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# *Constitutionality and constitutionalism beyond the state: Two perspectives on the material constitution of the United Nations*

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*This article examines the competences of the UN Security Council under the “constitution” of the United Nations, focusing in particular on its recent innovations in legislation. Certain critics decry Council legislation as unconstitutional, null and void. Apologists retort that the Charter delegates broad power to the Council, and the impugned legislative resolutions fall well within the broad textual limitations on its competence. I propose an approach to constitutional analysis to help cut through this debate, based on distinguishing between two perspectives on the “constitution” of an international organization: the juridical perspective emphasizing the transmission of validity in the creation, interpretation, and application of legal norms; and the political perspective from which the ordering of power among the constituted bodies may be assessed in terms of legitimacy and justice.*

*Distinguishing between the perspectives illuminates the merits of the arguments on both sides of the debate on the Council’s competences. Juridically speaking, it is difficult to argue that the Council’s innovations are unconstitutional and void. Yet the political perspective helps explain the critics’ discomfort with the Council’s expansive innovations; from the latter angle it appears that the Charter’s broad, unreviewable, and effectively unamendable delegation of power to the Council yields a deeply flawed constitutional arrangement, entailing systemic risks of hegemonic international law-making and the demise of constitutionalism.*

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## 1. Introduction

Can the Security Council of the United Nations (UNSC) act validly in excess of its expressly delegated competences? And how can we determine whether or not the UNSC acts *ultra vires* in a particular case? Though the answer to the first question may seem obvious at first blush, its complexity is illuminated by the second. The stakes of the inquiry into the Council's competences are evidently high. Under Chapter VII of the Charter of the United Nations (UN), the Council has the authority to enact decisions with binding legal force in order to "maintain or restore international peace and security."<sup>1</sup> Such decisions create legal obligations binding on all states—members and non-members alike.<sup>2</sup> The competence question asks, then, whether and how this singular power is ultimately limited.

Much of the literature approaches the issue from a constitutionalist stance.<sup>3</sup> The United Nations is a constitutional organization, the argument goes, whose constituent Charter delegates certain powers to various constituted organs, e.g. the UNSC, the General Assembly (UNGA), and the Secretariat. Therefore, from the point of view of constitutionalism, it should not be possible for the organs to act *validly* beyond the ambit of their constitutionally delegated powers. Action in excess of delegation is simply void.

Of course in general the constitutionalist position is absolutely right. However, seemingly irreconcilable controversy over "constitutionality" arises in any particular instance where the UNSC appears to act near (or beyond) the limits of its competence. The Charter delegates and limits the powers of the Council in very vague and open textured terms, making it far easier to spell out what the body can do than to identify what it cannot do. Resolving the constitutionality of any particular Council action seems a vague and ill-defined endeavor—perhaps prohibitively so in the absence of any body with ultimate interpretive authority over the Charter, and the conformity thereto of the actions of the UN organs. Nevertheless, the constitutionalist critique remains important, in order to assess whether the organization and its bodies exercise power appropriately, within limits, and in conformity with the rule of law. I want to suggest that it is possible to shed some light on the question of the Council's competences by reassessing how to conceptualize the constitutional analysis.

At its heart this paper is about the relevance of constitutional theory beyond the state. I am concerned with the analytical value of the concept of a constitution on the international legal plane, and with it two related concepts: the constitutionality/

<sup>1</sup> U.N. CHARTER, arts. 25, 39, 48.

<sup>2</sup> *Id.*, arts. 2(6), 25.

<sup>3</sup> See, e.g., ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 348–351 (2004); Thomas Franck, *The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT'L L. 519, 520 (1992).

unconstitutionality dichotomy; and the normative ethos of constitutionalism.<sup>4</sup> This paper is *not* about whether there exists a single global constitution, how to achieve one, or even what such a thing would look like. Rather the goal is to develop a method out of constitutional theory for examining the design, powers, and reach of governance bodies on the international plane—in other words international organizations exercising global governance functions. My hope is that by employing an appropriate theoretical framework, constitutional analysis can help shed light upon legal authority and the exercise of power by organizations on the international stage—in particular, here, by the UN Security Council.

Constitutional analysis of organizations in international legal space cannot mean blithely transplanting the classical theories, matured in the cradle of the modern state.<sup>5</sup> There is a significant problem of fit. It is, today, relatively common to hear about constitution beyond the state—the constituent instruments of international organizations are often referred to as their constitutions,<sup>6</sup> and occasionally even as aspects of a unified world constitution.<sup>7</sup> This discourse on the constitutions of international organizations or the “global constitution” often gives rise to a mode of critique of the actions of those bodies familiar to the domestic discourse, based on characterizing actions as constitutional or unconstitutional. The idea is that an unconstitutional action—one taken by any organization in excess of its delegated powers or in contravention of express limits in the organization’s constituent instrument—must be understood as *ultra vires*, null and void.<sup>8</sup> However, it is also often acknowledged that in light of the broad constituent instruments of certain international organizations, and the general lack of constitutional review in most of them,<sup>9</sup> it is difficult to know exactly which actions of international organizations are unconstitutional. Further, when their *ultra vires* nature is apparent, how can such acts be nullified or voided? Who gets to say when, and to what extent? Amidst all of the talk about constitutions on the international plane, it is sometimes difficult to see how the constitutional analysis bears conceptual fruit.

<sup>4</sup> On constitutionalism, see Mattias Kumm, *The Legitimacy of International Law: A Constitutional Framework of Analysis*, 15 EUR. J. INT'L L. 907, 929 n.55 (2004) (defending constitutionalism as an approach to the assessment and design of national and transnational institutions in light of a wide range of features that affect legitimacy); Neil Walker, *Postnational Constitutionalism and the Problem of Translation*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 27, 42 (Joseph Weiler & Marlene Wind eds., 2003) (referring to constitutionalism as “an exercise in practical reasoning . . . [which seeks to] propose solutions to the question of providing a viable and legitimate regulatory framework for political community”).

<sup>5</sup> See Walker, *supra* note 4, at 35.

<sup>6</sup> See, e.g., J.H. Jackson, *The WTO “Constitution” and Proposed Reforms: Seven “Mantras” Revisited*, 4 J. INT'L ECON. L. 67–78 (2001).

<sup>7</sup> See, e.g., BARDO FASSBENDER, *THE UNITED NATIONS AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY* (2009); Jürgen Habermas, *The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society*, 15 CONSTELLATIONS 444 (2008).

<sup>8</sup> See, e.g., DE WET, *supra* note 3, at 348–351; Matthew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations*, 16 LEIDEN J. INT'L L. 593 (2003).

<sup>9</sup> See, e.g., HANS KELSEN, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* XV (1950) [hereinafter LAW OF THE UNITED NATIONS].

I suggest that part of the problem is a particularly thorough conflation that occurs in the deployment of the concept of a constitution in international legal discourse, between the analytical appraisal of constitutionality (i.e., the validity of actions under the constitution) and the political position of constitutionalism—the idea that an organization entrusted with powers of governance should be constructed in such a way as to structurally limit the abuse of those powers. The question of what an organization can or cannot do under its mandate tends to be confused with the question of what the organization *should* be able to do—whether certain actions would be legitimate or just. These questions are not identical. Illegitimacy and injustice should not be confused with illegality; perhaps even more importantly, legality alone does not necessarily render an action legitimate or just. In other words, the ethos of constitutionalism does not necessarily illuminate whether a constituted organization is acting “constitutionally” under its mandate, nor does a constitutional action necessarily comport with constitutionalism.

I want to propose an approach to examining a constitutional system based on distinguishing between two related but conceptually distinct perspectives. I suggest that a constitution, and all powers exercised pursuant to it, should be simultaneously viewed and assessed from a *juridical* perspective (emphasizing validity and the hierarchy of norms) and a *political* perspective (emphasizing the distribution of power—the division of competences among the organs, checks and balances and review). These lenses illuminate different facts about the exercise of power within a constituted system. The first asks whether particular norms are valid pursuant to the normative hierarchy of the constitutional system—in other words whether they have been promulgated under correct procedures (procedural validity), and whether they have or have not been promulgated in excess of the norm-issuing organ’s delegated competences under the constitution (*intra/ultra vires*). The second perspective assesses the action of the organization and its organs by emphasizing powers instead of the hierarchy of norms: rather than inquire into validity, it examines how the competences for generating, interpreting, and applying valid norms are delineated, divided, checked, balanced, and reviewed. If the first point of view asks whether a norm is constitutionally valid, the second asks how the particular system provides for the creation, interpretation, and application of norms, in order to invite analysis of the quality of the constitution from the perspective of political theory: e.g., based on comparative empirical analysis under the rubric of good governance, the purely normative language of justice,<sup>10</sup> or the partially empirical and partially normative sociological category of legitimacy.<sup>11</sup>

This mode of analysis should be particularly helpful in the international context because it allows the appreciation of both institutional design and the relation between

<sup>10</sup> See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1st ed. 1971).

<sup>11</sup> I employ the term legitimacy in Weber’s sense, with a focus on the subjective states of the individual actors. In other words, an exercise of governmental authority would be legitimate if those subject to it consider the exercise to be acceptable and justified. The concept thus involves imputing meaning to the acceptance of these individuals—i.e. asking *why* these actors consider the exercise of authority to be acceptable. See MAX WEBER, *ECONOMY AND SOCIETY* 212 (Guenther Roth & Claus Wittich eds., 1978).

the institution and the member states it is designed to govern—which, though members of a constituted organization, remain the plenary actors under international law. Both the juridical and political lenses on the constitution of an international organization can be usefully refocused to appreciate the workings of that organization within the full international legal system.

To return, then, to the problem posed at the outset of this paper, I want to suggest that it is possible to shed some light on the pressing and divisive question of the limits, or lack thereof, of the competence of the United Nations Security Council by separating and adopting in parallel the juridical and political perspectives on the constitution of the United Nations. I hope that this analysis of the competence issue will demonstrate the value of the proposed perspectival approach to constitutions. At the same time, I hope that this approach will shed some light upon a particularly pressing and thorny problem at the heart of the United Nations regime.

### **1.1. Qualifying the Security Council's legislative efforts: Constitutionality and constitutionalism**

The problem of the Council's competence may be framed around two of the most contentious examples of controversy over the possibility that the UNSC has acted *ultra vires*: the creation of the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR) to try individuals from those territories for the commission of international crimes (Resolutions 827 and 955); and the enactment of general legal norms of indefinite duration, to combat terrorism (e.g., Resolutions 1267 and 1373) and the proliferation of nuclear weapons (Resolution 1540).

Each of these resolutions was duly passed by the Council acting under Chapter VII, through correct procedures. Yet each has been challenged, even decried, as *ultra vires*. Each has been challenged with the claim that the delegated power to take measures to maintain international peace and security does not include the power to legislate for the international community.<sup>12</sup> They have been further challenged on the grounds that certain aspects of the resolutions contravene the textual limits on the competence of the Council in article 24(2), requiring that it “shall act in accordance with the Purposes and Principles of the United Nations” as defined in articles 1 and 2.<sup>13</sup>

It is difficult to see a precise legal argument as to why the powers of the Council are sufficiently hemmed in to prohibit it from creating general norms, or establishing judicial institutions with the power to determine the meaning or existence of other sources of general international law (including treaties and custom). Once the Council has formally determined that its actions are necessary to maintain international peace and security, how can it be said that it is acting in excess of its competences?<sup>14</sup>

<sup>12</sup> See, e.g., Happold, *supra* note 8, at 609–610.

