

International Progress Organization



Organisation Internationale pour le Progrès

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Can the Notion of the Rule of Law Be Applied to the UN System?

Speech

International Conference

On the Understanding of Law and Jurisprudence

Faculty of Law and Administration

University of Szczecin

Szczecin, Poland, 26 November 2021

I.P.O. Online Publications
International Progress Organization, A-1010 Vienna, Kohlmarkt 4, Austria
www.i-p-o.org
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The "rule of law" in UN discourse

The special "Rule of Law Unit" of the United Nations, attached to the Executive Office of the Secretary-General, explains the *rule of law* as a "principle of governance" according to which all individuals and entities, "including the State itself," are accountable to laws that are "equally enforced" and are consistent with international human rights norms.¹ The UN web site lists, *inter alia*, the following principles for the *application* of the rule of law: supremacy of the law; equality before the law; accountability to the law; fairness in the application of the law; separation of powers; avoidance of arbitrariness; and procedural transparency. Noticeably, intergovernmental organizations – such as the United Nations itself – are not listed among those entities that are "accountable" in terms of the rule of law, and the designation of the special unit is not "*International* Rule of Law Unit."

In the last two decades, we have seen increasing references to the rule of law in non-binding documents and resolutions of the UN General Assembly as well as of the Security Council. In the Millennium Declaration of 8 September 2000, the heads of State and Government of UN member States committed themselves to "strengthen respect for the rule of law in international as in national affairs."² A similar commitment can be found in the 2005 World Summit Outcome where "good governance and the rule of law at the national and international levels" were acknowledged as being essential for sustainable development.³ At the initiative of Liechtenstein and Mexico, an item entitled "Upholding international law within the context of the maintenance of international peace and security" (or a similar formulation) has been on the agenda of the General Assembly since 2006. The most decisive and wide ranging affirmation, to date, of the rule of law came in the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, issued on 24 September 2012. The Heads of State and Government expressed their conviction in the following words: "We recognize that the rule of law applies to *all States equally*, and to international organizations, including the *United Nations and its principal organs ...*" (Emphasis by the author)⁴ It is worthy of note that, in this document, the General Assembly also extends and applies the rule of law to the *intergovernmental* level, something the Secretariat,

¹ "What is the Rule of Law." *United Nations and the Rule of Law*, <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>, retrieved on 25 November 2021.

² General Assembly resolution 55/2 of 8 September 2000, item II/9.

³ General Assembly resolution 60/1 of 16 September 2005, item I/11 ("Values and principles").

⁴ General Assembly resolution 67/1 of 24 September 2012, item I/2.

in its above mentioned “definition” of the rule of law, seems to avoid.⁵ Sporadic references to the rule of law, mirroring the agenda item of the General Assembly, can also be found in the records of the Security Council, as for instance in those on the Council’s third debate on the rule of law in June 2006,⁶ and again in May 2018.⁷ In these debates, the focus was on the behavior of member States in conflict situations and their specific obligations under the rule of law, but not on the Council’s performance in the exercise of its mandate of collective security.⁸ As we shall explain, the Council somehow appears to see its role as “enforcer” of the law at the *meta-level* – not accepting to be under the scrutiny of rule of law criteria when exercising its coercive mandate under Chapter VII of the Charter. With the notable exception of the earlier mentioned Declaration of the High-level Meeting of 2012, the proclamations on and references to the “rule of law” by the General Assembly appear to support this approach: The rule of law is only mentioned in regard to the actions of *States*, and not in connection with the performance of the United Nations as an inter-governmental organization.

The definition of the rule of law suggested by the UN Secretariat – apparently restricted to the domestic realm – and the resolutions and solemn proclamations adopted by the General Assembly⁹ and the Security Council somehow reflect today’s global consensus about the rule of law, but in an imprecise and non-committal way, as we shall later see. Law, as coercive normative order (as defined by Hans Kelsen),¹⁰ requires – under all circumstances – enforcement of the norms in a *consistent* and *non-arbitrary* manner and within a framework of separation of powers. This implies the existence of an independent judicial institution to check the constitutionality of legislative as well as executive decisions, and the accountability of all holders of public office. The rule of law also requires that a State’s constitution and specific laws are compatible with the norms of *jus cogens* of general international law. Only if all these criteria are met may a State be considered a constitutional state (a “*Rechtsstaat*”).

In view of the statutes and practice of the United Nations, and in particular its core institution, the Security Council, we have to ask the question whether – despite the many

⁵ Cf. note 1 above.

