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Questioning the Criminal Justice Imperative

UN Security Council Procedure and the Downside of Chapter VII Decision Making for the Adjudication of International Crimes

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Abstract

The Security Council's structure as a small but powerful executive, combined with its primary responsibility for international peace and security, leads to a presumption against the application of ordinary standards of procedural fairness. At the same time, explicit provisions of the UN Charter and its own rules of procedure indicate that some balance was to be struck. This article questions whether the attainment of international criminal jurisdiction through Security Council decision-making really outweighs the need to ensure procedural integrity in every step of the process. It posits that a lack of procedural fairness in the Council's methods of work at least undermines the justice imperative that the Council so espouses and at most violates an ancillary legal obligation.

Keywords

■ please provide keywords

1 Introduction

It need hardly be stated that the UN's fifteen-member Security Council has a unique and extraordinarily significant role in international security, international relations, and international law. Scholars of international law are apt to observe that as a matter of course the Security Council invokes, considers, applies, interprets, and endorses international law. Indeed, "when a body as politically significant as the Security Council … addresses, even indirectly, the issues underlying many international disputes, it cannot but influence how

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states regard the contours of the relevant norms."[1] The Security Council has routinely not only interpreted the applicable law, but also fundamentally declared its content, through its use of its binding Chapter VII authority. Over time, the Council has increasingly invoked its authority to make decisions of judicial and legislative character, yet it has remained devoid of the standards of procedural fairness required in a court, or the checks and balances of deliberation, transparency and consultation, that characterize a legislative function.

A problematic tension has arguably arisen wherein the desire to attain international criminal jurisdiction has outweighed the need to ensure procedural integrity in the decisions that grant it. The Council's apparent lack of compliance with ordinary standards of procedural fairness has received much scholarly attention, so too its relationship with international criminal courts and tribunals. What is missing is a stand-alone analysis of the link between the two. While some authors have addressed that connection peripherally, few have dedicated attention to the consequences of the Council's procedural practice on international criminal courts and tribunals.[2]

I begin this article by describing elements of procedural fairness evident under the UN Charter and the provisional rules of procedure of the Security Council. I set out existing arguments that transparency might constitute a secondary legal obligation incumbent on the Council, and contend that these are essentially arguments for procedural fairness by another name. I then establish the regression of transparency in Council decision-making in the post-Cold War context, at a time contemporaneous with its establishment of ad hoc criminal tribunals for the former Yugoslavia and Rwanda. In the final sections, I problematize the Council's internal procedures as they relate to the ad hoc tribunals and the International Criminal Court (ICC) before drawing final conclusions.

2 Procedural Fairness in the Security Council

Although rules of procedure are rarely decisive in themselves, they undeniably frame decisions in ways that can impact outcomes.[3] When the Charter was first drafted, delegates to the San Francisco Conference recognized that "procedure and substance often cannot be separated and the outcome of a procedural

1 Ratner 2004, 593.

2 Examples of where it is addressed more substantially, but remains peripheral to the main subject of the piece include: Hovell 2016, 3, 37–39; Sievers and Daws 2014, 514–519.

3 Shepsle and Weingast 1984, 206, 207.

dispute is likely to influence the substantive issue."[4] Yet the Council appears to hold the somewhat paradoxical position of displaying both a reluctance to amend its rules of procedure and a contemporaneous disregard for them.[5] In this section, I describe procedural fairness, and then examine what elements of it are apparent under the UN Charter and the Security Council's provisional rules of procedure. Drawing on those descriptions, I contend that while procedural fairness in Security Council decision-making probably has no normative charge of its own, it might constitute an ancillary or secondary legal obligation.

In essence, *procedural fairness* refers to the impartiality and adequacy of procedure to render a decision. It is distinct from *substantive fairness*, insofar as procedural fairness focuses on justice as the result of fair process rather than specific outcomes per se, although procedural fairness and substantive fairness are obviously interrelated because the former will usually have consequences for the latter. Indeed, Thomas M. Franck recognizes the value of procedural fairness as one of several "fairness" conduits to legal and institutional legitimacy. He observes that "to be effective, the [international legal] system must be *seen* to be effective. To be seen as effective, its decisions must be arrived at discursively in accordance with what is accepted by the parties as *right process*."[6] Franck famously speculated that legitimacy is the "compliance pull" by which "powerful nations obey powerless rules," and among those rules is procedural fairness.[7] Antonios Tzanakopolous, on the other hand, has disputed that legitimacy is a useful analytical tool to explain state compliance and contends that a procedural failure is fundamentally one of legality: "If the States … find that the Security Council has not decided 'in accordance with the right process,' they are arguing in effect that the Security Council acted *illegally* and not *illegitimately*: it did not comply with the process imposed on it by the Charter or general international law."[8] Following Tzanakopolous' analysis, then, if we perceive the toolbox for challenging the validity of Security Council decisions is the law, and the tools therein the norms and principles recognized by it, then it is worthwhile determining whether there is some standard of conduct in the *process* of making its decisions with which the Council must conform.[9]

4 Blum 1993, 11.
5 For an example of the traditional disregard, see the remarks of the distinguished representative of India: UN Security Council 1950, 5.
6 Franck 1995, 7, emphasis in original.
7 Franck 1990, 3, 26.
8 Tzanakopoulos 2013, 367, 378.
9 Tzanakopoulos 2013, 374 (emphasis added).