<sup>13</sup> See De Wet, *supra* note 3, at 348–351 (concluding that a Council action that violates basic human rights is devoid of a legal basis, and thus *ultra vires*, null and void).

<sup>14</sup> See Eric Rosand, *The Security Council As “Global Legislator”: Ultra Vires or Ultra Innovative?*, 28 FORDHAM INT'L L.J. 542 (2004).

The arguments immanent to the Charter regime—that the Council has acted beyond its delegated powers or in contravention of its textual limits—have been very difficult to square with the text of the Charter, especially in light of its drafting history and its development through interpretation and practice. The Charter explicitly grants broad powers to the Council, with little in the way of institutional checks and balances. Above all it designates no entity as competent to review whether the Council's actions were taken within its delegated powers, or in conformity with the scant textual limits of the principles and purposes of the Charter in articles 1 and 2.<sup>15</sup> In light of the absence of review, and the vague and open textured character of the Charter's formal limitations, it is difficult to second-guess the Council's determination of its competences in any particular instance. To phrase the point generally: it is radically unclear what powers have been constitutionally delegated by the Charter, how they have been limited, and who may decide whether any particular action is “constitutional”—i.e. whether the constitution has been violated.

By adopting both the juridical and political perspectives, I hope to show that both sides to the debate on the Organization's exercise of power have compelling arguments. On the one hand it is hard to argue that the “legislative” decisions of the Security Council are *invalid* in the juridical sense, i.e. that the UNSC has exceeded its technical competences in transmitting legal norms. On the other hand, the political perspective helps explain the manifest discomfort of a great many scholars about the ease with which the Council can enact general norms. The latter point of view reveals that the delegation of competence to the UNSC is so broad and unreviewable, and the constitutional provisions limiting the Council's sphere of action are so general and flexible, that the text ultimately empowers the organ to act extra-constitutionally—all the more because the Council appears solely competent to decide on the meaning of, and limits to, its own delegated powers (*Kompetenz-Kompetenz*). From the juridical perspective, the oft-challenged actions of the UNSC seem generally unassailable; but as soon as the political lens is applied it becomes clear that the Charter-system is quite a flawed constitution—one that entails systemic risks of hegemonic international law-making and the demise of constitutionalism.<sup>16</sup>

I have two main goals in this article. First, I hope to develop an approach to constitutional analysis appropriate to the study of constituted organizations beyond the state. Second, I hope to demonstrate the value of this perspectival approach through

<sup>15</sup> The same is true even of putative violations of *jus cogens*. It is occasionally suggested that at least the Council cannot violate peremptory norms of international law. See *Kadi I*, T-315/01, Yassin Abdullah Kadi v. Council of the European Union, 2005 E.C.R. II-3649, ¶¶221, 225–226 [hereinafter *Kadi I*, CFI]. See also Erika de Wet, *Holding International Institutions Accountable: The Complimentary Role of Non-Judicial Oversight Mechanisms and Judicial Review*, 9 GERMAN L.J. 1987, 2004 (2008). Yet even hypothetically assuming that the Council ordered something that looked like a clear violation of a peremptory norm, the theoretical problem of defining when the Council has acted *ultra vires* remains: who decides? As shall be made clear below, in the absence of any central international dispute resolution body with compulsory jurisdiction and the capacity to review UNSC actions, there is no entity that can *authoritatively* say whether the Council has breached *jus cogens*.

<sup>16</sup> JÓSE ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 199 (2005).

an analysis of the ever-controversial issue of the Security Council's competences. Finally, in so doing, I hope to facilitate cutting through the knotty question of what the Council can and cannot do. In the following section I delimit the scope of the paper; the focus will not be on the composition or even existence of a global constitution, but on the constitution of the United Nations as an organization charged with certain global governance functions. In section three I develop the theoretical approach to constitutional analysis, based on viewing a constitution from two perspectives: the juridical and the political. In section four I examine the constitution of the United Nations through both lenses, qualifying the capacity of the Council to enact general norms through its decisions in terms of both constitutionality and constitutionalism. Finally, in section five I shift the focus from the relations among the Charters' constituted bodies to the relationship between the UN organization and the member states, in order to account for recent legal challenges to the Council's legislative regime at the national and regional levels. I hope to show that these challenges are essentially insignificant to the material constitution of the UN from the juridical point of view; yet from the political perspective the capacity of the states and regional organizations (or some states/regions) to exert their will against the organization dramatically affects the image of the constitution.

## 2. The narrow sense of the “constitution” of the United Nations

I want to be clear at the outset: this paper takes no position on the question of whether the UN Charter is a world constitution, or part of any such global constitution. Instead I am here concerned with the Charter system as the constitution of just one of several international organizations exercising important global governance functions.

A spate of recent literature has cropped up on the subject of “global constitutionalism,” often oriented toward assessing the role of the Charter in international legal space.<sup>17</sup> Some seek to hold the Charter up as a bare-bones world constitution,<sup>18</sup> while others seek to knock the entire organization down as a mere tool of the states parties.<sup>19</sup> The debate continues at full steam today, and not without good reason. Lurking in the background is a manifold of issues that are much more explicit in the discourse on national constitutionalism—if sovereign states, as the plenary subjects of international law, have agreed to constitute a higher normative order, establishing bodies to govern

<sup>17</sup> See FASSBENDER, *supra* note 7. See also JAN KLABBERS, ANNE PETERS, & GEIR ULFSTEIN, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2009) (arguing for a more nuanced, decentralized and heteronomous understanding of a global constitutional system of which the UN Charter and Organization only constitute a part, along side other organizations, courts, and norms). See contra NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF INTERNATIONAL LAW (2011) (arguing that the very idea of global constitutionalism is inappropriate towards characterizing international space, as it dilutes the notion of constitutionalism and misunderstands the organization of international legal space).

<sup>18</sup> See Habermas, *supra* note 7.

<sup>19</sup> See, e.g., John Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SECURITY 5 (1995).

them in some way or another and adjudicate disputes between them, then what kinds of powers or competences have they delegated to the bodies they have constituted? How has power been carved up? What kind of constitutional order have they created? How democratic, and how just?

In recent debates on constitutionalism on the international level, these crucially important issues have tended to remain in the background. Most contention has rather focused on what appears as two interconnected preliminary questions: to what extent is there a global constitution at all, and to what extent ought this title be given to the Charter of the United Nations—as the constituent instrument of the preeminent global governance institution? These issues are certainly important, but their *primacy* may be brought into doubt.

Irrespective of the status of the Charter as a “global constitution,” the questions and concerns of constitutionalism remain applicable to the UN as a constituted international organization with significant power and authority on the world stage. It is not particularly controversial that in bringing the Charter into force the states parties delegated a great deal of power to the organization, not least in charging it (through the Council) with a wide mandate to maintain international peace and security—even through authorizing the use of force.<sup>20</sup> Moreover, the body cannot be viewed simply as a tool at the disposal of the member states. Amendments, for example, as well as decisions and resolutions of the UNSC, ICJ, and UNGA, are taken not on the basis of unanimity but by majority vote (however qualified this majority may be).<sup>21</sup> Especially in the cases of amendment, UNSC resolutions, and the judgments of the ICJ, a state may be bound by a decision to which it did not consent; the creature may oblige its creator.<sup>22</sup> At a minimum it is generally uncontroversial that the United Nations is an organization, created by states through treaty (the Charter), to which the parties have delegated a sizeable degree of power to wield over and above them. Viewed simply as an organization, this body has been constituted by states, through a constituent treaty, as an institution autonomous from its creators.

Therefore it is plausible to speak of the constitution of the UN organization to connote the normative architecture of the organization articulating the separation of powers among constituted organs, the modes through which these organs interrelate, and the mechanisms through which norms may be created and applied within that system.

<sup>20</sup> U.N. CHARTER, arts. 1(1), 42–44.

<sup>21</sup> Already in 1944, Kelsen argued that the possibility of action by majority vote renders an international organization independent and non-identifiable with its member states. See HANS KELSEN, PEACE THROUGH LAW 20–21 (1944).

<sup>22</sup> In the case of the Council this is of course *not* true about the five permanent members (the P5), because no action can be taken against the wishes of any one of them. They can veto any resolution (art. 27(2)) and no amendment of their veto power can be taken without their affirmative vote (arts. 108–109). The P5 thus have an extra-constitutional status—they are capable of binding the others, but cannot themselves be bound against their will. See Jean Cohen, *A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach*, 15 CONSTELLATIONS 456 (2008). As I shall argue below, this feature of the Council’s structure is part of why, from the perspective of constitutionalism, the Charter is a seriously flawed constitution—most states are fully inside the regime of obligations, but five are not.

And there is a value in conceptualizing the Charter in constitutional terms. Because states have delegated such great powers to their creature, the background issues of the debate on global constitutionalism remain applicable with equal force when considering the organization in itself. By reorienting focus on the Charter system as a constitution in this narrow sense, the critical questions and concerns underlying all constitutionalism may be brought into the foreground without controversy over the constitutional nature of global society. The more difficult tasks are: to assess the constitutional capacities of an organization endowed with far-reaching powers in the field of international peace and security; to qualify its practice, and that of its component organs, as constitutional under the Charter regime; and to assess the quality of this particular constitutional arrangement.

### 3. The concept of the constitution

The “constitution” of an international organization should not be simply equated to the text of the constituent instrument. By a constitution I mean to connote, in essence, the most basic normative and institutional architecture of an organization. It is thus helpful to distinguish, following Kelsen, between a *formal* constitutional document and the broader functional concept of the *material* constitution.<sup>23</sup> I am primarily interested in the *material* constitutions of international organizations—and here in particular the material constitution of the United Nations. Second, I distinguish between two perspectives on the material constitution—the juridical point of view, as opposed to the political one. The former perspective on the material constitution examines how validity is transmitted through a system, how norms are applied and interpreted, and under what circumstances and in what way a norm may be considered constitutional or unconstitutional. The latter examines the ordering of those constituted bodies charged with norm creation, application, interpretation, and review with the goals of assessing and evaluating the distribution of power among them. From this perspective one might ask: does this particular constitutional order reflect the characteristics that we have in mind when we speak of constitutionalism?

#### 3.1. The material constitution vs. the formal constitution

A constitution is more than a text. A constitution is above all a system of norms and institutions. This architecture may be more or less thoroughly articulated by a founding document, or not at all. Indeed even where a system is organized around a constitutional document, the text is never the whole story—it is often both under- and over-inclusive.<sup>24</sup> Constitutional analysis requires, at a minimum, the examination of all truly fundamental norms enshrined in the document as they are interpreted, narrowed, and expanded by the constituted bodies—not least in the judgments of

<sup>23</sup> HANS KELSEN, GENERAL THEORY OF LAW AND STATE 124, 258 (1945) [hereinafter GENERAL THEORY].