⁶ “Strengthening international law: rule of law and maintenance of international peace and security.” UN Doc. S/PV.5474, 22 June 2006.

⁷ “Upholding international law within the context of the maintenance of international peace and security.” UN Doc. S/PV.8262, 17 May 2018, ch. IV.

⁸ For details cf. Bardo Fassbender, “What’s in a Name? The International Rule of Law and the United Nations Charter,” in: *Chinese Journal of International Law*, Vol. 17 (2018), pp. 761-797

⁹ With the earlier mentioned exception.

¹⁰ Hans Kelsen, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik*. Leipzig and Vienna: F. Deuticke, 1934, ch. I/6/c.

declarations – any of the above criteria are met in the normative system of the world organization, i.e. whether there is a correspondence between the *idea* of the rule of law (in the proclamations) and the *reality* of its implementation (not only in the actual conduct of UN organs, but, first and foremost, in its Charter).

The issue is in particular about the enforceability of norms and their consistent application. This includes, first and foremost, the norm of the non-use of force, but also: the *universal application* of norms irrespective of power and privilege; the *absence of arbitrariness* and double standards in norm enforcement; and the compatibility of policies and decisions of all UN organs with *basic human rights*, in particular the right to life. The latter requirement has become especially urgent in view of the sanctions policy of the Security Council since the 1990s. One of the crucial questions, in that regard, will be whether the UN system contains any efficient mechanisms to deal with violations of *jus cogens* by organs of the United Nations itself.¹¹

The rule of law in the UN Charter

None of the above requirements are fully met in the United Nations system. There are only approximations in certain areas. *Uniformity* and *consistency* in the application of the UN's basic norms and principles is not ensured in the context of the Charter. Alluding to Kelsen's definition of law, one might say that the regulative system of the UN is not a *coercive normative order* and, strictly speaking, operates *outside* the parameters of the law – namely in a space between morality and (power) politics, as we shall demonstrate.

Apart from *implicit* and *selective* references in the Charter, which we shall briefly quote below, the “rule of law” is explicitly mentioned only in one key document, namely the Universal Declaration of Human Rights (1948), which was adopted by resolution 217 of the General Assembly at its third session in Paris.¹² In the third paragraph of its Preamble, the Declaration states, “that human rights should be protected by the rule of law.”

The Charter itself nowhere uses the term “rule of law.” However, the Preamble, in its third paragraph, solemnly has the “Peoples of the United Nations” state their “determination” to “establish conditions under which justice and respect for the obligations arising from

¹¹ Cf. Köchler, *The United Nations Sanctions Policy and International Law*. Penang (Malaysia): Just World Trust (JUST), 1995.

¹² A/RES/217(III), 10 December 1948.

treaties and other sources of international law can be maintained.” This pronouncement on the role of law – or legality – in relations between states stands in striking contrast to how the Charter introduces one of the basic “Purposes” of the United Nations, namely the maintenance of international peace and security. Article 1, Paragraph 1 effectively limits commitment to the rule of law to the “adjustment or settlement” of international disputes or situations “by peaceful means.” In parenthesis, the Charter states that this must be undertaken “in conformity with the principles of justice and international law.” This proviso, however, does not apply to that part of the same sentence in Paragraph 1, which describes the Purpose of taking “effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression, or other breaches of the peace.”

We must not overlook the striking difference of approach:

- The description of the Purpose of conflict settlement by peaceful means relates to the competencies of the Security Council under **Chapter VI** of the Charter where resolutions of the Council are of the nature of mere recommendations.
- In contrast, the description of the Purpose of taking effective collective measures for the preservation or restoration of peace relates to the competencies of the Council under **Chapter VII**, which sets out the Council's vast coercive powers and its authority to adopt decisions that are legally binding upon all member States.

