Separation of Powers in the United Nations System? Institutional Structure and the Rule of Law

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"Separation of Powers in the United Nations System? Institutional Structure and the Rule of Law"

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This article contends that separation of powers offers a mitigating force in answering questions about the limits of the authority of the UN's primary organs and provides a tool through which one can identify where the rule of law is under threat. Whether or not one agrees that separation of powers as such has legal applicability to the UN in a strict sense, there is value in casting the separation of powers lens over the organization as it operates now. This exercise is worthwhile not just for posterity but also because evolution of law ought to be carefully monitored, particularly at a time when regard for the fundamental norms of international law are subject to increasing derision and even direct challenge. That contemporary political tensions have slowed the Security Council from its earlier activism is precisely why this article is timely, because it is in these times that institutional memory gets lost, the boundaries of authority blur, and populist narratives bring the rule of law under threat.

Keywords: United Nations, Security Council, separation of powers, rule of law

1. Introduction

It is notable that the apparent inapplicability of any form of separation of powers to the UN is often stated as fact, absent delineation of any particular argument against. One might suppose that scholars have not felt the need to justify the point especially rigorously as the view is widely enough held. Indeed, in its 1984 *Nicaragua* judgment on jurisdiction, the ICJ was correct enough to say that municipal-law concepts of separation of powers 'are not applicable to the relations among international institutions for the settlement of disputes'.[1] The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Tadić* appealed to conventional wisdom when holding that 'the legislative, executive and judicial division of powers which is largely followed in municipal systems does not apply to the international setting, nor, more specifically, to the setting of an international organization such as the United Nations.'[2] Whether the internal mechanisms of the UN might be based upon separation of powers principles requires a little more unpacking than has been undertaken to date. The ICJ limited its finding to the settlement of disputes, but did not dismiss the applicability of separation of powers principles altogether. The Appeals Chamber's characterisation in the ICTY, was more sweeping than the ICJ had been, and arguably went too far when it dismissed separation of powers in the UN based upon a narrow construction based of whether there was a 'clear cut' division between executive, legislative and judicial authority.[3]

[1] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Jurisdiction)* [1984] ICJ Rep 392, 433.
[2] *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) [43] (hereafter '*Tadić'*).
[3] *Tadić* [43].

This article argues that as scholars of international law not only *can* we apply separation of powers to the UN, but also that we ought to. For to do so allows for an assessment of the standard of governance the organization performs, and, relatedly, the strength of the rule of law within it. The extent to which executive authority is held in check, to which legislative function is undertaken with due representation and deliberation, and to which judicial authority is free from political taint, among other things, not only characterise separation of powers, but also signal the extent to which the rule of law is upheld. Such thinking might well befit other international organizations too, but it is uniquely applicable to the UN because of its structure, membership and the character of its activities. The organisation's primacy over conflicting obligations under other international agreements, as well as its growing exercise of authority over individuals, manifests the kind of authority susceptible to separation of powers restraint.

An examination of the UN through a separation of powers lens serves to highlight a set of concerns about emerging practices in our system of international governance, and triggers some fairly fundamental normative concerns, particularly about the scope of Security Council authority. Those concerns do not evaporate simply because of a prevailing view that separation of powers does not apply as a matter of narrow legalism. As Waldron has written, even if one perceives of separation of powers as a 'forlorn and obsolete principle' as we look to the future 'we will see concerns about undifferentiated governance… still standing there, concerns we would not have recognized but for our thinking through this forlorn principle.'[4]

This article proceeds first with an analysis of separation of powers in section 2. It deals with key objections to that idea and seeks to provide some insight into how this framing of the UN system might have some value for contemporary thinking, particularly about the role of the Security Council. To do so, it examines the structure and form of the UN as established under the UN Charter, and draws comparisons between that and the contemporary and evolving practice of its three key organs, the General Assembly, the International Court of Justice and the Security Council. As ICJ Judge Robinson observed in a 2016 opinion, 'the branches of the UN cannot be divorced from the architecture of the system itself.'[5]

2. Separation of powers: the concept

Although separation of powers is hardly a new concept, it is worthwhile outlining its key characteristics, before delineating how it might apply to the UN in the next section. Accordingly, the purpose of this section is to delineate key aspects of separation of powers so that they can be used to assess the UN system of governance. This section also provides some justification for its application to the UN, but the bulk of that work will be undertaken section 4.

The godfathers of the modern doctrine of separation of powers are usually said to be the 17th century philosophers John Locke and Baron de Montesquieu. While the institutional division of powers was not a new concept by this time, it was Locke's and Montesquieu's vision for how that division might be implemented that rendered their philosophies unique, the core elements of which are incarnate in most political systems today. That is, that government must be held to account through its subjection to the rule of law, and its isolation of functions and authority such that no one entity can dominate the

[4] Jeremy Waldron, 'Separation of Powers in Thought and Practice' (2013) *Boston College Law Review* 433, 467-468.
[5] *Obligations Concerning Negotiations Relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan) (Jurisdiction)* [2016] ICJ Rep 159 (Judge Robinson) 3.

entire government. The institutions, functions and staff of the legislative, executive and judicial branches of government should be held at arm's length, each acting as a check on the other.

Typically, the legislature is the branch in which matters are deliberated in general terms. Regard is had to normative considerations and consequences focusing on the broad rationale for adopting or amending law rather than addressing the specifics of individual cases. Legislative authority is exercised unilaterally usually to modify or establish a general legal norm.[6] Separation of powers facilitates the legislature to undertake its role without the distractive interference of judicial or executive considerations. Although occasionally derided for too much conversation, representative deliberation is its cherished value. The derision directed towards the UN General Assembly today brings to mind John Stuart Mill's 19th century defence of the legislative branch:

> [r]epresentative assemblies are often taunted by their enemies with being places of mere talk and *bavardage*. There has seldom been more misplaced derision. I know not how a representative assembly can employ itself more usefully than in talk, when the subject of the talk is the great public interests… a place where every interest and shade of opinion … can have cause even passionately pleaded, in the face of … all other interests and opinions…[7]

The judicial branch is charged with making decisions in individual cases strictly according to law and to facilitate formalised hearings to resolve any question associated with whether action should be taken against an entity for failing to comply with the applicable law.[8] Judicial processes will ordinarily incorporate a systematisation of court proceedings including the introduction of evidence, the examination and cross-examination of witnesses, a detailed assessment of the legal background, the provision of publicly available reasons for decisions, and, crucially, an assessment of evidence and determination of law that is free from political contamination.[9] In many respects the traditional role of the judicial branch is to balance executive claims against the rights of the individual. As Lord Atkin of the UK House of Lords remarked in his acclaimed dissent in *Liversridge v Atkin* 'It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges … stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.'[10]

The executive function is characterised by its comparative agility and the decisiveness with which it is enabled, typified in the conduct of war and military action. It is a branch more concerned with strategy and planning public administration than it is the merits of general legislative directions. It is decidedly smaller than the representative assembly of the legislature, something of a subcommittee, such that it might respond expeditiously to crises and administrative necessities as the need arises. It is hardly surprising, then, that where separation of powers comes under threat, the executive is usually the antagonist. That the balance between branches can be upset makes it all the more important that differentiation between each function is consciously insulated.[11] Indeed, separation of powers is

[6] Edward Yemin, *Legislative Powers in the United Nations and Specialized Agencies* (A.W. Sijthoff, 1969) 6.
[7] John Stuart Mill, *Considerations on Representative Government* (1861) Ch V, 117.
[8] Jeremy Waldron, above n 4, 462.
[9] See further in the UN context: Elihu Lauterpacht, *Aspects of the Administration of International Justice* (Cambridge Grotius, 1991) 42-43.
[10] *Liversridge v Anderson* 1 [1942] AC 246 (Lord Atkin).
[11] Waldron, above n 4, 464.

realised in practice through the deliberate distinction of function undertaken by the various actors within each branch.

That deliberate differentiation of function is often overlooked in the literature, but is in fact important for the longevity and integrity of any iteration of the doctrine. For even in a system of governance in which the motley functions of a single body might incorporate, for instance, legislative and executive functions, it is important that there is a thoughtful differentiation of the power being exercised as a matter of *legal consciousness*. To illustrate this point, Jeremy Waldron has emphasised the value of distinguishing between 'insisting on the *articulation* of [the] different roles and … merely blurring them'.[12] Thus a distinction can be made between a repository of authority in which, even if all power is contained in one place, the exercise of legislative, executive and judicial functions are articulated and differentiated in their exercise and, on the other hand, one that exercises a kind of absolutist authority. That is, 'not only is the one person judge, jury and executioner, but he barely discerns the difference between adjudicating, fact-finding and punishment'.[13] It is this conflation of authority with which this article is especially concerned. As the following sections will elucidate, the evolution of functions that the primary organs of the UN have adopted over time give rise to a question about whether they have retained a conscious differentiation of the *character* of the functions each now undertakes, or merely blurred the distinctions. The answer to that question is important because it has implications for the extent to which the organization advances, or at least respects, the rule of law.

A crucial observation about separation of powers is that it is intertwined with and supports the rule of law. Accordingly, where aspects of separation of powers have become weakened or diluted you are likely also witnessing a diminution of the rule of law. While the delicate balance which separation of powers attempts to achieve is universally imperfect in its implementation, there is nonetheless a point at which the blurring of executive, judicial and legislative authority undermines the rule of law itself. Accordingly, law making and law enforcement ought not be 'just run together in a single gestalt' but possess mutually distinguishable functions.[14] Waldron explains:

> …to insist on being ruled by a process that answers to the institutional articulation required by Separation of Powers—there must be law-making before there is adjudication or administration, there must be adjudication, and the due process which that entails, before there is enforcement or any order… It may not be an *ex tempore* or off-the-cuff use of political authority… It must be housed in and channelled through these procedural and institutional forms successively one after the other. That is what the rule of law requires and … that is what is maintained too by Separation of Powers. The legislature, the judiciary, and the executive each must have its separate say before power impacts on the individual.[15]

The strength of separation of powers lies not necessarily – or only – in its textual or legal embodiment but also in its conceptualisation by those undertaking the relevant function and the extent to which it is buttressed by institutional practice and culture. At the same time it serves as a useful analytical

[12] Ibid, 449 [emphasis added].
[13] Ibid.
[14] Waldron, above n 4, 457.
[15] Ibid, 459. See also Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press, 2016) Ch 3; Aoife O'Donoghue, 'Separation of Powers Beyond the State: The "Inconveniences of [A]bsolute Power"' in Hans-Martien ten Napel and Wim Voermans, *The Powers That Be: Rethinking the Separation of Powers: A Leiden Response to Möllers* (Leiden University Press, 2016) 45.

device for those external to the process seeking to hold power to account. As Tetsuo Sato has contended with respect to the Security Council: 'the idea of analytically separating Security Council activities into executive, legislative and judicial functions [allows one] to judge their propriety in … [a] frame of reference appropriate for each function'.[16]

3. How separation of powers *can* apply to the UN, and why it ought to

The connection between separation of powers and the rule of law is important one for the present argument because the UN is under an explicit obligation to act 'in conformity with the principles of justice and international law'.[17] What constitutes 'principles of justice' under the UN Charter is debated, but that the rule of law is part thereof is hardly controversial. Of course, the rule of law is itself a contested idea. Few dispute its existence, but there remains persistent difficulty in agreeing its boundaries. There is not scope here to lay out the various theories, which range from 'thin' positivist conceptions, to the 'thick' substantive ideals (which incorporate notions of justice), to alternative formulations, including the idea that one ought to examine 'the architecture of the legal system rather than the content of its laws'.[18] Its fundamental features include that power may not be exercised arbitrarily, that the law must apply to all persons equally, and that no legal person is above the law.