Procedural fairness is not specifically addressed in the UN Charter, but appears to have been contemplated at least to some degree. Article 31 of the Charter allows a state not a member of the Security Council to participate in Council meetings where its interests are "specifically affected." The Council's provisional rules of procedure also allow for such participation (Rule 37), and allow those same non-member states to submit proposals and draft resolutions to the Council (Rule 38). There is a presumption in favor of the Security Council holding its meetings in public (Rule 48), and a series of rules on the publicity of meetings, access to information, record keeping, and publication (Rules 49–57).[10] That the rules were so drafted signals that the original Council members themselves envisaged that some degree of procedural fairness would govern their work, given that it is the Council itself that adopts and amends its own rules.[11]

Other elements of procedural fairness are evident within the terms of the UN Charter. According to its provisions, the Council must report annually to the General Assembly on its work,[12] and is under a clear obligation to act in conformity with the principles of justice and international law in its settlement of disputes.[13] Relevantly, Erica de Wet has interpreted the words "in conformity with the principles of justice and international law" to mean that the Security Council "must respect basic principles of procedural justice such as independence, impartiality and even-handedness when creating a subsidiary body which will exercise judicial functions"[14] such as the establishment of criminal tribunals. That obligation is arguably strengthened when considered in conjunction with the duty to act in good faith contained in Article 2(2) of the Charter.[15]

The obligations dispersed in the UN Charter and the provisional rules of procedure are not enough to contend that procedural fairness in Security Council decision-making is a primary norm of international law. That the rules in particular can be adopted and amended only by the Council itself arguably diminishes their normative weight.[16] However, there is a valid question whether there

10 UN 1983.
11 UN Charter, Art. 30.
12 UN Charter, Arts. 15(1) and 24(3).
13 UN Charter, Arts. 1(1), 24(2) and (3).
14 de Wet 2004, 339.
15 de Wet 2004, 340.
16 See *Delimitation of the Czechoslovak-Polish Frontier* 1923, No. 8, 6, 37, in which it was determined that "it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it."

exists an ancillary legal obligation of procedural fairness incumbent on the Council. The idea of *ancillary*, or secondary, obligations in international law is not new. In questioning whether international law qualified as law at all, H.L.A. Hart posited that the international legal system lacked the requisite ancillary or secondary legal norms that are fundamental to any concept of law. To Hart, international law consisted of only primary rules and was thus bereft of the "secondary rules of change and adjudication which provide for legislature and courts" necessary for a system of "law" to exist.[17]

The idea that the international legal system lies devoid of secondary legal norms has been disputed. Vaughan Lowe contends that as the scope and content of the primary norms is measured and contested, legal principles that sit in the interstices of those primary legal obligations have simultaneously arisen to reconcile competing normative rules.[18] Judge Christopher Weeramantry's. Separate Opinion in the *Gabcikovo* case before the International Court of Justice (ICJ) supports this view. His Honor reasoned that where primary legal obligations conflict "the law necessarily contains within itself the principle of reconciliation" and that

> to hold that no such principle exists in the law is to hold that the current law recognizes the juxtaposition of two principles which could operate in collision with each other, without providing the necessary basis of principle for their reconciliation. The untenability [*sic*] of the supposition that the law sanctions such a state of normative anarchy suffices to condemn a hypothesis that leads to so unsatisfactory a result.[19]

Whereas in the *Gabcikovo* case the clashing norms were between the law of development and the law of the environment,[20] here they are between Council's power to act and the persistent right of UN member states to undertake some degree of oversight of the application of Council powers, as derived from the text of the Charter itself. Indeed, UN member states constitute the only regular form of oversight on Security Council action, albeit diffuse, and there is no other form of consolidated review of Council decisions. The ICJ could offer Advisory Opinions, but they are rarely requested, and there is no possibility of direct judicial review of Security Council decisions under the Charter.[21]

17 Hart 1998, 214; Koh 1997, 2599, 2616.
18 Lowe 2000, 207, 216.
19 *Gabcikovo-Nagymoros Project* 1997, 87.
20 *Gabcikovo-Nagymoros Project* 1997, 87, 90.
21 UN Charter, Art. 96.

Member state scrutiny of Security Council decisions is sometimes derided as wholly ineffective, but it ought not be dismissed too quickly; after all, the "final and authoritative interpretation of the Charter is given by the general membership of the organization."[22] However, members struggle to properly undertake this role, in part because the Security Council's methods of work render the information to conduct it inaccessible. As Tzanakopolous has written, either the Security Council allows access to information sufficient to scrutinize its decisions (through ensuring public deliberations, publication of proceedings, etc.) or it does not.[23]

