The United Nations Security Council and the Emerging Crisis of Legitimacy

By Joy Gordon

Abstract—For many years, the Security Council of the United Nations was seen as paralyzed and ineffectual. But in the aftermath of the Cold War, the Council became much more active, and in some cases, was accused of overreaching. Some have argued that this puts the Council’s legitimacy into question. A series of recent European court rulings have provided support for this view, in that they find that some of the Security Council’s enforcement actions are inconsistent with international law.

During the Cold War, the UN Security Council was often viewed as weak and ineffectual, paralyzed by the opposition of its permanent members. The dismantling of the Soviet Union marked a new era for the Council, which some hailed as an opportunity for the Council to finally take up the role it was intended for, in regard to global security. Some held that the “successful combination of American military capacity and Security Council legal authority” represented the joining of power and legitimacy.1 Others criticized the new era of activism as overreaching:

There is a lack of consistency in practice, a failure to articulate principled lines of distinction identifying when a UN response is appropriate, and a reliance on unrestricted mandates to coalitions of States led by the United States. The Security Council is perceived as a geopolitical instrument.2

In recent years, there have been new situations emerging which suggest that the Council may be using its extraordinary powers in ways that exceed its authority, or serve the narrow political interests of its members rather than the mandate of ensuring peace and security within the international community. These situations raise questions regarding the basic legitimacy of the Security Council as a body of global governance. Legitimacy involves not only the operation of the machinery of power, but the right to

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do so. Power is often understood as involving “guns, money, technology, geography, and so on.” By contrast, legitimacy entails entitlement to power, not merely its exercise; it is an entitlement that is socially recognized. Legitimacy may be found in legality: the law may provide the authorization to exercise power and may be widely recognized as a valid source of authority. But one can also envision the possibility of legalized tyranny. For example, legislation that is properly adopted can authorize a state to engage in atrocities or other human rights violations. Consequently, legitimacy is grounded not only in legal authorization, but also in norms of what is right, fair, or appropriate.

It is increasingly common to hear people speak of a crisis of legitimacy on the part of the UN Security Council. Some have questioned the Council’s legitimacy on the grounds that it failed to act effectively in urgent situations such as those in Bosnia and Rwanda, or its diminished significance as states act unilaterally, as was the case in the United States’ military attack on Afghanistan in 2001 and Iraq in 2003. Conversely, neo-conservatives in the United States have argued that the Council faces a crisis of legitimacy because it impedes the United States in its efforts to address global terrorism and other security threats. But there is another set of concerns as well, related to whether the Council genuinely represents the will of the international community or is simply a tool of the permanent members that gives them access to the machinery of global governance.

Chapter VII of the UN Charter mandates the Council to respond to aggression, breaches of peace, and threats to peace. The Council has considerable discretion to decide whether such a situation is present. Once it has done so, it is authorized to take actions that may include (but presumably are not limited to) diplomatic measures, economic sanctions, and military intervention. Once the Council determines what measures it will impose, all the member states of the United Nations are bound to execute these measures. Article 25 provides, generally, that the member states “agree to accept and carry out the Council’s decisions.” Article 48 explicitly provides that the member states shall take whatever actions are required to carry out the Security Council’s decisions for the maintenance of international peace and security.

Under the Charter, the obligation of states to comply with Security Council decisions is nearly absolute. There is no provision for states to refuse to carry out Council resolutions, or even to question them. Article 24 seems to provide some limitation on enforcement actions the Council may take: in executing its duties concerning international peace and security, the Council “shall act in accordance with the Purposes and Principles of the United Nations.” But these are vague statements which leave considerable room for interpretation. It is not even clear that the Council must act in accordance with international law. Under Article 1, the Council is required to act “in conformity with the principles of justice and international law,” but this clause applies only in the context of peaceful settlements such as arbitration. In regard to measures that use force to stop aggression or remove threats to the peace, there is no such limitation. According to the Charter, the Council is not even bound by international treaties, such as the Genocide Convention. Article 103 provides that, in the event of a conflict between a treaty and a Security Council resolution, the Security Council resolution is binding.