Traditionally, of course, these features of the rule of law are interpreted to curtail the sovereign authority of states, not international organisations, due in large part to the vulnerability of individual citizens over whom states preside. However, far from confined to the regulation of disputes between states, international law now routinely reaches into the rights and duties of individuals within states. This trend is equally observable within the UN system where concerns over human rights and the attribution of individual responsibility for international crimes increasingly characterise debate and have been called upon in justification of Security Council action.[19] This is so despite the express presumption in article 2(7) against UN interference in domestic affairs except when the Security Council acts under Chapter VII of the Charter.[20] As organs of the UN make inroads into fields traditionally reserved for sovereign authority, it is worthwhile re-examining the principled boundaries of that authority. Significantly, the UN's and the Security Council's growing exercise of authority over individuals manifests its development of a governmental power susceptible to separation of powers restraint.

Well-known resistance to the idea that the separation of executive, legislative and judicial functions has a place in the UN system ought to be addressed. One could dispute the presence of separation of powers on the basis that the UN does not possess an adequate breadth of power for its application, or, in other words, the UN's power is already sufficiently fettered by its status as an international

[16] Tetsuo Sato, 'The Legitimacy of Security Council Activities under Chapter VII of the UN Charter Since the End of the Cold War' in Jean-Marc Coicaud and Veijo Heiskanen, *The Legitimacy of International Organizations* (United Nations University Press, 2001) 309, 330.
[17] *UN Charter* art 1(1).
[18] Simon Chesterman, 'An International Rule of Law?' (2008) 56 *The American Journal of Comparative Law* 331, 341.
[19] It has even been suggested that the transition might be generational: that a generation of thinkers whose most formative experiences were based upon the failure to intervene in Rwanda and Yugoslavia now view humanitarian intervention on individual rights bases as both legitimate and important. See: Brent J. Steele and Eric A. Heinz, 'Norms of Intervention, R2P and Libya: Suggestions from Generational Analysis (2014) 6 *Global Responsibility to Protect* 88.
[20] At the time the Charter was drafted there were various motivations for ensuring that the UN would not reach into domestic affairs. The US for instance was sensitive about civil rights, South Africa had its own concerns about its regime of apartheid, and smaller states, particularly in Latin America, equally wanted to avoid the UN, and especially its Security Council, becoming a mechanism through which the great powers could interfere in their domestic affairs.

organisation. When one considers the foundational notions of separation of powers delineated by Locke and Montesquieu, it is notable that they are fundamentally concerned about autocratic rule. That is, it was precisely because of the essentially *unlimited* scope of monarchical power over the individual, that it was important to have a system of checks to curtail the risk of injustices that could arise from arbitrary decision-making. One could argue that in international law there is no real and conceivable risk of absolute rule of the kind that concerned Locke and Montesquieu. Rather, international law fulfils certain specified roles largely if not exclusively at the subservience of national sovereignty. The UN is a treaty body established subject to the consent of the states' party to it for the purpose of collective security. With certain notable exceptions, it must respect the sovereignty of its members and is obligated under the Charter not 'to intervene in matters which are essentially within the domestic jurisdiction of any state'.[21] Unlike national constitutions and other sovereign mandates, the UN 'is not competent to take care of the general welfare of [its] members… [and is] obliged to respect the autonomy of the states as far as possible.'[22] Moreover, the subjects of the domestic and UN legal regimes are clearly different: any authority under the UN Charter is specifically delimited to states, not individuals. According to this line of thinking, because there is no single body in international law bestowed with a breadth of authority equivalent to that of a nation-state, separation of powers, as a doctrine, is inapplicable.

This objection, however, is not entirely persuasive in part because it derives from an erroneous premise: that it is somehow necessary to prove that domestic systems of governance and the international legal order are perfectly symmetrical equivalents in order to show that separation of powers exists in the latter. Even in domestic systems the precise implementation of separation of powers is not perfectly paralleled between states. Furthermore, it is not a prerequisite to the application of the doctrine that an entity possess the possibility of completely unqualified authority.[23] Although the risk of tyrannical rule formed the basis of the 17th century concerns that led to the fledgling inception of separation of powers, it is contrary to the purpose of the notion to suggest that an institution of governance must first stand on the precipice of tyrannical rule in order that the idea has value in application. Absolute power is the inspiration, not a qualifier per se. Finally, and as mentioned above, far from confined to the regulation of disputes between states, international law now routinely reaches into the rights and duties of individuals, and so too does the UN.[24]

Notwithstanding the preceding point, a principal reason that the present research is timely is precisely because the Security Council, the UN's executive authority, began to exercise the kind of power that deserves the term absolute. Not because it is tyrannical in the traditional sense but because it has fundamentally destabilised the delicate balance between sovereign authority of states, the organs of the UN, and its own resurgent international executive authority. These will be examined in detail in the next section, but needless to say it has, without any particular deliberate or 'conscious' differentiation of function, traversed into all three of executive, legislative and judicial roles. Thus, while it is reasonable enough to suggest that in order for the doctrine to be meaningfully apprehended

[21] *UN Charter* art 2(7). The notable exception being the enforcement measures available to the Security Council under Chapter VII of the Charter in response to a threat to or breach of international peace and security or an act of aggression.
[22] Karl Doehring, 'Unlawful Resolutions of the United Nations Security Council and their Legal Consequences' (1997) 91 *Max Planck Yearbook of United Nations Law* 91, 97.
[23] See further Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, 2004) 109.
[24] Roslyn Higgins, 'Human Rights in the International Court of Justice' (2007) 20(4) *Leiden Journal of International Law* 745, 746.

there must be *some* breadth of government-like power to which it can be applied, that hurdle is far from insurmountable here.[25]

A further objection to the application of separation of powers might arise in terms of how one identifies a violation of the principle, as the lines between executive and legislative function are sometimes obscured within and between the various organs. However, an imprecise division of authority is not in itself enough to defeat the application of separation of powers to the international legal system, for the exact lines between these two branches are not universally distinct even in domestic iterations. Thus, in his Separate Opinion in *Lockerbie*, Judge Lachs erred to conclude that separation of powers within the UN was not intended by the framers of the Charter on the basis that the Charter had not succeeded to enact 'a blinkered parallelism of functions but fruitful interaction'. Because a degree of interaction and overlap is a part of any functional system of separation of powers in any application.[26]

That there is no requirement in law or practice for the *strict* separation of powers is a key point. However, it also gives rise to a question about how one might identify a violation of the principle of separation of powers in practical terms. What is important in this respect is not how one characterises a relevant power, as even a single act of a given entity can contain elements of more than one function, but rather whether and how the powers are circumscribed. Erika de Wet has argued, 'the decisive question is whether the power of an organ has been *aggrandised* unconstitutionally'. Thus, de Wet continues:

> …in the context of the United Nations, this rationale would mean that one should not be side-tracked by arguments about whether the particular action of the Security Council would be of executive or legislative nature. It suffices that it has the *potential* to be one or the other. The question then becomes whether these executive or legislative powers are aggrandised at the expense of the constitutional structure of the Charter. After all, the Charter does attribute different powers to different organs and in this way establishes a rudimentary system of checks and balances.[27]

In drawing this conclusion, de Wet draws an analogy with the decision of the US Supreme Court in *Metropolitan Washington Airports Authority v Citizens for the Abatement of Aircraft Noise.*[28] In it, an airport was to be transferred from federal to state authority. It would then be operated under the direction of an oversight authority that included nine members of the US Congress each of whom purported to retain a congressional power of veto over the decisions of the Authority. Justice Stevens delivered the majority opinion in which he found that the arrangement would amount to 'extensive

[25] The collective authority housed within the constitutive organs of the UN was designed to be sufficiently broad so as to allow it to address matters related to the maintenance of international peace and security with sufficient flexibility and innovation so as to be effective. That breadth is enough. To this end the General Assembly was granted authority to address any question or matter that falls within the ambit of the Charter (although it shall not make recommendations if the Security Council is actively considering a matter unless the Council so requests) and the Security Council has authority to undertake coercive action in response to any matter it identifies as a threat to international peace and: *UN Charter* arts 12(1), 24(1) and 39.

[26] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial incident at Lockerbie (Libyan Arab Jamahiriya v United States of America) (Provisional Measures)* [1992] ICJ Rep 114, 138 (Judge Lachs) (hereafter '*Lockerbie*').

[27] De Wet, above n 23, 113 [original emphasis].

[28] Ibid 113 referring to *Metropolitan Washington Airports Authority v Citizens for the Abatement of Aircraft Noise* 501 US 252 (1991).

expansion of the legislative power beyond its constitutionally defined role'. His Honour observed that the power at stake could validly be classified as either executive or legislative in character. In his view, either way the action was unconstitutional: 'If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of [the Constitution].'[29] What was important, and decisive in this case, was whether the action would result in an unconstitutional aggrandisement of congressional power.

Comparably, the UN Charter has allowed the Council a breadth of authority, but that power has been circumscribed by checks and balances provided for within it. In his famous dissent in *Lockerbie*, Justice Weeramantry asked whether 'the Security Council discharges its variegated functions free of all limitations, or is there a circumscribing boundary of norms or principles within which its responsibilities are to be discharged?' His Honour construed the answer in favour of the latter interpretation, noting that article 24 of the UN Charter specifically anticipates that the Security Council *shall* act in accordance with the purposes and principles of the UN. Indeed, as His Honour points out, founding conceptions of the Security Council were that it would be so constrained.[30] Although unapologetically political, the Council is also under an undoubtable obligation to act in conformity with 'the principles of justice and international law'.[31] As observed by the ICJ in its Advisory Opinion on *Admission of a State to the United Nations*: 'the political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment.'[32] Nevertheless, those constraints on Council authority have rarely been invoked as the Council has made inroads into fields that were originally (and intentionally) reserved for the sovereign authority of states. Moreover, the UN's and the Security Council's growing exercise of authority over individuals manifests a governmental power susceptible to separation of powers restraint.