Tzanakopoulos and others have argued that, to facilitate that oversight, the Council must operate under a certain degree of transparency. Therefore *transparency*, or access to information, might constitute a secondary or ancillary legal obligation incumbent on the Security Council.[24] Tzanakopolous defines "transparency" as a general right of access to information that is "held by those exercising public powers and in relation to the exercise of these public powers, irrespective of motives or specific interest on the part of those requesting access to the information."[25] The matters Tzanakopoulos lists, which constitute elements of transparency, such as the presumption in favor of public deliberation, the provision of written reasons for judicial decisions, and the deliberative elements of legislating, are key elements of procedural fairness extant under either the Charter or the Rules of Procedure. Thus, the arguments in favor of some obligation of transparency incumbent on the Council are essentially arguments for procedural fairness by another name, and therefore applicable mutatis mutandis. Transparency rises to the level of an ancillary or secondary legal obligation because it is the tool through which state control of the UN as an organization is facilitated, however diffuse that control might be under the Charter.[26]

Based on the foregoing, procedural fairness in Security Council decision-making probably has no normative charge of its own, but rather operates in the apertures between primary legal obligations: its boundaries are therefore context dependant, much as they are in any domestic iteration of the idea.[27] If one accepts that some obligation for procedural fairness in Security Council

22 UN 1945/46, 710.
23 Tzanakopoulos 2013, 384.
24 Tzanakopoulos 2013, 385; Hovell 2009, 92, 98; Lowe 2000.
25 Tzanakopoulos 2013, 374–375.
26 Tzanakopoulos 2013, 389.
27 Tzanakopoulos 2013, 385; see also International Law Association 2004, 5; Hovell 2016, 37–39.

decision-making exists, then the question of what constitutes adequate procedural fairness in a particular situation is one of degree.[28] To examine procedural fairness through the application of the same processes that generate the primary norms of international law by searching for universally applicable norms fails to acknowledge that procedural fairness is highly contextual.[29]

It is important to recall that the Council's framework architecture, including its place within the UN system, its membership structure, and its methods of work, were designed for the purpose of facilitating expedited decision-making to quash immediate security (military) threats. If one conceives of the Security Council as a purely executive body, then its current methods of work are not necessarily problematic: a certain degree of executive opacity is acceptable, particularly where security considerations are at play.[30] Conversely, judicial and legislative actions demand a much greater degree of openness. If one accepts that the Council's mandate has shifted away from its original executive mandate to one more legislative and judicial in character, then, particularly where that character involves direct oversight of individuals, it is imperative for the maintenance of procedural fairness that there is a equivalently significant reconsideration of its modus operandi for those tasks.

In a broad sense, whether the international criminal courts and tribunals comply with obligations to uphold the highest standards of procedural fairness is arguably moot if the underlying processes, which establish the courts and define their legal boundaries, have not. With this in mind, in the following section I explain the Security Council's procedural framework and describe its diminishing transparency over the years, which has been broadly contemporaneous with its increased decision-making in international criminal justice.

3 Contemporary Procedural Practice in the Council

In late 1945 the Executive Committee of the UN Preparatory Commission drafted provisional rules of procedure, for anticipated approval and adoption by the Security Council at its first meeting in January 1946. However, the Council was unable to reach agreement. With a pressing need for a procedural framework within which to commence its work, Council members accepted the draft

28 Hovell 2016, 3; Galligan 1996, 315.

29 Harlow 2006, 204.

30 It is worth noting that the security justification has been questioned, see Hovell 2009, 95–96 (referring to the work of Paul Conlon and Jeremy Farrall). See also Johnstone 2008, 275.

rules as "provisional," in anticipation of further debate at a future date.[31] The same twelve pages of provisional rules guide the work of the Council today, substantially unchanged since their adoption, with only a few (mostly administrative) amendments since.[32]

In the first four decades of its existence, there was no real need to update the provisional rules, as the Cold War largely froze Council action. When the stalemate between veto-wielding powers subsided in the early 1990s, the Council's program of work notably intensified. The number of resolutions increased from an average of fourteen per year until 1990 to an average of sixty-four per year between 1990 and 1999.[33] The gusto with which the agenda was now pursued overwhelmed a rusty administrative and procedural framework. The provisional rules of procedure offered only skeletal guidance to assist members to navigate the Council's program of work in a global context quite distinct from the one in which the rules were crafted. In the intervening period, membership of the UN had more than doubled, institutional memory had been lost, and original understandings of the Council's mandate were either forgotten or put to one side as its role was increasingly stretched into new fields.

Rather than amend or adapt the rules of procedure, the Council undertook to conduct most of its business in private, and adopted ad hoc, informal, and unofficial working methods as an expeditious solution to procedural challenges as they arose. Crucially, it was during this period that the Security Council made its first major decisions in international criminal law: the establishment of two ad hoc international criminal tribunals (detailed in the following section). Few of the working methods that emerged during this time were officially recorded, adopted as they were with efficiency in mind, but they now form part of the Council's procedural norms. To this day, these informal practices continue to determine inter alia how issues are placed on the agenda, who briefs the Security Council and in what format and order, and the length of time for which issues are debated.

At the same time, the Council recognized the inadequacy of its procedural arrangements and established an Informal Working Group on Documentation and Other Procedural Questions (IWG) in June 1993 to improve its processes. However, the IWG's own procedural anomalies hindered its effectiveness. The

31 UN Security Council 2014a, 3.

32 The Provisional Rules of Procedure have been amended eleven times since they were adopted in January 1946; the last amendment was in 1982 (S/96/REV.7), which was to include Arabic as an official and working language of the Security Council in accordance with UN General Assembly, Resolution 35/219 (1980).