<sup>24</sup> See BRUCE ACKERMAN, WE THE PEOPLE 35 (1993); A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 277–315 (8th ed. 1915); KELSEN, GENERAL THEORY, *supra* note 23, at 124, 258.

the courts, but also through the practice of the political bodies. As shall be explained below, constitutional analysis will also likely require appreciation of other important, though uncodified norms. The constitutional text, as important as it may be, is only part of the overall constitution, along with other important legal norms, interpretations, settled practices, and constitutional customs or conventions that are developed during the life of the constitution through a variety of formal and informal means.<sup>25</sup>

Kelsen provides a useful conceptual starting point by distinguishing between the written document, or “formal” constitution, and the constitution in its full, “material” sense.<sup>26</sup> He rightly observes that all states have a constitution.<sup>27</sup> Some states (and today, most) have a solemn, codified “constitution”—what he calls the state’s *formal* constitution. Necessarily in writing, it attempts to entrench certain norms—giving them a status hierarchically superior to normal legislation by making them more difficult to change than normal statutes (usually via an onerous amendment rule).<sup>28</sup> However, a formal constitution is neither a necessary nor a sufficient component of a constitution in the full sense of the term. Many states, like the United Kingdom, have no solemn document at all, and yet clearly possess a normative structure that articulates how and by whom laws shall be passed, interpreted, executed, and enforced. If the goal of constitutional analysis is to understand how a state or organization is “constituted”—how a system provides for the creation, interpretation, and application of legal norms, and how powers are delegated, divided, and delimited—it would seem farcical to ignore foundational norms simply because they are not expressed in a solemn charter. Likewise even where there is some kind of founding document, no formal constitution can really articulate the full constitutional structure, especially over time. Some norms in the document may fall into *desuetude*, while others are expanded by legislative, executive, and judicial bodies to mean all sorts of things—often totally unanticipated by the text and sometimes at cross-purposes with other aspects of the document. Still other norms may arise or may change through the emergence or alteration of constitutional customs.<sup>29</sup>

Kelsen thus distinguishes the *material* constitution from the purely formal document. The material constitution, he argues, is that set of norms at the highest level of the legal system dictating the methods through which norms are created, interpreted, and applied.<sup>30</sup> It may consist of a wide array of laws and customs, some perhaps enshrined

<sup>25</sup> DICEY, *supra* note 24, at 277–315 (classically articulating the British notion that any constitution is held together in part by norms that cannot be quite qualified as laws. These rules, called conventions of the constitution, do have normative value—they require or proscribe certain behavior *for a reason*. They often derive additional power from their source in longstanding tradition or custom. Although conventions are not usually enforced like laws, i.e. through the application or threat of a sanction by a Court or some other body, they can be nevertheless extremely difficult to violate—the cost of breach will likely have to be measured in political terms stemming from a potentially serious loss of legitimacy).

<sup>26</sup> See KELSEN, GENERAL THEORY, *supra* note 23, at 124–125; KELSEN, PEACE THROUGH LAW, *supra* note 21, at 9, 127; KELSEN, THE LAW OF THE UNITED NATIONS, *supra* note 9.

<sup>27</sup> KELSEN, GENERAL THEORY, *supra* note 23, at 124–125.

<sup>28</sup> KELSEN, PURE THEORY OF LAW 222 (trans. Max Knight, 2d ed. 1967).

<sup>29</sup> See DICEY, *supra* note 24, at 277; KELSEN, GENERAL THEORY, *supra* note 23, at 126–128.

<sup>30</sup> KELSEN, GENERAL THEORY, *supra* note 23, at 258.

in a constitutional document and others developed through legislation, judgment, convention, or other practices of the constituted organs of government. For example, judicial review in the United States is mentioned nowhere in the formal constitutional document—yet the rule asserted in *Marbury* that the Court has final say over the validity of legislation under the constitution would certainly fall into the material constitutional structure of the United States. Similarly, though passed as normal legislation by a vote of fifty percent plus one, the Reform Act of 1832 transformed the constitution of the United Kingdom by radically overhauling the electoral system to expand representative government.<sup>31</sup> As opposed to the formal document, the material constitution describes the fundamental normative architecture within which the constituted bodies function.

The material constitution comprehends the full constitution of any organization. Nothing in it is non-constitutional, and nothing is missing from it that is constitutional for that given organization. By contrast, the formal constitution is both incomplete and may include and entrench norms that are not properly constitutional in the material sense.<sup>32</sup> Nevertheless, Kelsen rightly stresses that the formal constitution retains great relevance, both analytically and programmatically. Insofar as a constitutional system includes a solemn document that attempts to entrench certain norms, it may be said that those norms have been designated as exceptionally important by grant of a special place in the constituted legal order. Especially where they are entrenched, the norms of the formal constitution are relatively protected against incumbent power and self-interest. In this sense, formality can itself be materially significant.

However, as Kelsen rightly cautions, formal entrenchment is incomplete without some kind of constitutional review—the formal constitution would only have full material meaning if it were possible for a body other than the legislature to declare acts of legislation unconstitutional, or *ultra vires*.<sup>33</sup> In other words, if the body that legislates

<sup>31</sup> See, e.g., The Great Reform Act, 1832, 2 & 3 Will. 4, c. 45 (eliminating the “rotten boroughs” and significantly expanding the size of the electorate). Even in the presence of a formal constitution, as in the United States, normal legislative enactments can dramatically affect the material constitution. For example, the Acts determining the composition and jurisdiction of the Supreme Court materially affected the transmission of validity at the highest level of the hierarchy of norms. See, e.g., The Judiciary Act of 1789, ch. 20, 1 Stat. 73 setting the number of Justices at six, and the Judiciary Act of 1869, 16 Stat. 44, setting the number at nine. Congress has also attempted to tamper with the jurisdiction of the Court to varying degrees of success. See, e.g., Detainee Treatment Act of 2005, Pub. L. No. 109–148, §§ 1001–1006 (2005), whereby Congress attempted to strip the Court of “jurisdiction to hear or consider an application for a writ of *habeas corpus* filed by or on behalf of” a Guantanamo Bay detainee (*invalidated in relevant part by* Hamdan v. Rumsfeld, 546 U.S. 1149 (2006)). Because these constitutional norms are unentrenched, it is possible to pack the Supreme Court or remove its jurisdiction by simple statute—but the possibility of making such changes through ordinary legislative procedures does not mean that they are any less changes to the constitution. See also Georg Jellinek, *Constitutional Amendment and Constitutional Transformation*, in *Weimar: A JURISPRUDENCE OF CRISIS* 54–57 (Arthur Jacobson & Bernhard Schlink eds., 2000) (originally appeared in 1906).

<sup>32</sup> KELSEN, GENERAL THEORY, *supra* note 23, at 125. Consider, for example, the 18th Amendment to the US Constitution—prohibition, though formally entrenched, had a dubious constitutional status from a material perspective.

<sup>33</sup> KELSEN, GENERAL THEORY, *supra* note 23, at 155–157, 262–263. See also ACKERMAN, *supra* note 24, at 9–10 (emphasizing the importance of review for vindicating constitutional entrenchment, and thereby giving it full legal meaning).

general legal norms decides for itself whether or not its acts are constitutionally valid, the entrenchment of the formal constitution would have no binding material meaning—no one would be able to authoritatively question the conformity of the legislature's dictate with the restrictions of the constitutional document.<sup>34</sup> So long as the legislature remains convinced that its act is permissible under the formal constitution, then no matter how much violence it does to the formal text the act can only be called unconstitutional in a polemical sense—the label could only be employed to try to achieve repeal through political means.<sup>35</sup>

Kelsen's theoretical apparatus, in sum, facilitates examining a constitution in a far more rich and fruitful fashion than focusing exclusively on the text of a “founding document.” At the same time, it recognizes the profound importance of the formal document by highlighting its material function of entrenching particularly important norms. Finally, the theory flags independent (ideally judicial) review as an indispensable element of a complete formal constitution—an essential component of the constitutionalist vision of the rule of law.

### 3.2. Two perspectives on the material constitution: Juridical and political

It is important not to approach constitutions blinkered by an overly legalistic sensibility. In thinking about constitutions, Kelsen's pure theory of law need only be taken so far. For him, the purpose of distinguishing the material from the formal constitution was always to attain a full view of how, in a particular legal system, general legal norms are enacted, applied, and interpreted. While his analytic has much to say about how validity is transmitted through a system, and how to talk about whether particular norms are or are not valid within that system, his pure theoretical point of

<sup>34</sup> In other words, in a material sense any law passed by the legislature that cuts against the constitutional text would simply amend the constitution according to an implicit *material* amendment rule—simple *lex posterior*. If there is already a formal entrenched amendment rule, *lex posterior* would amount to a *second* amendment rule, belonging to the material, not the formal constitution. Needless to say this second amendment rule could vitiate the need to rely on any stricter formal amendment rule.

<sup>35</sup> KELSEN, GENERAL THEORY, *supra* note 23, at 157 (“The application of the constitutional rules concerning legislation can be effectively guaranteed only if an organ other than the legislative body is entrusted with the task of testing whether a law is constitutional, and of annulling it if—according to the opinion of this organ—it is ‘unconstitutional.’ . . . As long as a statute has not been annulled, it is ‘constitutional’ and not ‘unconstitutional.’”). See DICEY, *supra* note 24, at 371–372 (suggesting that the expression “unconstitutional” has, as applied to a law, three different meanings: (1) In a state like England, with no formal constitution, the expression as applied to an act of parliament means simply that the act is, “in the opinion of the speaker, opposed to the spirit of the English constitution; it cannot mean that the Act is either a breach of law or is void.” (2) In a society with a formal constitution but no constitutional review, the expression basically amounts to a polemic. In Dicey's opinion, such was the case in *fin de siècle* France. At that time, the charge “unconstitutional” would mean “that a law, e.g. extending the length of the president's tenure of office, is opposed to the articles of the constitution. The expression *does not necessarily* mean that the law is void,” however, because at the time French courts did not exercise judicial review—i.e. refuse to enforce “unconstitutional” laws. As a result, in France the expression would be, “when employed by a Frenchman, a term of censure” (emphasis added). It is only (3), in a system like the United States, with both a formal constitution and a judiciary capable of exercising constitutional review, that a law can be called unconstitutional and be thereby rendered *ultra vires*, null and void).

view has very little to say about the merits of any particular constitutional ordering.<sup>36</sup> It articulates a relativistic language of description and analysis, but *not* assessment. Constitutionalism, however, is and always has been precisely about evaluation—as an ethos, it is concerned with how to design a good constitution, and how to subject a bad one to critique. Of course, by the same token, the constitutionalist ethos cannot answer the descriptive question of whether a norm is or is not constitutional within a particular system. In order to take seriously the uses of the idea of a constitution for description and analysis on the one hand, and comparison and evaluation on the other, I want to propose a second distinction: between an understanding of the material constitution from a juridical perspective, and from the perspective of political theory.

The crucial distinction is between two overlapping but conceptually distinct perspectives on what precisely counts as the material constitution. They illuminate different aspects of the constituted order, in pursuing very different analytical goals. One is about the internal analysis of the generation of norms within a constitutional system, and the determination of the validity of those norms (or what might be called their “constitutionality”); the other takes an external perspective, examining the distribution of power within a constitutional order and assessing the quality of the constitution (typically from the ethos of constitutionalism). The latter relies upon a completely different analytical language from the former—its concern is not the legal-theoretical category of “validity,” but the evaluative categories of political theory, e.g. justice, legitimacy, and the rule of law. One perspective permits an empirical analysis of how norms are made in a given constitutional system, and discussion at least by hypothesis of whether particular norms are valid under that constitution; the other permits a normative evaluation of the constitutional system as a whole—highlighting the delegation and separation of powers among the constituted bodies, the degree to which these bodies enjoy discretion in the exercise of their powers, and the structural likelihood that they may abuse their power.