4. Separation of powers in the UN

The UN is a treaty body, its Charter forms both its constituent instrument and comprises the *lex specialis* primary rules of international law that establish the organisation's obligations.[33] Article 103 of the Charter provides for the organisation's own primacy over conflicting obligations under other international agreements.[34] This means that the text of the Charter conditions other international legal instruments agreed by member states, and it also provides the basic legal framework for interstate

[29] *Metropolitan Washington Airports Authority v Citizens for the Abatement of Aircraft Noise* 501 US 252 (1991) (Stevens J).
[30] *Lockerbie* 171 (Judge Weeramantry). And he was not lonely on the bench in wondering the limits of Security Council authority. Judge Shahabuddeen decided the case differently but also asked 'whether there are any limitations on the power of the Council' although he did not draw a conclusion on the point: *Lockerbie* 142 (Judge Shahabuddeen).
[31] Article 24(2) specifies that in discharging its duties the Security Council shall act in accordance with the principles and purposes of the UN: *UN Charter* art 24(2). A core purpose of the UN is to settle disputes which might lead to a breach of the peace, *inter alia*, 'in conformity with the principles of justice and international law': *UN Charter* art 1(1).
[32] *Conditions of Admission of a State to the United Nations (Charter Art 4) (Advisory Opinion)* [1948] ICJ Rep 57, 64.
[33] As recognised in the International Law Commission's Draft Articles on the Responsibility of International Organizations which are, themselves, without prejudice to the UN Charter but nevertheless applicable to its interpretation: International Law Commission, *Draft Articles on the Responsibility of International Organizations* (2011) arts 64 and 67.
[34] Specifically it provides: 'in the event of a conflict between the obligations of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail': *UN Charter* art 103.

relations.[35] These features of the UN Charter render it a unique instrument in international law and have underpinned arguments that it forms the constitution of the international legal order, insofar as the concept of 'constitution' can be used to 'designate the basic legal framework of a given human community, its essential structures and the ties which hold it together'.[36] This structure gives life to the complementary idea that UN organs are subject to certain analytical prisms drawn from domestic governance, of which separation of powers is one.

The UN Charter was agreed in 1945 between the Allied powers of World War II and presently enjoys near universal membership with 193 member states.[37] It creates six distinct principal organs: the General Assembly, the Security Council, the International Court of Justice (ICJ), the Secretariat, the Economic and Social Council and the Trusteeship Council, and establishes relationships as between them, setting out specific roles for each.[38] It is *prima facie* contrary to a separation of powers argument that the UN Charter anticipates a sestet organisational structure. However, The Economic and Social Council (ECOSOC) and the Trusteeship Council were both established as essentially sub-committees of the General Assembly,[39] and the Secretariat organ was created to perform a function comparable to that of a national public service, made up as it is of the Secretary-General and the UN staff.[40]

It is true enough that the division of executive, legislative and judicial authority in the UN is untidy. The absence of express terms in a constitutive document has been seen as reason enough to dispute the existence of separation of powers. For instance, John Manning has challenged whether the doctrine was enshrined in the US Constitution on the basis that it 'adopts no *freestanding principle of separation of powers.*'[41] He conceded that the idea unmistakably lies behind the Constitution but interpreted as significant that it was not 'adopted wholesale', insofar as the US Constitution 'contains no separation of powers clause.'[42] Comparably, the UN Charter does not adopt separation of powers in express terms either, or even specify the tripartite division of executive, legislature, and judicial branches (as distinct from the US Constitution which plainly does). However, the Charter does create an institutional division of authority and establishes separate organs with differing responsibilities which can broadly be categorised into executive, legislative and judicial functions.

Having established the tenets of separation of powers and justifications for applying it in the preceding sections, this article now adopts that lens to examine the UN itself. To do so, it relies on that earlier analysis to identify the functions of each primary organ of the UN, and to assess the ways in which those functions have shifted over time. Having made those assessments, it identifies the risks associated with the gradual obfuscation of the division of authority as provided for under the UN Charter. Although that division was imperfect to begin with, there is an important distinction between the imperfect division of institutional authority and no conscious differentiation of authority

[35] See in particular Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff, 2009).
[36] Christian Tomuschat, 'International Law as the Constitution of Mankind' in *International Law on the Eve of the 21st Century: Views from the International Law Commission* (United Nations, 1997) 37, 37.
[37] but for the Holy See and Palestine, which have observer status.
[38] *UN Charter* art 7(1).
[39] *UN Charter* arts 61(1), 87. The primary function of ECOSOC is to make recommendations to the General Assembly on economic, social, cultural, educational and health matters and for the realisation of human rights. The Trusteeship Council was established for the specific purpose of preparing trust territories for independence. By 1994 all trust-territories had gained independence and so the Trusteeship Council was essentially put out of work.
[40] *UN Charter* art 97.
[41] John F. Manning, 'Separation of Powers as Ordinary Interpretation' 124 (2011) *Harvard Law Review* 1941, 1944 [original emphasis].
[42] Ibid.

at all. The erosion of separation of powers has very real consequences for the rule of law within the organization as a whole.

4.3 Executive Authority

Although best characterised as the executive branch, the Security Council's creative interpretations of both articles 39 and 41 of the Charter in particular have facilitated its reach into legislative and judicial realms. Much of the remainder of this article is dedicated to elaborating this (over) reach, and its challenges. Focus on the Security Council expansion into functions of judicial and legislative character is justified because there has been no real usurpation of executive authority by the other two branches (but for an attempt by the General Assembly in 1950). However, the functional division of authority has been veritably shoved by the executive, and on more than one occasion. That this is the order of intrusion, matches with separation of powers theory. As explained in section 2, where separation of powers comes under threat, the executive branch is usually the aggressor. Accordingly, this section of the article describes where executive authority rests in the UN system, largely as a precursor to those forthcoming sections.

Notwithstanding that the Security Council has inched its way towards the arguable exercise of functions of judicial and legislative character (which we will come to), its function as described in the Charter is most analogous to the executive arm of government. It is the UN organ principally responsible for the maintenance of international peace and security and its decisions are of significant consequence including universally binding sanctions and/or the use of military force.[43] In line with the familiar understanding of a domestic executive, the Council is the enforcement arm of the UN. It was designed with responsiveness in mind, such that it could quash threats to peace and security with sanctions and military force, enacted with (relative) speed and agility when necessary.[44] The Council is responsible for the implementation of international law insofar as it can authorise a wide range of responses to threats to the peace, and such threats typically arise as the result of non-compliance with fundamental obligations under international law. The Council's relative agility is evident in its structure. Like the executive arm of most governments, it is made up of a small sub-committee, in this case fifteen UN member states. All members of the Council have the right to vote on a given resolution although only the permanent five have the power of veto. When making a decision under Chapter VII of the UN Charter, the Security Council acts on behalf of the UN membership at large,[45] and its decisions are binding upon all UN member states.[46]

Article 39 establishes that prior to engaging in coercive Chapter VII action, the Council must first determine that there exists a threat to, or breach of the peace, or an act of aggression.[47] The Council has very rarely identified an act of aggression or a breach of the peace,[48] but it has identified a wide

[43] *UN Charter* arts 24, 41 and 42.
[44] Article 24 of the Charter bestows primary responsibility on the Security Council for the maintenance of international peace and security 'in order to ensure prompt and effective action'.
[45] *UN Charter* art 24(1).
[46] *UN Charter* arts 25 and 103.
[47] *UN Charter* art 39.
[48] It identified acts of aggression only with respect to Israel, South Africa and Rhodesia in the 1970s and 1980s and not at all since: SC Res 573, 2615th mtg, UN SCOR, UN Doc S/Res/573 (4 October 1985) preamble para 1 (an act of aggression by Israel against Tunisia); SC Res 611, 2810th mtg, UN SCOR, UN Doc S/Res/611 (25 April 1988) preamble paras 1 and 3 (determining an act of aggression by Israel against Tunisia); SC Res 387, UN SCOR, 1906th mtg, UN Doc S/RES/387 (31 March 1976) (determining an act of aggression by South Africa against Angola) para 1; SC Res 567, UN

variety of circumstances as threats to the peace. These include conventional examples such as the unlawful use of armed force by one state against another, for instance, conflict between Arab armies and Israel,[49] and an attack by North Korea on South Korea.[50] Other threats to the peace identified by the Council have been less *prima facie* intuitive. For instance, the presence of a fascist government;[51] a request for military assistance;[52] a health crisis;[53] and that a certain state of affairs continues.[54] The Security Council has even acted under Chapter VII to appoint personnel in international criminal tribunals years after the armed conflict that constituted the threat had ended,[55] and commenced an open-ended sanctions regime without any connection to a single specific threat to peace and security.[56]

SCOR, 2597th mtg, UN Doc S/RES/567 (20 June 1985) (determining an act of aggression by South Africa against Angola) para 1; SC Res 568, UN SCOR, 2599th mtg, UN Doc S/Res/568 (21 June 1985) para 1 (determining an act of aggression by South Africa against Botswana); SC Res 572, UN SCOR, 2609th mtg, UN Doc S/Res/572 (30 September 1985) para 4 (affirming an act of aggression by South Africa against Botswana); SC Res 574, UN SCOR, 2617th mtg, UN Doc S/RES/574 (7 October 1985) (determining an act of aggression by South Africa against Angola); SC Res 577, UN SCOR, 2631st mtg, UN Doc S/RES/577 (6 December 1985) (determining an act of aggression by South Africa against Angola); SC Res 455, UN SCOR, 2171st mtg, UN Doc S/RES/455 (23 November1979) para 1 (determining acts of aggression by the British Colony of Southern Rhodesia against Zambia). It identified a breach of the peace in respect of a complaint of an act of aggression on the Korean Peninsula: SC Res 82, UN SCOR, 473rd mtg, UN Doc S/1501 (25 June 1950) Preamble para 3, and in respect of the Iraqi invasion of Kuwait: SC Res 660, UN SCOR, 45th sess, 2932nd mtg, UN Doc S/RES/660 (2 August 1990) Preamble para 2.

[49] SC Res 54, UN SCOR, 338th mtg, UN Doc S/RES/54 (15 July 1948) para 1.

[50] SC Res 82, UN SCOR, 473rd mtg, UN Doc S/1501 (25 June 1950) preamble para 3.

[51] This was a 1946 resolution in relation to the Franco regime in Spain. Although the language differed from the precise lexicon now routinely adopted directly from the Charter: the situation '*endangers* international peace and security': SC Res 4, UN SCOR, 39th mtg (29 April 1946) para 1 [emphasis added].