In the event that a person, company, or state believes that a Security Council resolution is in any way illegal, there is no court where one can bring legal action against the
Council or ask the court to interpret the Charter or the law and issue a ruling that can be enforced. The International Court of Justice (ICJ) can only hear adversarial cases brought by states against other states.\textsuperscript{17} The ICJ can provide an advisory opinion on a matter concerning the Security Council, but only in response to a request from the Council itself (or the General Assembly, or in certain circumstances, other UN agencies).\textsuperscript{18} But even where that is done, an advisory opinion is not binding or enforceable. Thus, the Council operates under a mandate that is exceedingly broad and vague. At the same time, there is a fundamental lack of accountability. States generally have no means to question whether Chapter VII measures are necessary or legitimate, nor can they refuse to implement these measures. No state or person can bring a suit before a court to determine whether the Council has acted illegally or improperly. The Council itself could seek an advisory opinion, but it is unlikely that it would do so. If there are sufficient votes to adopt a resolution, it would make little sense for the same parties to ask a court to second-guess their decision. Indeed, the Council has rarely sought an advisory opinion from the ICJ.

The lack of accountability is especially problematic in light of the extraordinary powers of the five permanent members (P5) of the Council. The United States, Britain, Russia, China, and France all have the power to veto any resolution. In effect, the P5 have impunity in certain regards since no Chapter VII resolution can be adopted that condemns or imposes measures in response to aggression, breach of peace, or threat to the peace by one of the permanent members. In addition, in the event that a state obtains a judgment from the ICJ and the defendant state refuses to act in accordance with the court’s ruling, the only recourse to enforcing the judgment is through the Security Council.\textsuperscript{19} Thus, the fundamental structure of two of the central institutions of global governance is such that the abuse of power is an ongoing possibility; there is no legislature that can limit the Council, and no court that can directly overrule it.

During the first forty years of the Council’s existence, there was little chance that the Council would abuse its power. The mutual vetoes of the Soviet Union and the Western nations meant that the Council as a whole was paralyzed. There was little danger of the Council enacting measures so extreme as to raise questions about their legality. When the Soviet Union was dismantled in 1991, however, the situation abruptly changed. Russia, which took over the seat held by the former Soviet Union, was in no position to contest the Western powers on the Council, and China had no interest in doing so. In the early 1990s, the Council’s balance of power disappeared and the United States and Britain, with the support of France, led the Council in adopting measures that were more extreme and far reaching than ever before seen in the history of the United Nations. In particular, there was a series of Chapter VII measures by the Council that raised concerns.
The most controversial of these were the economic sanctions imposed on Iraq in response to Iraq’s invasion of Kuwait in the summer of 1990. Initially, the sanctions did not even allow Iraq to import food. The massive bombing campaign of the Persian Gulf War of 1991 destroyed nearly all of Iraq’s infrastructure, including electrical generators, water and sewage treatment plants, roads, bridges, and factories. The destruction of Iraq’s infrastructure was followed by epidemics of cholera and typhoid, malnutrition was rampant, and health care and education deteriorated precipitously. All of this continued for over a decade. Two senior UN officials resigned, maintaining that the Security Council was itself committing human rights violations in conflict with the Council’s charge to ensure global peace and security.

The case of the Iraq sanctions was the most visible situation where the Council was accused of acting illegally and improperly, but there were others as well. In 1988, an airliner passing over Lockerbie, Scotland was bombed, killing nearly 300 people. The United States and the United Kingdom demanded that Libya extradite two men suspected of participating in the bombing. Libya refused, citing the 1971 Montreal Convention concerning aviation crimes. The Montreal Convention required a state to either extradite suspects or prosecute them; Libya offered to do the latter, but refused to extradite the suspects. In response, the Security Council, at the behest of the United States and Britain, imposed sanctions on Libya. Libya then brought an action against the United States and Britain before the ICJ, asserting that the Council had no right to punish a country that was in full compliance with its international obligations. The court deferred to the Council on the grounds that under Article 103 of the Charter, the Council’s decision overrode any international treaties. But in a concurring opinion and a dissent, two judges raised the question of whether there were limits on what the Council could legally do. Legal scholars argued that the court’s ruling put into question whether the Council was in fact bound by international law.

