR 1373 (n 32).
\item \textsuperscript{99} Paragraph 3(g) of SCR 1373 (n 32).
\item \textsuperscript{100} Paragraph 3(f) of SCR 1373 (n 32).
\item \textsuperscript{101} Paragraph 1 of SCR 1540 (n 32).
\item \textsuperscript{102} Paragraph 2 of SCR 1540 (n 32).
\end{itemize}
accomplice liability. A final mandatory provision, paragraph 3, looks at other precautions, requiring states physically to protect the weapons,\textsuperscript{103} to develop measures to account for and secure the weapons during their production, use, storage and transport,\textsuperscript{104} and to devise forms of border control that will detect and deal with illicit trafficking of such items\textsuperscript{105} as well as to keep control of their legal export and shipment.\textsuperscript{106}

The provisions in SCR 1540 that are phrased as recommendations deal mainly with the international regime against proliferation of nuclear, biological and chemical weapons, encouraging states to sign the relevant treaties,\textsuperscript{107} comply with them domestically\textsuperscript{108} and participate in the international bodies governing atomic energy and chemical, biological and toxin weapons.\textsuperscript{109} States are also encouraged to educate the public and industry about their obligations under the relevant domestic laws.\textsuperscript{110}

Like the two resolutions above, SCR 2178 is a mix of mandatory and hortatory provisions. Six of the paragraphs create new, mandatory obligations or restate obligations already created by SCR 1373. Nine paragraphs are phrased in terms of “urging”, “calling upon” or “encouraging”. The mandatory provisions obligate states in general terms to prevent foreign terrorist fighters from engaging in armed attacks.\textsuperscript{111} They also require member states to set up legislation that proscribes as serious offenses, and enables the states to prosecute and penalize, acting as foreign terrorist fighters, funding such fighters and organizing or recruiting such fighters.\textsuperscript{112} SCR 2178 further “decides” that member states must prevent transit through their territories of individuals if there is “credible information that provides reasonable grounds to believe” that these individuals seek

\textsuperscript{103} Paragraph 3(b) of SCR 1540 (n 32).
\textsuperscript{104} Paragraph 3(c) of SCR 1540 (n 32).
\textsuperscript{105} Paragraph 3(c) of SCR 1540 (n 32).
\textsuperscript{106} Paragraph 3(d) of SCR 1540 (n 32).
\textsuperscript{107} Paragraph 8(a) of SCR 1540 (n 32).
\textsuperscript{108} Paragraph 8(b) of SCR 1540 (n 32).
\textsuperscript{109} Paragraph 8(c) of SCR 1540 (n 32).
\textsuperscript{110} Paragraph 8(d) of SCR 1540 (n 32). A second hortatory article urges states to maintain dialogue and cooperation in the area of nuclear, chemical and biological weapons.
\textsuperscript{111} SCR 2178 (n 32) paragraph 5.
\textsuperscript{112} SCR 2178 (n 32) paragraph 6.
transit or entry in order to function as foreign terrorist fighters.\textsuperscript{113} This formulation copies the standard of proof adopted by the Ombudsperson for evaluation of a delisting request.\textsuperscript{114} By far the most arresting of the mandatory provisions, however, is that found in the first paragraph, where the Security Council “demands” that foreign terrorist fighters disarm. This provision, it has been argued, imposes a legally binding obligation directly on individuals to desist from terrorist acts.\textsuperscript{115}

One of the hortatory provisions in SCR 2178 is also not addressed at a state, but at INTERPOL, whom the Security Council “encourages” to “intensify its efforts with respect to the foreign terrorist fighter threat and to recommend or put in place additional resources to support and encourage national, regional and international measures to monitor and prevent the transit of foreign terrorist fighters, such as expanding the use of INTERPOL Special Notices to include foreign terrorist fighters”.\textsuperscript{116} Other hortatory provisions encourage states to use “traveller risk assessment” and screening procedures at borders,\textsuperscript{117} to co-operate with one another in countering foreign terrorist fighters,\textsuperscript{118} and to require airlines operating within their territories to provide states with the passenger information of persons listed under SCR 1267 or SCR 1989.\textsuperscript{119} States are further called upon to report information relating to the departure and attempted transit of listed persons\textsuperscript{120} and to improve their co-operation with one another.\textsuperscript{121} The final three hortatory provisions in SCR 2178 encourage states to counter violent extremism by engaging with

\textsuperscript{113} SCR 2178 (n 32) paragraph 8.
\textsuperscript{116} SCR 2178 (n 32) paragraph 13.
\textsuperscript{117} SCR 2178 (n 32) paragraph 2.
\textsuperscript{118} SCR 2178 (n 32) paragraph 4.
\textsuperscript{119} SCR 2178 (n 32) paragraph 9.
\textsuperscript{120} SCR 2178 (n 32) paragraph 9.
\textsuperscript{121} SCR 2178 (n 32) paragraph 11.
communities,\textsuperscript{122} to prevent the misuse of technology to spread extremism,\textsuperscript{123} and to support each other’s attempts to counter violent extremism, by capacity-building and other means.\textsuperscript{124}

Commenting on the legislative nature of SCR 1373, Szasz noted that the binding character of the resolution was underscored by the mechanism that SCR 1373 creates to monitor compliance\textsuperscript{125} - that is, the Counter-Terrorism Committee (CTC).\textsuperscript{126} The Security Council has subsequently used the committee infrastructure to support the implementation of both binding and non-binding resolutions on terrorism, with the result that a number of committees now promote and oversee the Security Council’s anti-terrorism regime as a whole.

The CTC, established by SCR 1373 of 2001 to monitor compliance with its founding resolution, has been supported by the Counter-Terrorism Executive Directorate (CTED) since 2004.\textsuperscript{127} Since September 2005 these two bodies have also monitored compliance with SC Resolution 1624, the resolution that “calls on” states to criminalize the incitement to terrorism.\textsuperscript{128} As noted above, the CTC and CTED were requested by the Security Council in SCR 2178 to identify gaps in the implementation of both resolutions.\textsuperscript{129} Apart from requiring, evaluating and publicizing reports from member states of the UN on their compliance with the SC Resolutions,\textsuperscript{130} these bodies also act as advisors to states, helping states to draft and pass legislation that is required by the

\begin{itemize}
\item \textsuperscript{122} SCR 2178 (n 32) paragraph 16.
\item \textsuperscript{123} SCR 2178 (n 32) paragraph 17.
\item \textsuperscript{124} SCR 2178 (n 32) paragraph 18.
\item \textsuperscript{125} Szasz (n 1) 902.
\item \textsuperscript{126} Set up by article 6 of SCR 1373 (n 32). See the website of the Committee at http://www.un.org/Docs/sc/committees/1373/ [accessed 21 June 2016].
\item \textsuperscript{127} Established by SCR 1575 of 2004, UN Doc S/1575/ (2004).
\item \textsuperscript{128} See SCR 1624 (n 36).
\item \textsuperscript{129} SCR 2178 (n 32) paragraph 24.
\item \textsuperscript{130} See the country reports submitted to the CTC and the CTC’s programme for analysing and evaluating them at http://www.un.org/Docs/sc/committees/1373/submitted_reports.html and http://www.un.org/sc/ctc/workprogramme.shtml [accessed 21 June 2016].
\end{itemize}
Resolutions. Among other measures, they recommend a list of best practices, which includes models for domestic anti-terrorism legislation.

The “1540 Committee” monitors the implementation of a Resolution against weapons of mass destruction. The Committee is mandated to report regularly to the Security Council, as well as to recommend to the Council measures to improve the execution of the Resolution. Like the Counter-terrorism Committee, it plays a role in the development of domestic legal systems, by providing a structure that assists states in setting up legal and regulatory infrastructures that will enable them to carry out their obligations under the Resolutions and relevant treaty law.

Resolutions 1373, 1540 and 2178 all created new obligations. In SCR 1373, these were closely aligned with obligations that had already, to some extent, been adopted by the international community. Thus SCR 1373 consisted largely of provisions taken from the International Convention for the Suppression of the Financing of Terrorism, a treaty that had, at the time of the resolution, been annexed to a General Assembly Resolution, but it had very few states signatories and had therefore not yet come into force. In the second resolution, however, the SC introduced obligations that had not yet been approved or even considered by the majority of the international community, and part of its very rationale was the closing of gaps in the existing international law against the proliferation of weapons of mass destruction. SCR 2178 reaffirmed many of the obligations in SCR 1373, but it also introduced a more detailed legal regime

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131 Rosand (n 79) 582.
134 Set up by SCR 1540 (n 32). See the website of the Committee at http://disarmament2.un.org/Committee1540/ [accessed 21 June 2016].
135 SCR 1540 (n 32) paragraph 2(e).
137 The International Convention for the Suppression of the Financing of Terrorism, 9 December 1999. See Szasz (n 1) 902-3; Happold (n 8) 594-5, 608; Asada (n 8) 17.
138 *International Convention for the Suppression of the Financing of Terrorism* 76th plenary meeting, GA Res. 54/109, UNGAOR, 54th session, UN Doc A/RES/54/109 (2000); Asada (n 8) 18.
139 Rosand (n 79) 549.
140 Rosand (n 79) 580; Asada (n 8) 19. See also Pakistan’s criticism of the resolution, discussed in Marschik (n 8) 18-19. The only possible precursors to SCR 1540 were the political negotiations of smaller groups, including the G8 and the Proliferation Security Initiative (PSI) of the USA. See Asada (n 8) 19, n 65 and 23-24, fns 80 and 81.
to control and deter foreign terrorist fighters, a topic not directly addressed by any international agreements. It also broke with all precedent by purporting to impose an obligation directly on individuals.¹⁴¹

Finally, all three resolutions are general in nature. They are aimed at general problems—terrorism, the migration of individuals to join terrorist movements, and the use of weapons of mass destruction by non-state actors. The measures imposed by these resolutions are general, relating not to a specified situation, state or non-state actor, but to a whole class of persons in all situations where particular criteria have been satisfied.¹⁴² They do not have a time limit, but are phrased such that the measures may continue indefinitely. The three resolutions can therefore be seen, in Szasz’s terms, to “establish new binding rules of international law—rather than mere commands relating to a particular situation”.¹⁴³

In conclusion, then, the Security Council began to legislate in SCR 1373 of 2001 and repeated this practice in SCR 1540 of 2004 and SCR 2178 of 2014. These resolutions are mandatory, unilaterally creating new, generally binding norms for the international community. Their binding nature is reinforced by the strong infrastructure of the committee system, which monitors and encourages compliance by states with the binding resolutions.

C. Responses to Security Council Legislation

As we saw in chapter four, the responses to the listing resolutions were so negative that the Council was eventually compelled to change the system. This section analyzes the responses to Security Council legislation from both states and scholarship. In comparison to the reactions to listing, these responses are generally muted or even supportive. When states address the phenomenon of legislation at all, they object to the exercise of legislative power by the Security Council.

¹⁴¹ It was not unknown for the Security Council to “make demands” of actors other than states, as noted by the ICJ in its advisory opinion *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* of 22 July 2010, paragraph 116. However, these demands related to specific action which the addressees were enjoined to carry out, or avoid. They did not create general obligations. See also Anne Peters, “Security Council Resolution 2178 (2014): The “Foreign Terrorist Fighter” as an International Legal Person, Part I”, at http://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-i/ (hereafter: Peters) [accessed 21 June 2016].

¹⁴² See the description of legislation by Happold (n 8) at 597.

¹⁴³ Szasz (n 1) 902.
Council. However, we will see that the legislative aspect has sometimes been ignored and previous objections forgotten. Scholarship, which initially responded positively to the new phenomenon, has produced a wider range of approaches to Security Council legislation over time. However, it tends, on the whole, to accept that such activity is legally valid.

C.1 State Practice: Objections and Amnesia

SCR 1373 was initially widely welcomed by states. This may have been due in part to the subject matter of the resolution - terrorism - in the wake of the trauma of 9/11. At that point, it seems as though no measure ostensibly aimed at curbing terrorism could have been resisted without considerable political fallout. The fog of the new war - the war against terrorism proclaimed by George W. Bush - made closer analysis of the resolution more difficult. It may also simply have been too early for states to notice and respond to the new phenomenon.¹⁴⁴

Many states which declared their support for resolution 1373 did so in terms that suggested they saw it as an administrative measure, and not as legislation. Thus, for example, the Algerian delegate “welcomed” its adoption and summarized its terms, but went on immediately to add:

On a different level, that of international law, there is an entire panoply of legal instruments that serve as a normative basis for all efforts to codify or draft a common global anti-terrorism strategy.¹⁴⁵

Similarly, the Norwegian delegate saw the resolution as containing “clear steps and measures” and several states praised it for setting up a mechanism whereby the implementation of the (general) anti-terrorism regime could be monitored.¹⁴⁶ Others praised the Council for setting a “general direction”¹⁴⁷ or providing a “framework” for implementation of the anti-terrorism regime.¹⁴⁸ It is

¹⁴⁴ The first General Assembly debate “Measures to eliminate international terrorism” (the 12th plenary meeting on Monday, 1 October 2001) took place on the morning of the first working day after SCR 1373 had been passed. The meeting which passed SCR 1373 was held late on Friday night, 28 September 2001. See UN Doc S/Agenda/4385.


¹⁴⁶ The only reference made by the European Union to SCR 1373 is to “note with interest” that it establishes a monitoring committee (UN Doc A/56/PV.12 (n 145) 10. See also UN Doc A/56/PV.12 (n 145) Croatia 25, Belgium 10, Belarus 21.