[52] In a diplomatic cable addressed to the Secretary-General of the UN in 1960, the Congolese Government sought military assistance to counter a Belgian incursion into its territory. In this instance the identification of a threat to be peace was made explicitly in the report of the Secretary-General: the situation 'represented a threat to peace and security justifying United Nations intervention…' (not instructive for invocation of Chapter VII) but only *implicitly* by the Security Council insofar as it authorised the Secretary-General 'to provide the Government [of the Congo] with such military assistance as may be necessary': SC Res 143, UN SCOR, 873rd mtg, UN Doc S/4387 (14 July 1960) para 2; *Cable Dated 12 July 1960 from the President of the Republic of the Congo and Supreme Commander of the National Army and the Prime Minister of National Defence Addressed to the Secretary-General of the United Nations*, UN Doc S/4382 (13 July 1960). See also: Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford, 1995) 224-230; and critiquing the legal veracity of the Congolese request: Roslyn Higgins, *Problems and Process: International Law and How We Use it* (Oxford University Press, 1994) 225.

[53] SC Res 2177, UN SCOR,, 7268th mtg, UN Doc S/RES/2177 (18 September 2014).

[54] SC Res 232, UN SCOR, 1340th mtg, UN Doc S/RES/232 (16 December 1966) para 1.

[55] See: SC Res 1877, UN SCOR, 6155th mtg, UN Doc S/RES/1877 (7 July 2009); SC Res 1900, UN SCOR, 6242nd mtg, UN Doc S/RES/1900 (16 December 2009); SC Res 1915, UN SCOR, 6286th mtg, UN Doc S/RES/1915 (18 March 2010); SC Res 1931, UN SCOR, 6348th mtg, UN Doc S/RES/1931 (29 June 2010) paras 3-7; SC Res 1932, UN SCOR, 6349th mtg, UN Doc S/RES/1932 (29 June 2010); SC Res 1954, UN SCOR, 6446th mtg, UN Doc S/RES/1954 (14 December 2010); SC Res 1955, UN SCOR, 6447th mtg, UN Doc S/RES/1955 (14 December 2010); SC Res 1993, UN SCOR, 6571st mtg, UN Doc S/RES/1993 (29 June 2011); SC Res 1995, UN SCOR, 6573rd mtg, UN Doc S/RES/1995 (29 June 2011); SC Res 2001, UN SCOR, 6613th mtg, UN Doc S/RES/2001 (14 September 2011); SC Res 2081, UN SCOR, 6889th mtg, UN Doc S/RES/2081 (17 December 2012); SC Res 2130, UN SCOR, 7088th mtg, UN Doc S/RES/2130 (18 December 2013); SC Res 2193, UN SCOR, 7438th mtg, UN Doc S/RES/2193 (18 December 2014); SC Res 2256, UN SCOR, 7593rd mtg, UN Doc S/RES/2256 (22 December 2015); SC Res 2269, UN SCOR, 7636th mtg, UN Doc S/RES/2269 (29 February 2016).

[56] SC Res 1390, UN SCOR, 4452nd mtg, UN Doc S/RES/1390 (28 January 2002); Although resolutions 1988 and 1989 have retracted its scope to some degree: SC Res 1988, UN SCOR, 6557th mtg, UN Doc S/RES/1988 (17 June 2011); SC Res 1989, UN SCOR, 6557th mtg, UN Doc S/RES/1989 (17 June 2011).

The implications of widening the scope of what constitutes a threat to the peace has been the subject of extensive academic critique, including in particular whether the Council's interpretation of Article 39 has expanded so far as to render the provision meaningless.[57] It is erroneous as a matter of law to describe the Council's discretion to determine a threat to the peace as completely unlimited. The Council is bound by the Charter provisions, to act in accordance with the purposes and principles of the UN, and in accordance with broader principles of justice and international law.[58] Indeed, founding conceptions of the Security Council were that its authority would be so constrained.[59] In contrast to the contemporary interpretation of article 39, the Committee responsible for drafting Chapter VII of the Charter made clear in its resultant report that a threat to the peace 'refers above all to the presumption of a threat of war'.[60] While this strict interpretation of article 39 has since been ousted, it is nonetheless provides a prudent reminder of how far its interpretation has been stretched since.

One ought to be careful not to suggest that the determination of a threat to the peace should be held strictly in line with what was anticipated in 1945. On the contrary, the founders were acutely aware that the nature of threats might change. Rather, the point here is to note that as what constitutes a threat to the peace has shifted further and further away from traditional security concerns, the spectrum of appropriate responses has also changed. Yet it does not follow as a matter of course, and certainly not as a matter of law, that the Security Council is properly equipped to provide those responses. Nevertheless, recognition of an extremely wide variance of situations as potentially threatening to international peace and security has provided the basis for the UN's executive authority reaching into legislative and judicial spheres as it stretches its arsenal of responses accordingly. Specific examples of these are provided in the sections that follow, but for now it suffices to observe that in doing so, the Security Council has opened the door to the very kind of tyrannical rule that separation of powers seeks to avoid.

Article 41 of the UN Charter provides a concise list of possible measures not involving the use of armed force to which the Council 'may' resort in response to a threat to the peace, which largely reflect those typical of the time: the interruption of economic relations or communications and the severance of diplomatic relations. The list is illustrative, not thorough, and that was intentional (the potential for an exhaustive list was discussed and dismissed).[61] Still, the Council's interpretation of article 41 of the Charter has been controversially wide-ranging such that reference to the provision as

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[57] Anna Hood, 'Ebola: A Threat to the Parameters of a Threat to the Peace?' (2015) 16(1) *Melbourne Journal of International Law* 29.

[58] *UN Charter* arts 1(1) and 24(2) read together, see above n 31.

[59] In proposals that would ultimately lead to the incorporation of article 24(2) of the Charter, Australia and Chile separately put forward amendments making it explicit that enforcement action by the Security Council would be undertaken in accordance with the purposes and principles of the Charter of the United Nations: See *Texts of Dumbarton Oaks Proposals, Amendments of Sponsoring Powers, and Amendment Submitted by Other Participating Governments, Relating to Chapter VIII B and XII,* United Nations Conference on International Organization, Doc 289, III/3/11 (13 May 1945) 2 in: *United Nations Conference on International Organization: Documents* Vol. 12 (1945) 603.

[60] *Report of Paul-Boncour, Rapporteur on Chapter VIII, Section B,* United Nations Conference on International Organization, Doc 881, III/3/46 (10 June 1945) 6 in: *United Nations Conference on International Organization: Documents* Vol. 12 (1945) 507.

[61] The breadth of article 41 reflects the desire of its drafters to avoid the mistakes of the League of Nations. The equivalent provision (Article 16) of the *Covenant of the League of Nations* had permitted sanctions only in specified forms and in relation to interstate war, which was perceived by the 1945 San Francisco Conference as too narrow to allow dynamic responses to conflicts yet unseen. Proposals were tabled in 1945 to specify that Article 41 was an exhaustive list, but these were not adopted by the plenary. See: 'Observations of the Government of Venezuela on the Recommendations adopted at the Dumbarton Oaks Conferences for the Creation of a Peace Organization' Doc 2, G/7(d)(1) (31 October 1944) 23 in: *United Nations Conference on International Organization: Documents* Vol. 3 (1945) 211.

the 'sanctions' power conceals the true extent for which it has since been relied. For example, it has established a quasi-judicial commission to provide compensation for military invasion,[62] it has created international criminal tribunals, and also referred situations to the Prosecutor of the International Criminal Court. It has furthermore demarcated territorial boundaries,[63] and demanded that UN member states adopt specific provisions in their criminal codes.[64] It has even, arguably, undertaken treaty action on behalf of the international community at large.[65]

4.3.1. Executive decision-making in the General Assembly

Although more comparable with the legislative branch of government, the General Assembly possesses at least some functions which have been characterised as executive. The General Assembly does not have the power to authorise the use of military force, but there was a role envisioned for it in the maintenance of international peace and security, albeit something less than the direct command traditionally wielded by an executive. Specifically, article 11 of the Charter empowers the General Assembly to make recommendations to the Security Council with regards to the maintenance of international peace and security including the principles governing disarmament and the regulation of armaments.[66] There is also provision in the Charter for the General Assembly to call to the attention of the Security Council situations which are likely to endanger international peace and security.[67]

That particular function is something less than executive *authority* insofar as a plain reading of the Charter leaves the decisive response to the Council itself. Still, concerns over potential inaction in the Council due to stalemates between veto-holders has previously led to action by the General Assembly. In its 1950 'Uniting for Peace Resolution' the plenary resolved that in circumstances where there existed a lack of unanimity among Security Council members such that the Council was impeded from exercising its responsibility for the maintenance of international peace and security, the General Assembly reserved the right to make recommendations for collective measures including the use of force.[68] Controversially, this resolution contained the implicit assertion that the General Assembly

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[62] SC Res 687, UN SCOR, 2981st mtg, UN Doc S/RES/687 (3 April 1991) paras 16-19.

[63] Ibid paras 2-3 in which the Council demanded that Iraq and Kuwait respect the inviolability of the international boundary and the allocation of islands set out in the 4 October 1963 agreement made between the two countries. The resolution was adopted by majority: 12-1, Cuba voted against, Ecuador and Yemen abstained from the vote. Notwithstanding SC Res 833, UN SCOR, 3224th mtg, UN Doc S/RES/833 (27 May 1993) in which the Council specified the Iraq-Kuwait Boundary Demarcation Commission was not to reallocate territory but make the precise coordinates of the 1963 agreement, which was, quite literally (and therefore ironically), to demarcate territory. It has also attributed state responsibility through SC Res 687, UN SCOR, 2981st mtg, UN Doc S/RES/687 (3 April 1991) para 16 in which the Council held Iraq responsible for the invasion of Kuwait.

[64] For example, SC Res 1373, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (28 September 2001) paras 1(a)-(d) and (2)(e); SC Res 1540, UN SCOR, 4956th mtg, UN Doc S/RES/1540 (28 April 2004) paras 1(a)-(d) and (2)(e). That and others since are discussed in the next section of this article.

[65] That is action broader than just the conclusion of treaties (which the UN has authority to do), see for example *Prosecutor v Fofana (Decision of the Appeals Chamber of the Special Court for Sierra Leone on Preliminary Motion on Lack of Jurisdiction Materiae: Illegal Delegation of Powers by the United Nations)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-14-AR72(E), 25 May 2004) [18] in which Defence challenged the validity of the agreement between the UN and the Government of Sierra Leone to establish the Special Court for Sierra Leone (*Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone,* United Nations—Sierra Leone, signed 16 January 2002, 2178 UNTS 138 (entered into force 12 April 2002) annex ('*Statute of the Special Court for Sierra Leone'*)) on the basis that it constituted an unlawful delegation of authority. Notwithstanding the argument being made, both Defence and Prosecution agreed 'that it is well established that the United Nations can conclude treaties with a government'.

[66] *UN Charter* arts 11(1) and (2).

[67] *UN Charter* art 11(3).

