

Address to the UN Security Council's Working Group on Conflict Prevention and Resolution in Africa

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The concept paper prepared for this session by the Chair of this Working Group raised a number of issues. In my short time I would like to address only the "third" element raised: namely whether and how the rule of law applies to the international community's efforts to resolve conflict and in particular to the efforts of the UN Security Council.

First, I need to say a few words about the "rule of law." The rule of law is hard to define but most of know a violation of it when we see it. It occurs when political leaders interfere with the independence of courts or prosecutors, when politics not law leads to detentions of people, when rulers or institutions manipulate their powers to partisan advantage. The rule of law's assurance of reciprocal application – that rules that apply to one needs to apply to all, including the rulers themselves--- protects us from arbitrary exercise of power. The rule of law is grounded not just on predictable, stable, and generally applicable rules. It requires independent agents or organs whom we trust to respond to legal arguments and to apply these without bias or political interference.

Compliance with the rule of law requires that those "independent" agents that seek to promote the rule of law need to be kept politically as well as legally accountable -- at both the international and national levels. Our trust in the so-called agents of the international community is eroded when these are seen as immune from legitimate political demands as well as the law. A Security Council that is subject to absolutely no political or legal checks – that

could, for example, commit genocide when it finds 9 votes to justify it -- finds no support among politicians or lawyers. Those applying the law and protecting the peace need to be seen as themselves subject to what they promote. To the extent the Security Council tries to “govern the world” by promoting conflict resolution in Africa in accordance with the rule of law it too should be subject to the constraints that are imposed on anyone else that governs. If the Council is a “police force” for the world, we increasingly expect it to act like other police forces – that is to be a part of legitimate governance and not *apart* from it.

The Security Council, like all other UN organs, is subject to some forms of political accountability. The “political” checks and balances that impact on the Council and may at times pressure that body into behaving in ways that are consistent with the rule of law include most prominently the need for the Council to find nine votes to affirm what it seeks to do, including avoiding the vetoes of the P-5 and the need to find support from the non-vetoing wielding members. Political accountability may also take the form of criticism by the General Assembly (notwithstanding the ostensible limits imposed by art. 12(1) of the Charter which even the International Court of Justice appears to think is a dead letter), criticism by NGOs and individual governments of its actions, and, of course, the ever-real threat that states that disagree with what the Council does may not abide by even its legally binding action. While states are formally bound to abide by Chapter VII decisions of the Council, the degree of their compliance is always subject to political legitimacy. The relatively weak enforcement power of international law ensures that is the case. As the late great UN scholar Oscar Schachter pointed out, the ultimate “check” that the Council faces is legitimacy. If it takes action that many states find unpalatable or that those states deem incompatible with the Charter the Council’s actions

might be met with civil disobedience -- as some say occurred by the end of 12 years of comprehensive Council sanctions directed against Iraq after its invasion of Kuwait. As all here know, those Council sanctions, criticized far and wide for their human rights impact on vulnerable populations, ultimately proved so porous that it led the Council to move towards the “smart” sanctions of resolution 1267 and its progeny – and today’s human rights complaints against those smart sanctions. Today, the Council’s inability to provide those subject to its smart sanctions with the individualized juridical process that some believe human rights requires has led to questions before national courts – and the ever present possibility that some of those edicts will not elicit thorough-going compliance by states. Of course states may not acknowledge that they are engaging in civil disobedience—they may simply be turning a blind eye or not putting sufficient resources to enforcing UN sanctions programs that lack rule of law legitimacy.