In the carefully drafted text of Article 1, Paragraph 1, it is not by accident that the phrase about “justice and international law” is exclusively linked to *non-binding* resolutions of the Council. Though almost always overlooked, the intention of the wording is to make this description of the Purpose conform to the provisions of Chapter VII (Article 27[3]) that give the Council virtually unlimited powers under its mandate of collective security. In plain words, restricting reference to the principles of international law to the Council’s role under Chapter VI is meant to give the Council a free hand in terms of coercion. Apparently, the drafters of the Charter – the “sponsoring governments,” representing the States that later became the Security Council’s permanent members¹³ – did everything to make sure that no conceptual or associative link is established between the idea of the “rule of law” and the core area of the UN mandate, indeed the rationale of its existence: the preservation or restoration of peace by

¹³ The government-in-exile of France was not a sponsoring government and did not take part in the drafting of the Charter at Dumbarton Oaks.

means of coercion. It was again Kelsen who early on commented on this statutory peculiarity – and inconsistency – in favor of great power politics.¹⁴

As we shall see in the analysis of Chapter VII, the *selective* reference to the principles of international law in Article 1 of the Charter is quite indicative of the role of power in the UN system, and of its predominance over law.

Structural issues: The role of the Security Council

The rule-of-law problem in the UN, so to speak, is *structural*. It is rooted in the very architecture of the world organization, intended by its founders. The primary role of the Security Council, with executive power effectively in the hands of its permanent members, is enshrined in the Charter at the expense of the rule of law and at the price of systemic, *normative contradictions* that undermine the legitimacy of the entire system from the outset.¹⁵ There should be no illusion: the organization would not have been founded without this *sacrificium intellectus* in terms of legal consistency.¹⁶ As the only body with *enforcement powers*, the Security Council operates completely outside a framework of checks and balances. A separation of powers – indispensable criterion of the rule of law – is totally alien to the Charter. To stress it yet again: the omission of the “principles of justice and international law” from the first part of Article 1(1) was not by accident. It was deliberate, so as to make it possible to define the Council’s role as a kind of supreme arbiter in situations of global emergency, almost a “law unto itself,” in the words of US Secretary of State John Foster Dulles.¹⁷

All member States and UN organs are subordinate to the Council's authority under Chapter VII of the Charter. This also includes the International Court of Justice (ICJ), as has become evident e.g. in the Lockerbie dispute between Libya and the United States and the United Kingdom. In the Judgment of 27 February 1998, the Court acknowledged that it was able to admit a Libyan application *only* because the relevant Security Council resolution on the case was not based on Chapter VII. Having been adopted in the framework of Chapter VI

¹⁴ Hans Kelsen, “The Preamble of the Charter: A Critical Analysis,” in: *The Journal of Politics*, Vol. 8 (1946), pp. 134-159.

¹⁵ For details cf. Köchler, “Normative Inconsistencies in the State System with Special Emphasis on International Law,” in: *The Global Community – Yearbook of International Law and Jurisprudence 2016*. Oxford: Oxford University Press, 2017, pp. 175-190.

¹⁶ One of the founding fathers of the UN, Cordell Hull, US Secretary of State in the crucial period of negotiations at Dumbarton Oaks, reminded us of this crude reality of power politics in his memoirs (*The Memories of Cordell Hull*. New York: Hodder and Stoughton Ltd., 1948, vol. II, esp. p. 1664).

¹⁷ “The Security Council is not a body that enforces agreed law. It is a law unto itself.” (John Foster Dulles, *War or Peace*. New York: Macmillan, 1950, p. 194.)

("Pacific settlement of disputes"), it was, according to the Court, "a mere recommendation without binding effect."¹⁸ Similarly, it is impossible for the ICJ, under the current system, to rule on the compatibility of the Security Council's decisions with norms binding upon all States individually, in particular human rights. The Council is not accountable to any other UN body or member State. Thus, there is a supreme irony in the wording of Article 24(2) of the Charter: "In discharging these duties [maintenance of international peace and security / H.K.] the Security Council shall act in accordance with the Purposes and Principles of the United Nations." As we have explained earlier, reference to the principles of justice and international law is ominously omitted from the description of "Purposes" concerning action under Chapter VII. Therefore, the commitment of Article 24(2) is *irrelevant* in terms of the rule of law.

As serious as the total absence of checks and balances are certain procedural arrangements in Chapter VII, contradicting (1) a foundational principle of the Charter and (2) a general principle of law. The voting rules of Article 27(3) are drafted in such a way as to guarantee to the main enforcers of the Council's coercive resolutions, its permanent members (P5), total discretion plus protection from any condemnation or counter-action.¹⁹ The veto rule – euphemistically drafted as requirement of the "concurring votes of the permanent members" – is an outright negation of the principle of "sovereign equality" of all member States (Article 1[2]). The absence of an obligation of parties to a dispute to abstain from voting in all decisions under Chapter VII is even more carefully camouflaged in the wording of Paragraph 3 of Article 27, after a semicolon. It enables an aggressor state, if it is a permanent member, to act with total "impunity" because such a State can use the veto to protect itself. (Indirectly, that State may also protect an ally that is not a permanent member from any enforcement action.) By way of apposition, Paragraph 3 of Article 27 (on voting procedure in the Council) stipulates a requirement for parties involved in a dispute to abstain from voting in decisions under Chapter VI – while no such obligation is stated for decisions under Chapter VII.²⁰ This omission, by way of implication, mirrors the omission of any reference to the principles of international law in the earlier mentioned Article 1(1) concerning the exercise of executive powers by the Security Council. In both cases, the purpose is one