[68] *Uniting for Peace,* GA Res 377(V), 5th sess, 302nd mtg, UN Doc GA/RES/377(V) (3 November 1950) para 1.

could authorise (not just recommend) an armed response.[69] However the assertion was more anomalous than it was effective, having never led to any action by the Assembly and the legality of this possible measure remains the subject of some debate.[70]

4.1 Legislative authority

The description of separation of powers in section 2 identified that the legislative branch is characterised in part by the discussion, creation and adoption of regulatory instruments by a widely inclusive—in terms of both membership and subject matter—and deliberative body. A principal tension associated with legislative authority in the UN is that the General Assembly was premised on the design of legislature, but that the Security Council is the only branch with the capacity to issue binding decisions. That power is divided thusly does not mean that separation of powers has no role to play. For indeed, the Security Council's binding decision making authority carries with it none of the ordinary characteristics of legislative decision-making *but for* its legally binding effect. Whereas the General Assembly possesses nigh on all of them, *but for* the capacity to compel state compliance. One must recall that the ambit of Security Council decision-making was, at the time power was conferred at least, of the purest of executive forms: military defence. The next section will assess the role of legislature, or legislating, in the UN system, and will use that separation of powers prism to identify the places at which rule of law vulnerabilities lie.

4.1.1 The General Assembly

The General Assembly is best characterised as the legislature of the UN. It is broadly representative, made up of all member states of the UN and has authority to discuss any question or matter that falls within the ambit of the Charter and to make recommendations to the UN or the Security Council.[71] Like a national legislature, it is the most deliberative branch, it includes representatives from all states, each of which has a single vote of equal weight;[72] it decides the budget;[73] and the 'executive' (the Security Council) has a duty to report to it at regular intervals,[74] (so too other UN organs).[75] It is governed by rules of procedure comparable to those that would ordinarily guide a national legislature; and it adopts resolutions by majority vote.[76] It is the principal place for discussion, deliberation, recommendation, review, and election.[77] Article 13(1)(a) of the UN Charter bestows upon the Assembly the responsibility to 'initiate studies and make recommendations for the purpose of … encouraging the progressive development of international law and its codification'. The scope of

[69] Expressly forbidden by the *UN Charter* art 2(4) subject to the exceptions delineated in Chapter VII which include where it is so authorised by the Security Council in response to a breach or threat to the peace or an act of aggression; and by the exercise of the individual or collective self-defence, which also accords with customary international law.
[70] See further: Michael Ramsden, '"Uniting for Peace" and Humanitarian Intervention: The Authorising Function of the UN General Assembly' (2016) 25 *Pacific Rim Law and Policy Journal* 267.
[71] *UN Charter* arts 10, 12(1).
[72] *UN Charter* art 9(1).
[73] The budget is decided by the Fifth Committee of the General Assembly. *UN Charter* art 17(1); see also *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 262.
[74] *UN Charter* art 15(2) and 24(3).
[75] *UN Charter* art 15(2).
[76] By a simple majority for most questions, and by a two-thirds majority for recommendations related to international peace and security and also on questions of membership (membership of the UN itself as well as membership of its principal organs): *UN Charter* art 18.
[77] The General Assembly elects members to the Security Council and also elects the Secretary-General.

General Assembly oversight is also broadly legislative insofar as it possesses the power to concern itself with all matters within the general competence of its constitutive document.[78]

But the General Assembly's separation of powers credentials are constrained in two important respects. Firstly, it lacks the authority to pass binding law, and secondly its capacity to act as a check on the executive is arguably weak, although not non-existent. To deal with the first point, it is true that General Assembly resolutions are absent binding legal effect save to the extent that they delineate already extant rules of international law.[79] Nor does a General Assembly resolution amount to an international agreement of the kind anticipated in article 38(1)(a) of the ICJ Statute.[80] Furthermore, a vote in the General Assembly does not meet the procedural requirements of the *Vienna Convention on the Law of Treaties* to give rise to a legally binding convention, and such a vote would not in itself indicate an intent to be contractually bound vis-à-vis other states.[81] That said, resolutions of the General Assembly are not devoid of all legal value.[82] In the *South West Africa* case, immediately after the familiar passage that General Assembly resolutions are 'only recommendatory in character' the ICJ went on to acknowledge that 'the persuasive force of Assembly resolutions can indeed be very considerable'.[83] In its later Advisory Opinion in the *Legal Consequences of the Continued Presence of South Africa in Namibia,* the ICJ found that: '…it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.'[84]

Much like a national legislature, the exchange of ideas in plenary debate contributes to the construction of law as treaty agreements, as well as the development and acceleration of customary international law.[85] For treaty agreements, the discursive processes within the General Assembly allows states to iron out difficulties prior to the settlement of new treaties and the adoption of non-binding resolutions themselves develop language and norms adopted in subsequent treaty agreements.

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[78] *UN Charter* art 10.

[79] *South-West Africa (Second Phase) (Judgment) (Liberia v South Africa)* [1966] ICJ Rep 6, 50: 'Resolutions of the United Nations General Assembly … are not binding, but only recommendatory in character'. See also *Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Rep 16, 38 [105].

[80] *Statute of the International Court of Justice* art 38(1)(a) provides that in determining disputes in accordance with international law the Court shall apply, *inter alia,* 'international conventions, whether general or particular, establishing rules expressly recognized by the contesting states' (hereafter '*ICJ Statute*').

[81] A treaty agreement requires, among other things, the express consent of states to be legally bound 'by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed': *Vienna Convention on the Law of Treaties,* opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 11.

[82] *Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Rep 16 (hereafter '*South West Africa Advisory Opinion*'); *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep 66 [70]. See also Roslyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford, 1963).

[83] *South-West Africa (Second Phase) (Judgment) (Liberia v South Africa)* [1966] ICJ Rep 6, 50-51.

[84] *South West Africa Advisory Opinion* [105]. Cf Kay Hailbronner and Eckart Klein, 'Article 10' in Bruno Simma (ed) *The Charter of the United Nations: A Commentary* (Oxford University Press, 1995) 226, 237.

[85] Which 'crystallises' into recognised existence where there is evidence of a consistent state practice alongside *opinio juris*: *Statute of the International Court of Justice* art 38(1)(b).

For instance, the two most significant human rights treaties of last century[86] were based on the 1948 General Assembly resolution enunciating the Universal Declaration on Human Rights.[87] Arms agreements and the treaty on activities in outer space also had their origins in non-binding resolutions first pieced together in the General Assembly.[88] Indeed, beyond the legal evolution advanced by the negotiation of its own instruments (resolutions), the General Assembly has long served as the venue for the negotiation and adoption of multilateral treaties.

General Assembly resolutions can catalyse the growth of customary international law by setting standards for state behaviour and articulating the development of new problems and possible solutions in a forum which possesses near universal membership. In this way, the General Assembly can 'legislate' by adopting resolutions by consensus which can then crystallise into norms of customary international law. Accordingly, from time to time the ICJ will examine General Assembly resolutions, albeit 'with due caution', to ascertain the existence of principles of customary international law.[89] Voting behaviour can assist in this pursuit 'in cases where the text of a resolution expressly points out that states are expressing an *opinio juris* with their vote, or where this is evident from the circumstances'.[90] As Roslyn Higgins has observed, the body of General Assembly decisions as a whole 'undoubtedly' provides 'a rich source of evidence' as indications of customary international law.[91]

Pointing to the absence of a capacity to enact strictly legally binding decisions by the General Assembly is not enough to summarily dismiss the application of separation of powers to the UN. Nor is it the sole criterion by which one can adjudge the useful application of separation of powers to a particular governing body. For it is the *process* of deliberation, consultation and agreement, with universality of its representative over the broadest spectrum of topics which is the essence of the legislature. This too is the reason that the General Assembly annual meeting from September to December each year is vitally important to states, notwithstanding that decisions are rarely the result. A General Assembly resolution while not strictly legally binding is nevertheless indicative, like legislation in the domestic context, of the general policy direction of the governing authority, it sets the tone and agenda for future deliberations.

But what of the institutional checks and balances to which separation of powers aspires? The legislature traditionally acts as a check on executive authority through executive reporting at regular intervals and control of the budget, as well as through the power wielded by its membership. The

[86] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR); and *International Covenant on Economic, Social and Cultural Rights,* opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (ICESCR).
[87] GA Res 217(III)(A), UN GAOR, 3rd sess, 177th mtg, UN Doc S/RES/217 (10 December 1948).
[88] The *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies,* opened for signature 27 January 1967, (entered into force 10 October 1967) was adopted based on GA Res 2222(XXI), UN GAOR, 21st sess, 1499th mtg, UN Doc S/Res/2222 (19 December 1966).
[89] In the *Nicaragua* merits decision for instance, the Court referred to a General Assembly resolution to ascertain the position of States on whether the prohibition on the use of force had developed into *opinio juris: Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 99-100 [188].
[90] Hailbronner and Klein, above n 84, 238; see also Higgins, above n 52, 1-3. Customary international law must also be exhibited in state practice, especially by those states the interests of which are specifically affected. To give rise to a customary rule, that conduct must be 'very widespread' and consistent, even if for only a relatively short period of time and manifest the overall recognition of a legal obligation: *North Sea Continental Shelf Cases (Advisory Opinion)* [1969] ICJ Rep 3, 43 [73].
[91] Higgins, above n 52, 5.

Charter specifies that the Security Council must report to the Assembly at regular intervals[92] and provides for the General Assembly's control of the budget.[93] Peacekeeping operations, which do not fall under the regular budget of the organization, also fall under the budgetary authority of the General Assembly, notwithstanding that they are authorised by the Security Council.[94] Like any legislative body, the General Assembly is not entirely obsequious to the executive and it has occasionally taken the Security Council to task.[95] However, its capacity for acting as a check on executive authority has diminished somewhat over time.

The reporting obligations contained in Articles 15(1) and 24(3) of the Charter lack specificity, thus rendering it possible for the Council to deliver reports that detail little but what is already well-known about its activities and decisions. The Security Council has long been criticised by members of the General Assembly in for its lack of transparency, including in the annual plenary debate on the Security Council's annual report.[96] While the UN Charter envisaged only the regular budget referred to in Article 17(1) to be overseen by the General Assembly, in contemporary practice the budgets controlled by the General Assembly (regular and peacekeeping) comprise only a modest proportion of the organization's total. The remaining finances come from voluntary contributions to operational programmes.[97]

One might conclude then that the General Assembly's capacity to act as a check on the executive is weak but not entirely absent. And in this respect, the checks and balances originally provided for in the UN Charter—the same checks and balances which negatived proposed amendments to strengthen accountability through the General Assembly—are not as effective as originally envisaged.

4.1.2. The Security Council's Exercise of Legislative Power

The Security Council was the least active UN organ for much of its first four decades in existence. The advent of the Cold War led to a period of stagnation during which time Council practice was hardly developed and inevitably some institutional memory was lost, including, to an arguable degree, the envisaged role of the Council in the UN structure, and perhaps even the boundaries of the functions it was to undertake. This issue was compounded by the lack of any public record of the Council's closed-door consultations, such that 'the five permanent members represent the Council's institutional memory.'[98] The early 1990s heralded a new era in consensus decision-making in the Security Council, where the veto no longer stalled progress in the way it had for the preceding half-century, and led to a sudden and dramatic expansion of the Council's programme of work.