33 Hulton 2004, 237, 239.

chairmanship of the IWG rotated monthly, in parallel with the presidency of the Security Council as a whole. The regularly changing leadership thwarted continuity and consistency in the development of working methods. What resulted was not the development of a coherent body of practice but, rather, more than fifty different presidential notes and statements. The piecemeal production of different documents obfuscated how the Council actually worked. It was difficult to decipher which were in effect and which had lapsed, and they were in any case notoriously difficult to find.[34]

The post-September 11 political climate led to a flurry of innovative uses of the Council's Chapter VII powers. The Council itself has asserted that the "legislative phase" of its work commenced in response to terrorism, with the attacks on the World Trade Center in New York in September 2001: the passage of Resolution 1373 (and later Resolution 1540) reckoned as the turning point.[35] These resolutions obliged states to enact domestic legislation criminalizing terrorist activities and to implement various domestic measures to prevent the proliferation of nuclear weapons. Legislative actions can be thought of as unilateral acts, that create or modify a legal norm, where that legal norm is general in nature (i.e., directed to indeterminate addressees [all states] and capable of repeated application in time [all terrorists and terrorist acts]).[36]

But as the Council became more active, it also became more opaque, and the General Assembly became increasingly concerned with the Security Council's working methods, it being the only body afforded some form of regular oversight over the Council. In the 2005 World Summit Outcome Document, the Assembly called on the Council to ensure "fair and clear procedures" for placing individuals on terrorist sanctions lists. It also called for the Council to adapt its working methods so as to better accord with its preexisting procedural obligations, and thus to increase the involvement of states not members of the Council, to enhance transparency, and to increase accountability to the membership at large.[37] In response, the Council agreed that the chair of the IWG would serve for a full calendar year instead of a month at a time, and in 2006 the *Working Methods Handbook* was produced under the IWG leadership of Japan. Although improvements were indeed made over this period—including enhanced document sharing with non-Council member states, better access to the Council's monthly program of work, and improved consultation with troop-

34 Sievers and Daws 2014, 13, 482.

35 UN 2004. See further Alvarez 2003, 238, 241, as quoted by Talmon 2005, 175; Happold 2003, 593, 596.

36 Yemin 1969, 6.

37 UN General Assembly, Resolution 60/1 (2005), paras. 109 and 154.

contributing countries—such advances only tinkered at the edges of larger systemic problems, and did not result in amendments to the rules of procedure, nor were there substantial changes in the Council's practices.[38]

That procedural fairness has been lacking in some aspects of Council decision-making is not a particularly controversial sentiment. The Council's targeted sanctions regime against individuals has received particular attention for its lack of due process and procedural fairness.[39] Legal challenges have been initiated in the Court of Justice of the European Union (ECJ), the European Court of Human Rights, and the UN Human Rights Committee as well as in national proceedings in Belgium, Canada, Italy, the Netherlands, Pakistan, Switzerland, Turkey, the United Kingdom, and the United States.[40] The most common objections were that a person could be placed on a sanctions list without being heard, reasons given, or any avenue for appeal, in violation of fundamental human rights norms.

The September 2008 judgment of the ECJ in *Kadi* is perhaps the most infamous example.[41] In that case, the ECJ determined that EU implementation of the Council's sanctions against individuals, inter alia, infringed the right of defense and the right to effective judicial review. The ECJ ordered that the relevant regulation giving effect to the Security Council decision be annulled. The court 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 consequences for Security Council decision-making were not lost on the Council itself and within a matter of months it had established an ombudsperson to hear and oversee the targeted sanctions regime, including applications for removal.[42] Yet it too arguably lacks adequate procedural safeguards to

38 There were modest improvements in document sharing with non-Council member states, access to the Council's monthly program of work, and consultation with troop-contributing countries: Sievers and Daws 2014, 13, 482.

39 Leading scholarly contributions include: Farrall 2009; Hovell 2016.

40 An exhaustive list of pending and recently concluded cases are listed in the first annex of each of the annual reports of the Analytical Support and Sanctions Monitoring Team submitted pursuant to Resolutions 2253 and 2008. For a summary of the most recent litigation, see Analytical Support and Sanctions Monitoring Team 2017, Annex.