¹⁸ International Court of Justice, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Judgment of 27 February 1998, paras. 39-44.

¹⁹ For details, see Köchler, *The Voting Procedure in the United Nations Security Council: Examining a Normative Contradiction and its Consequences on International Relations*. Studies in International Relations, Vol. XVII. Vienna: International Progress Organization, 1991.

²⁰ Wording of the last part of the sentence after the semicolon: "provided that, in decisions under Chapter VI (...) a party to a dispute shall abstain from voting."

and the same: to free the Council, first and foremost its permanent members, from any restraints in the conduct of the mandate of collective security – irrespective of whether or not this is compatible with letter and spirit of the Charter or with general principles of law.

There is another statutory safety valve in the Charter to protect the privileges of the permanent members. Neither of the two above-mentioned provisions – that respectively violate (a) the norm of sovereign equality and (b) the fundamental principle of justice, *nemo iudex in causa sua* – can be removed from the Charter without the consent of the P5 (according to Article 108). It is a strange *circulus vitiosus* of self-protection, which the founders of the organization have built into its statute. They can veto the abrogation of the veto and, thus, enjoy in perpetuity their "unconstitutional" privilege – without which, as Secretary of State Cordell Hull once admitted, the US would never have considered to join the organization.²¹ In view of these *fundamental normative contradictions* – internal (regarding the Charter) as well as external (regarding general principles of law) – the provisions of Chapter VII are a recipe for abuses of power by the "sponsors" of the organization who drafted the Charter upon the end of World War II. Under the present rules, it is impossible to censor or restrain a permanent member. Coercive action is possible against all other States as long as they do not enjoy the protection of a permanent member.

Furthermore, since the end of the East-West conflict, with the collapse of the bipolar balance of power, the Security Council has begun to arrogate *legislative powers* that are alien to the normative architecture of the UN Charter. Acting totally outside a framework of checks and balances, the Council established ad hoc criminal courts (for the former Yugoslavia and Rwanda), insisting to regulate even matters of court administration and judicial appointments by Chapter VII resolutions. In this way, the Council simultaneously acted as *legislative* (concerning the creation of a court) as well as *judicial* authority (concerning court administration), all in the exercise of its *executive* mandate under the Charter.²² In a further step towards claiming legislative authority by executive fiat, the Council established a kind of "terrorism legislature" in the period after September 11, 2001. The decisive measures, in that regard, were resolution 1373 (2001), listed under the title, "Threat to international peace and security caused by terrorist acts," and resolution 1540 (2004), under the title, "Non-

²¹ "... our government would not remain there a day without retaining the veto power." (*The Memories of Cordell Hull*, Vol. II, p. 1664)

²² For details, see Köchler, *The Security Council as Administrator of Justice?* Studies in International Relations, Vol. XXXII. Vienna: International Progress Organization, 2011.

proliferation of weapons of mass destruction." Misleadingly, in my assessment, these resolutions were celebrated as milestones in the history of international relations. Commenting on the first resolution, a delegate in the General Assembly approvingly said, "for the first time in history, the Security Council enacted legislation for the rest of the international community."²³ However, in terms of the international rule of law, the exercise of legislative authority by an intergovernmental organ that is accountable to no one except itself can only be considered as a step towards global anarchy. Considering such steps as precedents for the future course of the UN – as also the statement of the President of the Security Council after the adoption of resolution 1540 seems to indicate – is even more serious since the power "to legislate for the rest of the United Nations' membership"²⁴ is effectively in the hands of only five States.