The first perspective is *juridical*. Its goal is to analyze the hierarchy of norms in a constitutional system, to determine those fundamental rules that articulate how norms are created and validly transmitted throughout the entire legal order. From this perspective, the constitution in the material sense consists in the first place “of those rules which regulate the creation of the general legal norms.”<sup>37</sup> Within a state this means in particular the regulation of legislation, but also critically those norms regulating the executive and judicial powers at the highest level—i.e., all of the bodies empowered to affect the validity and content of general legal norms through application, interpretation, and in some cases review and nullification.<sup>38</sup> In other words, from the juridical perspective the constitution is that highest level of norms which express the criteria of validity for the creation of all norms of the lower levels, including general

<sup>36</sup> See, e.g., KELSEN, GENERAL THEORY, *supra* note 23, at 178, 188–189. At least within the confines of the pure theory, for Kelsen everything is either juridical or irrelevant; he identifies legality and legitimacy, and disregards other normative questions like justice, leaving little space for evaluation and critique.

<sup>37</sup> KELSEN, GENERAL THEORY, *supra* note 23, at 124.

<sup>38</sup> *Id.* at 124, 259.

legislation, administrative rule-making, and norm application, interpretation, and review in particular cases. As a perspective for the purpose of analysis, the characteristic inquiries of this point of view are: who is empowered to promulgate norms? What are the substantive constraints on this body's (or bodies') norm-generative capacity? What procedures must be followed to create a norm? And who is empowered to give flesh to the skeletal general norms through application and interpretation? Who, if anyone, is empowered to review and even nullify a norm?

It is from this juridical perspective that the “constitutionality” of a particular norm must be assessed, in the sense of determining its validity under the constitution.<sup>39</sup> Once the observer has a handle on the highest-level framework for the creation of norms in a hierarchical normative system, he may inquire into the validity of any norm by working backwards from the norm in question. Each stage of the inquiry requires asking two questions: (a) did the enacting body follow the correct procedures in creating the norm? and (b) was it authorized to do so by a higher norm “delegating” the power to legislate in the area in question? Take for example an administrative regulation in the United States. The inquiry into its validity would have to ask (a) whether it was passed according to the correct procedures—e.g. did it properly go through “notice and comment” process? If required, were less invasive alternatives considered?; and (b) whether the administrative body was entitled to enact the rule by a delegation of legislative power over this particular substantive area. If the norm passes these tests, the analysis moves up a level, and examines whether the delegation of legislative power was valid: (a) did the delegating body—say the Congress—act according to proper procedures?; and (b) did the Congress have constitutional authority to delegate such legislative powers to the lower-level administrative body? The full analysis of a norm’s validity must work backwards from the actual commission of the norm to the original constitutional delegation of powers.

The point of the juridical perspective is to illuminate what questions go into the calculation of a norm’s validity in a particular hierarchical system. It should be understood that this perspective is usually adopted as an exercise in academic discourse or legal advocacy, yielding at most a hypothesis or claim about the constitutionality of a norm—only a duly authorized body, like a constitutional court, can make an authoritative statement on the validity of a norm.<sup>40</sup>

The second lens may be called the *political* perspective. It focuses on the interplay between the mechanisms through which law is created, interpreted, executed, and reviewed. This point of view is concerned with the normative architecture articulating

<sup>39</sup> According to Kelsen the term “constitutionality,” in its technical legal sense, means nothing but validity under the constitutional procedures. Any unconstitutional act is, legally speaking, a nullity. But as noted above, an act can only be truly considered “unconstitutional” (i.e. invalid) where some authoritative interpretive organ is capable of vindicating constitutional guarantees. KELSEN, GENERAL THEORY, *supra* note 23, at 157. It is worth noting, however, that the polemical use of the term is nevertheless important. It says nothing about the *validity* of a legislative enactment, but it brings into question the act’s legitimacy, and thereby potentially the legitimacy of the enacting authority—as such it properly belongs not to the juridical analysis of a constitutional system but to analysis from the political perspective.

<sup>40</sup> KELSEN, GENERAL THEORY, *supra* note 23, at 157; KELSEN, LAW OF THE UNITED NATIONS, *supra* note 9, at xv.

the competences of, and relationships between, the constituted bodies—or, in other words, with the distribution of power within a constitutional system. The perspective belongs to political theory in the sense that it does not evaluate a constitution in order to examine its empirical juridical qualities, like how validity is transmitted, or whether particular norms are valid; rather the political perspective reorients focus on power and authority for the normative purpose of *assessing* the quality of the constitutional arrangements for creating, enforcing, and interpreting norms.<sup>41</sup>

I call the second perspective political both because of its focus on power and authority, and because its method of evaluation is premised on categories outside of legal analysis, more properly belonging to political theory. Indeed it employs an altogether different language of assessment. The juridical perspective is concerned above all with validity—with how a constitution provides for the transmission of validity throughout the legal hierarchy. The political perspective permits evaluating these same institutional arrangements from the outside, as articulating a regime for the exercise of power. It focuses on the ordering of power within a constitutional system: how are powers separated among the constituted bodies? What kind of checks and balances characterize their interrelations?<sup>42</sup> What degree of discretion do these bodies enjoy? This external perspective further permits evaluation and critique: whether the ordering of power can be considered just (for example according to the neutral observer taking Rawls' original position behind the veil of ignorance);<sup>43</sup> whether the subjects consider, or may they be likely to consider the normative architecture legitimate (legitimacy in Weber's sense);<sup>44</sup> or whether the system appropriately limits the discretion of the constituted bodies, and thereby fosters the rule of law.<sup>45</sup> The political perspective thus privileges analysis of a constitution according to a language conceptually independent from and external to the juridical—even if the two perspectives concern matters that are deeply related.

Unlike the juridical perspective, which considers a high position in the hierarchy of norms an essential characteristic of being “constitutional,” the position of a norm in the validity hierarchy is much less significant from the political point of view. Some constitutional norms may occupy a high place, for example, the provisions of the United States Constitution regulating the creation of general legislation, or providing for certain of the powers of the presidency and the Supreme Court. In other cases constitutional norms may have a much lower place in the validity chain, as in the United Kingdom where the powers of the Court may be changed, like nearly anything else,

<sup>41</sup> It bears noting that even Kelsen, whose pure theory of law is the exemplar of the juridical perspective, moves to the political mode in his impure writings. His work on international organizations reveal a deep political concern about the way in which particular constitutional orders articulate and divide the power to create, apply, and interpret norms. See, e.g., KELSEN, PEACE THROUGH LAW, *supra* note 21, at 13, 20–32.

<sup>42</sup> See generally M. J. C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (2d ed. 1967).

<sup>43</sup> RAWLS, *supra* note 10, at 120.

<sup>44</sup> WEBER, *supra* note 11, at 212.

<sup>45</sup> See DICEY, *supra* note 24, at 110 (“The rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers”).

by ordinary legislation.<sup>46</sup> From this perspective it is not the position of these norms at the top of the hierarchical chain of validity that is decisive for their status as “constitutional,” but their position establishing the order of relations among the highest bodies of state. The political material constitution entails all those norms, enacted or based on custom or convention, that articulate the interrelations between those bodies that create, interpret, apply, and review the law at the highest level. Take, for example, the constitutional position of the courts of the United Kingdom. Certainly in their own view the courts can only interpret, never invalidate, acts of Parliament. Nevertheless, the courts have successfully employed common law interpretation as a means to compel parliament to reconsider and even alter its legislative agenda by forcing the legislature to confront internal democratic forces or external Europe-wide political constellations more directly.<sup>47</sup> While the will of Parliament is nearly unlimited from the hierarchical juridical perspective, from the political theoretical point of view that absence of limitation is an illusion.<sup>48</sup>

Finally, the political perspective casts a wider net than the juridical in that it allows considering how the constituted bodies might be directly or indirectly influenced by the governed. It is here useful to recall A.V. Dicey’s analogous distinction between “legal” and “political” sovereignty. In describing the constitution of the United Kingdom, Dicey affirms the orthodox view that Parliament is alone sovereign in a legal sense—its will is absolutely supreme, especially in the courts. And yet Parliament is nevertheless constrained by the people—sovereign in the political sense. “The external limit to the real power of a sovereign,” Dicey cautions, “consists in the possibility or certainty that his subjects, or a large number of them, will disobey or resist his laws.” A sitting parliament might without any breach of law extend its own term of office, as has been

<sup>46</sup> See, e.g., the Appellate Jurisdiction Act of 1876 (creating the Law Lords) or the Constitutional Reform Act of 2005 (removing appellate jurisdiction from the House of Lords and creating the Supreme Court of the United Kingdom).

<sup>47</sup> See the famous opinion of the UKHL in the second appeal on *Factortame* concerning the conflict of norms between an Act of Parliament and European Union Law. R. v. Secretary of State for Transport, ex p. Factortame Ltd (No.2) [1991] 1 A.C. 603, 658–659 (opinion of Lord Bridge). The UKHL struck down the domestic Act as being inconsistent with Community law (in this case a regulation with direct effect); Lord Bridge indicated that the Court remained mindful of, and continued to respect, parliamentary sovereignty, but suggested that it would only interpret an Act of Parliament as derogating from EU legislation if Parliament clearly expressed its intention to so derogate. The Court thereby put Parliament in the position of either permitting its law to be subsumed into the EU legislation, or publicly and expressly acting in breach of its obligations under the Union, with a likelihood of severe political consequences. In *Factortame* the Court forced Parliament’s hand by triggering external political pressure, but it can just as well influence Parliament to change its legislative agenda and even repeal laws by forcing the legislature to directly confront internal democratic pressure, for example by narrowly interpreting Acts of Parliament to conform with basic rights with the caveat that if the legislature wants to violate such rights it would have to do so explicitly and thereby face the electorate. See generally DICEY, *supra* note 24, at 30–31. In both types of situation the Court has employed political means in the absence of the juridical power to invalidate legislation. See also A. V. DICEY, LAW AND PUBLIC OPINION IN ENGLAND IN THE NINETEENTH CENTURY 283 (1917).

<sup>48</sup> See DICEY, *supra* note 24, at 30. See, more recently, the symposium on “The Changing Landscape of British Constitutionalism” 9 Int’l J. CONST. L. (I•CON), especially: N.W. Barber, *The Afterlife of Parliamentary Sovereignty*, 9 Int’l J. CONST. L. (I•CON) 144 (2011); T.R.S. Allan, *Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism*, 9 Int’l J. CONST. L. (I•CON) 155 (2011).

done in the past; and yet politically speaking it could not “at present day prolong by law the duration of an existing House of Commons.”<sup>49</sup> A constituted body may find itself constrained to act legitimately as much as it is constrained to act legally. The avenues through which the constituted bodies may feel the influence or pressure of the governed are of course different in different constitutional systems, as are the criteria for legitimacy—the particulars are an empirical matter. But it bears noting that this last feature of the political perspective is especially important for the analysis of constitutions beyond the state—it should be recalled here that in the international legal system the governed (states) retain a *great deal* of power over the bodies they have constituted to govern.<sup>50</sup>

The goal of the political perspective of inquiry is to identify how the highest-level constituted bodies interrelate, and how they may or may not be open to influence by the governed—either formally, through the exercise of constitutional powers by an electorate, or informally by the threat of popular noncompliance or even the extreme possibility of resistance. The use of the perspective is to determine and *assess* how and by whom the law is created and given concrete meaning. The characteristic inquiries ask who are the authorities with supreme judicial, executive, and legislative powers; how are these powers divided, checked, and/or balanced; and who, if anyone, has the supreme capacity to change this balance, i.e. the constituent power? From this perspective the observer may be just as concerned about locating the ultimate authority to create or interpret a norm, or to decide if a norm is valid, as the observer from the juridical perspective—but the objective here is to answer these questions in order to evaluate the distribution of political power in the constitutional system.