¹⁴⁸ Nicaragua praised SCR 1373 as a framework while simultaneously calling for a multilateral Convention on Terrorism (UN Doc A/56/PV.12 (n 145) 6). See also Egypt (UN Doc A/56/PV.12 (n 145) 23).
also significant that most of the speakers in the General Assembly debates held in September and October of 2001 thought that the work of legislation still had to be done - and by the General Assembly. In the General Assembly debates, this body was seen as the most appropriate organ to draw up such a global instrument, because of its fully representative nature.\footnote{Belarus (UN Doc A/56/PV.12 (n 145) 22); the President of the General Assembly (UN Doc A/56/PV.12 (n 145) 2; the Secretary-General (UN Doc A/56/PV.12 (n 145) 3; Nicaragua (UN Doc A/56/PV.12 (n 145) 6; Belgium (UN Doc A/56/PV.12 (n 145) 10; Algeria (UN Doc A/56/PV.12 (n 145)13; United Kingdom (UN Doc A/56/PV.12 (n 145) 18; Equatorial Guinea (UN Doc A/56/PV.22 (n 147) 4.}

In October 2001, the General Assembly debated the annual report of the Security Council. On this occasion, the Costa Rican delegate to the General Assembly isolated the factors that distinguished SCR 1373 from previous SC resolutions, and used the term “legislation” to describe it.\footnote{UN GAOR, 56th Sess., 25th Plenary Mtg., UN Doc A/56/PV.25 (2001) at 3 (hereafter: UN Doc A/56/PV.25).} He added:

Resolution 1373 (2001) demonstrates the broad powers of the Security Council. In exercising its powers, however, the Council must act responsibly. In accordance with the provisions of the Charter, the Security Council acts on behalf of all Members of the United Nations. Its members, whether permanent or elected, represent equally all States Members of the Organization and they are, therefore, responsible to them.\footnote{UN Doc A/56/PV.25 (n 150) 3.}

Most of the contributions to this debate criticized the Security Council report for its lack of analysis and meaningful information. In this regard, SCR 1373 was cited as a particular reason why the Security Council reports had to be more open and informative.\footnote{Colombia (UN Doc A/56/PV.25 (n 150) 5).} More bluntly, Algeria complained that the Security Council was

increasing its incursions into the Assembly’s sphere of action ... and now takes it upon itself to legislate and make decisions on matters that, by all logic, should be discussed in larger and more competent bodies. There are even situations in which, emboldened by the lack of any reaction or challenging debate, the Council has gone so far as to decide to enjoin states to implement the provisions of international conventions that have not yet come into force, thus substituting itself for the sovereign will of States.\footnote{Algeria (UN Doc A/56/PV.25 (n 150) 8.}

In Algeria’s view, the Council’s extension of its own powers had to be resisted because it threatened multilateralism and the “principle of the democratic participation of States in negotiation and decision-making on questions of general interest ...”\footnote{Algeria (UN Doc A/56/PV.25 (n 150) 8.}
Similarly, Singapore, noting the huge change wrought by SCR 1373,\textsuperscript{155} reminded the Assembly that it acted on behalf of the United Nations Members, under article 24 of the Charter, and that it should therefore expect to be held accountable to the international community.\textsuperscript{156} In the same debate, the representative of Ghana warned:

\begin{quote}
If the Security Council continues to adopt resolutions as edicts that all Member States are expected to implement scrupulously - such as resolution 1373 (2001), then it is only fitting and proper that it should explain its actions fully to the general membership in order to attain the latter’s support, understanding and cooperation.\textsuperscript{157}
\end{quote}

Three years were to pass before the Council’s next legislative resolution (SCR 1540 (2004)). However, in the intervening period, the Council passed two controversial resolutions - 1422 of 2002 and 1487 of 2003 - suspending prosecution by the International Criminal Court (ICC) of all peacekeepers from non-signatory states to the Rome Statute.\textsuperscript{158} As argued above, these resolutions do not constitute legislation because the element of generality is missing. However, one of the bases on which the resolutions were challenged was that the Security Council does not have the power to amend international law. Because these arguments are relevant to its legislative capacity, they must briefly be canvassed here.

The Security Council purported to act under article 16 of the Statute of the International Criminal Court (the Rome Statute) when it suspended the prosecution of nationals of certain states before the Court.\textsuperscript{159} States argued that article 16 had never been intended as a mechanism for blanket immunity,\textsuperscript{160} and that, by treating it in this fashion, the Security Council was purporting to

\begin{footnotes}
\item[155] Singapore (UN Doc A/56/PV.25 (n 150) 10).
\item[156] Singapore (UN Doc A/56/PV.25 (n 150) 13).
\item[157] Ghana (UN Doc A/56/PV.28) 16.
\item[158] The relevant paragraph (1) of both resolutions (SCR 1422 of 2002 and SCR 1487 of 2003) reads: “The Security Council ... Acting under Chapter VII of the Charter of the United Nations, Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a 12-month period starting [1 July of that year] not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise”.
\item[159] Article 16 of the Rome Statute reads: No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect.
\item[160] UN SCOR, 57th Year, 4568th Mtg., UN Doc S/PV.4568 (hereafter: UN Doc S/PV.4568) Canada 4, New Zealand 5, Denmark (speaking for EU) 8, Costa Rica 14, Brazil 22, Switzerland 23, Mauritius 25, Mexico 26-7. UN SCOR, 58th Year, 4772nd Mtg., UN Doc S/PV.4772 (hereafter: UN Doc S/PV.4772) New Zealand 5, Jordan 6, Switzerland 7-8, Greece 9, Trinidad and Tobago 14-15, Nigeria 18, the Netherlands 20.
\end{footnotes}
change the Rome Statute. While it was acknowledged that the Charter allows the Security Council to override treaty obligations under article 103 of the UN Charter, states nonetheless emphasized that the Security Council did not have the power to amend treaties. This was because the Security Council could not pass decisions unless it found a threat to the peace, which it had not done, and could not do, in this case. The argument thus allowed for short-term suspensions of applicable law (in the form of emergency measures which would be lifted once their purpose had been achieved) but not the long-term abolition of rules of law, or the introduction of new law. In other words, the Council could take executive action with respect to a specific threat to the peace, but not create new law.

By purporting to amend the law, the Council was seen as overriding the consent, and therefore the sovereign will, of other states in order to further its own interests. Many of the speakers in both debates emphasized how widely supported the ICC was; suggesting that the Security Council ought not to be frustrating the will of such a large number of states. Delegates pointed out that article 24 of the UN Charter required the Security Council to act on behalf of the UN membership as a whole; indeed, the representative from Mongolia went so far as to link states’ compliance with Security Council obligations - under article 25 - with fulfilment of article 24 by the Council.

SCR 1540 (2004), described above, sets out general, binding measures to prevent non-state actors from gaining access to weapons of mass destruction. Once again, a large number of non-

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161 UN Doc S/PV.4568 (n 160) New Zealand 5, South Africa 6, Liechtenstein 20, Brazil 22, Mauritius 25, Mexico 26. UN Doc S/PV.4772 (n 160) Uruguay 11.
163 UN Doc S/PV.4568 (n 160) New Zealand 5-6, South Africa 6, Iran 15, Liechtenstein 20, Brazil 22. UN Doc S/PV.4772 (n 160) Brazil 10, Pakistan 21.
164 UN Doc S/PV.4568 (n 160) Jordan 16, Liechtenstein 20. UN Doc S/PV.4772 (n 160) Canada 5, Switzerland 7.
165 UN Doc S/PV.4568 (n 160) Iran 15. See also Jordan 16: “Moreover, it is almost inconceivable, given the obligations conferred upon it by Article 24 of the Charter, that the Council could ponder putting at risk the lives, potentially, of millions of people by placing existing peacekeeping operations in jeopardy because of differences of opinion over the International Criminal Court.”
166 UN Doc S/PV.4568 (n 160) Liechtenstein 21. UN Doc S/PV.4772 (n 160) Malawi 12, Nigeria 17. See also Germany’s statement (UN Doc S/PV.4772 (n 160) 25): “We feel that a treaty already ratified by 90 States and signed or ratified by 12 of the 15 Security Council members should not be amended by a Security Council resolution.”
167 UN Doc S/PV.4568 (n 160) Iran 15, Jordan 16, Mongolia 19; UN Doc S/PV.4772 (n 160) Iran 10, Pakistan 21.
168 UN Doc S/PV.4568 (n 160) Mongolia 19.
members to the Security Council (34) asked for permission to address the Council when this resolution was debated. This time there was no doubt as to the legislative nature of the resolution, and it was greeted with widespread unease. The states which supported it gave two main justifications for doing so. First, they emphasized that the problem in question - the possibility that non-state actors might obtain access to weapons of mass destruction - was urgent. There was therefore no time to address the problem through the usual channels of multilateral negotiation. The second justification offered in support of the draft resolution was that it did not interfere with the established treaty regime in any way.

Recognizing the unease about the nature of the draft resolution, New Zealand encouraged other parties to the debate not to “confuse” its “process” with its “substance”:

It is no secret that there is some disquiet within and without the Council over the process by which this draft resolution is being produced. However, those qualms must not be allowed to distract States, including members of the Council, from the importance of the issues being addressed in the draft resolution and the need for all Member States to take all possible measures to prevent non-State actors gaining access to weapons of mass destruction.

However, the statements of opponents of the resolution provide objections to both the procedure and the substance. On the procedure, states pointed out that the Security Council should not be imposing its decisions on sovereign states. India expressed this most directly, refusing bluntly to accept externally prescribed norms or standards, whatever their source, on matters pertaining to domestic jurisdiction of [the Indian] Parliament, including national legislation, regulations or arrangements which are not consistent with its constitutional provisions and procedures which are contrary to its national interests or which infringe on [Indian] sovereignty.

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169 See UN SCOR, 59th Year, 4950th Mtg., UN Doc S/PV.4950 (2004) (hereafter: UN Doc S/PV.4950) where the term “legislation” was used expressly by Angola at 10, Pakistan at 15, India at 23, Singapore at 25, Switzerland at 28, Indonesia at 31, and Iran at 32.


171 UN Doc S/PV.4950 (n 169) the Philippines 2, Algeria 5, Spain 7, Angola 9, United Kingdom 11, New Zealand 21, India 24, Singapore 25, Sweden 27, Japan 28, and Switzerland 28.

172 UN Doc S/PV.4950 (n 169) the Philippines 3, United Kingdom 11, Romania 14, US 18, Germany 18, and New Zealand 21.

173 UN Doc S/PV.4950 (n 169) New Zealand 21.

174 UN Doc S/PV.4950 (n 169) Brazil 4, Algeria 5, Pakistan 15, Peru 20, Cuba 30, Indonesia 31, and Iran 32. See also Japan 28.

175 UN Doc S/PV.4950 (n 169) 24.
The Indian representative also expressed India’s concern that “the exercise of legislative functions by the Council, combined with recourse to Chapter VII mandates, could disrupt the balance of power between the General Assembly and the Security Council, as enshrined in the Charter.”\textsuperscript{176}

Several states suggested that the resolution should not be passed under Chapter VII at all.\textsuperscript{177} Suspecting that a Chapter VII measure could open the door to enforcement action by the Security Council, these states preferred that the resolution be passed under Chapter VI. This argument gained enough force to lead the USA to insist that the Chapter VII status was intended to send a “political message” about the importance of the issue at hand, and was not geared towards enforcement.\textsuperscript{178}

On the substance of the resolution, many states noted that the draft resolution separated two obligations that had hitherto— in the treaty regime— been interlinked: that is, non-proliferation and disarmament. While adding obligations on non-proliferation, the resolution disregarded the disarmament aspect.\textsuperscript{179} Many states commented on the one-sidedness of the regime created by the resolution. On this point, Pakistan also commented:

The Security Council, where five States, which retain nuclear weapons, also possess the right veto [sic] any action, is not the most appropriate body to be entrusted with the authority for oversight over non-proliferation or nuclear disarmament.\textsuperscript{180}

Finally, Sweden noted that people whose rights were affected by the resolution had not been provided with the protection of a judicial process. The Swedish representative suggested that “[A]n individual who claims that his rights have been violated as a consequence of the implementation of this resolution should be guaranteed access to courts at the national level, and States have a duty to ensure that this happens.”\textsuperscript{181} Sweden added that states and individuals who took measures to implement this resolution remained bound by international law and the United

\textsuperscript{176} UN Doc S/PV.4950 (n 169) 24.
\textsuperscript{177} UN Doc S/PV.4950 (n 169) Brazil 4, Algeria 5, Benin 13, and Pakistan 15.
\textsuperscript{178} UN Doc S/PV.4950 (n 169) 17. See also France 8-9 and UK 12 in this meeting.
\textsuperscript{179} UN Doc S/PV.4950 (n 169) Brazil 4, Algeria 5, Peru 20, South Africa 22, India 24, and Cuba 30.
\textsuperscript{180} UN Doc S/PV.4950 (n 169) Pakistan 15.
\textsuperscript{181} UN Doc S/PV.4950 (n 169) Sweden 27.
Nations Charter - thereby resisting the notion that the Security Council could unilaterally change the international legal system.\(^\text{182}\)

From the responses to SCR 1540, it seemed clear that states were set to resist further legislation by the Council. It is not surprising that the Council did not attempt to legislate for the next ten years. And yet, when it did, once again, take up this practice, it encountered almost no resistance at all. The reaction to SCR 2178 presents a startling about-turn of state opinion to Security Council legislation. All of the principled objections to Security Council legislation appeared to have been forgotten. A large number of states which were not on the Security Council asked to participate in the meeting, and were allowed to do so. All of these non-member states supported the resolution. 104 states are listed as having “sponsored” the resolution and it was passed unanimously, with all 15 member states of the Council voting for it.\(^\text{183}\) After the vote, 46 states spoke on the topic, as well as a representative of the European Council. No speaker criticized the resolution and almost all expressly supported it. In the following days, a number of states recorded their support for the resolution in the General Assembly, including states which had not taken part in the Security Council proceedings.\(^\text{184}\) Only one note of caution was sounded, in the Sixth Committee of the General Assembly. In a committee meeting, Guatemala objected to the fact that the Security Council had created a new legal framework through SCR 2178, stating that this task should have been performed by the General Assembly.\(^\text{185}\)

This review reveals a curiously disconnected set of responses by states to Security Council legislation. On some occasions, states have raised strong and principled objections to legislation by the Security Council; on other occasions, they have supported legislative resolutions while ignoring their legislative aspects completely. We need to consider both what principles might underlie the objections and also why these principles seem periodically to be abandoned.

The express objections of states to Security Council legislation hint at a deeper, underlying complaint. Formally, states objected to the infringement of their national sovereignty through the imposition of laws binding on them without their consent. They also objected to the violation and

\(^{182}\) UN Doc S/PV.4950 (n 169) Sweden 27.

\(^{183}\) UN SCOR, 69\(^{th}\) Year, 7272 Mtg., UN Doc S/PV 7272 (2014) 1.

\(^{184}\) Mozambique (UN GAOR, 69\(^{th}\) Year, 16\(^{th}\) Plenary Session, UN Doc A/69/PV.16 (2014)), Myanmar (UN GAOR, 69th Year, 21\(^{st}\) Plenary Session, UN Doc A/69/PV.21 (2014)).

\(^{185}\) UN GAOR, 69\(^{th}\) Year, Sixth Committee Mtg., UN Doc. A/C.6/69/SR.2 (2014), paragraph 16.
disregard of international law itself, criticizing the Council for taking steps that negated or infringed existing rules or ignored the established law-making processes of the international level. Although some states acknowledged the pre-eminence that article 25 of the Charter accords Council decisions over other obligations, they also brought two arguments to temper this apparent “trump card”. The first was that a valid Chapter VII decision could not be adopted in the absence of a threat to the peace - by which speakers understood a specific incident, rather than a general set of circumstances. Second, some states linked article 25 to article 24, emphasizing that the Council was meant to act on behalf of the membership of the UN.