41 Joined cases C-402/05 P and C-415/05 P *Kadi v Council of the European Union* [2008] ECR I-0000.

42 UN Security Council, Resolution 1904 (2009).

ensure due process.[43] The Council also took steps to provide some reasons for its terrorist sanctions decisions. It also sought to better streamline its procedure. Some of its informal practices were taken from the otherwise piecemeal statements and notes, and incorporated into a single, consolidated Presidential Note in 2010 (Note 507).[44]

Note 507 described, among other things, that the Council may use public or private meetings, that it may host "Arria-Formula" meetings to enable third parties to brief the Council off the record. It also stipulated that the Council agenda should be published in the *Journal of the United Nations*. In the summer of 2017, again under Japan's leadership of the IWG, the Security Council updated Presidential Note 507. The 2017 version usefully consolidates some thirteen other procedural notes, and acknowledges some of the practices not previously included such as penholder arrangements (by which the first draft of resolutions are prepared by a single state, or small group) and silence procedures (by which the text of resolutions are circulated and then acceptance is implicit by the lack of objection). But it remains far from a thorough account of Council methods of work, with common practices still absent, and even some of those suggested for inclusion ultimately blocked.[45]

Overall, each version of Note 507 has constituted more of a window through which the outside observer might peer in than it has provided authoritative guidance to Council members themselves. Its language is aspirational, not steadfast, and numerous well-established Council practices have been omitted. For instance, the specific geographic division of seats for non-permanent members remains only an unwritten custom, albeit a well-known one. So too the practice that when ambiguities about a certain working method arise, it is usually left to the longest-serving ambassador to provide an authoritative interpretation.[46]

In the 2017 note, Council members indicated a continued willingness to consider ways to improve working methods through the IWG.[47] But that such improvements would be spearheaded through the IWG (through, one assumes, the continued ongoing release of aspirational notes) means that procedural

43 UN Security Council, Resolution 1904 (2009); UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism 2012.

44 UN Security Council 2010.

45 Russia objected to the inclusion of any acknowledgment of the Secretariat's regular situational awareness briefings: UN Security Council 2017a.

46 Security Council Report 2014, 3.

47 UN Security Council 2017b, para. 5.

safeguards in the Council are perpetually weakened. That is, the functional relevance of the provisional rules is slowly eroded, being effectively replaced by statements and presidential notes that are even less committal.

While there has been some clamor for greater transparency in Council working methods, to date the Council has mostly avoided the demands of the broader UN membership. This state of affairs persists notwithstanding that, strictly speaking, amendments to procedural rules in the Council are not as difficult to pass as substantive resolutions.[48] One must not forget that a Security Council decision requires nine votes in favor, not five, and for a resolution on procedure, the veto cannot be cast. Thus, theoretically at least, much can be achieved procedurally by the nonpermanent members. This point is often brushed over by scholars writing about the Security Council, the vast majority of whom focus on the Permanent Five (P5) with minimal (if any) consideration of the rest of the Council. There is good reason for this: the P5 are indeed the Council's powerbrokers. However, nonpermanent members are functionally vital in Council decisions, although they have arguably undercapitalized on that role to date.

4 Making Decisions in International Criminal Law: The Ad Hoc Tribunals and the Council's Methods of Work

At first blush one might suppose that the establishment by the Security Council of ad hoc tribunals in the 1990s has limited relevance to present-day challenges. However, their creation set the boundaries within which judicial decisions of international criminal responsibility have since been made. The processes through which the ad hoc tribunals were founded left their mark on contemporary procedure and practice, including in the ICC, and are therefore worthy of consideration here. I address that legacy for the ICC in Section 5 of this article.

While the 2001 adoption of Resolution 1373 was certainly a turning point in terms of the Council explicitly demanding the domestic enactment of criminal law, this was not its first legislative action with respect to the exercise of de facto authority over individuals: that occurred more than a decade before. The 1993 adoption of Resolution 827 established the International Criminal Tribunal for the Former Yugoslavia (ICTY).[49] The Council annexed the Statute

48 See, further, Shepsle and Weingast 1984, 208–209.

49 UN Security Council, Resolution 827 (1993a).

for the ICTY to the resolution. It delineated the content of applicable law, including the crimes themselves and the administrative structure of the tribunal, as well as its temporal and geographical jurisdiction. Under the terms of the statute, the prosecutor would be appointed by the Security Council,[50] and judges appointed by the General Assembly from a list prepared by the Security Council.[51]

The ad hoc criminal tribunals were created during a period of particular opacity and relative confusion in terms of the Council's methods of work and modes of operation. As much was recognized by the Council itself, which established the IWG one month after it created the ICTY. The (unofficial) drafting group for matters pertaining to the former Yugoslavia (the Coordination and Drafting Group for the Balkans) included the United States, the United Kingdom, France, Russia, Germany, and Italy, with much of their work carried out in off-the-record meetings.[52] It was unusual that four of the five permanent members of the Council would be included in a single drafting group, but most of the P5 had active interests in the conflict. The negotiation and drafting of texts was a guarded process, and Resolution 827 establishing the ICTY was adopted in May 1993 under the Drafting Group's penmanship.[53]

The formation of an international criminal tribunal was an unprecedented and innovative use of the Council's powers under Article 41 of the UN Charter. That provision permits the Council to decide "measures not involving the use of armed force" to give effect to its decisions, and stipulates a concise and nonexhaustive list of such measures to which the Council may resort. The establishment of courts or tribunals is not specifically contemplated, although in general the Security Council can create subsidiary organs that are "necessary for the performance of its functions."[54]

It is noteworthy that the statute that would govern the ICTY—delineating the elements of crimes, jurisdiction, and legal processes—was drafted by the UN Secretariat, not negotiated between UN member states. The Security Council had demanded that the Secretariat provide a full draft of the statute "no later

50 *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia* 2009, Art. 16.