Dividing the concept of the constitution into these two distinct perspectives helps isolate two very different kinds of goals at stake in talking about constitutions. At the heart of the juridical perspective is validity—it entails the examination into the rules articulating how laws may be validly created, and, working backwards, whether or not particular norms are valid under those conditions for the purpose of academic analysis, advocacy, or judgment. The other perspective is concerned less with determining how validity is transmitted, but with assessing the quality of the particular system for creating norms, applying them, bestowing them with meaning, and resolving conflicts between them. If the first point of view allows asking if a norm is constitutionally valid, the second allows asking whether the constitution providing for its validity is any good.

#### **4. Qualifying UNSC action in terms of constitutionality and constitutionalism**

The distinction between the juridical and political perspectives allows reframing the constitutional question concerning the competences of the UN Security Council under

<sup>49</sup> *Id.* at 31–32.

<sup>50</sup> See *infra*, § 5.

the Charter. It allows dealing separately with conceptually distinct questions: on the one hand whether the Council may enact valid general legislation at all and whether its particular attempts in this regard are valid; and on the other hand the normative question of whether such a power comports with the ethos of constitutionalism.

#### 4.1. The Security Council's legislative resolutions

For most of the first half century of its existence the UN Security Council limited its actions under Chapter VII to taking measures directly targeting temporally and spatially specific “threats to the peace.”<sup>51</sup> However, beginning in the early nineties, the Council began asserting more robust and far reaching powers to enact decisions with long-term, norm-generative effects. These increasingly assertive decisions have come more and more to resemble general legislation.<sup>52</sup>

The first putatively legislative resolutions came in the early nineties, in response to reported atrocities in the Balkan wars and the internal armed conflict in Rwanda. In 1993 the Council established a tribunal for the prosecution of individuals responsible for committing international crimes in the former Yugoslavia (ICTY).<sup>53</sup> The following year it established a similar tribunal for Rwanda (ICTR).<sup>54</sup> In both instances, acting under Chapter VII, the Council decided to “adopt,” i.e., enact, a constituent “Statute of the Court” (annexed to each resolution), thereby creating a standing tribunal competent to try individuals for the commission of certain international crimes in certain territories. Included in each statute was a list of specific crimes over which the Court would have jurisdiction. Finally, the Council made clear that the resolutions were binding upon all states, and that each state “shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute . . .” including requests for cooperation or compliance with orders (such as arrest warrants) issued by the Trial Chamber.<sup>55</sup>

On the surface Resolutions 827 and 955 were justified as *ad hoc* measures to address immediate and particular threats to international peace and security.<sup>56</sup> Yet upon a closer examination they appear to go far beyond the *ad hoc*, instead establishing general and indefinite legal norms—i.e. legislation.

In the first place, the act of constituting independent tribunal itself has a legislative character—in each case the Council established an independent body with delegated powers, and articulated its jurisdiction, competence, and other capacities. These tribunals would stand for a lengthy period of time, capable of being extended indefinitely—indeed, they continue their work today. Thus in constituting and defining the tribunals, Resolutions 827 and 955 created secondary norms of general and indefinite ambit.

<sup>51</sup> ALVAREZ, *supra* note 16, at 184.

<sup>52</sup> Gráinne de Búrca, *The European Court of Justice and the International Legal Order after Kadi*, Jean Monnet Working Paper 01/09 (2009).

<sup>53</sup> UNSC Resolution 827, U.N. Doc. S/Res/827 (1993).

<sup>54</sup> UNSC Resolution 955 U.N. Doc. S/Res/955 (1994).

<sup>55</sup> UNSC Resolution 827, Annex, Art. 28.

<sup>56</sup> See UNSC Resolution 827, pmb. (referring to the establishment of the tribunal “as an *ad hoc* measure”).

It may be further argued that Resolutions 827 and 955 enacted primary norms of international law by enumerating the crimes over which the Tribunals would be competent. The ICTY was made competent to try a specific set of “grave breaches of the Geneva Conventions,” violations of the laws and customs of war, crimes against humanity, and genocide.<sup>57</sup> The ICTR was empowered, similarly, to try specific crimes against humanity, genocide, and “violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.”<sup>58</sup> On the surface these statutes purport to empower the Court to try crimes that already existed under international law. It is true that most of the enumerated crimes represented were, at the time, uncontroversially violations of international law already extant in treaties and custom. However, these were violations for which *states* could be responsible. The notion that these violations were prohibited by international criminal law, which would entail *individual* criminal responsibility in addition to state responsibility, was far from settled. The UNSC did not invent individual responsibility for the commission of international crimes as such, but by articulating a comprehensive list of crimes over which the Tribunals would be competent going far beyond the “precedents” of Nuremberg and Tokyo, the UNSC arguably legislated a wide set of international criminal legal norms (including, for example, the international criminality of rape recognized for the first time in the ICTY statute, and the crime of violating the law of non-international armed conflict in the ICTR statute). If the UNSC did not create this international criminal legislation out of whole cloth, at a minimum the Council crystallized the criminality of a large set of violations found in other treaties and custom.

More recently, the UNSC has waded even more clearly into the practice of legislation. Resolutions 1267 establishes a sanctions regime targeting terrorists and those who finance them, obliging states, *inter alia*, to freeze the assets of any individual (or organization) listed by the Council and ban them from foreign travel.<sup>59</sup> Resolution 1373 obliges all states to enact certain domestic laws targeting the financing of terrorism, as well as other measures designed to prevent terrorism.<sup>60</sup> Resolution 1540, finally, obliges all states to refrain from providing any support to non-state actors attempting to develop, acquire, manufacture, possess, transport, or transfer certain listed nuclear, chemical, and biological weapons—primarily by adopting appropriate laws to bar such activity.<sup>61</sup> In each case the Council established a subsidiary committee tasked with monitoring state compliance with the resolutions.

These more recent resolutions do not purport to be temporally or spatially limited. In no case is the Council reacting to discrete acts or directing a measure at specific countries. The resolutions are not *ad hoc* measures in nature. Further, the Council does not purport to simply enforce pre-existing international law, but is explicitly creating general international legal obligations for all states out of whole cloth. Alvarez argues

<sup>57</sup> See UNSC Resolution 827, annex, arts. 2–4.

<sup>58</sup> UNSC Resolution 955, arts. 2–4.

<sup>59</sup> UNSC Resolution 1267, U.N. Doc. S/Res/1267 (1999).

<sup>60</sup> UNSC Resolution 1373, U.N. Doc. S/Res/1373 (2001).

<sup>61</sup> UNSC Resolution 1540, U.N. Doc. S/Res/1540 (2004).

that these Resolutions are therefore the “closest thing we have in international institutional law to real “law-making” . . . [i.e.] action that is binding, backed by the possibility of real coercive sanction, affecting all relevant actors, and capable of repeated application across time in comparable instances.”<sup>62</sup>

The “constitutionality” of the Council’s legislative resolutions has been challenged on two main grounds: it is argued (1) that the UNSC does not have the competence to legislate, i.e. enact *general* legal norms, at all; and (2) even if it has such competence, these particular resolutions violate the textual limits on the Council’s substantive competence, i.e. that any law-making must be in conformity with the principles and purposes of the Charter.<sup>63</sup> The obvious counter argument, however, is that (a) the Charter entails a grant of power to the Council so broad as to encompass even long-term general normative enactments; and (b) the scant textual limits on the Council’s powers are so vague and open-textured that they provide no barrier to the Council’s choice of means.<sup>64</sup> The latter point is compounded by (c) the absence of any independent body with authority to interpret the Charter and pronounce upon the conformity of Council Resolutions with said interpretations.<sup>65</sup> Yet even if in a strict positivist sense these counterarguments are correct, there is still something unsettling about the idea of such an unregulated grant of power to a body wielding true enforcement powers on the international stage.<sup>66</sup> The point of approaching the question from both the juridical and political perspectives is to determine *first* whether the Council is so empowered to act, and *second*, if so, whether such a constitutional system is well-ordered and ultimately acceptable.

#### **4.2. The UNSC’s legislative resolutions from the juridical perspective: Constitutionality**

There is little doubt that the Charter qualifies as the formal constitution of the United Nations. It establishes organs, confers power upon them, and entrenches these constitutive and regulatory rules along with other important principles. Indeed, it attempts to entrench them rather deeply. Any amendment must be adopted by two thirds of the UNGA, and further ratified by two thirds of the membership *including* all five permanent members of the UNSC (P5).<sup>67</sup> The two-thirds super-majority rule is not, of itself, a particularly high threshold relative to most federal or quasi-federal polities (though the difficulty of securing the ratifications should not be underestimated). However, with respect to the powers of the UNSC, articles 108 and 109 introduce a great deal of substantive rigidity into the amendment rule by granting the P5 an effective veto on any amendment. Although the two-thirds supermajority may not be an impossible

<sup>62</sup> ALVAREZ, *supra* note 16, at 196–197.

<sup>63</sup> See DE WET, *supra* note 3, at 348–351; FRANCK, *supra* note 3, at 520.

<sup>64</sup> ALVAREZ, *supra* note 16, at 174; KELSEN, *LAW OF THE UNITED NATIONS*, *supra* note 9, at 294–295.

<sup>65</sup> KELSEN, *LAW OF THE UNITED NATIONS*, *supra* note 9, at xv–xvi.

<sup>66</sup> ALVAREZ, *supra* note 16, at 197.

<sup>67</sup> See U.N. CHARTER, arts. 108–109.

goalpost, it appears extremely unlikely that every permanent member will assent to any serious qualification of the Council's competences.

The Council's powers under the Charter are sizeable. At first blush, the Charter seems to expressly and meticulously delegate certain powers to the UNSC, as well as establish certain limiting principles on the exercise of these powers. However, its language is highly open-textured, rendering the grant of power extremely broad in potential, and the textual limits both narrow and malleable. The Charter delegates to the Council "primary responsibility for the maintenance of international peace and security." To that end it is permitted to take substantive decisions (articles 25–28 and 48) so long as these satisfy certain voting requirements (an affirmative vote of nine members, including either the concurrence or abstention of the P5) (article 27).<sup>68</sup> Under Chapter VII, by determining the existence of a "threat to the peace, breach of the peace, or act of aggression," the Council may *inter alia* recommend or decide on "measures not involving the use of armed force" (article 41). Decisions of the Council are binding on members (articles 25 and 48), and in the event of any conflict between obligations arising under the Charter (including under decisions of the UNSC), their obligations under the UN Charter shall prevail (article 103).<sup>69</sup>

According to article 24(2), "[t]he Security Council shall act in accordance with the Purposes and Principles of the United Nations." These purposes (article 1) and principles (article 2) appear to establish textual limitations on the power of the Council. Yet parts of article 1 seem more empowering than limiting—the first express purpose of the Charter is nothing less than to "maintain international peace and security" by taking "effective collective measures for the prevention and removal of threats to the peace" and "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace" (article 1(1)). Indeed the only salient limiting "purposes" may be found in article 1(2) requiring "respect for the principle of equal rights and self-determination of peoples," and article 1(3) "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." The only potentially relevant limiting "principle" is article 2(7), stating that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. . . ." However, it goes on, "this principle shall not prejudice the application of enforcement measures under Chapter VII."<sup>70</sup>

<sup>68</sup> The text of Article 27 actually requires the "concurring" vote of the P5, but the ICJ has subsequently interpreted the provision as requiring only the lack of a negative vote, based on what it took to be the consistent practice of the Council since its formation. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶¶ 21–22 (June 21). See Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and their Diverse Consequences*, 9 LAW & PRAC. INT'L CTS. & TRIBS. 443 (2010).