There were also other occasions in the early 1990s when the legitimacy of the Council’s actions was questioned. In 1993, the Council established the International Criminal Tribunal for the former Yugoslavia and in 1994, established the International Criminal Tribunal for Rwanda in response to the human rights violations taking place there. In both cases, the Council cited Chapter VII as the basis of its authority. But this interpretation was subject to challenge. The member states of the United Nations grant wide powers to the Council “in order to ensure prompt and effective action,” envisioning emergency situations where a more deliberate, inclusive process would not be feasible. Some suggested that it seemed questionable to invoke emergency powers in order to create entire judicial bodies, which would be conducting prosecutions lasting months or years.

By 1996, the balance of power within the Council had shifted once more. Russia and China were more vocal in opposing the United States and Britain, and France was no longer a consistent ally. There were fewer occasions where judges or scholars suggested that the Council was abusing its authority or was itself violating international law. But the events of September 11, 2001 changed that. In several contexts, there was the sense that terrorism constituted an emergency that demanded immediate action, along with the suspension of structures of accountability. This was apparent in the increased use of financial sanctions, specifically asset freezes on individuals and companies.
It is difficult to imagine that asset freezes of a few hundred people—not aggression against a nation, or bombing of a population—would be the sort of issue that would bring into question the fundamental legitimacy of the United Nations Security Council. But it has, in fact, happened. On one hand, asset freezes seem like the mildest of penalties. They are not as severe as an actual fine. Assets are not seized, they are frozen. Yet the asset freezes imposed by the UN Security Council in response to international terrorism were problematic in part because they were preventative, not punitive. They were measures imposed not to punish those who had committed wrongful acts, but to effectively bankrupt those who *might* commit acts of terrorism. Although there have been several cases that have come before national and regional courts, the *Kadi* case is one of the most influential. It is also a case that has gone on for over a decade and shows the shift in judicial thought on this question.

In 1999, the UN Security Council invoked Chapter VII and adopted Resolution 1267 which imposed a set of measures to freeze funds of those with ties to terrorist operations, specifically the Taliban, Al-Qaeda, and Usama bin Laden. It also established a committee to designate the funds that were to be frozen. Two years later, immediately after the bombing of the World Trade Center, the committee added a number of names to the list of “specially designated nationals”—the individuals, foundations, and companies with putative ties to Al-Qaeda, whose assets were to be frozen by all member states of the United Nations. In October 2001, at the request of the United States, Yasin Kadi, a wealthy Saudi businessman, was placed on the list. In response to the Security Council resolution, the European Council and Commission adopted regulations implementing the asset freezes, including Kadi’s assets within Europe. The Security Council’s sanctions committee did not provide Kadi with the particulars of the claims against him, nor did it give him the opportunity to review and respond to the evidence upon which the claims were based. Kadi brought a suit in the European Court of Justice seeking annulment of the regulations, maintaining that these measures violated his right to judicial review, the right to property, and the principle of proportionality.

In 2005, the General Court dismissed the case, reasoning that the European regulations, “being designed to implement a Security Council resolution leaving no latitude in that regard, could not be the subject of judicial review.” The court considered the possibility that it might have jurisdiction in the event that the European regulations violated *jus cogens*, the fundamental principles of international law, which are binding on all subjects of international law, including the United Nations. But it found that there was no violation of *jus cogens*. Thus, it seemed that within the Security Council, the sanctions committee could add names to the lists without notice or opportunity to be heard; and there was no venue in which the person listed could challenge their status.