The question of the role of the Security Council within the UN as a body, and of its duty to the member states, brings to the fore the theme of public power. In these Security Council and General Assembly debates, states are aware that a single body is aggregating power to itself, and they are attempting to contain this body’s power. They do so partly by insisting on their own autonomy - their national sovereignty - in an attempt to restore the theoretically horizontal structure of the international arena. But they also invoke features such as democracy, transparency and consultation. If we return to the frameworks of analysis presented in chapter two, we see that these features play a role when scholars assume a constitutionalist mindset, recognizing and addressing the phenomenon of public power within the global community. The terms democracy, transparency and consultation are employed when a polity has assumed a hierarchical structure; one in which an institution is exercising governmental functions and making decisions for the members of the body. These constitutional terms permeate the debates. It is notable that even supporters of SCR 1540 emphasized that the multilateral, consensual process was preferable to a Security Council resolution. China, for example, noted that “[b]oth the improvement of the existing regime and the establishment of a new one should be based on universal participation by all countries and on decisions made by means of the democratic process.” Furthermore, states that accepted the Council’s legislative role in this case also

\[\text{UN Doc S/PV.4568 (n 160) Jordan 16, Liechtenstein 20. UN Doc S/PV.4772 (n 160) Canada 5, Switzerland 7. UN Doc S/PV.4568 (n 160) Iran 15, Jordan 16, Mongolia 19; UN Doc S/PV.4772 (n 160) Iran 10, Pakistan 21. UN Doc S/PV.4950 (n 169) China 6.}\]
emphasized that it should follow as transparent, consultative and “democratic” a procedure as possible.\textsuperscript{189} Among the supporters was Spain, which suggested,

\begin{quote}
We believe that, since the Council is legislating for the entire international community, this draft resolution should preferably, although not necessarily, be adopted by consensus and after consultation with non-members of the Council.\textsuperscript{190}
\end{quote}

These constitutional readings can also be seen in other objections to Security Council legislation. Thus, for example, Stefan Talmon notes the objection that a body that carries out the general role of a “policeman” has been described as ill-suited to adopt the role of “a legislature or jury”.\textsuperscript{191} An argument on the appropriate function of the Council arises from a more fundamental understanding of the division of powers between the Council, the General Assembly and other actors in international law.\textsuperscript{192} But they are also central to any complaint that the Council is overriding the consent of member states, disregarding international law or behaving in an unaccountable manner. All these criticisms raise the spectre of a body that has gained power over other UN bodies and member states and is using it in an unacceptable manner. To find the criteria for acceptable uses of power, the criticisms draw on principles from constitutional law and other bodies of public law.

Why, then, did most states accept SCR’s 1373 and 2178 with so little comment, and comply with the obligations imposed by them? It is important to note that, while the implementation of SCR 1540 has been weak,\textsuperscript{193} states have co-operated well with the Counter-Terrorism Committee and the Council’s anti-terrorism programme as a whole.\textsuperscript{194} If all three resolutions constitute international legislation, why did the legislative aspect result in significant resistance to only one of the resolutions? Did states forget their strong and principled objections to Security Council legislation in the ten years between SCR 1540 and SCR 2178 and, if so, why?

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\textsuperscript{189} UN Doc S/PV.4950 (n 169) Philippines 2, China 6, Romania 14, Russian Federation 16, United States 18, Canada 20, and South Africa 22.

\textsuperscript{190} UN Doc S/PV.4950 (n 169) Spain 7.

\textsuperscript{191} Talmon (n 8) 179. See also Rosand (n 79) 558 and Happold (n 8) 600.

\textsuperscript{192} Rosand (n 79) 558.

\textsuperscript{193} Ian Garvey, \textit{Nuclear Weapons Counterproliferation: A New Grand Bargain} (Oxford: Oxford University Press, 2013) at 74 (hereafter: Garvey); Johnstone (n 170) 293.

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I suggest that the answer lies in two related properties of the Council’s anti-terrorism programme. The first is that it requires states to act against non-state actors. Implementing such measures strengthens the hand of states against non-state actors. As Barker notes:

All states have an interest in ensuring that the threat of global terrorism is effectively addressed, if not eliminated. Crucially, the counter-terrorism effort, although dominating the international legal agenda, is not an issue of high-level politics. It is not seeking to achieve a balance between conflicting state interests but is, rather, focussed on the development and coordination of measures directed against terrorist organizations.¹⁹⁵

Unlike Resolution 1540, which concerned states without nuclear weapons and states with nuclear weapons differently, the anti-terrorism resolutions give all states the same rights. Moreover, it gives states these rights against entities who are not represented in the Security Council; namely, non-state actors.¹⁹⁶ As Thomas Franck commented:

I think what has happened is that the Security Council has totally failed to carry out its mandate to deal with terrible things being done by regimes of member states; instead, it is sort of hugging itself because it’s easier to do something about terrorists because they tend not to be governments, at least not of member states.¹⁹⁷

To understand the second important property of the Council’s anti-terrorism programme, we have to acknowledge that states are not atomic units, each pursuing only the (homogenous) interests of its own populace. Instead, each is composed of various interest groups with differing levels of power and influence within the state itself. The interests of the government may not coincide with the interests of its citizens and the government itself is not an atomic unit. In those states where governments are divided into the different branches of legislature, executive and judiciary, it is the executive that enjoys a voice in international fora and international negotiations. As Craig Forcese points out, international policy-making enhances the executive branches of state governments at the expense of other branches. Executive discretion is often supported by the substantial deference shown to the foreign affairs prerogatives of the executive branch of government.¹⁹⁸ The result, in Eric Stein’s terms, is that

¹⁹⁵ Barker (n 35) 16.
¹⁹⁸ Forcese (n 72) 179 (footnotes omitted).
[a] new level of normative activity superimposed on national democratic systems makes citizen participation more remote, and parliamentary control over the executive, notoriously loose in foreign affairs matters, becomes even less effective.¹⁹⁹

The second property of the Council’s anti-terrorism programme is therefore that it increases the power of the executive both against individuals within the state and against the other branches of government. Kim Lane Scheppele provides this as the reason for the high level of compliance with the Security Council’s anti-terrorism programme:

Because the interests of powerful countries in the Security Council could be linked to the fate of national executives around the world—including those in the veto-bearing states themselves—compliance with the new global security law has been extraordinarily high.²⁰⁰

One of the central ways in which the Council’s anti-terrorism programme increases the power of the executive is in omitting a definition of terrorism from both SCR 1373 and SCR 2178. This leaves the government with wide discretion to adopt a conception of terrorism that targets any groups or individuals it chooses, including political opponents.²⁰¹ If, as has happened in many states, the domestic definition of terrorism is overbroad or vague,²⁰² it is then the executive branch of government—through its police and prosecutors—which makes the decision of what to investigate and whom to prosecute.²⁰³ By granting states this discretion in defining and prosecuting terrorism, the Security Council has facilitated ever more repressive government.²⁰⁴ The Counter-Terrorism Committee, for its part, has not censured such broad definitions. Indeed, in Scheppele’s view, it

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²⁰⁰ Scheppele (n 35) 247 (footnote omitted).


²⁰³ Scheppele (n 35) 265.

²⁰⁴ Barker (n 35) 20-21; Scheppele (n 35) 267-274.
has attempted further to broaden Vietnam’s approach to terrorism, which already defined the concept in sweeping terms.\textsuperscript{205}

Another way in which the national executives gain power through Security Council legislation is through what Forcense terms “power laundering”. Within the domestic sphere, it is meant to be the legislature that creates the law. However, because the state is under an international obligation to carry out decisions of the Security Council, the executive can - and does - inform the legislature that it has little choice in its anti-terrorism legislation. It must follow the instructions of the Security Council closely. But the executive itself may have shaped the obligations that the Security Council imposes on states. The executives of the P5 states, in particular, can, through their influence in the Security Council,\textsuperscript{206} dictate the content of legislation to their own legislatures.\textsuperscript{207}

In \textit{Ahmed}, discussed in Chapter four, the United Kingdom Supreme Court recognized that the executive’s ability to influence the obligations which the Security Council imposes has serious implications for domestic constitutionalism. This was one of the reasons which the Court gave for limiting the executive’s role in giving effect to the Security Council’s anti-terrorism measures (whether listing or legislation):

But these resolutions are the product of a body of which the executive is a member as the United Kingdom’s representative. Conferring an unlimited discretion on the executive as to how those resolutions, which it has a hand in making, are to be implemented seems to me to be wholly unacceptable. It conflicts with the basic rules that lie at the heart of our democracy.\textsuperscript{208}

The disturbing conclusion is therefore that, when executive bodies representing states perceive that their states are suffering an abuse of power by the Security Council, they complain and resist.

\textsuperscript{205} The relevant provision read as follows: “Article 84. Terrorism 1. Those who intend to oppose the people’s administration and infringe upon the life of officials, public employees or citizens shall be sentenced to between 12 and 20 years of imprisonment, life imprisonment or capital punishment.” Cited by Scheppele (n 35) 267, who notes the CTC’s response in footnote 121.

\textsuperscript{206} For the role which can be played by non-P5 states, see Alejandro Rodiles, “Non-Permanent Members of the United Nations Security Council and the Promotion of the International Rule of Law” (2013) 5 Goettingen J. Int’l L. 333. Rodiles notes the positive contribution which non-permanent members of the Security Council can make by ensuring transparency and deliberation in Council processes.

\textsuperscript{207} Forcense (n 79) 194-5.

\textsuperscript{208} \textit{Her Majesty’s Treasury (Appellant) v R (on the application of Hani El Sayed Sabaei Youssef) (Respondent)} [2010] UKSC 2, on appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 1187 and the Administrative Court [2009] EWHC 1677(Admin) paragraph 45 (hereafter: \textit{Ahmed}).
But they tend to welcome and implement measures which confer the legitimating mantle of law on the growth or even abuse of their own, executive power.

C.2 Scholarship: Defences and Unease

The academic response to Security Council legislation was initially overwhelmingly positive. As set out above, states challenged the Security Council through reference to public law concepts and values; early academic commentators, by contrast, rejected both the public-law paradigm and the idea of implicit concepts in the UN Charter. In terms of the frameworks presented in chapter two, early academic commentary and some more recent scholarship adopt the “plain text” approach. Indeed, chapter two sets out academic arguments in favour of Security Council legislation as perfect examples of this approach to Security Council powers.\(^ {209} \)

A “plain text” approach holds that the Security Council may legislate because it is authorized by Chapter VII to take whatever measures it deems necessary to restore peace, and these measures do not exclude legislation.\(^ {210} \) Article 39 of the UN Charter confers on the Security Council the power to determine whether there is a threat to the peace, breach of the peace or an act of aggression, and article 41 empowers the Council to decide which “measures” to adopt in order to maintain or restore peace. As the Charter offers no definition of the operative terms, and sets out an indicative, rather than exhaustive, list of possible measures in article 41, “plain text” scholars point out that there is nothing limiting the discretion of the Security Council to do as it sees fit.\(^ {211} \) Thus Talmon, Rosand and Wood all reject the argument that the Council may respond only to individual situations on the basis that the Charter does not expressly limit the Council to individual situations.\(^ {212} \) Within the wide authorization of Chapter VII, in other words, the Council may do whatever is not expressly prohibited.

\(^{209}\) See section C.1 of chapter two.


\(^{211}\) See Simma et al. (n 210) paragraph 70.

\(^{212}\) Rosand (n 79) 545, Talm (n 8) 179, Michael Wood, “The UN Security Council and International Law” *Lauterpacht Lectures*, lecture one, paragraph 25 (hereafter: Wood, *Lauteracht Lectures*). See also Tsagourias (n 8) 551.
Such an approach also rejects the notion that there are any principles implicit in the Charter - particularly principles of public law - which restrict the Security Council’s legislative capacity. In particular, the Security Council is not to be seen as an executive body which is precluded from exercising functions usually associated with other branches of domestic governments.\textsuperscript{213} Instead, each of the organs of the UN determines its own competence, which is measured only against the aim which the organ pursues.\textsuperscript{214} Wood argues that international law is of a completely different nature than domestic constitutional law:

> The term ‘constitution’ has no particular meaning in international law. ... The ‘international community’ (itself a much misused term) has little in common with society within a State.\textsuperscript{215}

Similarly, Talmon meets the objection that the SC is a policeman, not a legislature, with the remark that the SC’s powers should be determined not by reference to that body’s general role but “on the basis of the provisions of the UN Charter”.\textsuperscript{216}

However, some of the scholars in this camp base the Council’s unfettered powers on an interpretation of the Charter as a whole, offering what Tsagourias calls a “teleological” interpretation of the document.\textsuperscript{217} Citing the Reparations for Injuries Case, Tsagourias points out that the rights and duties of the UN (and, by implication, its organs) must be determined in the light of its functions and purposes.\textsuperscript{218} Although Tsagourias does not spell out the functions and purposes of the Security Council, other authors build their arguments on the Security Council’s primary responsibility of maintaining peace and security, which is conferred on the Council expressly by article 24 and mentioned as a purpose of the United Nations in article 1.\textsuperscript{219}

The idea underlying this teleological approach needs to be further interrogated. The argument that places the Council largely outside the law emphasizes the political nature of the Council and the seriousness of the dangers that it must thwart. Such an argument proposes, on the

\begin{itemize}
\item[213] Simma et al. (n 210) paragraph 72.
\item[214] Tsagourias (n 8) 543.
\item[215] Wood, \textit{Lauterpacht Lectures}, lecture one, (n 212) paragraph 18.
\item[216] Talmon (n 8) 179. While the American delegate referred to the Security Council’s role as that of “policeman” during the drafting of the Charter, the policeman function was not inscribed in the text of the Charter. See Simma et al. (n 210) paragraph 63.
\item[217] Tsagourias (n 8) 551. See also Barker (n 35) 15.
\item[218] Tsagourias (n 8) 543.
\item[219] Talmon (n 8) 179-180; Rosand (n 79) 552-556 and Szasz (n 1) 904.
\end{itemize}
one hand, that the constraints on the Council are of a political, rather than a legal, nature, but it also suggests that the Council needs freedom from the legal constraints that do exist, in order to respond swiftly to emergency situations. Law is, in other words, seen as a “braking” process, limiting the effectiveness of the body that it would constrain.

The legal restraints that the pro-legislation camp does recognize impose negligible constraints on the Council. Thus it has been argued that the only constraints on the Council are that it acts in accordance with the purposes and principles of the United Nations and that it complies with jus cogens - a category that is argued not to include many of the human rights relevant to the Council’s anti-terrorism campaign. Authors who support legislation by the Security Council also acknowledge that the Council is subject to the principle of proportionality, but, on their interpretation, this principle has negligible effect in practice.

In the context of Security Council legislation, such an approach has a very unfortunate and, I would argue, legally untenable result: the Council is held to be (almost) unbound by law itself, while it is given the power to create law for the rest of the global system. The power to legislate becomes an aspect of the unfettered executive power which the Council must enjoy in order to carry out its global mandate.