<sup>69</sup> U.N. CHARTER, arts. 25–28, 41, 48, 103.

<sup>70</sup> U.N. CHARTER, art. 2(7).

The supposed limitations of articles 1 and 2 are framed in broad language that does nothing clear to prevent the Council from legislating in order to achieve its functions, including fulfilling the first purpose of the entire Charter—the maintenance of international peace and security.<sup>71</sup> Only 2(7) could have arguably barred the Council from employing legislation as a means *per se*, but it expressly exempts UNSC action under Chapter VII from its strictures. It is true that the textual limits cannot be reasonably read as to allow legislative decisions with absolutely *any* content. The Council must, under article 1(2)–(3), respect self-determination, equality, human rights, and fundamental freedoms without discriminatory distinction. But these certainly do not bar employing the means of enacting general norms through decisions under Chapter VII as such—at most they constitute only extremely vague and interpretable outer limits on what particular acts of UNSC “legislation” would pass muster.<sup>72</sup>

Indeed the Council’s varied forays into legislation have been challenged as “unconstitutional,” especially in light of article 1(3): Resolutions 827 and 955 for supposedly violating the human right of *nullem crimen sine lege* by providing for the punishment of international crimes for which there had not yet been individual criminal responsibility under international law; and the sanctions resolutions for violating, *inter alia*, the suspects’ right to property, their right to a fair trial, and their freedom of movement.<sup>73</sup> Some of these challenges, at least regarding the sanctions resolutions, may be quite compelling from the perspective of national or regional human rights law and jurisprudence. However, it is difficult to understand how these resolutions breach the extremely general language of article 1(3). To understand a properly enacted decision of the Security Council as *invalid* based on violating such a broad and malleable category as “human rights,” with no textual or other authoritative definition of that term’s content or connotations, the resolution would have to be *prima facie* egregiously and unjustifiably in breach of universally accepted human rights. The perennial

<sup>71</sup> Indeed, already in 1950 Kelsen realized that the Council’s empowerment to maintain international peace and security could entail the power to legislate. “The Charter does not provide that the decisions [of the Council] must be in conformity with the law that exists at the time they are adopted. The purpose of the enforcement action under Article 39 is not: to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law. *The decision enforced by the Security Council may create new law for the concrete case.*” KELSEN, LAW OF THE UNITED NATIONS, *supra* note 9, at 294–295 (emphasis added).

<sup>72</sup> As shall be clear in the next section, this is especially true in the absence of a body with authority to interpret the Charter and compulsory jurisdiction allowing it to actually issue interpretations. *See infra* §4.3.

<sup>73</sup> See *Nada v. Switzerland*, Eur. Ct. H.R., Third Party Intervention Submissions by JUSTICE, App. No. 10593/08, ¶46 (2010). JUSTICE submits that “the ‘maintenance of international peace and security’—though the primary function of the Security Council—is neither the preeminent principle of international law nor the UN Charter. At least equal importance must be attached to the principle of respect for fundamental rights” as enshrined in the preamble and in Art. 1(3). The Court, JUSTICE submits, is not bound under Article 103 to privilege obligations arising out of UNSC Resolutions that are passed in contravention of the textual dictates of the Charter requiring the Council to respect international human rights); *See also Kadi I*, Joined Cases C-402/05 P & C-415/05 P, Yassin Abdullah Kadi et al. v. Council of the European Union, 2005 E.C.R. II-3649 & II-3533, ¶¶ 7–9, 296, 298–300 [hereinafter *Kadi I*, ECJ] (in which the applicant successfully complained of violations to his rights to property and to a fair trial resulting from his listing under Res. 1267).

controversy over the conformity of even the more questionable sanctions resolutions with international human rights suggests that they do not violate article 1(3) with any sufficient clarity.

Thus, from the juridical perspective concerned with the valid transmission of norms, it seems quite difficult to argue that the UNSC may not take measures to maintain peace and security amounting to the enactment of general legal norms of indefinite duration—i.e. legislation. It even appears difficult to challenge the substance of its particular legislative enactments as contravening the limits of article 1, although it could be argued that in demanding respect for self-determination, equality, human rights, and fundamental freedoms the article at least indicates that there is an ultimate limit—however malleable.<sup>74</sup>

The difficulty of identifying a logical or linguistic rationale for considering UNSC action to be invalid under its mandate is exponentially compounded by the absence of any reviewing authority.<sup>75</sup> The formal terms of the Charter do not grant any organ the competence to review the Council's actions, nor have any asserted such a power in practice.<sup>76</sup> Under the loose delegation in the formal terms of the Charter, as confirmed by the *travaux préparatoires* and institutional practice, the Council decides its own competences in the last instance.<sup>77</sup> Within its limitless bailiwick of international

<sup>74</sup> While the implementation of these resolutions has been successfully challenged in regional and national courts, these judicial bodies have avoided pronouncing on the *constitutional validity* of the UNSC resolutions as such, under Articles 1 & 2 of the Charter. See, e.g., Kadi I, ECJ, *supra* note 73, ¶¶ 296, 298–300 (where the ECJ found the implementation of UNSC Res. 1267 in Europe to violate fundamental human rights enshrined in the European constitutional order—not international human rights). See also, in the Supreme Court of the United Kingdom, Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants); Her Majesty's Treasury (Respondent) v. Mohammed al-Ghabra (FC) (Appellant); R (on the application of Hani El Sayed Sabaei Youssef) (Respondent) v. Her Majesty's Treasury (Appellant), (Opinion of Lord Mance) 2010 UKSC 2, ¶¶85, 245 (Jan. 27, 2010) (raising but leaving undecided the question of whether the Council could, in conformity with Article 1(3), order the Member States to enact domestic legislation that would violate fundamental principles of human rights under their national regimes).

<sup>75</sup> KELSEN, GENERAL THEORY, *supra* note 23, at 157; KELSEN, LAW OF THE UNITED NATIONS, *supra* note 9, at xvi.

<sup>76</sup> The ICJ has at most hinted that it might have such power, see *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, 1992 ICJ Rep. 114 (1992). In its prior jurisprudence, however, the Court has explicitly rejected having any such power. In *Certain Expenses* the Court noted that “In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations.” Moreover, the Court emphasized, “[p]roposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted . . .” *Certain Expenses of the United Nations*, Advisory Opinion, 1962 ICJ Rep. 168 (1962). Already at that early stage, it was clear that even if the ICJ did try to assert such power, it would be in no position to engage in regular binding review of Council action—it is utterly hamstrung by its jurisdiction. See *infra*, text accompanying note 90.

<sup>77</sup> See the objections of Norway at the San Francisco Conference of 1945, which unsuccessfully called for granting the ICJ competence to review the actions of the other organs for conformity with the Charter. Documents of the United Nations Conference on International Organization, San Francisco, 1945, Vol. XI, p. 37; see also SIMON CHESTERMAN, THOMAS FRANCK & DAVID MALONE, LAW AND PRACTICE OF THE UNITED NATIONS: DOCUMENTS AND COMMENTARY 8 (2008) (confirming that the decision of the San Francisco conference of 1945 was to leave each principal organ of the UN to interpret its own competence for itself).

peace and security, the Council possesses the *Kompetenz-Kompetenz* in both the judicial sense (because no one else can authoritatively interpret or invalidate its decisions) and the legislative meaning (because no one can alter its competences through statute or amendment).<sup>78</sup> In other words, even if it appears that a Council decision manifestly exceeds its delegated powers, or otherwise violates the purposes and principles of the Charter, there would be no one to authoritatively pronounce such invalidity. In Kelsenian terms it would thus be impossible to say that any of its acts are “unconstitutional” in the strict legal sense of *ultra vires*, null and void; only the polemical sense of the expression would be apposite.<sup>79</sup>

Ultimately, the Council’s legislation is in general probably valid, as are the particular legislative resolutions enacted thus far. To contend otherwise would seem to contort the language of the Charter beyond recognition. Moreover, there is no institution capable of stating authoritatively and universally that Council action is invalid other than the Council itself (a decision that is, for obvious reasons, unlikely to be forthcoming). In sum, for the time being it seems impossible to view Council “legislation” as unconstitutional in the sense of invalid. Yet for many there will be something roundly dissatisfying about this strict positivistic legal reasoning: the juridical fact of these resolutions’ validity says nothing about whether or not the UNSC’s innovations in legislation violate important conventional understandings of good governance and the rule of law (in general, and with regard to the UN in particular), and whether the violation of such conventional understandings produces legitimacy problems. Finally, on a purely normative level, validity says nothing about whether or not a body such as the Council *should* have such far-reaching discretionary power. The validity of the Council’s exercise of power does not mean that the manner in which such power is delegated, checked, and balanced (if at all) is any good.

#### **4.3. The UNSC as legislator from the political perspective on the Charter: Constitutionalism**

Upon shifting lenses from validity to the ordering of political power, the Security Council’s ability to enact general legislation appears significantly less comfortable. Not only does the Charter delegate an extremely broad power to the Council with very little in the way of constitutional limits—it also does very little in the way of institutional design to constrain the uses and abuses of this power. Valid as these legislative resolutions may be, it is hard to view the Council’s power to enact them in a favorable light from the political perspective. This discomfort stems from three factors: (a) the insufficient separation of powers in the Charter’s institutional design, coupled with a total lack of any checks or balances on the Council’s power; (b) the absence of any organ with the capacity to review the Council’s action for conformity

<sup>78</sup> On the legislative and judicial meanings of *Kompetenz-Kompetenz*, see J.H.H. WEILER, *The Autonomy of the Community Legal Order*, in THE CONSTITUTION OF EUROPE 312 (1999).