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[92] *Charter of the United Nations* art 15(2) and 24(3).
[93] *UN Charter* art 17(1); see also *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 262.
[94] *UN Charter* art 17(1); *Scale of Assessments for the Apportionment of the Expenses of the United Nations Peacekeeping Operations*, GA Res 55/235, 55th sess, UN Doc GA/RES/55/235 (30 January 2001).
[95] The most prominent example being the adoption of the Uniting for Peace resolution in 1950: *Uniting for Peace*, above n 68, para 1.
[96] Although since 2015 there have been amendments to the way in which the report is delivered and the Security Council has been routinely late on reporting since. This has meant that debate on the annual report has been left to the last moments of the General Assembly discussion, and not substantively debated. See further: Security Council Report, *In Hindsight: Security Council Annual Report to the General Assembly* (28 February 2019) <www.securitycouncilreport.org/monthly-forecast/2019-03/in-hindsight-security-council-annual-report-to-the-general-assembly.php> accessed 4 June 2019.
[97] Frauke Lachenmann and Rüdiger Woflrum, 'United Nations Budget' in *Max Planck Encyclopedia of Public International Law* (2013) [20].
[98] Adekeye Adebajo, 'Ending Global Apartheid: Africa and the United Nations' in Adekeye Adebajo (ed), *From Global Apartheid to Global Village: Africa and the United Nations* (University of KwaZulu-Natal Press, 2009) 3, 20.

Problematic though, in the Security Council's new and emergent practice, was its encroachment into new fields of activity ill-befitting executive authority.

The argument that the Security Council is a legislative body is substantially premised on the binding nature of Security Council decisions, even those taken outside Chapter VII and notwithstanding member states' votes against.[99] But to say that an organ's capacity to make binding decisions is also authority to legislate is a substantial misstatement of law. Decisions can be binding without being legislative in character. Legislating and executive decision-making are not one in the same, and, importantly, they ought not to be run together. For the checks and balances available in legislative processes (broad representation, consultation, deliberation, and transparency) are not features of executive authority.

Nevertheless, in recent decades the Security Council has utilised its binding decision-making authority to adopt a more overtly legislative role.[100] Some scholars contend that this 'legislative phase' of the Security Council's work commenced after the attacks on the World Trade Centre in New York in September 2001: the passage of resolution 1373 and later 1540 reckoned as the turning point.[101] In fact, the 'first major step' towards acts of legislative character occurred more than a decade before. The origins of Council's modern legislative role can be traced back to the 1993 adoption of resolution 827 which established the International Criminal Tribunal for the Former Yugoslavia (ICTY).[102] In establishing the Tribunal, the Council also drafted and adopted its statute. In doing so it transcribed the content and form of the applicable law, which was a bold step down a largely legislative path.

Still, it was the Council's reach into legislative functions in the early 2000s that really caused the brows of legal scholars to rise. Acting under Chapter VII of the Charter, the Council unanimously adopted resolution 1373 on 28 September 2001, which for the first time called upon UN member states to enact legislation domestically and was fairly specific about what such law must achieve. It demanded *inter alia* that states 'shall enact criminal legislation' to prohibit the act or financing of terrorism, freeze the financial and economic resources of individuals who commit actual or attempt offences of terrorism and forbid through criminal legislation any individuals from making resources available to terrorists.[103] In resolution 1540, adopted on 28 April 2004, the Council acted under Chapter VII to decide that 'all states shall… adopt and enforce appropriate effective laws which prohibit any non-State actor to [*sic*] manufacture, acquire, possess, develop, transport, transfer, or use nuclear, chemical or biological weapons or their means of delivery, in particular for terrorist purposes...'[104] The Council's appetite for issuing binding demands for domestic legislation has not waned since, particularly with respect to terrorism. In 2014 it adopted resolution 2178 which dealt

[99] *UN Charter* art 25 states ""The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." The ICJ has explained that 'If article 25 had reference solely to article 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter': *South West Africa (Advisory Opinion)* 53 [113].

[100] Ramesh Thakur, 'Law, Legitimacy and the United Nations' in Richard Falk, Mark Juergensmeyer and Vesselin Popovski (eds), *Legality and Legitimacy in Global Affairs* (Oxford University Press, 2012) 45, 59.

[101] Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 *The American Journal of International Law* 175, citing José E. Alvarez, 'The UN's "War" on Terrorism' (2003) 31 *International Journal of Legal Information* 238, 241; and Matthew Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 *Leiden Journal of International Law* 593, 596.

[102] SC Res 827, UN SCOR, 3217th mtg, UN Doc S/RES/827 (25 May 1993).

[103] SC Res 1373, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (28 September 2001) paras 1(a)-(d) and (2)(e).

[104] SC Res 1540, UN SCOR, 4956th mtg, UN Doc S/RES/1540 (28 April 2004) para 2.

with foreign fighters in terrorist organisations. It demanded that 'domestic laws … establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense'. Significantly the resolution then went on to specify the elements of those offences including both *mens rea* and *actus reus*.[105]

Many scholars have since addressed this phase in Security Council decision-making in terms of its unprecedented reach into the domestic affairs of states.[106] The application of separation of powers is often implicit in these critiques but addressed indirectly. Thus we see this series of resolutions described as a period in which the Security Council was acting as "legislature" or "legislator",[107] and, moreover, that it suffers a "deliberative deficit".[108] But it is worth acknowledging the separation of powers connection more directly because to do so paints a more complete picture. In this way we can piece together that the 'deliberative deficit' in the Council's 'legislative phase' is problematic not because the Council ought to be more deliberative generally, but precisely because it undertook a legislative function.

This period was a conscious shift by the Council towards a more overtly legislative role. In 2004, the Council President for April advised a press conference that the discussions leading to resolution 1373 were 'the first major step towards having the Security Council legislate for the rest of the General Assembly' and perceived that the Council would increasingly be required to undertake 'that kind of legislative work'.[109] As an executive authority, the Security Council does not possess the procedural safeguards that characterise legislative decision-making: representative deliberation with due regard for normative considerations. Proper regard to appropriate process, albeit adapted to context (as separation of powers permits) would have gone some way towards enhancing the legitimacy of these decisions.[110] In upholding the rule of law, separation of powers is not just infrastructural, it needs to be performed.

4.2 Judicial authority

It is hardly controversial to observe that the ICJ is the judicial branch of the UN, defined as 'the principal judicial organ' in Article 92 of the Charter, to which the ICJ Statute is annexed and forms part. The word 'principal' is important as it anticipates the possibility of judicial authority or judicial organs existing elsewhere in the UN system (such as the Administrative Tribunal in the General Assembly, or the ad hoc criminal tribunals created by the Security Council), but clarifies through the use of this word that the ICJ remains the superior court.

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[105] SC Res 2178, UN SCOR, 7272nd mtg, Un Doc S/RES/2178 (24 September 2014) para 6.

[106] See, eg, Paul Szasz, 'The Security Council Starts Legislating' (2002) 96 (20) *The American Journal of International Law* 901; José E. Alvarez, 'Hegemonic International Law Revisited' (2003) 97(4) *The American Journal of International Law* 873.

[107] See, eg, Talmon, above n 101; Eric Rosand, 'The Security Council as Global Legislator: Ultra Vires or Ultra Innovative' (2004) 28 *Fordham International Law Journal* 542; Monica Lourdes de la Serna Galvan, 'Interpretation of Article 39 of the UN Charter (Threat to Peace) by the Security Council: Is the Security Council a Legislator for the Entire International Community?' (2011) 11 *Anuario Mexicano de Derecho Internacional* 147.

[108] Ian Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit' (2008) 102(2) *American Journal of International Law* 275.

[109] President of the Security Council April 2004, 'Press Conference by Security Council President' (Press Conference, 2 April 2004).

[110] See, eg, Devika Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (OUP, 2016) 167.

Needless to say, the ICJ possesses the characteristic elements of judicial authority outlined in section 2. These include binding decisions according to law, formalised hearings, systematised court proceedings, the provision of publicly available reasons for decisions, and, an assessment of evidence and determination of law that is independent and free from political contamination. Indeed, it is for this latter reason that the ICJ was housed in The Hague and not alongside the overtly political branches of the UN organization in New York.[111] Its decisions constitute authoritative, if not always binding, statements of international law. It has jurisdiction to decide disputes between states and to provide advisory opinions on legal questions at the request of the General Assembly or the Security Council.[112] However, the Court's jurisdiction is not compulsory, and is premised upon state consent.[113] It has no jurisdiction over individuals, nor can it initiate proceedings *proprio motu.* Nonetheless it is an autonomous judicial body with the duty to apply and interpret international law in relation to the matters before it.[114] However, its competence to act as a check on executive authority is constrained because it does not possess the authority to undertake direct judicial review of executive decisions: its capacity is limited to where the question is relevant to a matter before it, either in its contentious or advisory jurisdiction.

4.2.1 Judicial review of executive decision-making?

The presence or absence of judicial review of executive decision-making does not single-handedly uphold or defeat the application of separation of powers, although it will likely tell us something about the strength of the doctrine in that particular system. Like other aspects of separation of powers, judicial review is subject to varied constructions even in its domestic form.[115] Nevertheless, traditionally, there are three key tenets. First, judicial review ought to be conducted by an internal judicial organ within the same overarching constitutional framework as the decision-maker (in this case, the UN). Second that decision itself must be subject to a higher constitutional order on which the decision can be adjudged (the UN Charter), and finally that review is usually an 'inherent' part of the judicial authority of the relevant court.[116] It is on this final point that judicial review of executive decision-making is arguably weak.