Over time, objections have emerged to Security Council legislation, but these objections seldom include an argument that the Council lacks the legal capacity to legislate. Instead, objections are phrased with reference to the legitimacy of Security Council legislation - an ambiguous term, but one often seen to be extra-legal and to reflect political or moral

220 Wood, Lauterpacht Lectures (n 212), lecture two, paragraphs 13 and 16.
222 Wood, Lauterpacht Lectures (n 212) lecture two, paragraph 6; Talmon attaches more consequences to this requirement. See Talmon (n 8) 182-4.
223 Kadi v. Council and Commission Case T-315/01 [2005], printed in [2006] European Court Reports II-02139 (hereafter: Kadi); Wood, Lauterpacht Lectures (n 212), lecture one, paragraphs 51-6, and lecture two, paragraph 6; Rosand (n 79) 556, n 63. See also Marschik, “Legislative Powers” (n 10) 483.
224 Including procedural justice and the right to property. See Wood, Lauterpacht Lectures (n 212), lecture two, paragraphs 35-50; Alvarez, International Organizations (n 59) 119; Al-Jedda: R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent) [2007] UKHL 58, paragraphs 26-39 and 150-152.
225 Rosand (n 79) 557 and Talmon (n 8) 184. See also Tsagourias (n 8) 555.
Scholars thus tend to understand legislation as a power which the Council enjoys under law, but they suggest that it constrain itself in exercising this power. For political, moral or simply practical reasons, these scholars argue, the Council should avoid legislating or should do so only when certain, strict conditions are met.\footnote{226 See Martinez (n 10) 349-352 at 353-356 and the discussion below.}

There have, however, been some voices suggesting that the Council has no capacity to legislate at all. Writers who do take this view base their arguments on the text of the UN Charter, the (constitutional) structure of the Charter as a whole, and the underlying principles of international law - particularly the principle of state sovereignty and its related notion that international law is based on the consent of states. Thus Abi-Saab points out that article 24 of the UN Charter, which confers upon the Security Council the “primary responsibility for the maintenance of international peace and security”, states that the Council’s “specific” powers are set out in Chapters VI, VII, VIII and XII.\footnote{227 Simma et al. (n 210) paragraphs 66 and 77. See Tsagourias (n 8) 557: “To this, it should be added that the Security Council cannot, by itself, initiate legislation or practically enforce it worldwide because it does not have its own administration or links with domestic stakeholders, but relies on the co-operation of states, which means that state interests will be taken on board in its legislative initiatives.”}

Reading the term “specific” to require that the powers conferred be expressly provided for, Abi-Saab points out that none of these chapters suggest that the Council is empowered to handle anything other than specific situations.\footnote{228 Abi-Saab (n 8) 120-121.} This point is supported by other authors, who argue that neither the empowering provisions themselves\footnote{229 Abi-Saab (n 8) 121.} nor their context within the UN Charter\footnote{230 Articles 39 and 41.} envisage that the Council should respond to general problems rather than specific incidents.\footnote{231 For this point, see, in particular, Elberling (n 79) 342-343; Andreas Zimmermann & Björn Elberling, “Grenzen der Legislativbefugnisse des Sicherheitsrats” in (2004) 52 Vereinte Nationen 71 at 71-72 (hereafter: Zimmerman & Elberling).} Scholars rely on two other arguments to support the view that the Security Council is limited to responding to specific events and not general, abstract issues. The first is that article 39 allows the Council to act if a threat to the peace exists rather than to prevent threats to the peace.\footnote{232 Happold, (n 8) 599-600; Elberling (n 79) 342-343.} The second draws on the principle of proportionality. In contrast to those authors who suggest that the principle of proportionality has negligible effect in...
practice, authors who oppose Security Council legislation argue that the proportionality limits the Council strictly to what is “necessary” to deal with the particular threat it has identified. This cannot include general measures that go beyond the immediate threat.\textsuperscript{234}

In addition, some writers raise disarmament as a specific issue for which the Security Council has no capacity to create general norms. This is because the Charter specifically assigns this responsibility to the General Assembly.\textsuperscript{235}

On the structure of the UN, scholars argue that the General Assembly, not the Security Council, was designed to develop international law; the Security Council, by contrast, was designed to have an executive, police-like function of responding to specific problems as they occurred.\textsuperscript{236}

Finally, Security Council legislation is seen to subvert the structural order of international law itself, as it suggests state consent is no longer necessary and thereby undermines state sovereignty.\textsuperscript{237}

Currently, however, most scholars accept that legislation by the Security Council can and has become legally valid because it has been accepted by a sufficient number of states.\textsuperscript{238} This acceptance of the legal validity of Council legislation does not dispense with increasing unease about the phenomenon. Some writers address this unease by suggesting that the UN Charter and general international law limit the Council’s legislative capacity to certain, specific situations.\textsuperscript{239} Many others locate the problems inherent in Security Council legislation in some area other than law. Thus they identify political or practical constraints on the Security Council’s legislative power, or they suggest political solutions to what is still seen as a problem, but one of legitimacy rather than law.\textsuperscript{240}


\textsuperscript{235} Happold (n 8) 605-607; Zimmerman & Elberling (n 231) 72.

\textsuperscript{236} Abi-Saab (n 8) 121-122; Happold (n 8) 599-600; Zimmerman & Elberling (n 231) 72; Martti Koskenniemi, “The Police in the Temple: Order, Justice and the UN-A Dialectical View” (1995) 6 E.J.I.L. 325 at 337-9; Elberling (n 79) 343. See also Martinez (n 10) 336-338 and Tsagourias (n 8) 541.

\textsuperscript{237} Martinez (n 10) 339-340; Happold (n 8) 599-600; Elberling (n 79) 351-352; Zimmerman & Elberling (n 231) 75.

\textsuperscript{238} Martinez (n 10) 335; Giegerich (n 79) 50; Barker (n 35) 22; Garvey (n 193) 57-58; and Marschik, “Legislative Powers” (n 10) 475. See, however, Abi-Saab (n 8) 124-5 and Zimmerman & Elberling (n 231) 74.

\textsuperscript{239} Martinez (n 10) at 336.

\textsuperscript{240} Martinez (n 10) 349-352 at 353-356 and the discussion below.
The restrictions which writers suggest are to be found in international law itself are drawn from the various frameworks discussed in chapter two, including Constitutionalism and the text of the UN Charter itself. Thus Martinez suggests that the Security Council is acting ultra vires if the Council imposes “abstract norms of general scope that meet significant opposition in the GA”.241 Other authors support the requirement of unanimous or nearly unanimous support by member states.242 It is further argued that the UN Charter allows the Security Council to legislate only on those questions directly tied to international peace and security and must respect general international law unless exceptional circumstances allow it to derogate from this law, in which case it must still respect jus cogens.243 It may also override treaty law, but must restrain itself due to the principle of state sovereignty and use its powers only when this is indispensable for safeguarding international security.244 Finally, as noted above, it is still widely accepted that the Security Council is subject to the principle of proportionality, but this term is interpreted so differently by different authors that its practical effect cannot be determined with any certainty.245

However, as noted above, many writers accept the validity of Security Council legislation and do not identify what they consider legal limitations on that legislative capacity. They still take issue with the phenomenon, but in terms of its legitimacy rather than its legal status.246 Tsagourias, who accepts the legal validity of Security Council legislation, phrases his unease with the concept in the following terms:

[T]he more specific question is whether the Security Council is indeed the right forum for making such decisions in view of its composition and decision-making process. It is well known that the Security Council has limited membership, that it privileges its permanent members in the decision-making process, and that its proceedings are closed and secretive.247

241 Martinez (n 10) 340.
242 Giegerich (n 79) 50; Talmon (n 8) 193; Lavalle (n 79) 242; Marschik, “Legislative Powers” (n 10) 489.
243 Martinez (n 10) 345-346; Marschik, “Legislative Powers” (n 10) 488. See also Talmon (n 8) 182, who describes the Council as a “single-issue legislator” and Tsagourias (n 8) 687-689.
244 Martinez (n 10) 348; Marschik, “Legislative Powers” (n 10) 488-492.
245 Martinez (n 10) 349. See also Arangio-Ruiz (n 234) 723-724; Happold (n 8) 608; Tsagourias (n 8) 687-689; Marschik, “Legislative Powers” (n 10) 488; Rosand (n 79) 557. But see arguments contra proportionality in Garvey (n 193) 56.
246 Szewcyk (n 79) 472; Dantiki (n 8) 674-675 and 677ff.
247 Tsagourias (n 8) 557.
Each of these objections is expounded on by various writers. Ian Johnstone notes the “deliberative deficit” of the Council, while others comment that it is unrepresentative of the global community and undemocratic. Thus Giegerich comments that “[i]t has become more and more difficult to attribute SC decisions to those approximately two thirds of the world population which have no seat on the Council at any given time.”

Dantiki, Elberling, Forcese and Szewcyk similarly note its democratic deficit. Others complain that the Council will only ever legislate in support of the foreign policy aims of its permanent members.

Similarly, authors propose political solutions to the problem of Security Council legislation or solutions which involve extensive institutional reform. Tsagourias, for example, suggests the principle of “subsidiarity” - which he expressly identifies as a political concept - to determine which subject matters the Security Council should handle in its legislation, and which issues it should rather leave to member states. Extensive reform suggestions include reform to the structure of the Council itself and amendment of its decision-making process, amendments meant to allow for wider consultation and deliberation and to factor in the interests of parties not represented on the Security Council. A repeated refrain is the idea that there should be another, independent body with the ability to pronounce on Security Council measures, and authors call for ways in which the Security Council can be held accountable for its decisions.

In the area of institutional reform, a High Level Panel constituted under Kofi Anan in 2003 suggested increasing involvement in the decision making of the Council by those who contribute most to the United Nations (either financially or diplomatically, or through military support),

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248 Giegerich (n 79) 50.


250 Garvey (n 193) 58; Erika de Wet, “The Security Council as a Law Maker: The Adoption of (Quasi)-Judicial Decisions” in Rüdiger Wolfrum & Volker Röben, eds., Developments of International Law in Treaty Making (Heidelberg: Springer, 2005) 183 at 225; De Wet, “Critical Remarks” (n 201) 132-3; Elberling (n 79) 350; Zimmerman & Elberling (n 231) 76. See also Szewcyk (n 79) 471.

251 Tsagourias (n 8) 547 and 558.


253 Tsagourias (n 8) 558.
increasing the Council’s representativeness, particularly with regard to the developing world, and enhancing its democratic basis and accountability.\textsuperscript{254}

While supporting the idea that the Council be made more representative, Martinez suggests various requirements for the legislative resolutions themselves, including unanimity and a limit on how long the resolutions can remain in force.\textsuperscript{255} Dantiki advocates that the Council should accept as a limitation on its legislative capacity that it may not legislate unless it makes a finding under article 39, and that it cannot permanently overturn any terms in an international treaty.\textsuperscript{256} He also suggests that legislative resolutions always be passed separately from other Chapter VII resolutions.\textsuperscript{257}

Together with Johnstone,\textsuperscript{258} Martinez suggests that the General Assembly play a role in the passing of legislative resolutions, while Giegerich proposes improving the parliamentary input in the UN deliberative and decision-making process at the international and/or the national level by setting up a UN parliamentary assembly and/or by including the national parliament in the determination of the national policy agenda to be pursued within the UN system by the member states’ representatives.\textsuperscript{259}

Where review of the Security Council is concerned, Martinez proposes that a mechanism be introduced whereby the International Court of Justice can facilitate the exercise of a legal control over the Council,\textsuperscript{260} while Dantiki sees the International Court of Justice as a resource to which the Security Council can turn if it requires a legal opinion. Dantiki proposes that the Council itself encourage review of its resolutions before domestic courts.\textsuperscript{261} Johnstone suggests that Council decisions be reviewed by an “internal panel” or an Ombudsperson.\textsuperscript{262}

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\textsuperscript{255} Martinez (n 10) 359.
\textsuperscript{256} Dantiki (n 8) 699.
\textsuperscript{257} Dantiki (n 8) 700. In this regard, see his discussion of SCR 1497, the resolution which authorized the use of force in Libya, while introducing immunity for nationals of non-member states of the International Criminal Court.
\textsuperscript{258} Johnstone (n 170) 300.
\textsuperscript{259} Giegerich (n 79) 52.
\textsuperscript{260} Martinez (n 10) 359.
\textsuperscript{261} Dantiki (n 8) 701.
\textsuperscript{262} Johnstone (n 170) 307. Johnstone is referring here to listing decisions as well as legislation. See also Thomas Franck’s suggestion for an independent panel of experts nominated by member states of the Security Council.
\end{flushright}
A significant element of the proposals is that the Security Council widen its consultations to include non-state actors such as NGO’s. This idea seems to be based, on the one hand, on the expertise that particular non-state actors, including individual consultants, can offer, and, on the other hand, the acknowledgment that such parties are affected by the particular decisions which the Security Council will reach in a particular case. The idea is not only to improve the representativeness of the Security Council by “increasing and formalizing the participation by non-governmental organizations in UN decision-making” but also to improve the quality of the deliberations which the Council holds.

The authors who tackle the legitimacy of the Security Council and its legislative and other activities hold differing concepts of what legitimacy is. In particular, some authors treat legitimacy and legality as mutually exclusive concepts; others find an occasional overlap between the two, and a third approach holds that legitimacy is a “value-added” quality; that is, that anything that is legitimate must, first and foremost, be legal. It is therefore impossible to find a uniform conception, but there is, nonetheless, a common strand that emerges across the different viewpoints. For most authors, the term legitimacy relates to the buy-in from the community which is affected by, and meant to implement, the measures which the Security Council or any other body in question passes. For a measure to be legitimate, the wider community must accept and support the body or the measures it takes.

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263 Giegerich (n 79) 52.
264 See the discussion of the “Arria formula” by Szewczyk (n 79) 492. He cites the examples of an informal meeting between the Venezuelan Ambassador Diego Arria, while he was Council president in 1992, with a Croatian priest, who had unique information on the Balkan conflict, as well as the meetings with leaders of opposition movements in Bosnia and Kosovo.
265 Giegerich (n 79) 52.
266 The term is also used across various disciplines, which adds to the diversity and confusion of its treatment. See Helen Keller, in “Round Table” in Rudiger Wolfrum & Volker Röben, eds., Legitimacy in International Law (Heidelberg: Springer, 2008) 381 at 387.
267 See, for example, Giegerich (n 79) 52; Wood, Lauterpacht Lecture (n 212), lecture one, paragraph 12.
268 Abi-Saab (n 8) 115; “Discussion after De Wet and Abi-Saab” in Rudiger Wolfrum & Volker Röben, eds., Legitimacy in International Law (Heidelberg: Springer, 2008) 155 at 166.
269 De Wet, “Critical Remarks” (n 201) 135; Lavalle (n 79) 424; Szasz (n 1) 905; Abi-Saab (n 8) 129; Hurd (n 196) 367.
This acceptance and support are built on a sense that the body in question is furthering an interest which is shared by the broader community. Thus Szewczyk argues that a key task for the international community is to find the “common purpose” which the Security Council is meant to serve, while Tsagourias investigates how the Security Council can be helped to serve the “common good”. The central role of common interests explains why the Council is often criticized for promoting only the narrow interests of the P5.