<sup>79</sup> KELSEN, GENERAL THEORY, *supra* note 23, at 157; See DICEY, *supra* note 24, at 371–372. See *supra* text accompanying note 39.

with the formal Charter, or to even pronounce an authoritative interpretation of the Charter; and (c) the impossibility of augmenting the powers of the UNSC on the constituent level—through amendment—without the consent of the permanent members. Taken together, these factors illuminate the highly discretionary, even extra-constitutional position of the Security Council. The problem they pose may thus be reframed as the absence of the time-honored techniques of modern constitutionalism for restraining the exercise of power in government—supplanting the rule of man with the rule of law.<sup>80</sup>

Perhaps the most familiar mechanism of modern constitutionalism is the separation of powers,<sup>81</sup> augmented by checks and balances.<sup>82</sup> The typical separation, since Montesquieu and Blackstone, has been among legislative, executive, and judicial power—though there is nothing essential about dividing power according to this usual trinity. Of course, these divisions cannot be neat, because there are no clean theoretical borders between these competences—for example, every executive act entails some degree of quasi-judicial interpretation, just as every judicial act entails some degree of law-making. As Madison famously argued, mere separation cannot suffice, because the powers will without doubt seek to encroach upon one another (either innocently, or much more likely out of ambition). Proper constitutional design requires both separation and checks and balances empowering each body to protect itself against the encroachments of the other.<sup>83</sup>

It is to be expected that any separation of powers in a functionally limited international organization would not match the typical tripartite division found in modern constitutional states. Indeed, the Charter divides its functions into five plenary organs—the Council, the General Assembly, the ICJ, the Trustee Council, and the Economic and Social Council.<sup>84</sup> And yet the Council is in an altogether different position than the others: it alone can unilaterally define its own sphere of competence and expect its decisions pursuant to those competences to have binding force. No other organ is equipped with any means of challenging the Council where the latter has the will to act. It is not necessary to examine the competences of each body here. Suffice it to say, first, that the Council is indisputably capable of deciding for itself when it is empowered to act—i.e. where a situation falls under its purview of the maintenance of international peace and security. And second, once a situation is so qualified, the Council has proven capable of accruing all powers to itself as it sees fit to deal with

<sup>80</sup> Already in 1784, Immanuel Kant argued that the most difficult problem of governance on the global-scale is to constrain the governors by law and thus preempt slippage from constitutionalism and the rule of law to the autocratic rule of one or a few human beings. IMMANUEL KANT, IDEA FOR A UNIVERSAL HISTORY FROM A COSMOPOLITAN POINT OF VIEW, 6<sup>th</sup> Thesis (Lewis White Beck, trans. 1963); See Dicey, *supra* note 24, at 110 (arguing that discretionary power is among the greatest threats to the rule of law, and should be mercilessly curtailed wherever constitutional design is attempted).

<sup>81</sup> See MONTESQUIEU, SPIRIT OF THE LAWS, bk. XI (Anne M. Cohler, Basia C. Miller, & Harold S. Stone trans., 1989).

<sup>82</sup> See FEDERALIST PAPERS, No. 51 (Madison).

<sup>83</sup> *Id.*

<sup>84</sup> U.N. CHARTER, art. 7(1).

the situation—executive, judicial, and legislative.<sup>85</sup> In the absence of any real checks and balances, whatever separation of powers the Charter creates becomes meaningless as soon as the Council says so.

A second institutional safeguard in the toolbox of modern constitutionalism is constitutional entrenchment. In theory, the constituent power is omnipotent in constituting the governing bodies: it can delegate to them any degree of power, in whatever form or permutation it finds necessary. Constitutional entrenchment through a solemn formal document attempts to ossify in advance the precise powers delegated to the constituted bodies, as well as, in some cases, a set of substantive limits on the exercise of these powers, e.g. a bill of individual rights. However, as explained above, the safeguard of entrenchment is incomplete and likely critically weakened in the absence of a particular “check” or “balance”—constitutional review.<sup>86</sup> Such review has two components: it must entail both the capacity to issue an authoritative interpretation of the constituent instrument, as well as the capacity to declare the acts of the other constituted bodies as not in conformity with said interpretation and thus null and void.

It is well known that under the formal terms of the Charter no organ of the UN has supreme capacity to authoritatively review the constitutionality of the actions of the others, nor has any organ asserted such authority in practice. The sole candidate would be the International Court of Justice, and some have suggested that it appeared prepared to assert this role in the *Lockerbie* case.<sup>87</sup> But the Court is, in the end, utterly hamstrung by its jurisdictional competence. Its advisory opinions are explicitly non-binding on either the organs of the Organization or the Member States, and its contentious cases are only formally binding upon those states party to the dispute.<sup>88</sup> Additionally, it enjoys no general compulsory jurisdiction, further limiting its ability to position itself as a standing court of constitutional review.<sup>89</sup> Ultimately only the Council is in a position to determine for itself what competences are delegated to it through the Charter, and whether its actions comport with that delegation (judicial *Kompetenz-Kompetenz*). In Kelsenian terms, the Charter should indeed be understood as a formal constitution, yet because no organ can authoritatively vindicate its prescriptions it is in an important sense a very incomplete one.

Finally, there is basically no check on the power of the Council on the constituent level. The possibility of amendment is typically the last great safety valve of modern

<sup>85</sup> The Council not only exercises legislative and executive functions, as described above, but has on occasion even accrued to itself explicit and significant judicial functions. Under Resolution 1267, in particular, it has empowered itself to decide which individuals should be placed on the sanctions list, and maintains plenary authority to review their cases. See ALVAREZ, *supra* note 16, at 173–174, 194.

<sup>86</sup> KELSEN, GENERAL THEORY, *supra* note 23, at 157; see also FEDERALIST PAPERS, No. 67 (Hamilton).

<sup>87</sup> See DE WET, *supra* note 3, at 348–351 (2004); ALVAREZ, *supra* note 16, at 174. But see the Court’s disclaimer of any such power in 1962, in the *Certain Expenses* Advisory Opinion, *supra* note 78.

<sup>88</sup> U.N. CHARTER, arts. 94, 96.

<sup>89</sup> It is not inconceivable that the Court try to assert its authority to review actions of the Council for conformity with the Charter, but it is much more difficult to imagine the UNSC agreeing that the ICJ can pronounce on the validity of its actions—in any event such a situation would represent a dramatic change in the material constitution of the United Nations and takes us beyond the present critique into the realm of prescription.

constitutionalism. Where a formal constitution is supposed to delineate powers, there is always a risk that the organs attempt to overreach. No amount of institutional design can guarantee that attempts at encroachment will never be successful. Thus, the logic goes, it should be possible, in extreme cases, to amend and reorder the constitutional system to address such flaws as they arise.<sup>90</sup> The framers of the Charter were well aware of this problem, and dutifully included two different amendment provisions in articles 108 and 109 (though logically they amount to the same thing). Indeed, the amendment rule is not, numerically speaking, prohibitively difficult. It simply requires a two-thirds super-majority vote, plus the ratifications of two-thirds of the members. But it also requires the assent of each of the five permanent members of the Council. Unless each permanent member could be convinced to accept a limitation of its power, their effective vetoes render amendment utterly unavailable as a tool for constraining the power of the UNSC. Dicey cautions that over time too much institutional discretion poisons the rule of law.<sup>91</sup> We might add that where that discretion is unamendable the venom is all the more likely to prove fatal.

The Council has proven capable of enacting general legislation, executing its own enactments, in some cases rendering judgment on states and individuals concerning their compliance with its enactments, and above all judging for itself and by itself whether its decisions comport with the Charter. No other constituted body is equipped with sufficient powers to check the Council's exercise of power—a power that thus resembles more a prerogative.<sup>92</sup> No entity has proven capable of authoritatively reviewing the Council's actions for conformity with the Charter, or even to authoritatively interpret either the Charter or the decisions of the Council.<sup>93</sup> Finally, the Council's power cannot be limited through amendment, unless its five permanent members consent to such a change. As a result, the UNSC enjoys an extremely broad discretion in the use of its broad power to maintain peace and security, apparently rising to the level of the plenary *Kompetenz-Kompetenz* (in both the legislative and judicial senses).<sup>94</sup> Taken far enough, the Council's power to decide what it is empowered to do by the Charter becomes the power to decide what the Charter means in the first place, or more specifically to decide how much power the constituting states have granted to the organization as a whole. Where a constituted body is capable of deciding for itself what its constitution means, it becomes capable of acting extra-constitutionally—any action it takes is by definition constitutional, even if it entails

<sup>90</sup> THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, ch. 13 (1781); E. J. Siéyès, *Dire sur la question du veto royal* (1789), in ÉCRITS POLITIQUES 236, 239 (Roberto Zapperi ed., 1985); CONDORCET, PROJET DE CONSTITUTION FRANÇAISE, tits. 3(2), 8 & 9 (1793).

<sup>91</sup> DICEY, *supra* note 24, at 110.

<sup>92</sup> Cf. FEDERALIST PAPERS, No. 51 (Madison); WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Bk. I, Ch. 7 (1765).

<sup>93</sup> Cf. FEDERALIST PAPERS, No. 67 (Hamilton).

<sup>94</sup> See the ruling of the German Constitutional Court in its Decision on the Treaty of Lisbon, Zitierung: BVerfG, 2 BvE 2/08 vom 30.6.2009, ¶ 338 [hereinafter Lisbon] (In the context of reviewing the Lisbon Treaty in light of the Basic Law of Germany, the Constitutional Court emphasized in extremely stern language the dangers of delegating *Kompetenz-Kompetenz* to a supranational entity, because it would entail delegating to the supranational entity the power to usurp the constituent power of the German people).

a *de facto* modification of the formal text.<sup>95</sup> The constituted power transforms itself *de facto* into the constituent power, to the total subversion of constitutionalism.

## 5. The political challenge of non-compliance: Refocusing on the position of the UN organization vis-à-vis states and regions

In spite of everything, there have been challenges to the Council's legislative innovations, especially in recent years. The challenge has come not from any other constituted body, but from the member states and regional organizations. To get a full picture of the capabilities and limits of the organization, it is necessary to refocus, shifting from an analysis of the relations among the constituted bodies to the relationship between the organization and the entities over whom it is meant to exercise governmental functions. The challenges to the Council's legislative resolutions have come in two broad forms: simple non-compliance (ranging from tacit to explicit) and legal challenges to these resolutions by national and regional courts. Both types of challenge are important to an assessment of the material constitution of the United Nations. However, it should be understood that even though the latter is framed in legal terms, both types of challenge are relevant to the Charter regime only in the political sense. In this section I suggest that these challenges do not meaningfully affect the constitution of the United Nations in any juridical sense; but from the political perspective they represent an enormously important development. Indeed the political account of the constitution of the UN remains very much incomplete without taking into account the relationship between the "governing" organization and the "governed" states in the international legal system writ large.

The first kind of challenge is simple non-compliance. The Council's legislative efforts have, in some instances, been stymied by the inability and/or unwillingness of some states to implement the relevant resolutions. For example, in a Fall 2003 assessment of Resolution 1373 by an expert on the UNSC's monitoring committee for that resolution, only thirty states were rated as having achieved good compliance, with sixty more moving gradually in the right direction, seventy as "willing but unable," and twenty as materially able but unwilling to comply.<sup>96</sup>

The second type of challenge is legal in form, and has arisen in national and regional courts in several nuances. Some courts have declared the domestic or regional implementation of the Council's resolutions invalid within their own legal orders for failing to comport with the autonomous constitutional standards of those orders. Most famously the ECJ adjudged in *Kadi I* that the EU's implementation of Resolution 1267 could not comport with the constitutional requirements of the autonomous legal

<sup>95</sup> See Cohen, *supra* note 22, at 464.