51 *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia* 2009, Art. 13(1) and Art. 13 *ter*, as amended by UN Security Council, Resolution 1329 (2000), para. 1.

52 Whitfield 2004, 316.

53 Whitfield 2007, 7–11.

54 UN Charter, Art. 29. See also *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal* (*Advisory Opinion*) [1954].

than 60 days" after its initial decision to establish a criminal tribunal.[55] It justified the haste on the grounds that the urgency of the situation demanded it, for indeed the conflict in the former Yugoslavia was worsening.[56] But whether criminal investigations and proceedings are an effective response to an escalating security threat is questionable. Legal proceedings, including criminal cases, tend to advance at a glacial pace. Some twenty-four years later, final appeal proceedings at the ICTY are only just winding up.

The text of the ICTY Statute, as proposed by the Secretariat, was adopted by the Council, acting under Chapter VII of the Charter, and therefore binding on the UN membership at large but largely absent its input. This is not to suggest that the statute was somehow based on legal fiction, there can be little doubt that the Secretariat sought to estimate accurately the content of customary international law and how it ought to apply. Moreover, it had useful guidance from earlier work undertaken by the International Law Commission,[57] and a few states provided some ideas.[58] But the Secretariat of the UN is not one of the sources of international law, and sixty days is a brief period for legislative drafting, particularly in an area in which substantive aspects of the law remained unsettled. One might compare that process with the drafting of Rome Statute of the International Criminal Court (hereafter Rome Statute).[59] It is also based on customary international law, but came about through years of protracted negotiations between some 160 UN member states and with input from over 200 nongovernmental organizations. The point here is not to analyze the potential deficiencies of the law itself, but to emphasize that the Council's working methods, by design, lack key characteristics of procedural fairness one expects in decisions of legislative character. These typically include broad representation, consultation, meaningful deliberation, and transparency.

One might read to this point and retort that the point being made is moot in any case: the Security Council has not used its Chapter VII powers to establish a tribunal since 2007, and is unlikely to do so again. Moreover, the ICTY and the subsequent tribunals for Rwanda and Lebanon, have substantially contributed

55 UN Security Council, Resolution 808 (1993b), para. 2.

56 *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* 1993, para. 22.

57 *Report of the International Law Commission on the Work of Its Forty-Fourth Session* 1992.

58 See, for example, Letter from the Permanent Representative of France to the United Nations Secretary-General 1993; Letter from the Permanent Representative of Italy to the United Nations Secretary-General 1993.

59 Opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (hereafter Rome Statute).

to the beneficial development of international criminal law and procedure. Accordingly, concerns of the kind expressed here are unwarranted.

The first point is valid enough, but shortsighted, for there is nothing inherent to the present political climate that forever precludes the Council from so acting. It is notable in this respect that the Council established the Special Tribunal for Lebanon (STL) *after* the entry into force of the Rome Statute. Although the circumstances of the STL's creation were sui generis, so too will be the circumstances of any future criminal tribunals.

The second critique confuses substantive fairness (fairness in outcome) with procedural fairness, and because of this it overlooks the prevailing systemic problems associated with Security Council oversight of criminal tribunals. These include that the Council supervised the drafting and subsequent of amendments of the tribunal's statute, selected the prosecutor, and effectively selected the judges, including the problematic appointment of ad litem judges whose terms needed to be regularly extended by Security Council decree, which in turn contributed to perceptions of bias within the tribunal.[60] The Council's oversight of judicial appointments arguably also contributed to later more specific accusations of judicial bias.[61]

Procedural fairness is realized in the *process* by which a decision is reached, which includes the architecture of the system itself. Thus, two questions ought to be asked with respect to procedural fairness in the Council's decisions regarding international criminal law. First, do we have any problems at the level of principle when a court tasked with the determination of individual criminal responsibility is established by an executive, which also drafted the applicable law, and selected the prosecutor and judges? Second, do we have any problems at the level of principle when that same law, which fundamentally impacts or will impact individual rights, is legislated, policed, and subject to the oversight of a body that is neither democratic nor representative? In both instances, the answer must be yes. Not because there is some single primary norm of international law that in each instance is being violated, but because the (at least) ancillary obligation of procedural fairness, inherent to the rule of law, so dictates.

None of this is to contest the successes of the ad hoc tribunals, and the substantial advancement of international criminal law to come out of its consequent jurisprudence. And one must be careful not to assert that the Security Council somehow puppeteered the outcomes of cases through its selection of

60 *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia* 2009, Arts. 13 *ter* and 13 *quater*; and UN Security Council, Resolution 1329 (2000).