To determine what the common interest requires, and to establish whether the decision-making body is furthering this interest, many authors focus on the decision-making process itself, rather than whether the body itself is representative or democratic. In Röben’s terms, what is required is functional inclusion of those affected by the decision, rather than the formal inclusion that would be obtained through representative membership on the decision-making body. The suggestion is that the process of deliberation itself must allow for the participation of the wider community.

To conclude, then, SCR 1540 was received with hostility in 2004 and was not followed by any further legislation for a decade. The phenomenon seemed to have been a flash in the pan. However, its return in 2014 - a return accepted largely uncritically by states and commentators - signals that legislation is a very real tool in the arsenal of the Security Council, and that further legislation is likely to follow. States resist some, but not all, of the legislative measures, and it is fairly clear that they are likely to accept and implement legislation which empowers them to act against non-state actors. The scholarship is more critical, but, largely because of the response of states to the phenomenon, it has generally accepted legislation as valid. Most of the discourse centres on how the Security Council should legislate, not whether it should do so. Moreover,

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270 Szewczyk (n 79) 452.
271 Tsagourias (n 8) 547. See also Abi-Saab (n 8) 113 for the central role that common needs play in the modern international community.
272 See section C.1 above.
274 Giegerich (n 79) 52, referring to Habermas’ discourse theory; Barker (n 35) 6 and 26-7; Szewczyk (n 79) 452 and 482; De Wet, “Critical Remarks” (n 201) 138 and 145. See also Corneliu Bjola, “Legitimating the Use of Force in International Politics: A Communicative Action Perspective” (2005) 11 European Journal of International Relations 266 at 280 (hereafter: Bjola), addressing the legitimacy of use of force.
writers are hesitant to conclude that legislation which does not follow their suggestions of participation, transparency, and particular decision-making processes, is not lawful.

To most of the authors discussed in section C.2, the lack of participation in, and deliberation about, Security Council legislation, leads to legislation that is not legitimate. From a Fullerian perspective, however, these factors may have as a consequence that the legislation lacks the quality of law. This is because the factors which ensure legitimacy are part of law’s internal morality and thus constitutive of law.

D. Security Council Legislation Through a Fullerian Lens

In this section, I deal with a number of overlapping issues, which together suggest an answer to the question whether the Security Council can legislate. First of all, I suggest that the Security Council, while purporting to legislate, has not, thus far, succeeded in creating law (D.1). To make this argument, I look closely at the content of the three legislative resolutions and measure these against the Fuller’s rule of law criteria. This exercise reveals that all three resolutions suffer serious deficiencies in terms of legality and may therefore be argued not to have the quality of law.

In a second step, I consider whether the Council could nonetheless still create law at some future stage. This step involves an investigation of the Security Council’s design and process against the requirements of interactional law. The first issue to be examined is the structure of the Security Council and the way in which reaches its decisions. This examination compares how the Council works with the way in which interactional law develops (D.2), and it will reveal that the Council’s design and processes are antithetical to interactional law.

D.1 The Content of the Current Legislative Resolutions

Chapter two set out Lon Fuller’s vision of the rule of law and his account of how legality produces fidelity to law through its promotion of the agency of the subjects of law. To recall, the eight specific requirements Fuller posited were that there be (1) (general) rules, which are (2) publicized, (3) understandable, (4) not retroactive and (5) internally consistent (that is, not contradictory). The rules must also be (6) relatively constant over time - that is, they may not change so frequently that the legal subjects can no longer orient their conduct in compliance with
the rules. In addition, (7) compliance must not be physically impossible - that is, law cannot demand that legal subjects act beyond their powers. Finally, the (8) administration of law must be congruent with the rules as announced.275

With respect to the content of the relevant Council resolutions, many of Fuller’s criteria appear, at first blush, to be met. As set out in section A, Security Council resolutions have to meet the requirement of generality in order to be classified as legislation in the first place. They also meet the second, fifth and sixth requirement, that is, publication, internal consistency and stability over time. The last attribute is present because the norms created by the legislative resolutions have not been changed. This leaves SCR 1373 on the “statute books” for 14 years, and counting. However, where the remaining requirements are concerned, all three resolutions present serious deficiencies.

SCR 1540 appears clear on the text, requiring states to take a number of measures to prevent non-state actors from obtaining weapons of mass destruction. The rules are understandable and prospective. States are capable of determining their meaning and carrying them out. Where they are not, they may obtain assistance from the Council itself for the task, a provision which ensures that the rules are comprehensible but does not guarantee that they will be consistent over time.276 The third, fourth and seventh requirements (that the law be understandable and not retroactive, and that compliance must not be physically impossible) thus appear to be met. The eighth requirement - congruence - is more problematic. This is not to say that the Committee set up by paragraph 4 of the resolution is not carrying out the programme assigned to it by the resolution itself. The disconnect lies in the relation between SCR 1540 and its implementation, on the one hand, and the pre-existing Treaty on the Non-Proliferation of Nuclear Weapons, on the other.

SCR 1540 states expressly that none of its provisions may be “interpreted so as to conflict with or alter the rights and obligations of State Parties to the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention and the Biological and Toxin Weapons Convention or alter the responsibilities of the International Atomic Energy Agency or the Organization for the Prohibition of

275 Fuller, Morality of Law (n 18) 39.
276 SCR 1540 (n 32) paragraph 7.
Chemical Weapons.” There is thus, formally speaking, no contradiction between the resolution and the existing law. However, where the regime on nuclear weapons is concerned, the resolution undermines the underlying purpose of the Treaty on the Non-Proliferation of Nuclear Weapons and destroys the reciprocal relationship which this treaty created between states already in possession of nuclear weapons and those without nuclear weapons. In this way, it disregards the shared understanding which gave rise to the treaty regime, and it destroys one of the underlying values of the rule of law.

The Treaty on the Non-Proliferation of Nuclear Weapons (NPT), concluded in 1968, allowed all states already in possession of nuclear weapons to retain them, on the understanding that they would start a programme of disarmament. Richard Price describes this understanding as a “famous central bargain[] of the NPT: in return for non-nuclear states foreswearing the acquisition of nuclear weapons, the nuclear weapons states committed themselves to disarmament.” The regime as a whole was “premised upon the ... understanding that nuclear weapons are not ‘conventional’ in that sense with legitimate uses, but rather are inherently illegitimate.”

This treaty was drafted in the wake of numerous General Assembly resolutions calling for the elimination of all nuclear weapons and is the most widely-ratified arms control convention in existence. Currently, only four states are not parties. And yet the Treaty on the Non-Proliferation of Nuclear Weapons faces a crisis of legitimacy because the states with nuclear weapons - including all permanent members of the Security Council - have not attempted to

277 SCR 1540 (n 32) paragraph 6.
278 Treaty on the Non-Proliferation of Nuclear Weapons of 1968 729 U.N.T.S. 161, article VI, reads: “Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”
280 Price (n 279) 244.
281 For example, UN Doc A/RES/1665 (1961); UN Doc A/RES/6097 (1965); UN Doc A/RES/6316 (1966); and UN Doc A/RES/6509 (1966).
282 Price (n 279) 234.
283 Israel, India, Pakistan and North Korea. See http://disarmament.un.org/treaties/t/npt. [accessed 21 June 2016]
disarm.\textsuperscript{284} Indeed, the USA, in particular, but also other members of the P5, seemed to have changed their stance on the elimination of all nuclear weapons. Instead of aiming for global disarmament, they focus on which states may, and may not, possess the weapons. Commenting on the USA's 2005 nuclear sharing agreement with India (itself not a party to the NPT), Price notes:

> The significance of this is to remove nuclear weapons themselves as the referent of threat and transfer it to particular potential possessors and users of the threat; this amounts to a rejection of the bedrock premise of the NPT regime: namely, that nuclear weapons themselves are an international bad no matter who possesses them. This is the international analogue of the National Rifle Association's infamous slogan, ‘guns don't kill people, people do.'\textsuperscript{285}

It may be that the actions by nuclear weapons states in the last 20 years have shaken the shared understanding that was given expression by the \textit{Treaty on the Non-Proliferation of Nuclear Weapons}. But it cannot be argued that these actions have led to the replacement of the previous shared understanding with a new understanding, under which it is acceptable that certain states may possess nuclear weapons forever, and new states may acquire such weapons if they have the approval of the nuclear weapons states. In other words, whatever shared understandings have survived the recent abandonment of disarmament by the P5 do not support SCR 1540. As we discussed in chapter two, Postema explains that Fuller's emphasis on “implicit law” - law emerging from “the network of tacit understandings and unwritten conventions, rooted in the soil of social interaction”\textsuperscript{286} - requires the proclaimed rules (and official administration of these rules) to be reasonably consistent with the broader legal and social system into which they are introduced.\textsuperscript{287} SCR 1540 adds obligations on to the existing rules on non-proliferation, while completely ignoring the existing rules on disarmament.\textsuperscript{288} In doing so, it promotes an approach which “amounts to an

\begin{thebibliography}{99}

\bibitem{284} See Johnstone (n 170) 291 on the asymmetry in the relationship between states possessing nuclear weapons and those that do not. See also Garvey (n 186) 61 and 102-3.

\bibitem{285} Price (n 279) 234-5 (references omitted).


\bibitem{287} Brunnée & Toope, \textit{Legitimacy} (n 66) 97.

\bibitem{288} SCR 1540 (n 32) paragraph 4. For state comments on this point, see UN Doc S/PV.4950 (n 169): Brazil at 4, Algeria at 5, Peru at 20, South Africa at 22, India at 24 and Cuba at 30.

\end{thebibliography}
attempt to reconstitute the social relations that underpin the regime, though in a direction that legitimizes more, not less proliferation.”

SCR 1540 also removes the reciprocity created by the treaty regime. As set out above, the NPT regime recognized two groups of states: those possessing weapons, and those without. It imposed different obligations on the two groups, which were together meant to benefit the global community as a whole. While SCR 1540 maintains the distinction between these two groups, it upholds and develops only those obligations borne by non-nuclear states. Furthermore, one category is to be subject to a monitoring process, while the other is not. The element of reciprocity has been lost, not only in the substance of the law, but also in how it is monitored. Through SCR 1540, the Security Council, and particularly its permanent members, claim the capacity to influence the nuclear policy of other states without having to endure any oversight over their own.

Turning to the two resolutions focusing specifically on terrorism (SCR’s 1373 and 2178), the rule of law criteria which are not met are requirement 3 (that the rules be understandable), 4 (that the rules be prospective) 7 (that compliance be physically possible) and 8 (that the administration of the law be congruent with the rules as announced). Both resolutions consist of a number of measures to be taken against either terrorists in general, or “foreign terrorist fighters”, but neither defines the term “terrorists” or “terrorism”. States are therefore required to penalize the “terrorists” and “foreign terrorist fighters”, prevent them from leaving the borders of their states, and block funding to them, all without a clear concept of what terrorism is. This means that the “terrorists” themselves are given no guidance on whether they fall into this category or not. It is important to recall that, in determining whether the rule of law requirements are met, we need to examine the effect of the law on all the participants in the legal regime. Individuals and other non-state entities are directly impacted by these resolutions; they need to understand the norms in order to be able to adjust their behaviour and avoid the severe consequences of being classified as

289 Price (n 279) 244.
290 This freedom is inherent in their veto power, rather than the design of the oversight mechanism. See also Joyner (n 83) 251-3.
291 This deeply contentious matter was left to the discretion of states. For difficulties of definition and problems of overbreadth in definition, see C.H. Powell, “Defining Terrorism: How and Why” (hereafter: Powell, “Definition”) and Kent Roach, “Defining Terrorism: The Need for a Restrained Definition” both in Nicole LaViolette & Craig Forcese, eds., The Human Rights of Anti-Terrorism (Toronto: Irwin Law, 2008). See also the discussion below at section B of chapter 6.
a (suspected) “terrorist”. Even if individuals and non-state actors are not formally recognized as legal persons by the resolutions,\textsuperscript{292} the practice of legality requires their engagement.\textsuperscript{293}

The requirement that the rules not be retroactive is in doubt because the non-state actors subjected to this system run the risk of being penalized for the acts they carried out before the law came into being. This is because the penalties which states must impose apply to “terrorists” and “terrorist freedom fighters”, whose status is likely to be determined by past as well as present conduct. Finally, the lack of clarity on the criteria for the sanctions means it is impossible to establish whether the imposition of those sanctions is congruent with the rule.

The anti-terrorism resolutions also fail to give effect to the underlying values of the rule of law. These were set out in chapter two, which set out Fuller’s view that the rule of law served ultimately to protect human agency, which is itself underpinned by the related values of congruence and reciprocity. Congruence has a deeper meaning in Fuller’s theory than the eighth, specific rule of law criterion would suggest,\textsuperscript{294} because his emphasis on “implicit law” also requires congruence between the proclaimed law and the broader legal and social system into which they are introduced.\textsuperscript{295} As Barker notes, the anti-terrorism resolutions fail to acknowledge other, applicable norms, such as human rights norms. In his view, this detracts directly from the legal quality of the resolution:

By focusing exclusively on state security and by failing to address the relevance of other, equally important and well-established norms of international law, anti-terrorism law-makers have undermined the authority of their efforts in the longer term. Thus, even if the legality and legitimacy of Security Council Resolution 1373 can be established, questions remain as to the internal morality of the law.\textsuperscript{296}

For Fuller, reciprocity was at the root of several vital aspects of law. As noted in chapter two, it is a basis of the subject’s duty to obey the law.\textsuperscript{297} It also means that law is mutually beneficial, that is, it has a benefit for both the law-giver and the subject, and, finally, it reflects that law is

\textsuperscript{292} It should furthermore be noted that, in paragraph 1 of SCR 2178 (n 32), the Security Council can be read to impose legally binding obligations directly on individuals, as it “demands that all foreign terrorist fighters disarm and cease all terrorist acts and participation in armed conflict”. See also Peters (n 141).
\textsuperscript{293} Barker (n 35) 25.
\textsuperscript{294} Postema, “Implicit Law” (n 286) 255. Fuller discusses the relationship between “made law” and “implicit law” in Anatomy of the Law (New York: Frederick A Praeger Publishers, 1968) at 57ff. See also the discussion in chapter two above.
\textsuperscript{295} Brunnée & Toope, Legitimacy (n 66) 97.
\textsuperscript{296} Barker (n 35) 19.
\textsuperscript{297} Fuller, “A Reply to Critics” in Fuller, Morality of Law (n 18) 209.
created through a reciprocal, interactive process.\textsuperscript{298} Even for states, there is minimal reciprocity in the second sense, that is, very few states have the chance to engage with the Security Council in generating the rules. Individuals and non-state entities, on the other hand, have no role to play in the creation of the rules at all.\textsuperscript{299} Secondly, while states may gain some benefit from the use of the anti-terrorism rules, there is little benefit for individuals and non-state entities in attempting to comply with them. Because of its overbreadth, the anti-terrorism law will often provide insufficient guidance for their behaviour. Further, states can and do use anti-terrorism law to increase the discretionary power of the executive to suppress political dissent.\textsuperscript{300} There is thus often no guarantee that compliance with the law will protect the suspected terrorist. Being able to rely on the law-giver to implement the proclaimed law faithfully is what enables the subjects to reason with law and “make choices about their own lives”.\textsuperscript{301} In this sense, congruence and reciprocity together ensure the agency of those subject to the law, thereby forming the bedrock of the rule of law:

Surely the very essence of the Rule of Law is that in acting upon the citizen (by putting him in jail, for example, or by declaring invalid a deed under which he claims title to property), a government will faithfully apply rules previously declared as those to be followed by the citizen and as being determinative of his rights and duties. If the Rule of Law does not mean this, it means nothing.\textsuperscript{302}

On their content, therefore, all three resolutions suffer serious deficiencies when measured against the criteria of legality.