The UN Charter is silent on whether direct judicial review of the Security Council or General Assembly determinations is possible. *Prima facie*, contrary to a conventional separation of powers framework, the ICJ is not directly vested with the *responsibility* to review the decisions of other UN organs. This has been recognised explicitly by the Court itself: '[u]ndoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned [the Security Council and the General Assembly]'.[117] However, focusing on the

[111] Its predecessor, the Permanent Court of International Justice was already housed there, but that the seat of the court ought to remain far from the politics of New York was a key concern in the debates founding the UN. See *Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice* (10 February 1944) 4 [13]-[14]. See also, eg, 'Observations of the Government of Venezuela on the Recommendations adopted at the Dumbarton Oaks Conferences for the Creation of a Peace Organization' Doc 2, G/7(d)(1) (31 October 1944) 39 [6] in: *United Nations Conference on International Organization: Documents* Vol. 3 (1945) 227. The Venezuelan position draws on a suggestion out of the *Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice* (10 February 1944) 3 [7].
[112] *UN Charter* art 96.
[113] *ICJ Statute* art 34(1).
[114] *ICJ Statute* art 38(1).
[115] Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions* (OUP, 2011) 95.
[116] Adapted from ibid 95.
[117] *South West Africa Advisory Opinion* [87].

capacity of the ICJ to undertake *direct* judicial review of Council decisions obscures the various ways in which the Court may act as a check on Security Council action, albeit more subtly. For instance, through the precedential nature of ICJ decisions. Additionally, the expression of disquiet by the ICJ over the legality of a particular Council decision, even if not making a determination on that matter perse, will often draw the boundaries for future Council decisions of similar character.[118]

To date, the ICJ has twice been asked to review the legality of a Security Council decision. Interestingly, in neither *Lockerbie* decision nor the *Bosnia Genocide* case did the question of *whether* the Court had the power to review the relevant decisions arise as an objection to its jurisdiction.[119] These cases triggered extensive academic analysis on the *scope,* not prospect, of the Court's capacity to conduct review of Security Council decisions.[120]

In its consideration of provisional measures in *Lockerbie,* the Court found itself for the first time in the unusual position of examining a matter that was the subject of simultaneous active consideration by the Security Council.[121] What was interesting in this case, from a separation of powers perspective, is the ICJ's implicit concern to retain the distinction between judicial and executive power. In declining Libya's application for provisional measures the majority observed that 'any indication of provisional measures would run a serious risk of conflicting with the work of the Security Council.'[122] Cognisant of the contemporaneous consideration of the matter by the Security Council, the judges did not further clarify the relationship between the Security Council and the ICJ, with each member of the Court extremely careful to deal with only the most unavoidable preliminary legal questions.

Much of the Court's own dismissal of its power of judicial review is simply the acknowledgement that its authority to review decisions of other UN organs is incidental rather than inherent. Article 35(1) of the UN Charter allows any member of the UN to bring any dispute or situation likely to endanger international peace and security before the Council for its consideration. Article 36(1) of the ICJ Statute grants jurisdiction to the Court in all cases that parties refer to it and 'all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force.' Nevertheless, it is unavoidable that the Court review the decisions of other UN organs, and determine their validity, when to do so is relevant to a matter before it. [123] Indeed, as Judge Oyeama wrote, to avoid making a determination in such circumstances would be an abdication of its role as a judicial

[118] Jose Alvarez, 'Judging the Security Council' (1996) 90 *American Journal of International Law* 1, 28-36.
[119] *Application of the Convention on the Prevention and Punishment of Crime of Genocide (Bosnia & Herzegovina v Yugoslavia (Serbia and Montenegro) Requests for Provisional Measures* (1993) Order, ICJ Reports (1993) 3 and 325.
[120] See, eg, Dapo Akande, 'The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46 *International and Comparative Law Quarterly* 309; Michael J Matheson, 'ICJ Review of Security Council Decisions' (2004) 36 *George Washington International Law Review* 615.
[121] The dispute was removed from the ICJ's list at the request of the parties in 2003: 'Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie' (Libyan Arab Jamahiriya v. United States of America): Cases Removed from the Court's List at the Joint Request of the Parties' (Press Release, 2003/29, 10 September 2003).
[122] *Lockerbie* 126 [40].
[123] *UN Charter* Ch XIV; Bernhard Graefrath, 'Leave to the Court What Belongs to the Court: The Libyan Case' (1993) 4 *European Journal of International Law* 184, 204; Bernd Martenczuk, 'The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie' (1999) 10 *European Journal of International Law* 517; Tzanakopoulos, above n 115, 110-111.

organ.[124] Accordingly, while there is no inherent power of judicial review formalised in the UN Charter, there is at least capacity for it, which is implicit to its role as a judicial organ.

It is undoubtable that interpretating the UN Charter was part of the role envisaged for the ICJ, including the associated capacity to determine the legal boundaries of the authority granted by the Charter to its principal organs. During the founding negotiations of the UN, the Special Committee on the Interpretation of the Charter determined that member states were free to submit a dispute over interpretation to the ICJ and noted that the General Assembly or the Security Council could also ask the Court for an advisory opinion.[125] Although it noted that for an interpretation to be binding on the UN membership at large, an amendment to the Charter might be necessary.[126]

4.2.2. The Security Council's exercise of judicial authority

From time to time the Security Council has made decisions that assumed a judicial or quasi-judicial character, notwithstanding that the Charter does not furnish it with judicial authority. For instance, it has on several occasions purported to make authoritative statements on the 'illegality' of particular acts. These include claims of independence in Southern Rhodesia and South-West Africa,[127] attempts to secede in the Congo;[128] matters associated with the Middle East conflict, including the legal status of Jerusalem;[129] the establishment of the Northern Cyprus;[130] and the attempted Iraqi annexation of Kuwait.[131]

Security Council decisions of judicial character become more concerning when they constitute direct decision-making authority over individuals. Many of those who criticise the Council for this have, rightly enough, done so under the rubric of international human rights law, including due process and fair trial protections, as enshrined in custom and article 14 of the International Covenant on Civil and Political Rights (ICCPR). But it is worth noting that fundamentally, those due process rights are realised in structural form by separation of powers. At its core, the foundational notions of separation

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[124] *Legal Consequences for the Continued Presence of South Africa in Namibia (South West Africa) Notwithtstanding Security Council Resolution 276* (1970), Advisory Opinion, ICJ Reports (1971) 16 [45].
[125] *Report of Special Subcommittee of Committee IV/2 on The Interpretation of the Charter,* Doc 750 IV/2/B/1, 13 UNCIO (1945) 831-832.
[126] Ibid 832.
[127] See: SC Res 276, 1529th mtg, UN Doc S/RES/276 (30 January 1970) para 2 in which the Council determined that 'the continued presence of the South African authorities in Namibia is illegal and that consequently *all acts by the Government of South Africa on behalf of or concerning Namibia … are illegal and invalid'* [emphasis added]; similarly see SC Res 232, UN SCOR, 1340th mtg, UN Doc S/RES/232 (16 December 1966) para 1.
[128] SC Res 169, UN SCOR, 982nd mtg, UN Doc S/RES/169 (24 November 1961) para 1: 'strongly deprecates the secessionist activities *illegally* carried out by the provincial administration of Katanga…' [emphasis added].
[129] SC Res 252, UN SCOR, 1426th mtg, UN Doc S/RES/252 (21 May 1968) para 2: 'Considers that all legislative and administrative measures and actions taken by Israel, including expropriation of land and properties thereon, which tend to change the legal status of Jerusalem are *invalid and cannot change that legal status*' [emphasis added]; SC Res 298, UN SCOR, 1582nd mtg, UN Doc S/RES/298 (25 September 1971) para 3: 'Confirms in the clearest possible terms that all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including the expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied sector, are *totally invalid and cannot change that status'* [emphasis added].
[130] SC Res 541, UN SCOR, 2500th mtg, UN Doc S/RES/541 (18 November 1983) para 2, in which the Security Council deplored the attempted annexation of Northern Cyprus by Turkey and in that respect 'considers the declaration [of Turkey claiming Northern Cyprus] *legally invalid* and calls for its withdrawal' [emphasis added].
[131] SC Res 662, UN SCOR, 2934th mtg, UN Doc S/RES/662 (9 August 1990) para 1: 'Decides that the annexation of Kuwait by Iraq under any form whatever pretext has *no legal validity,* and is considered *null and void*' [emphasis added].

of powers delineated by Locke and Montesquieu are centrally concerned with protecting individuals from the risks associated with a tyrannical executive.

The Security Council first moved towards direct decision-making over individuals through its amended sanctions programme implemented in the late 1990s and early 2000s. Battered with criticism for the human consequences of its comprehensive sanctions policy, the Council shifted gears to focus on a sanctions program of more targeted design. Resolution 1267, adopted in 1999, was arguably the first incarnation of this policy shift.[132] Resolution 1267 was adopted to combat the sheltering and training of 'terrorists' by the Taliban in Afghanistan,[133] and was catalysed in part by a spate of attacks on US Embassies in East Africa the year before. Enacted under Chapter VII of the Charter, resolution 1267 compelled UN member states to freeze the financial and material assets of, and prevent travel for, individuals it listed as associated with the Taliban.[134] The same resolution established a Sanctions Committee for the purpose of overseeing the implementation of this regime. As a consequence of the list being formulated under the authority of a Chapter VII resolution, all UN member states were (and remain) under a legal obligation to implement sanctions against listed individuals or entities. Three more sanctions committees were to be established in the years that followed, each with similar mandates.

The initial demurrer against the new sanctions regime rose to a clamour when people who had been erroneously included on sanctions lists had no clear avenue to appeal to have their names removed. Sanctioned individuals had no forum in which to directly appeal the Security Council's decision and states are under a binding obligation, pursuant to article 103 of the Charter, to implement the Council's Chapter VII decisions. *Prima facie,* the Security Council being unapologetically political, and functionally opaque, its adoption of judicial authority over individuals, even when alleged to be involved in serious crime, conflicts with ICCPR requirements.[135]

As numerous scholars have since contended, because targeted sanctions are essentially penal in nature, they ought to be implemented with the same procedural safeguards that are available in criminal proceedings.[136] Yet the measures here were imposed without any of the associated due process and fair trial protections a court would ordinarily afford including: the right to a hearing, to have reasons for a decision, and to appeal the decision.[137] Missing too is the judicial standard of legal procedure and analysis sufficient to justify the conclusions reached. In the exercise of judicial authority, the pronouncement of law must be buoyed by a detailed understanding of the relevant problem, informed by thorough legal advice and safeguarded by procedural fairness.

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[132] SC Res 1267, UN SCOR, 54th sess, 4051st mtg, UN Doc S/RES/1267 (15 October 1999). It has since been amended by subsequent resolutions, all adopted under Chapter VII of the Charter, and two of which have had the consequence of separating the 1267 regime into two separate schemes. One to deal with sanctions upon individuals and entities associated with the Taliban that threaten peace and security within Afghanistan; and the other to deal with those who have associations with the Taliban, Al-Qaida, wherever they might be in the world: SC Res 1988, UN SCOR, 6577th mtg, UN Doc S/RES/1988 (17 June 2011); SC Res 1989, UN SCOR, 6577th mtg, UN Doc S/RES/1989 (17 June 2011).

[133] SC Res 1267, UN SCOR, 4051st mtg, UN Doc S/RES/1267 (15 October 1999) preamble.

[134] Ibid para 4(a)-(b).

[135] Arts 14 and 16.

[136] See, eg, Hovell, above n 110; Iain Cameron, *Respecting Human Rights and Fundamental Freedoms and EU/UN Sanctions: State of Play* (European Parliament Policy Department External Policies, 2008) ii and 38-43; Andrew Hudson, 'Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights' (2007) 25(2) *Berkeley Journal of International Law* 203, 210.

[137] Guaranteed in international law under pursuant to an individual's right to a fair trial: ICCPR art 14.