Conclusion: Rule of force vs. rule of law

In view of the normative inconsistencies and contradictions in the UN Charter, a standard phrase in the resolutions adopted annually (since 2006) by the General Assembly under the item "The rule of law at the national and international levels" appears in a new light. In the third paragraph of these resolutions, the General Assembly, instead of plainly committing itself to the "international rule of law," reaffirms "its solemn commitment to an international order based on the rule of law *and* international law"²⁵ (emphasis H.K.). Against the backdrop of a pattern of oblique implications we have diagnosed in some phrases of the Charter, the strange dichotomy, expressed in the separate mentioning of the two notions, raises questions as to the real and unequivocal commitment of the world organization to the application of the basic principles of law to *all* areas of inter-state relations.

Under the impression of the comprehensive sanctions imposed by the Security Council on Iraq, international civil society increasingly has begun to challenge the legality of coercive action of the Security Council when this results in the denial of basic human rights to an entire people. For the first time, the issue was raised by the International Progress Organization at

²³ United Nations, General Assembly. *Official Records*, Fifty-sixth session, 25th plenary meeting, 15 October 2001, Doc. A/56/PV.25, p. 3. (Agenda item 11: Report of the Security Council, Statement by Mr. Niehaus, Costa Rica.)

²⁴ Gunter Pleuger (Germany): United Nations, Press Briefing. *Press Conference by Security Council President*, 2 April 2004.

²⁵ E.g., resolution 75/141, adopted by the General Assembly on 15 December 2020.

the UN Human Rights Commission in Geneva in 1991.²⁶ Later, in the wake of the unilateral use of force against Iraq in 2003, in violation of Article 2(4) of the Charter by a permanent member of the Security Council, did UN member states raise, albeit rather timidly, questions as to the legality of coercive action under the mandate of collective security. At the initiative of Austria, an "Advisory Group" was initiated in 2004 that presented a report on "The Security Council and the Rule of Law."²⁷ However, in its 17 "Recommendations" the Committee, more or less, stated truisms or delved into superficial aspects of crisis management. As was the case with other similar initiatives, the elephant in the room – namely, the effective status *above the law* granted to the P5 under the Charter – is nowhere addressed in this report. Apparently, the authors carefully avoided any identification of the statutory shortcomings that facilitated unilateral action in the post-Cold War scenario. Obviously, they did not in any way want to irritate or challenge the great powers. More outspoken in the defense of international legality, and in addressing core issues, was the representative of Liechtenstein in remarks to the Security Council open debate on "Upholding International Law Within the Context of the Maintenance of International Peace and Security" in May 2018. Ambassador Wenaweser said: "Those who believe in the rule of law, as we do, are challenged to stand up for the primacy of international law at the heart of the international order. The prohibition of the illegal use of force is a core provision in that respect."²⁸

In conclusion: As long as the contradictions in the provisions for the organization's management of collective security are not eliminated from the Charter, the United Nations system will not be compatible with even the most basic requirements of the rule of law. The Security Council's vast coercive powers under Chapter VII are the core element of the United Nations, but they stand in isolation from the overall architecture of the Charter – and in opposition to basic principles of law and justice. They are not embedded in a system of checks and balances, but resemble emergency powers similar to those defined by Carl Schmitt as the

²⁶ United Nations / Economic and Social Council / Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, forty-third session, 5-30 August 1991, Palais des Nations, Geneva: *Statement by the delegate of the International Progress Organization, Mr. Warren A. J. Hamerman, on the U.N. sanctions against Iraq and human rights.* (United Nations / Doc. E/CN.4/Sub.2/1991/SR.10, 20 August 1991)

²⁷ *The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-based International System. Final Report and Recommendations from the Austrian Initiative, 2004-2008.* Vienna: Federal Ministry for European and International Affairs; New York: Institute for International Law and Justice, New York University School of Law, 2008.

²⁸ United Nations, Security Council, Seventy-third year, 8262nd meeting, 17 May 2018, Doc. S/PV.8262, p. 42.

authority of the sovereign ruler under the state of exception, beyond and above the law.²⁹ As long as this is the case, it will be the *law of force*, not the *rule of law*, that shapes relations between states and determines the fate of "The Peoples of the United Nations" in whose name the founders of the organization promulgated the Charter. Notwithstanding the political taboo, or a diplomatic "denial of reality": ultimately, power trumps law in the system of the United Nations.

²⁹ Köchler, "Carl Schmitt's Conception of Sovereignty, the UN Security Council, and the Instrumentalization of the 'State of Exception,'" in: Valur Ingimundarson and Svein Jóhannesson (eds.), *Liberal Disorder, States of Exception, and Populist Politics*. Abingdon (UK)/New York: Routledge, 2021, pp. 27-43.