D.2 Legislation as Process: The Security Council as Legislator

Thus far, I have argued that the Council has not created law because its legislative measures fail to meet the requirements of the rule of law. This does not, in itself, dispose of the question of the Security Council’s legislative capacity. To determine whether the Council can legislate, we need to examine it as an institution, looking, in particular, at how it is designed and how it reaches its decisions. At this stage, our focus moves from the content of the legislative resolutions to the

\textsuperscript{298} See the discussion in chapter two at section E.
\textsuperscript{299} The law-making process is explored further under point D.2 below.
\textsuperscript{300} See the discussion above under section C.1.
\textsuperscript{301} Brunnée & Toope, Legitimacy (n 66) 29-30.
\textsuperscript{302} Fuller, “A Reply to Critics” in Fuller, Morality of Law (n 18) 209-210.
process of law-making. In particular, we need to determine whether the Security Council can allow for interactional law.

Interactional law was proposed in chapter two after a discussion of a range of possible frameworks for the limitation of the Security Council’s powers. As explained in chapter two, the notion of interactional law arises from Lon Fuller’s philosophy of law and is applied to international law by Brunnée and Toope. In this chapter, I considered law-making as fundamentally horizontal, but interested in public power because law requires “a meaningful limitation on the lawgiver’s power in favour of the agency of the subject”\(^{303}\). A power imbalance between the parties in the law-making process increases the danger that the reciprocal engagement that is necessary for interactional law could be lost. The rule of law therefore requires that the institution which exercises public power facilitate interaction with those affected by its decisions. This in turn requires a particular design, through which processes of communication and feedback can be directed between the parties.

It is readily apparent that neither the design nor the process of the Council facilitates participation of non-member states in its decision-making processes, to say nothing of non-state actors that are affected by the measure. Non-members of the Council (and even, on occasion, non-permanent members of the Council) have no opportunity to influence the drafting of a resolution. They are also not privy to the deliberations of those who do draft the resolution:

By and large, Security Council deliberations are not celebrated for their inclusiveness. They operate to a large extent behind closed doors, without a public record being taken. Though early official records of the Council’s formal meetings are more detailed, at some point it seems that Security Council members began to feel constrained by the responsibility of negotiating in the public eye, and increasingly substantive negotiations began to take place in private. Eventually, the practice of ‘informal consultations’ was institutionalized, and in 1978 a purpose-built room was constructed to host such consultations. In time, the Council was conducting the bulk of its business in the consultations room rather than the Security Council chamber. There are no official records of these consultations, and attendance is tightly controlled. Draft resolutions are rarely tabled for discussion in formal meetings until members of the Council are prepared to vote on them, at which point the outcome of the vote is fairly pre-determined. The Council sometimes adopts decisions with no discussion at all, meaning that there is no public record of the negotiations leading up to the vote, the justification for the decision, or a clear picture of the resolution’s objectives.\(^{304}\)

And, if we examine the drafting history of the legislative resolutions, we see the Security Council making full use of its ability to exclude other parties from engaging with its decision-making


\(^{304}\) Hovell, *Power of Process* (n 249) 145-6 (footnotes omitted).
process. SCR 1373 was drafted without any public consultation. Permanent members considered the draft for two days only, and it was revealed to non-permanent members only one day before the vote.\(^\text{305}\) As Kent Roach notes:

> On September 28, 2001, all fifteen members of the Security Council approved of the momentous resolution in a five minute evening meeting. No country explained why they voted for the Resolution and no country outside the 15 state Security Council was consulted. Although the Security Council acted as a world legislator by proclaiming general, binding and permanent obligations on states, it functioned with the secrecy and efficiency associated with executive action.\(^\text{306}\)

Three years later, when the Council proposed resolution 1540, it held meetings which non-members of the Security Council could attend, and did so in advance of the vote on the resolution.\(^\text{307}\) (By contrast, a public debate was held on SCR 1373, but only after the resolution was adopted.)\(^\text{308}\) Nonetheless, the text of the resolution was negotiated behind closed doors and very few of the recommendations made in the public debate found their way into the final version of the SCR 1540.\(^\text{309}\) The public meeting itself was held only after “significant pressure” was received from non-member states\(^\text{310}\) and was perceived as “an occasion to vent off steam” rather than an opportunity to change the wording of the resolution.\(^\text{311}\) Not even the elected, non-permanent members of the Security Council had much influence on the text.\(^\text{312}\)

By the time SCR 2178 was drawn up, all the lessons of the decade before seemed to have been forgotten. True, there was a public debate of more than four hours, but the vote was held in the first three minutes of that meeting.\(^\text{313}\) The text of the resolution had, once again, been determined in advance of any public debate.\(^\text{314}\)


\(^{306}\) Kent Roach, The 9/11 Effect (n 37).

\(^{307}\) On 22 April 2004. See UN Doc SC/8070.

\(^{308}\) Heupel (n 305) 132.

\(^{309}\) Heupel (n 305) 132.

\(^{310}\) Marschik, “Legislative Powers” (n 10) 476.

\(^{311}\) Marschik, “Legislative Powers” (n 10) 485.

\(^{312}\) Marschik, “Legislative Powers” (n 10) 485.

\(^{313}\) See UN Doc SC/11580.

As noted above, the anti-terrorism resolutions (SCR 1373 and SCR 2178) have generally been accepted and implemented by states. But it is important to note that acceptance by states does not dispose of the enquiry. In section A.2.2 above, I cited Brunnée and Toope’s position that an interactional theory of international law requires that a diversity of participants takes part in lawmaking, and that this requirement arises from the need for reciprocity in the construction of law.\textsuperscript{315} In chapter six, I examine the implications of this position in the context of a law against terrorism, and argue that, in this area at least, participation by non-state actors is needed to create legal norms. For now, however, I want to put the issue of the participation of non-state actors aside, and note merely how the Council’s design obstructs interaction with, and the participation of, the wider community of state actors.

The structure which creates the legislative resolutions is the Security Council itself, consisting of only 15 States, five of whom are permanent and enjoy veto powers over any substantive decisions. As discussed above, this body usually makes its decisions in an “informal process” which is undocumented, and is barred to non-members of the Security Council. Within that “informal process”, five states have disproportionate power to promote the measures that they favour and absolute power to block those that they dislike.

Commentators see little prospect that the design of the Council itself is going to change. Hurd notes that the history of the Security Council demonstrates concern for its legitimacy, but that this concern is limited, as calls for democratic reform of the Council have been unsuccessful.\textsuperscript{316} The veto power, in particular, will not be dropped, as the Charter process required for its amendment is itself subject to the veto.\textsuperscript{317}

One of the features which the design protects seems to be particularly important to the members of the Security Council, namely, the secrecy of the deliberative process (if, indeed, there is any deliberation at all). Even when the Council has allowed an open debate to be held - such as in the case of SCR 1540 - it has prevented this debate from determining the content of the

\begin{footnotesize}
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\item \textsuperscript{315} Brunnée & Toope, \textit{Legitimacy} (n 66) 45.
\item \textsuperscript{316} According to Hurd, this concern has led to the increase in the number of non-permanent members of the Council from six to ten, and to the practice of consulting with non-members of the Security Council on key decisions. See Hurd (n 196) 368 and 370.
\item \textsuperscript{317} \textit{Charter of the United Nations}, 24 October 1945, 1 UNTS XVI, article 108. See also Giegerich (n 79) 51.
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This secrecy frustrates two central facets of interactive law: reasoned argument and public justification.

Chapter two explored the idea of reasoned argument in some detail, touching on its treatment by a range of authors who refer variously to the concept as “rhetorical activity”, “deliberation”, and “communicative action”. I suggested in chapter two that the central features of such communication were, first, persuasion, which suggests that the communication must be based on reason and principle, and, secondly, that the discussion is directed towards some common good, or promotes some common value, and is not merely directed at the self-interest of the various parties to the discussion.

It is clear that no reasoned argument can take place if the decision-making process of the Council is hidden from the wider community. Or rather, it may take place, but will be meaningless because nobody can hear it or be persuaded by it. The second consequence of the Council’s secrecy—exacerbated by its structural bias in favour of particular states—is the absence of any process of justification by the wielder of power to those who are affected by it.

There is therefore no culture of justification, which is a necessary feature of the rule of law. Under such a culture of justification, the power-wielder is subject to law and has no discretion over whether to render account of its actions; as Etienne Mureinik pointed out, a culture of justification is one in which “every exercise of power is expected to be justified”. The decision-making process of the Security Council does not prohibit communicative action, as the Council has the option to open its discussions to a broader audience and entertain the views of other institutions. However, it retains control over when it does so. It is not inconceivable that it

318 As noted above, even in the case of SCR 1540, which was ostensibly preceded by an open and consultative process, the suggestions made in the open forum had little effect on the final text adopted by the Council.
319 Brunnée & Toope, Legitimacy (n 66) 31.
320 Johnstone (n 170) 279.
321 Bjola (n 274); Jürgen Habermas, The Theory of Communicative Action (Boston: Beacon Press, 1984).
322 See chapter two above.
323 David Dyzenhaus, “Law as Justification: Etienne Mureinik’s Conception of Legal Culture” (1998) 14 S.A.J.H.R. 1 at 33. See also the discussion of Dyzenhaus’s argument in chapter two.
may, on occasion, produce norms which satisfy the criteria of legality. But its design is antithetical to the rule of law and to interactional law.
Chapter Six

Becoming Lawful:
The Prospects for Interactional Law-Making by the Security Council

In chapter four, we saw how, in the case of listing, the Security Council measures gained some of the quality of law over time. Depending on the work of the Ombudsperson, and how seriously her recommendations are taken by the Security Council, it is conceivable that its decisions and processes may become lawful. In this chapter, I investigate whether such a transformation is also possible in the case of Security Council legislation.

A. Interactional (New) Law

It will be useful at this point to restate the central features of Brunnée and Toope’s notion of interactional law. As discussed in chapter two, Brunnée and Toope suggest that law develops out of the “shared understandings” within a community - a community arising from the mutual engagement of its members.¹ Norms will form from the shared understandings of this community, and they will be legal norms if they meet Fuller’s eight “rule of law” criteria. The community, however, need not share a common goal or vision:

It is not necessary to have a morally cohesive ‘community’ before law-making is possible; though some foundation of shared understandings is required. In this sense, Fuller’s theory differs from Habermas’s concept of communicative action, where it would seem that a ‘common lifeworld’ is a precondition to effective norm building. Nor is our view of interactional law predicated upon a vision of a growing liberal world community. Our theory of legal obligation is not aligned with cosmopolitan liberalism, or with theories of the ‘democratic peace’, or with visions of global constitutionalism. Rather, we envisage interactional law as a particular kind of ‘community of practice’ ... We reiterate Adler’s important observations that the ‘joint enterprise of members of a community of practice does not necessarily mean a common goal or vision,’ but that members ‘must share collective understandings that tell [them] what they are doing and why’...²

¹ Jutta Brunnée & Stephen Toope, Legitimacy and Legality in International Law (Cambridge: Cambridge University Press, 2010) at 80 (hereafter: Brunnée & Toope, Legitimacy).
² Brunnée & Toope, Legitimacy (n 1) 44-45 (footnotes omitted).
What the community of practice does need in order to create law, however, are “certain basic understandings about what they hope to achieve together,” which can be fostered through “pre-legal mutual interaction.” As legal norms develop from the shared understandings of the community, the ongoing process of interaction - “of reasoning through law” - allows for “a modest and gradual building up of society.”

Thus the diversity of the global community, and the politically-charged environment of international relations and of the Security Council itself, does not render law impossible per se. But law is not possible without basic, shared understandings and a particular type of interaction. As discussed in chapters two and five, this type of interaction is variously described as deliberation, reasoning and persuasion, through which a particular norm or activity is presented as a route to some common good. Brunnée and Toope refer to the term “rhetorical activity”, and also describe interaction as “reasoning through law”. Note that Brunnée and Toope posit that an ongoing “practice of legality” is required (in addition to Fuller’s eight criteria), which confirms and sustains the norm which the community has created. Once the shared understandings have been formed, in other words, the ongoing interaction becomes part of the law - law as an enterprise - and must have the quality of law.

Against this background, we can now move to examine what chances the Security Council has of formulating or amending legal norms through some form of engagement with the wider community which fulfils the requirements of interactional law. I conduct this examination by considering issues specific to the three legislative resolutions passed thus far, particularly their focus on terrorism, and then moving on to some broader points about the kind of feedback which is needed to create general norms.

I start by considering whether the shared understandings necessary to give rise to a system of anti-terrorism law currently exist (section B). This discussion will then consider whether the rules that have been built on the existing foundation create law or managerial direction. This

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3 Brunnée & Toope, Legitimacy (n 1) 42.
4 Brunnée & Toope, Legitimacy (n 1) 42.
5 Brunnée & Toope, Legitimacy (n 1) 43.
6 Brunnée & Toope, Legitimacy (n 1) 36.
7 Brunnée & Toope, Legitimacy (n 1) 43.
leads to the second discussion, in section C, which focuses on the form of social ordering which both domestic governments and the Security Council itself tend to adopt in cases of emergency. Here the focus will be the claim of executives, in particular, to act outside of the normal law or under minimal constraint in order to protect domestic or international society from a serious security threat. This claim presents particular problems for interactional law, because it eschews the process of deliberation and justification by which law is formed. Against the background of these two sections, section D considers the Security Council’s chances of creating law more broadly. I will suggest that the deck is already stacked against the Security Council’s legislative capacity due to the factors which have emerged from the preceding sections. To these might be added a couple of practical considerations relating to the kind of interaction which the Security Council might require in order to create new rules of law.

My concluding section E summarizes the various points of my argument, reiterating the requirements of interactional international law and noting the aspects of this account which the Security Council fails to meet. I conclude that the Council is highly unlikely to produce law in the foreseeable future, and suggest that legislative resolutions - which claim to create law in themselves - should be challenged because they undermine the rule of law.