From a separation of powers perspective, perhaps paramount among the long list of arguments against an executive exercising judicial authority, is that the assessment of evidence and determination of the law must be free from political considerations. Conversely, purported determinations of law by the Security Council are cast with the spurious hue of 'causal description for political purposes'.[138] As Elihu Lauterpacht has observed, to make assertions of positive law without proper legal reasoning and judicial safeguards is to use the term adjectivally but not seriously.[139]

Absent an option for judicial review in the UN legal system, these cases ended up before regional and national courts.[140] Legal challenges were initiated against states' implementation of Council sanctions practice in the Court of Justice of the European Union (ECJ), the European Court of Human Rights, the UN Human Rights Committee as well as in national proceedings in Belgium, Canada, Italy, The Netherlands, Pakistan, Switzerland, Turkey, the UK and the US.[141] The leading decision was that of the ECJ in *Kadi*. In it, the ECJ annulled a Council Regulation of the European Commission which purported to implement Security Council imposed measures against specific individuals associated with Al Qaeda and/or the Taliban.[142] Yassin Abdullah Kadi was added to the Sanctions Committee Consolidated List on 17 October 2001 and thereafter listed in the EU regulations which *inter alia* imposed restrictive measures on individuals associated with those same groups.[143] No reasons were given for his inclusion on the list, he was granted no hearing and no right of appeal was available within the UN system.

In a judgment delivered on 3 September 2008, the ECJ determined that the competent Court had an obligation to ensure judicial review, and 'in principle the full review', of the lawfulness of EU acts in light of fundamental rights, including measures that give effect to Security Council Chapter VII resolutions.[144] Moreover, effective judicial review required that the relevant EU entity communicated the grounds for including a person on such a list 'as swiftly as possible' to the person upon whom restrictive measures were to be imposed such that they may be heard.[145] Finding that Mr Kadi had

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[138] Higgins, above n 52, 181.

[139] Lauterpacht, above n 9, 39-42 as paraphrased in ibid 182.

[140] For national courts see, eg, Antonios Tzanakopoulos, 'Domestic Court Reactions to UN Security Council Sanctions' in August Reinisch (ed), *Challenging Acts of International Organisations before National Courts* (Oxford University Press, 2010) 54; Antonios Tzanakopoulos, 'State Reactions to Illegal Sanctions' in Matthew Happold and Paul Eden (eds), *Economic Sanctions and International Law* (Hart Publishing, 2016) 67; Matthew Happold, 'Targeted Sanctions and Human Rights' in Matthew Happold and Paul Eden (eds), *Economic Sanctions and International Law* (Hart Publishing, 2016) 87; Hayley Hooper, 'Liberty Before Security: Yassin Abdullah Kadi v Commission' (2012) 18(3) *European Public Law* 457; Erika de Wet, 'Review of the Security Council Decisions by National Courts' (2002) 45 *German Yearbook of International Law* 166, 171; De Wet, above n 23. For regional courts see, eg (of many): Annalise Ciampi, 'Security Council Targeted Sanctions and Human Rights' in Bardo Fassbender (ed), *Securing Human Rights?: Achievements and Challenges of the UN Security Council* (Oxford University Press, 2011); Erika de Wet, 'Holding the United Nations Accountable for Human Rights Violations Through Domestic or Regional Courts: A Case of "Be Careful What You Wish For"?' in Jeremy Farrall and Kim Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalised World* (Cambridge University Press, 2009) 143.

[141] See *Fifteenth Report of the Analytical Support and Sanctions Monitoring Team Submitted Pursuant to Resolution 2008 (2012) Concerning Al-Qaida and Associated Individuals and Entities,* UN Doc S/2014/41 (23 January 2014) annex I, 23-25.

[142] No 1190/2008 (28 November 2008).

[143] Council Regulation (EC) 467/2001 (6 March 2001) Annex I; and subsequently Council Regulation (EC) 881/2002 (27 May 2002).

[144] *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* (C-402/05 P and C-415/05 P) [2008] ECR 461 [326]: confirmed by the European Union General Court in *Yassin Abdullah Kadi v European Commission* (T/85/09) [2010] ECR-SC II-418.

[145] Ibid.

received no evidence to justify the measures imposed upon him nor been afforded the right to be informed of that evidence that *inter alia* his rights of defence and the right to effective judicial review had been infringed. The ECJ ordered that the relevant regulation be annulled.

The ECJ was careful not to pronounce on whether the resolution was itself a lawful exercise of Security Council authority, conceding as it did that it had no jurisdiction to review Council decisions. It clarified that it was examining only the European Union's implementation of the Council resolution and nothing more. As a matter of legal gymnastics that much is true, but in effect a review of Security Council authority is what the ECJ undertook. The implications the decision could have for the effectiveness of its sanctions decisions was not lost on the Council and within months it had established an Ombudsperson to hear and oversee the targeted sanctions regime, including applications for removal.[146] The Council also took limited steps to provide some reasons for its decisions. But the larger structural problem remains: the Council is not a court, and possesses neither judicial authority nor the procedural framework to undertake that kind of decision-making.

Indeed, the sphere in which the aggrandisement of authority is most apparent is in the Council's diversion into the judicial realm. But itis the combination of its having undertaken both judicial and legislative roles that is most dangerous. As Waldron has put quite aptly for present purposes: separation of powers 'definitely will not work if the law-makers can control the application of the law, that is, if the law-makers can make prosecutorial decisions or participate in adjudication. For then they will have the power to direct the burden of the laws they make away from themselves.'[147]

The independence of the judiciary, as championed by separation of powers and the rule of law, is of such vital importance to our general system of law that when egregious enough violations of that idea emerge such cases will sometimes find judicial review in spite of the obstacles. As Andreas Bianchi has described, legal challenges to terrorist sanctions that have emerged in national and regional courts are an example of a situation in which 'a societal body has responded to an unprecedented agglomeration of power at the international level by a diffuse reaction where formal and informal controls, including judicial ones, have materialised.'[148]

Acts of judicial character when undertaken by the Security Council exemplify a failure to meet the circumscription of executive, legislative and judicial functions that is demanded by separation of powers and rule of law principles. The problem arises from a *conflation* of powers: an institution with executive function (the Security Council) undertook the role of the judiciary (sentencing) which led to an absence of proper process (the right to a fair trial). That is not to say that the Security Council ought not to seek justice or to respond to threats to peace through innovative use of sanctions, but rather that decisions of judicial character made by an executive organ are contrary to the rule of law and may serve to undermine rather than underpin both the goal and the organisation.

5. Conclusion

That separation of powers is not embodied in pristine division between the three functional branches is not reason enough to dismiss the application of the idea to the UN. For if that were so, most

[146] SC Res 1904, UN SCOR, 6247th mtg, UN Doc S/RES/1904 (17 December 2009).
[147] Waldron, above n 4, 446.
[148] Andreas Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19(3) *European Journal of International Law* 499.

municipal systems that claim such a system of governance would also not meet the criteria. In the UN context, separation of powers is an especially useful tool for alerting us to when other fundamental principles might be under threat. That is, although it may lie submerged within the daily hubbub of UN activity, and the pressing priorities of Security Council action, separation of powers is an important touchstone to ensure the organisation's compliance with the rule of law. As Thomas Franck has written, separation of powers among and between the UN's organs is essential to the efficacy of the institution itself. It enables it to 'adjust to changing priorities and issues, and to prevent it from growing into a Leviathan'.[149] It also underpins the legitimacy of the UN and the rules of international law that derive from it.

In certain circumstances, and in order to act with relative deftness to material threats, the Security Council may undertake some action cast with the hue of legislative or judicial character, but such action ought to be both limited and very carefully monitored. For it is important to recognise that there are very real risks to the rule of law in permitting power to be concentrated in a single organ of a system of governance. Accordingly, concerns about the breadth of power that is tacitly granted through a persistent nudging of the boundaries of authority are both real and warranted.

There is no small compliance incentive to undertake this course of action. Obviously the legitimacy of a decision can be bolstered by the integrity of the process which underpinned it. But even more persuasively, in a system where state sovereignty reigns supreme, there is also the threat of non-compliance. As Tzanakopoulos has written, 'the threat of massive disobedience … is a potent tool for inducing compliance of a powerful organ with international law'.[150] That threat was not lost on the Council when states were forced by their own domestic or regional courts to disobey the 1267 regime when domestic implementation of the sanctions were ruled to have violated fundamental human rights standards. The response from the Security Council was swift and triggered the implementation of an Ombudsperson to oversee the process. But the broader structural problems remain. As Hovell has observed, the Security Council lacks 'the procedural framework of more inclusive deliberations, greater access to information and greater responsiveness to the concerns of the broader interpretive community.'[151] Yet pre-empting the disquiet of the interpretive community is possible through the application of a separation of powers lens, and the risk of disobedience can be cut off at the pass through the conscious application of its precepts.

How ought that be achieved? Just as with any domestic iteration of procedural fairness, separation of powers ought to be applied to the UN not in a formalist strict sense, for there is no "one-size-fits-all", but rather should be adapted to context. This means that a question as to process must be internally put. Not in terms of strict legalism and questions about whether a particular decision is or is not *ultra vires* the Charter, but rather in terms of the appropriate checks and balances to ensure the legal integrity of the decision and its compliance with the rule of law. A conscious differentiation of function requires not only the acknowledgement of the form of decision-making taking place but the performance of that distinction evident in the manner in which it is undertaken. Thus it is not enough that the 'legislative phase' of Security Council decision-making was acknowledged by the Council itself but it ought to have recognised the concomitant procedural distinctions that this new function demanded. Rather than swiftly decided fiat, a legislative process requires deliberation, consultation, inclusion, as well as access to information. Notwithstanding larger questions about whether the

[149] Thomas M. Franck, 'Preface' in Jeffrey L. Dunoff and Joel P. Trachtman, *Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009) xiv.
[150] Tzanakopoulos, above n 115, 202.
[151] Hovell, above n 110, 166.

Security Council is competent to undertake judicial decision-making at all, to the extent that it facilitates or undertakes this function then, again, the hallmarks of judicial decision-making are a prerequisite. These are matters to which the Council ought to have had conscious regard and, more importantly, to have arranged. This is not a far-fetched proposal: the swift induction of the 1267 Ombudsperson offers precedent for the Council implementing alternative procedures that better fit the distinct function it undertakes.

Even more concerning than the threat of disobedience to which Tzanakopoulos referred, is the threat of disregard, for at least disobedience is sufficiently engaged as to take a position. In the context of contemporary populist ambivalence about the United Nations and its Charter, it is important that the ideas that underpin our system of international law are not only defended and protected, but championed. That the height of Security Council activity may have waned for the time being makes this argument all the more important, because it is in these times that institutional memory gets lost, boundaries blurred and populist normative arguments risk defeating fundamental legal principles. Separation of powers offers one method through which adequate safeguards for the rule of law in the UN system can be questioned, challenged and, most importantly, invoked.