The due process issues raised by the asset freezes were widely criticized. A study commissioned by the UN’s Office of Legal Affairs found that the Security Council measures failed to provide for basic principles of due process, including the right of the individual to be heard and the right to an effective remedy before an impartial authority. In response to these criticisms, the Security Council made modest changes. It began providing the sanctioned individuals with notice that their assets had been frozen and allowed those sanctioned to request that the committee “de-list” them. The Council later established an ombudsperson to review these requests and make recommendations.
to the sanctions committee. The Council did not and still does not, however, provide individuals with the evidence on which the sanctions are based, making it nearly impossible to challenge or disprove it. The Council also does not permit an impartial body to review its decisions.

In 2008, the Grand Chamber of the European Court of Justice overturned the General Court’s ruling. The court now held that, to be lawful, all acts of the European Union must respect the fundamental rights that are contained in the treaty establishing the European Community. The court also held that the courts of the European Union must ensure the review, “in principle the full review,” of these acts. Thus, while the court was directly addressing the legality of regulations adopted by the European Union, the court was indirectly intervening in the implementation of a UN Security Council resolution.

In response to that ruling, the sanctions committee of the Security Council sent Kadi a summary of the reasons for his inclusion on the list. The sanctions committee did not provide a detailed explanation, or the evidence on which the claims were based. Kadi denied the claims, noting that three national authorities had already conducted extensive criminal investigations against him for the same reasons and had determined there were no grounds to prosecute him. The European Commission renewed the asset freezes against Kadi on the grounds of his putative association with Al-Qaeda. In 2010, however, the European Court of Justice once again intervened. The court ruled that it had an obligation to review all acts of the European Union for conformity with treaties, including measures adopted by the EU to implement Chapter VII resolutions adopted by the Security Council. In July 2013, the Grand Chamber’s most recent ruling affirmed this and annulled the EC’s regulations, which froze Kadi’s assets pursuant to the Chapter VII resolutions.

The Kadi case, and similar cases that have recently come out, mark a radical shift in the legal landscape. The Kadi ruling from the summer of 2013 has the effect of rejecting Article 103 of the Charter. Where Article 103 provides that Security Council resolutions override any treaties, the Kadi ruling finds that the EU cannot implement a Security Council measure if it conflicts with the terms of the treaty of the European Community.

But what is equally significant is simply that the courts are now beginning to intervene in the implementation of Chapter VII resolutions.
The judicial developments that we are starting to see in *Kadi* and similar cases suggest a sea change in international law. There is recognition by the courts that the Council is indeed capable of acting unwisely and even illegally, and that when it does so, the Council’s fundamental legitimacy as a body of global governance will be called into question.

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*Denise Lim served as Lead Editor for this article.*

NOTES

4 Ibid., 161.
5 Ibid.
6 Ibid., 158.


Ibid., Art. 41 and 42.

Ibid., Art. 48(1).

Ibid., Art. 24(2).

Ibid., Art. 1.

Ibid., Art. 1(1).

“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” Ibid., Art. 103.

“Statute of the International Court of Justice,” Art. 34(1).

— — —, “Charter,” Art. 96.

Ibid., Art. 94(2).


Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya vs. US), International Court of Justice, (Provisional Measures), Order of April 14, 1992.

Ibid., separate opinion of Judge Shahabuddeen and dissenting opinion of Judge Weeramantry.


United Kingdom v. Yassin Abdullah Kadi, July 18, 2013, para. 16.

Ibid., para. 18.

Ibid., para. 19.

Ibid., para. 20.

Bardo Fassbender, “Targeted Sanctions and Due Process: The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter,” Office of Legal Counsel United Nations Office of Legal Affairs, (March 20, 2006).


United Kingdom v. Yassin Abdullah Kadi, para. 22.

Ibid., para. 23.

Ibid., para. 27.

Ibid., para. 31.

Ibid., para. 33.

Ibid., para. 97.