B. The Foundation of the Legislation: The Concept of Terrorism

All three of the Security Council’s legislative resolutions purport to be designed to prevent terrorism in some way. Chapter five demonstrated that these resolutions have been well-received when they empower the state, particularly its executive branch, in its relationship with non-state actors, but less well-received when they privilege some states over others. However, the insistence on a non-reciprocal relationship between states and non-state actors thwarts a concept of terrorism rooted in law.

Terrorism can be seen as politically motivated violence to the extent that it aims to influence how power is exercised over a particular group of people.\(^8\) It does so by attempting either to replace or to coerce the group wielding power - usually, the government of a state. As a

result, states and commentators often see terrorism as violence by non-state actors against state actors, accepting as an often unstated premise that the state may use violence whereas the non-state actor may not. The two principal models for a definition of terrorism - normative and descriptive - both reflect an understanding of the phenomenon that is premised on the state’s monopoly over violence. The normative model defines the crime expressly by its political nature. By contrast, the descriptive model simply prohibits a range of violent acts.

The normative definition prohibits political violence while implicitly accepting the state’s right of recourse to force. Use of force by the military and the police is generally justified for political reasons, but violence of this kind is considered acceptable because it is exercised by the state. On the other hand, political violence directed against the state is proscribed as terrorism.9

The descriptive definition, by ignoring the political element inherent in the crime, and, instead, simply proscribing a range of violent acts, effectively criminalizes all violence beyond a certain limit - thereby outlawing politically motivated violence at this level as well.10 And, once again, the recourse to force by the military and the police on behalf of the government of a state is excluded from the definition of terrorism.11

The claim of states to a monopoly on the legitimate resort to violence raises several problems. For one thing, it contradicts other aspects of international law, such as human rights law and international criminal law, which set limits on the violence which a state may itself carry out. While these norms thus establish that a state’s use of violence can be illegitimate, the right of a people to self-determination further suggests that violence may legitimately be used by non-state actors. The right to self-determination entitles a people to withdraw from the authority of a state and its government in certain circumstances,12 and, where the state denies this right, some

9 Saul (n 8) 135-138.
10 Saul (n 8) provides a range of treaty examples at 130-135.
11 Powell, “Definition” (n 8) 140-143. See also the critique of this position in Saul (n 8) 148.
12 In the Western Sahara Case, the Court notes that GA Resolution 1514 (XV) (n 54) allows a people to choose from three options: to emerge as an independent state, to associate with an independent state and to integrate with an independent state. See Western Sahara Case [1975] ICJ Rep 12 at paragraph 57. Self-determination also provides the driving force behind decolonization, such as the UN has accorded recognition to groups which resisted colonization through violence (such as the ANC while South Africa was ruled by a minority government). The impact of the right to self-determination on minority groups is more ambiguous, as their claim to a right to self-determination is contested by some authors. See, for example, Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal (Cambridge: Cambridge University Press, 1995).
commentators and states have argued that the people thus denied their right may legally resort to force in order to realize it.  

Apart from the legal uncertainties surrounding the legitimate monopoly on violence, states have, in practice, often accepted and even supported the use of violence by non-state actors.  

Today, the UN is still struggling to formulate a widely accepted Convention on Terrorism, and the right of non-state actors to use force presents one of the major obstacles to consensus.

Thus, while states interpret political violence directed against themselves by non-state actors as terrorism, they are unwilling to condemn all political violence against other states as terrorism.  Perhaps the most direct example of this attitude is found in the Arab League’s definition of the concept.  The Arab Convention for the Suppression of Terrorism excludes from the definition of terrorism all cases of struggle against “foreign occupation and aggression for the sake of liberation and self-determination …” but adds that “[s]uch cases shall not include any act prejudicing the territorial integrity of any Arab state”.

Despite the incoherence of a state-centred concept of terrorism, it remains the preferred approach in the UN, and particularly in the Security Council.  In practice, this defeats the

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14 This is one of the reasons why the political offence exception endured as long as it did.  See Saul (n 8) 139 and C. Van den Wijngaert, The Political Offence Exception to Extradition (Deventer, The Netherlands: Boston Kluwer, 1980).

15 See the discussion in Saul (n 8) chapter four and pages 206-208.

16 See the discussion of the definition of terrorism in the UN Ad Hoc Committee in Saul (n 8) 206-208.


18 The Security Council’s state-centred approach can be gleaned from the fact that all its terrorism-related sanctions are aimed at non-state actors, but also from its latest suggested definition in SCR 1566 of 2005 (UN Doc S/RES/1566 (2005)).  This proposal is largely descriptive, while including the element of political motivation.  It does not consider the possibility that states can also be guilty of terrorism and thus does not challenge the still dominant understanding of the concept.  Paragraph 3 names “criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing
requirement of congruence, as states, over time, adopt conflicting positions on who is and is not a terrorist. The anti-terrorism legislation thus presents the same difficulty we encountered in the legislation against weapons of mass destruction: it identifies the problem it is addressing (terrorism, or nuclear proliferation) not in principled terms but in terms of the identity of the body which is carrying out the violent acts or acquiring nuclear weapons. Crassly put, a united, global response to terrorism is possible only at times when there is consensus on who the goodies and baddies are. As the “definition” of terrorism reflects the immediate political allegiances of the decision-makers rather than a legal principle, it rests on self-interest rather than the common good. As a result, the communicative action which is integral to interactional law becomes impossible; there can be no reasoning through law.

The lack of a coherent definition of terrorism has not presented an obstacle to the 1267 Committee, as there is the necessary global consensus that Al-Qaeda and, more recently, ISIL/Da’esh, are terrorist groups. The only legal controversy that has arisen relates to the process whereby the associates of these groups are recognized. But, with SCR 1373, the Security Council has goes beyond imposing certain measures on associates of these particular groups. It claims to have created new rules which are based on terrorism as a legal concept.

As shown above, the Security Council’s resolutions in this regard have been widely accepted by states. But one of the main reasons for their acceptance was the omission of a definition of terrorism. This left national governments with wide discretion to adopt a conception of terrorism that targets any groups or individuals they choose, including political opponents, and national governments have, in fact, used SCR 1373 to increase executive power, in particular, over domestic any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism.”

The best example of the classification of a person as a terrorist due to a switch in alliances rather than a change in the type of violence he carried out is Osama bin Laden. Bin Laden was actively supported by the USA until the end of the Soviet invasion of Afghanistan in 1989. See Steve Coll, Ghost Wars: The Secret History of the CIA, Afghanistan and Bin Laden From the Soviet Invasion to September 10, 2001 (New York: Penguin Books, 2004) chapter 4.

As noted in chapter four, SCR 2253 of 2015 includes ISIL, or Da’esh, within the remit of the 1267 Committee. See UN Doc S/RES/2253 (2015), paragraph 1.

See above at chapter 5, section C.1 (n 201) for further sources on the role of the omission of a definition in ensuring the acceptance by states of SCR 1373.
opposition. The broad discretion provided by SCR 1373 has therefore facilitated ever more repressive government.

In Fuller’s terms, such a system of arbitrary power would be termed managerial direction, rather than law. In chapters one, two and four, we considered Fuller’s distinction between these two concepts, noting that law is built on a “relatively stable reciprocity of expectations between lawgiver and subject”; and that managerial direction functions for the benefit of the superior. As a result, persons subject to managerial direction cannot expect congruence:

Within a managerial relation ... ‘the subordinate has no justification for complaint if, in a particular case, the superior directs him to depart from the procedures prescribed by some general order,’ not only because the principle of generality has no necessary place within managerial direction but also because the demand of congruence equally has no such constitutive role. Thus there can be no expectation on the part of the subordinate within the managerial relation that the actions of the superior should conform to previously announced rules.

However, without this congruence, there can be no reciprocity. As we saw in chapter two, Fuller regarded reciprocity as the basis of the subject’s duty to comply with the law. In a reciprocal system, there is an expectation on the part of government that the subject will comply with the law, and an expectation on the part of the subject that such compliance will have the expected result. When this reciprocity is “completely ruptured” by government, Fuller claimed, “nothing is left on which to ground the citizen’s duty to observe the rules”.

For an anti-terrorism law to function effectively, it needs the buy-in not only of states, but also of as many as possible of those non-state actors which would otherwise be treated as terrorists. While states may currently gain some benefit from the anti-terrorism rules, there is little benefit for individuals and non-state entities in attempting to comply with them, because there is no guarantee that compliance will protect them from the measures which are carried out

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26 See also the discussion above in chapter 5, section D.1.
27 Fuller, “A reply to critics” in Fuller, Morality of Law (n 24) 209.
28 Fuller, Morality of Law (n 24) 40.
against “terrorists” as defined by states or the Security Council itself. This will remain the case until these groups can engage in some form of reciprocal interaction with the law-maker to formulate a concept of terrorism that is independent of political alliances and can be applied equally to all states and non-state actors.

Two main points emerge from this discussion of the definition and nature of terrorism. First, it is possible that the shared understandings on which anti-terrorism law must be built are missing. Second, and assuming that this area of law can be constructed at this point, the Council would have to create a regime in which the participants can expect congruence, and enjoy a reciprocal relationship with the law-giver. In rule of law terms, we need a culture of justification. In interactional law terms, we need process of dialogue, or communicative action, and of reasoning through law.

C. (Interactional) Law in a State of Exception

Apart from their reliance on a contested foundational concept (terrorism), there is a second feature of the Council’s legislative resolutions which discourages a culture of justification and reasoning through law. One of the criteria for Security Council legislation is that the norms it issues are mandatory, and this means that it is almost certain to pass its legislative resolution under Chapter VII.29 By acting under Chapter VII, the Council is claiming, whether expressly or implicitly, that it has identified a threat to the peace, a breach of the peace, or an act of aggression. It can, in other words, claim that it is acting in a state of emergency or a state of exception.

It is, in fact, specifically in the context of terrorism that a longstanding debate has been revived regarding the scope of legality in states of exception.30 According to some

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29 See section A.1 of chapter five.
commentators, the government is, or should be, free to act outside of law in a state of exception. Thus any use of Chapter VII by the Council raises the spectre that it could consider itself unbound by law. After all, the Council seems to match Carl Schmitt’s description of a sovereign - he who decides on the exception to a T: only the Council can determine that a threat to the peace, breach of the peace or act of aggression is present, and there are no definitional criteria to explain what these terms mean. As Jack Garvey notes:

“Threat to the peace,” the triggering term for action by the Security Council under Article 39 of Chapter VII, has never been defined other than as given content by the Security Council. It is generally viewed as a determination to be made at the Security Council’s discretion notwithstanding the controversy over whether there are any legal limits. Though given the opportunity, the ICJ has not asserted authority to second-guess the Security Council’s determination of “a threat to the peace.” As much legal scholarship acknowledges, this is surely both in recognition of the political nature of the determination, and that there would be an absence of judicially manageable standards for any court to apply.

Chapter two revealed that the Charter provides no express limits on the Council’s powers when it acts under chapter VII, and we saw that the “plain text” approach to the Council’s powers read this to mean that there are, in fact, no constraints on the Council, or constraints so negligible as to be meaningless. Many of the authors who argue that the Council should not be constrained by law support their position by reference to the “political” nature of the Council. In this regard, the UN Office of Legal Affairs has itself claimed an unfettered discretion for the Council, as Devika Hovell reports:


32 Schmitt (n 31).

33 Garvey (n 31) 62.

34 Chapter two, section B.3.1.

When asked to interpret whether the power granted to states under Security Council resolution 1730 to place a 90-day hold on a de-listing could be renewed indefinitely, the UN Office of Legal Affairs responded that a sanctions resolution means ‘whatever the sanctions committee wants it to’.  

On the other hand, many other scholars insist that law remains applicable throughout a state of exception and that this requires that the government justify its actions taken in the name of security. As noted in chapter two, this view is supported by the argument that a culture of justification is a necessary feature of the rule of law. In chapters three and four, we saw the European jurisprudence come closer to meeting the requirements of a culture of justification, to the point where the European Court of Human Rights was prepared to assess the nature of the emergency which the Council claimed to be addressing, and the Court of Justice of the European Union held that it would determine the lawfulness of a listing decision only on the basis of evidence that was actually presented to the Court. When the Council can keep the information on which it bases its decisions secret, it avoids having to justify itself. The ruling in Kadi II makes serious inroads on the Council’s claim to secrecy, suggesting that the Council might have to find a way of sharing its information with judicial bodies in order for its listing to remain effective. This is even though listing, just like the anti-terrorism legislation, was created under Chapter VII to address the pressing threat of terrorism.

The story of listing is not over, however. We have noted how an interactional process brought listing closer to the rule of law, but it is not yet certain where the journey will end. In particular, it remains to be seen whether the Security Council will be prepared to justify its decisions to the extent expected by the courts and tribunals discussed in chapter four. Even the


38 *Al-Dulimi and Montana Management Inc*, case no. 5809/08, judgment of 26 November 2013 (hereafter: *Al-Dulimi*); *Commission and Others v Kadi* (18 July 2013), heard with C-593/10 P and C-595/10 P (hereafter *Kadi II CJEU*).

39 *Kadi II CJEU* (n 38).
Ombudsperson berates the dearth of information that she is given to justify a listing decision,\(^\text{40}\) and she protects the confidentiality of the Council’s decisions and processes to a far greater degree than would a court or tribunal.\(^\text{41}\)

Thus the emergency context of Security Council legislation increases the likelihood that the Council will resist justifying its new rules, just as it has resisted justifying its listing decisions. And, for as long as it is doing so, it is rejecting the process of dialogue and communicative action through which interactional law comes into being.

In the following section, I explore the chances that parties outside of the Security Council will be able to initiate the dialogue and bring about the reasoned argument that gives rise to law.

D. The Security Council and Interactional Law

We have seen that change to the listing system was initiated by parties outside of the Council, because the Council had not been interested in interacting with those affected by its decisions when it set up its programme. It began to reform the system only when it encountered resistance from states and other entities outside of itself.

Chapter four demonstrated how the Council’s decision-making body – the 1267 Committee – could be remoulded through interaction with states and non-state actors so that the listing mechanism itself eventually accommodated such interaction. The listing mechanism used to consist of one committee, which issued decisions which were binding on all states. Now it consists of a committee and an Ombudsperson, who has herself created a network of other bodies with which she communicates with respect to listing decisions. The Committee has to consider the views of the Ombudsperson, who in turn seeks the views of the wider community. Through her, the Council receives feedback from states, intergovernmental organizations, UN bodies, judges of national, regional, and international courts, prosecutors, private lawyers, academics, representatives of non-governmental organizations, and civil society.\(^\text{42}\) As Hovell notes, the

\(^{40}\) See the statement by Catherine Marchi-Uhel, the current Ombudsperson (accessible at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680630453). [accessed 21 June 2016]

\(^{41}\) Hovell, *Power of Process* (n 36) 158.