61 For the most infamous of such accusations, see Harhoff 2016, 1.

judges. Rather, as with any judicial appointment, the preselection of candidates defines the field. The jurists are well known, as are their likely interpretations of law. When you add to that a system in which the statute of the court and its prosecutor are determined by that same single organ, the systemic issue becomes clear. As William Schabas has pointed out, "the system is fraught with the potential for manipulation and political influence at every stage."[62]

5 The ICC and Embedded "Ad-hoc-ism"

In many respects the problems experienced at the ad hoc tribunals were what many sought to avoid through the establishment of a treaty-based court. However, the direct and decisive involvement of the Security Council continues to be problematic even under that regime. In the concluded Rome Statute, two provisions gave the Security Council important authority. The first is Article 13, paragraph (b), which provides that the court may exercise jurisdiction with respect to a crime specified in Article 5 of the statute (genocide, crimes against humanity, and war crimes as defined therein) where the situation is referred to the prosecutor by the Security Council acting under Chapter VII of the UN Charter. Paragraph (b) does more than simply trigger preexisting ICC jurisdiction, but in effect grants the Council the authority to expand it: Security Council referral is the sole mechanism by which a country that is not a party to the Rome Statute may be subject to the court's adjudication.[63]

To date, the Security Council has made two referrals to the ICC. On 31 March 2005, it adopted Resolution 1593 to refer the situation in Darfur (Sudan) since 1 July 2002 to the prosecutor of the ICC.[64] Six years later, on 26 February 2011, by a unanimous vote in favor, the Security Council considered that "widespread and systematic attacks"[65] against the civilian population in Libya may amount to crimes against humanity and referred the situation in Libya since 15 February 2011 to the ICC prosecutor.[66] A Security Council referral does nothing more than open the potential for the exercise of jurisdiction. It does not produce admissible evidence, authorize arrests, or guarantee cooperation from the state

62 Schabas 2007, 182, 190.

63 Rome Statute, Art. 12(2) read with Art. 13.

64 UN Security Council, Resolution 1593 (2005), para. 1. There were eleven votes in favor of the resolution and four abstentions (Algeria, Brazil, China, and the United States).

65 The customary international law position at that time (and now) was that the relevant test is disjunctive; that is, that the attack must be either widespread or systematic, as well as being directed against a civilian population, to amount to a crime against humanity.

66 UN Security Council, Resolution 1970 (2011), Preamble, paras. 6, 4.

so referred. Accordingly, and despite the passage of time, there have been no criminal trials at the ICC with respect to Darfur and Libya, and no accused persons in these cases have been transferred to the court.[67] Indeed, the very reason that the referral is necessary (because the state is not a party to the Rome Statute and, therefore, has not agreed to the ICC having jurisdiction over its territory or nationals) renders the likelihood of state cooperation extremely limited.

The Council also enjoys the discretion, conferred by Article 16 of the Rome Statute, to defer ICC proceedings for a renewable period of twelve months.[68] Thus, in theory at least, the Security Council also wields the power not only to suspend proceedings, but also to impede their continuance ad infinitum. The Council has not yet utilized Article 16 to suspend extant proceedings, although some states have implored the Council to do so.[69] Controversially, however, it has employed the provision to exempt its own peacekeepers from criminal responsibility under the ICC regime.[70]

The relevant problem with the discretions contained in Articles 13 and 16 of the Rome Statute is to do with the way the Council operates. The issue is expressed well by Ruth Philips: "The lack of parallel complementarity criteria for Security Council referrals to the Court raises the spectre of a Court reduced on some level to permanent institutionalized Security Council *ad-hoc*-ism, which re-enshrines Security Council hegemony rather ironically for a formally independent institution." She continues, "*Ad-hoc*-ism and complementarity are incompatible; indeed, complementarity is addressed to the very problem of partiality."[71] Security Council referrals contradict a basic principle of the rule of law—that the law applies equally and no person is above it—because its methods of work mean that the inconsistent application of law is virtually guaranteed.

The present and ongoing criticism of the Security Council for "failing" to refer the situation in Syria to the ICC is one such example.[72] The Human Rights

67 The Appeals Chamber upheld the Pre-Trial Chamber's application of the principle of complementarity in respect of potential proceedings against one accused in the Libya situation on the basis that domestic proceedings were already on foot, and thus precluded admissibility before the ICC: *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* 2014.

68 Rome Statute, Art. 16.

69 See UN Security Council 2008 (see, in particular, the statements of Russia, Libya, France, and Indonesia); see also African Union 2016, para. 2(ii).

70 UN Security Council, Resolution 1593 (2005), para. 6.

71 Philips 1999, 61, 65 (emphasis in original).

72 See, for example, Nikoghosyan 2015, 1240.

Council and the General Assembly have joined forces to document atrocity crimes in support of a future prosecution. Although much information has been gathered, with Syria not party to the Rome Statute the ICC prosecutor cannot act without a Security Council referral.[73] On 22 May 2014, a draft Security Council resolution to refer the situation in Syria was put to the vote after years of discussion.[74] Despite having thirteen votes in favor, it was vetoed by China and Russia. The result was not surprising. Russia is a party to the conflict in Syria and has openly opposed a referral. It was assumed China would abstain if no other permanent members voted against the referral (as it did for the referrals of Darfur and Libya to the ICC), or vote against the resolution if it had company. After the failed vote, the Security Council established a Joint Investigative Mechanism between the Office for the Prohibition of Chemical Weapons and the United Nations to identify the perpetrators of chemical weapons attacks in Syria.[75] However, a resolution to extend the mechanism's work was vetoed by Russia in October 2017.[76] There has been vocal disappointment that the referral to the ICC prosecutor failed, but those who are frustrated are imparting a duty of equity and fairness on the Council that it neither possesses nor aspires to.