<sup>96</sup> DAVID CORTRIGHT, GEORGE A. LOPEZ, ALISTAIR MILLAR, & LINDA GERBER, AN ACTION AGENDA FOR ENHANCING THE UNITED NATIONS PROGRAM ON COUNTERTERRORISM 7 (2004), available at [http://www.globalct.org/images/content/pdf/reports/action\\_agenda.pdf](http://www.globalct.org/images/content/pdf/reports/action_agenda.pdf) (based on an unpublished paper by the CTC legal expert, Oct. 2003); see also Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT'L. L. 275, 285 (2008).

system of the European Union.<sup>97</sup> It has been argued that if the Court would permit no implementation of that resolution, then by implication the ECJ would have here indirectly reviewed and declared invalid Resolution 1267. Other courts (and advocates) have posed more direct challenges to the Council's resolutions. The European Court of First Instance (CFI), in its initial, though overturned, opinion on *Kadi I* held that it could review the validity of Council resolutions for compliance with *jus cogens*—peremptory norms of international law which have an even higher status than the UN Charter, article 103 notwithstanding.<sup>98</sup> Finally, in *Nada v. Switzerland*, a complaint currently pending before the ECHR, the third-party interveners requested that the Court consider Resolution 1267 invalid for violating the principles and purposes of the Charter—i.e. unconstitutionality proper.<sup>99</sup>

From the vantage point of the Charter regime, these legal challenges have no juridical significance. True, they are framed in juridical terms—attacking the validity of UNSC resolutions either directly or indirectly (“as implemented”). But the rulings of national and regional courts do not affect the constitution of the United Nations in the juridical sense because none of these courts can pronounce upon the validity of any Council Resolution with ultimate and universal authority. Even where challenges premised on the *ultra vires* nature of a Resolution succeed, e.g. for violating *jus cogens*, national and regional courts can only authoritatively hold the norm invalid for internal purposes—i.e. within the system over which they have jurisdiction. The ECJ can only invalidate a norm within the European Union; the Supreme Court of the United Kingdom can only invalidate a norm within the UK. Neither the ECJ nor the UK Supreme Court could rule on the universal validity of a UNSC resolution any more than they could rule on the validity of a Russian law within Russia—they could pronounce upon Russian law if they felt so inclined, but doing so would not affect the validity of the norm within Russia.<sup>100</sup> From the point of view of the UN constitutional regime, these rulings are not in essence true juridical invalidations but local judicial orders not to comply. That is to say, to the extent that these judgments are given effect, they represent political challenges.

From the political point of view, the challenge of non-compliance in both its simple and judicial forms affects the capacities of the UN Security Council quite dramatically. Unlike the modern state, the United Nations maintains no monopoly on the legitimate use of force over those it governs. The reverse is true—the governed states maintain the monopoly for themselves within their own territories. In spite of the broad delegation of powers to the UN, the Council must rely upon states to implement its decisions. Compared to the state, the UNSC must depend upon legitimacy in far greater proportion to the threat of coercion. The state remains the plenary actor in international law; though their creatures may legally bind them, the creators must remain willing to be bound. Thus the possibility of widespread non-compliance poses a serious threat

<sup>97</sup> *Kadi I*, ECJ ¶5.

<sup>98</sup> *Kadi I*, CFI ¶¶ 221, 225–226 (finding, in the event, no conflict between 1267 and *jus cogens*).

<sup>99</sup> *Nada v. Switzerland*, *see supra* note 73.

<sup>100</sup> See H.L.A. HART, THE CONCEPT OF LAW 119–120 (2d. ed. 1994).

to the capacities of the Council and the UN Organization as a whole—whether that non-compliance is tacit or flaunted; framed as a matter of political will/capacity, or in terms of competing legal commitments.

Though the Council may have all the juridical competence in the world, it cannot expect states bow their heads and comply with its every whim. Recalling Dicey's distinction between the political and legal sovereign: even within a state in which one organ of government (parliament) has plenary legal authority to legislate, it cannot expect to be able to enact any law it wants. Parliament must contend with the political sovereign—the people, capable of manifesting itself formally as the electorate, and in the extreme case in the form of a resistance movement. On the international level, where states actually retain most legal and political power vis-à-vis the governing institution (and especially coercive power) the situation facing the Council is even starker.

As a result of the position of the United Nations in the ultimately state-centric international legal system, the Council cannot act in a vacuum. It must be responsive to challenges by the mighty governed. It is forced to react in the face of a clear non-compliance challenge to its authority by a major bloc, as with the ECJ's decision in *Kadi* which invalidated the implementation of Resolution 1267 in twenty-five European countries including two permanent members of the Security Council. Ian Johnstone rightly characterizes the problem in terms of legitimization. "While it may be possible to act coercively against a handful of holdouts," he writes, "broad compliance cannot be compelled if the majority of UN members view the Security Council as having acted illegitimately."<sup>101</sup> And, indeed, the Council has had some success in mitigating non-compliance through attempts at legitimization. For example, Johnstone notes, in 2003 implementation of Resolution 1373 began to sag below its already low level, and the Council was only able to reverse the trend by adjusting its practices with a view towards legitimization. This meant, *inter alia*, engaging in sustained attempts at public justification and providing opportunities for affected States not represented on the Council to express their views.<sup>102</sup>

However, the threat of non-compliance is *not* a prophylactic. It does not mitigate the manifold flaws of the UN constitutional system apparent from the political perspective on the ordering of power among the constituted bodies. Dicey thought, perhaps rightly, that in the United Kingdom the safeguard of political sovereignty mitigated the concern that a single body enjoyed the formal plenitude of legal authority (the legal sovereignty of Parliament). But this conclusion cannot be transplanted to the international plane. Sovereign equality aside, states are not all created equal. On the one hand the possibility of non-compliance is uneven and irregular. On the other, the members of the Council, especially the P5, may simply not care about non-compliance, or at least not about all failures to comply. With some rare exceptions, such as the *Kadi*

<sup>101</sup> Johnstone, *supra* note 96, at 308.

<sup>102</sup> *Id.*, at 286.

scenario, the Council is generally not politically accountable to those states threatening or engaging in non-compliance. Unless the threat is so severe that it would outweigh the value (to the members of the Council) of the compliance actually achieved, it may not be enough to push the UNSC to revisit its desired approach. Though the requirement of legitimization very clearly and significantly affects the constitution of the UN from the political point of view, it does little to alleviate the myriad political concerns about the ordering of power within that organization. As one author forcefully argues, it remains necessary above all that:

global political institutions, especially the UN, are regulated by and comport with constitutionalist principles, the rule of law and human rights. This is why a UN reform project, however difficult, is so important today. Otherwise the invocation of cosmopolitan right or global constitutional law to justify radical innovations on the part of unilateral or multilateral actors will either amount to little more than symbolic constitutionalism, playing into the hands of the imperial or great power projects, and/or culminate in the loss of legitimacy.<sup>103</sup>

## 6. Conclusion

I hope to have demonstrated that the two perspectives illuminate different aspects of some of the UNSC's, and thus the UN's, most controversial actions: the enactment of global legislation, occasionally in dubious conformity with human rights.

On the one hand, from the legal perspective the creation of *ad hoc* courts or the promulgation of "legislative" resolutions were perfectly valid (if unprecedented and perhaps shocking). Framed in juridical terms, the legal order of the Charter regime is entirely plausible, coherent, and consistent. It is possible to trace the validity of any norm back to broad grants of power in the Charter. It is thus possible to speak of a full legal system constituted by the Charter. Further, in light of the breadth of the delegation of competence and the absence of any reviewing entity capable of narrowing those powers through interpretation, it is perfectly plausible to view the Council's dramatic self-arrogation of the power to legislate and judge as entirely valid under the constitutional system.

On the other hand, from the political perspective, it becomes increasingly clear that the Council possesses a startling degree of discretion. It alone has the capacity to define the extent of its own powers under the Charter and can block any attempt to augment said power—either by other constituted bodies or on the constituent level. The Council thus enjoys the capacity to decide for itself both what it can do under the Charter, and what is the full extent of the power granted to it through the Charter, by those states acting as constituent power in 1945 (and as reaffirmed by each acceding state in the intervening years). It may be said to possess *Kompetenz-Kompetenz* in its fullest legislative and judicial sense—enabling it, in the final analysis, to act extra-constitutionally with binding legal effect on the rest of the membership. This is a serious constitutional flaw that renders the principles of constitutionalism tenuous at best.

<sup>103</sup> Jean Cohen, *Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective*, in THE PHILOSOPHY OF INTERNATIONAL LAW 261, 279 (Samantha Besson & John Tasioulas eds., 2010).

In the end I do not mean to argue that there is no check whatsoever on the ability of the Council to act. But such checks as exist are irregular, uneven, and in many ways unfair.

The traditionally great check was internal to the Council itself—the very same veto that safeguards its powers. Where any permanent member will not agree to a particular measure, the Council is rendered impotent—as evidenced by its lethargy in the first two thirds of its existence, as well as its greatest failures in the 1990s. The irregularity and unfairness of this particular check should be apparent—it is only, after all, available to five of the most powerful states in the world, providing more security to their own interests than the interests of the community of states as such. But, in any case, the purpose of the political-theoretical critique has been to demonstrate the deeply problematic *potential* of the Council, where it can muster the will to act, in light of the apparent impossibility of qualifying any of its actions as invalid from a legal point of view.

The emerging check—the challenge of non-compliance in its various forms—is external to the constitutional ordering of the political bodies of the UN, but nevertheless significantly affects those bodies' capacities. In its most powerful form, the challenge of political non-compliance has emerged in juridical terms, in the form of local and regional legal challenges. Even though no independent entity can render a resolution of the Council authoritatively and universally invalid, in the sense of null and void for all member states, any state can bar implementation within its own territory. Indeed even regional organizations can thus indirectly review and declare invalid the Council's legislative decisions *for internal purposes*—as the ECJ approached doing in its *Kadi I* judgment. It may be that this constitutes a breach of international law, but some states have expressed their ultimate willingness to have their international responsibility be engaged rather than implement a particularly onerous international legal norm.<sup>104</sup> States retain sizeable, arguably plenary power in the international legal system. When push comes to shove they may simply refuse to implement any resolution through their judicial or political branches—or at least some of them can do so some of the time.

The threat of non-compliance represents a check on the power of the organization—and a powerful one, indeed. At a minimum it restrains the Council by forcing it to engage in some attempt at legitimating its decisions. It is true that non-compliance for the right reasons may indeed vindicate the principles of constitutionalism, where for example the impugned global measure is egregiously illegitimate or unjust. But non-compliance is not always (or even often) based on the “right” reasons. Non-compliance as a mechanism for “keeping international institutions honest” is a Pandora’s box, opening the door for self-judging and selective implementation. And it is far from evenly available to all states. However relevant the threat of non-compliance to the

<sup>104</sup> See, in a slightly different context, the position of the German Constitutional Court in its Lisbon Judgment, declaring that in the exceptional case where European institutions overstep their enumerated powers, even with the interpretive blessing of the ECJ, the German Court will exercise review and may instruct German authorities not to apply the European law—even if it means engaging Germany’s international state responsibility. Lisbon, *supra* note 94, ¶340.

political understanding of the UN constitution, such an irregular check goes very little way toward ameliorating the serious problems in the institution's design. On the one hand, the Council has not gone very far to reform its behavior in light of these challenges, further damaging the legitimacy of the most important international organization we have. On the other hand, non-compliance is not only irregular and unfair, but its very exercise risks damage to the notion of legality on the international plane. True, it may be argued that in particular cases, such as that of Resolution 1267, the Council's own actions go further toward undermining the international rule of law than the national and regional judicial challenges to that regime. But the justifiable case does not alleviate the concerns about self-judging and the meaningful operation of international law that arise if the only check on the power of the Council is states' willingness to simply stop applying international legal obligations. The problem is the political organization of the United Nations; the solution is not *de facto* non-compliance, but a *de jure* reorganization of the UN's constitutional system.