\(^{42}\) Hovell, *Power of Process* (n 36) 147 (footnotes omitted).
Ombudsperson thereby “feeds into a dialogue with the Council, the petitioner, and the broader public based on contextual standards and principles.”

The process of listing has also been amended to require reasoned argument with which other participants can engage. States proposing that a person or entity be listed are now required to produce information which justifies their proposals, and the delisting process allows for further information and argument to be exchanged. Under this process, representations are made to the Ombudsperson, who then gathers information and views from a full range of actors, draws up her own recommendation, and submits this to the Security Council Sanctions Committee for consideration. Further procedural rules allow the Ombudsperson’s recommendation to take effect if it is not overturned by the Sanctions Committee through two, specific procedures.

Could such a feedback process transform legislation, such that the Council is able to produce law? Without proposing a definitive answer, I set out some features in this section which suggest that the feedback and amendment process for legislation will not provide the kind of guidance which facilitated the reform of listing. To do this, I first compare the listing feedback process with the (likely) form of feedback to legislation, noting certain major differences which may make it significantly more difficult for the Council to process the objections to its legislation and to amend its legislation in response.

Secondly, I suggest that legislation may require more detailed engagement from the members of the global community, and that this may need to take place in the early stages of the formulation of the rule, not just as feedback after the event.

Feedback towards listing originated in resistance to particular listing decisions from parties outside the Security Council. Legislation looks likely to receive its early feedback in much the same way - as a challenge to the implementation of a legislative resolution at the regional or domestic level. The differences between the feedback processes, however, arise largely from the target of this resistance. Parties objecting to a listing decision do not challenge the underlying instruction which listing is carrying out. That is, there is no objection to the notion that associates of Al-Qaeda and the Taliban be subjected to restrictions which would prevent them from

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44 These two procedures are: 1) a decision by the Sanctions Committee, by consensus, that the person or entity in question not be listed; or 2) or a referral of the issue to the Security Council (as a separate body) by any one member of the Sanctions Committee. See UN Doc S/RES/1989 (2011) paragraph 23.
travelling, dealing in arms and financing terrorism. Furthermore, it is implicit in this acceptance of
the imposition of sanctions on associates of Al-Qaeda and the Taliban that these two organizations
should indeed be seen as terrorist organizations.

Instead of challenging the Security Council’s concept of terrorism, or questioning whether
Al-Qaeda and the Taliban fall under it, courts, states and commentators have criticized the
implementation of the rule that members of these two organizations be sanctioned. Their main
objection was related to the lack of due process provided to listed persons. This narrow focus
brings the listing critiques under the umbrella of Global Administrative Law, which makes it
vulnerable to the criticism which some scholars direct at Global Administrative Law, namely, that
it ignores or even validates the underlying rule being implemented. As we have seen,
amendment to the process of listing did not question the directive behind listing. Indeed, it gave
that directive better effect.

By contrast, the topic of the feedback to the legislative resolutions would have to be the
underlying rules which the states are meant to implement, because this is what legislation consists
of - new, general norms. The norms in question may require extensive engagement before
community buy-in can be assured. Thus, in the example of terrorism above, one of the
foundational norms which would have to be established is the very definition of the phenomenon
which the legislation is trying to address.

There is a second difference relating to the target of resistance to the Council’s programme.
In the case of listing, the critique was directed at the listing procedure as adopted by the Security
Council itself, even if those challenges took place in domestic and regional fora. In the case of
legislation, however, challenges are likely to be focused on the form which any one state or region
gives to the legislation it is required to produce under the Security Council’s programme.

45 In this regard, it is interesting to note that a challenge to the EU’s process of implementing SCR 1373 similarly
did not contest that terrorists should be subjected to the freezing of funds and other sanctions. It focussed,
instead, on the manner in which the European measure was implemented. See Organisation des Modjahedines
du people d’Iran v Council of the European Union ECJ Second Chamber (2006), paragraph 24 (hereafter:
Organisation des Modjahedines).

(hereafter: Harlow).

47 See Devika Hovell’s discussion of the “instrumentalist” approach to due process in listing at Hovell, Power of
Process (n 36) 65ff.
As we saw in chapters three and four, one of the most common forms of challenges to Security Council measures is court action at the regional or domestic level. When handling such a challenge, domestic and regional courts and tribunals turn first to the question of whether the state or region in question enjoys any discretion in its implementation of the Security Council directive. If the state or region does have discretion, it is the implementation of the directive at the domestic or regional level that is challenged, rather than the original directive. In the case of listing, some judicial bodies claimed to find a discretion when the Security Council directive was clear, precise and unequivocal - a feat of reasoning that enabled the courts and tribunals to focus on the local governing authority rather than a “higher” or “separate” authority, over which they had no formal jurisdiction.\textsuperscript{48} But because there was no separate listing procedure at the domestic or regional level - the domestic and regional authorities were required to impose sanctions specifically on those parties whom the Security Council itself had listed - any criticism of the listing process was necessarily a criticism of the Security Council’s listing process. Courts and tribunals have pronounced expressly on the procedural failings of the Council’s listing procedure even in those cases in which they held that the local or regional authority had discretion in how it implemented the listing directive.\textsuperscript{49}

This has meant that each instance of feedback - particularly when it originated in a judicial decision - identified specific shortcomings in the Council’s own listing procedure, such as lack of access to the information on which a listing was based and the lack of opportunity to be heard. This targeted critique put the Council in a position to correct that specific shortcoming should it wish to do so. While the changes it made were often seen as insufficient, there was no doubt about the demand it was ostensibly meeting. It could, over time, make specific, incremental changes to the process by which it identified the targets of its sanctions programme. A process of dialogue - we might even say mutual generative activity - resulted as each incremental change received comment and further resistance from the global community and this, in some cases, led to further amendments.

\textsuperscript{48} \textit{Kadi II} CJEU (n 38).

\textsuperscript{49} \textit{Nada v Switzerland} [2012] E.C.H.R. 1691 (ECtHR) paragraph 11 (hereafter: \textit{Nada}); \textit{Sayadi and Vinck v Belgium} (Human Rights Committee; communication no. 1472, UN Doc CCPR/C/94/D/1472/2006); and \textit{Kadi II} CJEU (n 38), which pronounces the institution of the Ombudsperson in 2009 inadequate to meet the due process concerns of listing.
In the case of legislation, however, the challenge will be directed against the state or region implementing the resolution. This is because legislation is, by definition, general. States and regional authorities which implement it will always have discretion in how they do so. As a result, domestic and regional courts will address not the Security Council legislation itself, but the legislation produced under it by the state or region. As Elberling notes:

[It does not seem likely that ... judicial review may easily be obtained with regard to legislative resolutions. Both the establishment of the ICTY and ICTR and the sanctions regime under Resolutions 1267 et al. are directed against individuals, therefore easily leading to human rights issues, while at the same time giving hardly any leeway to states in their implementation.]

Thus, in suits against measures implementing these resolutions, reviewing the legality of the implementation measures often will necessitate at least an implicit review of the legality of the Council resolution itself. The legislative resolutions discussed here, on the other hand, only contain rather general obligations for states to reach a certain result, leaving states a certain leeway in their implementation. Thus, in suits arising out of national implementation measures, the focus may often be on the question of whether this leeway of implementation was employed, by the state, in a manner compatible with human rights. In other words, it will be the national implementation, not the Security Council resolution itself, that is the focus of judicial review.

When courts review domestic or regional measures that implement Security Council legislation, they may draw on both administrative and constitutional law. They will have to examine whether the executive branch, when implementing the measures, remained within the terms of the relevant domestic or regional legislation, but they may also review the constitutionality of the domestic or regional legislation itself for violating human rights norms or the rule of law. Such cases may at least include an implicit critique of the Security Council measure underlying the domestic or regional legislation.

Such was the case in Ahmed, discussed in chapter four. The critique of the Council measure is implicit, because the Court’s finding is ostensibly directed at the shortcomings of the UK legislation. In this case, the UK Supreme Court quashed the UK’s implementation of SCR 1373 on the basis that the executive decree (the Terrorism Order) which implemented the resolution went beyond the express terms of the Security Council legislation. The Supreme Court held that the UK Terrorism Order was ultra vires because it allowed the sanctions regime to be applied on the

50 See, for example, Organisation des Modjahedines (n 45), in which the ECJ held that the EU had discretion in how it implemented SCR 1373.

reasonable suspicion, rather than proof, that a particular individual was a terrorist.\textsuperscript{52} The wording of SCR 1373 does not, however, state which standard of proof is required for the imposition of sanctions. Furthermore, the Council itself, in its listing programme, imposes sanctions on the basis of mere suspicion. We could therefore read a message into the Supreme Court’s finding that the Security Council’s legislation should not allow for sanctions on mere suspicion, and that the Security Council should clearly require that states, in implementing its resolutions, respect due process requirements when they identify the targets of the sanctions. Note, however, that in this case the critique relates once again to the specific process whereby the Security Council’s programme and policy is put into effect. It does not relate to the underlying idea that terrorists should be subjected to certain sanctions in order to prevent further acts of terrorism.

Similarly, the case of Organisation des Modjahedines du people d’Iran v Council of the European Union ECJ Second Chamber (2006)\textsuperscript{53} dealt with the European legislation which gave effect to SCR 1373. The Court found that the way in which the legislation giving effect to SCR 1373 was administered - that is, the process by which the organization was listed as terrorist - violated the applicant’s rights to due process in a number of respects - including the duty on the authorities to give reasons for its decisions, the right of the organization to have access to the evidence against it, its right of reply, and its right to an effective judicial remedy.\textsuperscript{54}

The feedback is thus likely to focus on the administration of the rules, or, at best, to provide an indirect critique of how the rules could be improved. Listing could move closer to law - to the extent that it did - because it could be reformed by after-the-fact, specific responses to the implementation of an already formulated rule. This form of feedback might be sufficient for the reform of some of the general norms as well. Thus Ahmed’s ruling that listing may not take place on the basis of suspicion might lead the Security Council to amend the legislative resolution to improve its rights protection. But what if the effect of the feedback is not to save the rule or

\textsuperscript{52} Lord Rodger’s objection to the TO was not based on its standard of proof, but the permanent nature of the order. See Her Majesty’s Treasury (Appellant) v R (on the application of Hani El Sayed Sabaei Youssef) (Respondent) [2010] UKSC 2, on appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 1187 and the Administrative Court [2009] EWHC 1677(Admin) paragraphs 174-176 (hereafter: Ahmed).

\textsuperscript{53} Organisation des Modjahedines (n 45).

\textsuperscript{54} Organisation des Modjahedines (n 45) paragraphs 89 to 173.
improve its administration, but instead to cast doubt on the entire legislative scheme that the Council has adopted?

Depending on the ambitions of the Security Council, there may well be norms for which piecemeal, indirect, and after-the-fact feedback is insufficient. I've already suggested that terrorism is one of these. Any scheme which rests on a contested foundational concept will need more intensive engagement at the stage of formulation of the norms, as will larger, more integrated or policy-driven legislative schemes, such as a programme to reduce HIV infection.55

The form of interaction required for general law-making may therefore go beyond the more focussed consideration which courts can provide to rules which have already been made. Brunnée and Toope make a similar point about the drawing up of treaties - another method of creating general rules:

[E]xamples abound where important parts of the negotiations leading to the adoption or further development of a treaty are conducted by a relatively small group of influential states. The ‘participation’ of many other states in law-making is often merely formal: there is no real inclusion, no engagement. Such practices undercut the potential development of both widely shared understandings and the reciprocity that animates interactional legality and invites and encourages fidelity to law. This analysis explains ... the strong resistance shown by many developing states to the trade regime negotiated under the World Trade Organization (WTO). All too often, smaller, less influential states believe that they are not true participants in the negotiations, but rather are bystanders in disputes between increasingly salient regional trading blocs and the single superpower.56

The need for a genuine consultative process in the creation of legal norms suggests that the ad hoc responses of various states to legislative resolutions that have already been adopted may not provide the Council with the feedback it needs to form law. What is needed is ongoing interaction involving the full range of parties who are participating in the legal system.

E. Conclusion

If a king can legislate without the help of a democratically elected legislature,57 then the Security Council can, in principle, do so as well. However, it will produce law only if the system it creates satisfies the eight requirements of the rule of law, and ensures the agency of the participants in

55 In Security Council Resolution 1308 of 2000, the Council indicated that it would be prepared to declare HIV/AIDS a threat to international peace and security. See UN Doc S/RES/1308/2000, 12th paragraph of the preamble.
56 Brunnée & Toope, Legitimacy (n 1) 73-4.
57 As in Fuller’s fable of King Rex. See section A of chapter five.
the legal system. We have seen that such law comes about through a process of reciprocal
engagement with those subject to the law, a process elaborated more fully in the notion of
interactional international law, as developed by Brunnée and Toope. Neither the design nor the
current decision-making process of the Security Council supports interactional law in any way. Its
chances at law-making are further weakened by the nature of the feedback that it is likely to
receive from states and courts, in particular, and the type of feedback that may be necessary to
formulate some norms and legislative programmes.

Listing may not yet have met all the requirements of the rule of law, but its process of
transformation reflects interactional law in action. In other words, it bears out Fuller’s description
of law as a process. It also bears out Fuller’s suggestion that a “cooperative enterprise” has the
best chances of success if it is ordered by law.58

In the case of legislation, however, I have argued that the form of social ordering which the
Council is adopting is managerial direction. It is important to make this point, because the
Council’s anti-terrorism legislation has been embraced by many states, creating at least a
superficial impression that the requirements of interactional law are being met. This is misleading,
however; first because it is only (some of) the wielders of power at the various levels of global
government who are participating in the creation of these norms. There is no reciprocal
engagement with those who will be subjected to it. Secondly, the resolutions themselves, and
much of the implementing domestic legislation, do not meet the requirements of the rule of law.
Thus neither the process nor the product truly reflect the form of law.

I noted in the introduction that the “hard work”59 of international law may include the task
of establishing clearly when a process is not law. This, I hope, is the contribution of this thesis. I
am not insisting that Security Council may never create general norms which meet the
requirements of the rule of law. But I am suggesting a range of factors which render this unlikely,
including the subject matter of the current legislation, the institutional design of the Council, the
detrimental potential of the emergency context in which the Council works, and the forms through
which the Council currently interacts with other members of the global community. I am also

58 Lon L. Fuller, “Freedom as a Problem of Allocating Choice” (1968) 112:2 Proc Am Philos Soc 101, online:
<http://www.jstor.org/stable/985926> at 106. [accessed 21 June 2016] See also the discussion at the beginning
of chapter four.
59 Brunnée & Toope, Legitimacy (n 1) 355.
suggesting that any claim that the Council has created law at this stage is, at best, inaccurate and, at worst, dangerous. Allowing managerial direction the legitimating cloak of law scuppers a coherent, law-based and effective response to the problem of terrorism and destroys the very values which the rule of law is meant to protect.
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