6 Conclusion: Reconsidering the Security Council's Place in International Criminal Law

The Security Council's structure as a small powerful executive, combined with its primary responsibility for international peace and security, leads to a presumption against any obligations to uphold procedural fairness, but explicit provisions of the Charter and its own rules of procedure indicate that some balance was to be struck. Moreover, the Council's foray into matters of judicial and legislative character arguably alters the requisite standard. Yet the Council has remained devoid of the standards of procedural fairness required in a court,

73 See UN General Assembly, Resolution 71/48 (2016), para. 4, in which the General Assembly decided to create the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic (IMIPRSAR) since 2011 to complement Independent International Commission of Inquiry on the Syrian Arab Republic created by the Human Rights Council: Human Rights Council 2011.

74 UN Security Council 2014b.

75 UN Security Council, Resolution 2235 (2015).

76 UN 2017.

or the checks and balances of deliberation, transparency, and consultation that characterize a legislative function.

In principle at least, there is a valid question whether there ought to be any embedded role for the Security Council in international criminal courts and tribunals at all. The traditional retort to this idea is that without Security Council involvement there is no international mechanism with the authority to offer meaningful enforcement of international criminal law. But that argument is not entirely meritorious. The Chapter VII authority of the Security Council would remain unaffected. The Council could no doubt still bring matters to the attention of the ICC prosecutor absent the statutory connection to the court, and it could still make decisions about measures not involving (or involving) the use of armed force under Chapter VII of the UN Charter in circumstances that meet the requirements of Article 39 of the Charter. In the meantime, Security Council exceptionalism would no longer be facilitated by the court's own statute. Moreover, a statutory disconnect might enhance what the ICC prosecutor already relies on (state enforcement) because it would hold the court apart from the overtly political Council. It is true enough that the prosecutor would not enjoy jurisdiction over nationals of, or crimes committed within, the territory of states not party to the Rome Statute, but as the investigations into Darfur and Libya have illustrated, it is in any event difficult to progress those cases absent state cooperation. Nevertheless, there is not likely to be much, if any, political will for this approach.

An alternative, if also imperfect, solution lies within the Security Council itself. The Council is not procedurally equipped to deliver decisions with the kind of balanced and impartial contemplation exemplified in judicial decision-making, nor the kind of representative deliberation and policy-oriented thinking that legislative decisions require. Yet provisions within the UN Charter and rules of procedure indicate an ancillary obligation exists to ensure some degree of procedural fairness. Thus, with the Council's expanded mandate into acts more legislative and judicial in character, a tension arises. Arguably, were the Council to embrace procedural norms befitting those functions, there is a reasonable concern that to do so would inhibit its effectiveness with respect to its primary responsibility to maintain international peace and security by slowing it down. But that need not be so.

To borrow from Jeremy Waldron's work on separation of powers, such concerns might be ameliorated if the variegated functions that the Security Council now undertakes are subject to the thoughtful differentiation of the power being exercised in each instance.[77] Waldron has emphasized the importance

77 Waldron 2013, 433, 458–459. See also Waldron 2016, chap. 3; O'Donoghue 2016, 45.

of distinguishing between "insisting on the articulation of [the] different roles and … merely blurring them, so that the relevant decision-maker actively differentiates rather than conflates those functions."[78] The exercise of legislative, executive, and judicial functions must be articulated and distinguished such that appropriate standards of procedural fairness can be applied to the specific function being performed—that is, that decisions of judicial character are protected by due process, legislative decisions are open and consultative, and security decisions retain their executive effectiveness. The beginnings of that differentiation are already apparent in the Council's appointment of an independent ombudsperson to exercise what is essentially judicial authority to oversee the terrorist sanctions regime.

Of course, there are challenges with this suggestion too. A procedural division of function must not be permitted to unnecessarily fragment debate on relevant agenda items. Moreover, and as always, such reform would require the political will to implement it, although as mentioned above there is precedent. The terrorist sanctions cases illustrate well that pressures external to the Council can force it to reconsider whether it has met standards of procedural fairness befitting the functions it exercises. The nonpermanent members of the Council could play a greater role in transferring that pressure. The power of veto does not apply to procedural decisions and, thus, the Permanent Five are outnumbered. That is not to ignore the political weight wielded by the minority, but merely to observe that theoretically at least the nonpermanent members could do more. However, efforts to alter the status quo have been Sisyphean, with working methods being slightly better recorded over time, but ultimately unaltered. That lack of procedural fairness infected the credibility of the ad hoc tribunals and continues to compromise the work of the ICC.

There are serious questions to answer about whether the attainment of international criminal jurisdiction really outweighs the need to ensure procedural integrity at every step of the process. The paradoxical result of the current situation is that on the one hand the Council can hardly be chastised for operating in a political fashion, for that is its very role, and on the other hand as long as it pursues ever more activities of judicial or legislative character, then it must meet certain standards of procedural fairness. If not, its decisions will be slowly eroded not only of credibility and legitimacy but also, potentially, of legality.

78 Waldron 2013, 449.

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