The extent to which the Council is formally subject to legal accountability is, as the concept indicates, more contentious. So far as I am aware no international court has so far clarified what exactly are the legal limits on the Council, including what limits might apply when acts to prevent conflict under chapters VI or VII. I would suggest, however, that the Council has already been subject to indirect judicial review by some international and national courts. This is suggested by some of the individual opinions issued in the course of the Lockerbie case in the International Court of Justice, and especially by those judges who suggested that while Chapter VII action by the Council (and in particular the ultimate determination of what constitutes a “threat to the peace”) might not be reviewable, aspects of the Council’s actions – and especially its Chapter VI actions – might indeed be examined for consistency with the rest of the

international law, including the UN Charter. It is also suggested by the ICTY's first decision on jurisdiction in the Tadic case. While the Appellate Chamber of the ICTY affirmed that the Council had the legal power to establish the ICTY, it suggested that had the Council attempted to establish a court that did not respect the fundamental human rights protections owed to criminal defendants under human rights law, that might not have been the case. To many scholars, the ICTY appeared to be suggesting that the Council itself was subject – perhaps because it is subject to the UN Charter – to the human rights protections with which the UN Charter has come to be associated over time. Some might also consider the European Court of Justice's decision in Kadi – even though only about the legality of EU law – also a form of indirect judicial review of the Council. Certainly the effect of the Kadi decision – and of other national court decisions that have considered the consistency of the Council's counter-terrorism sanctions with human rights norms – is consistent with what we expect to occur as a result of judicial review. These judicial actions appear to be motivating the Council to consider ways to make its sanctions process more amenable to review and reconsideration, though not yet the kind of judicial process that seems to have been anticipated by the Kadi decision. These decisions suggest that effectively the Council might be made subject to the rule of law if national and international judges fail to give effect to its edicts because these are inconsistent with regional or even national human rights norms.

As the concept paper indicates, the legal limits on the Council are not entirely clear. The clearest limit emerges from Art. 24(2) of the UN Charter which affirms that the Council “shall act in accordance with the Purposes and principles of the UN.” (While some think that art. 25 of the Charter requires the Council to act “in accordance with the Charter” as a whole, the text

of article 25 in my view only states that members agree to abide by the Council's decisions, as the Charter indicates under art. 48. Nor can it be said that art. 36 (3) requires the Council to defer legal disputes to the ICJ. Art. 36(3) only indicates that in making recommendations that the Council "should" bear in mind that parties to legal disputes should refer them to the ICJ.)

Just what concrete legal limits are imposed by the "purposes and principles" of the UN are not clear given how vague these are. While "international law" is mentioned in art. 1(1), that provision seems to anticipate that the Council act in conformity with "international law" only when it is "adjusting or settling" international disputes. Art. I famously does not define the "human rights" and "fundamental freedoms" mentioned therein and no such bill of rights was included in the Charter. Moreover, the UN itself is not a party to the international human rights covenants or other human rights treaties that were later developed. Indeed, those human rights instruments anticipate the abuse of *state* not international organization action. And imposing legal limits on the Council is all the more difficult given art. 103—which affirms that the Charter prevails over any other international agreement. The Council has, of course, used art. 103 to trump treaties – like the civil aviation agreements it dispensed with when it imposed aviation sanctions against Libya in the wake of Lockerbie. Some scholars argue that art. 103 enables the Council to trump treaties but that since art. 103 does not mention custom, the Council cannot trump and therefore remains subject to other international obligations, including customary law and of course jus cogens.

But those seeking legal limits on the Council should not, in my view, stop with the text of the Charter. Today, there is a strong case to be made that the Council is bound by its own

institutional practice to respect basic human rights, including but not limited to jus cogens, and including the principles of international humanitarian law. From the very beginning of the organization, it is clear that the Charter's meaning has been clarified, deepened and expanded by the practice of its organs – which has been deemed to be functionally equivalent to the practice of the parties under the Vienna Convention on Treaties' article 31. The Council has now affirmed the need to respect human rights and humanitarian law so often that it must be deemed to have accepted those limits on its own actions. The Council, which has affirmed that its own peacekeepers are subject to the principles of international humanitarian law, is, in my view, estopped from acting otherwise or disclaiming responsibility when those principles are violated. In addition, there is greater acceptance (including in the dicta of European courts) of the proposition that states might themselves be liable for actions that they commit while in organizational mode. As is suggested by the articles of responsibility of international organizations recently released by the International Law Commission, states that aid or assist an international organization in the commission of an internationally wrongful act, which direct or control such an organization that commits such acts, or which attempt to circumvent their own legal responsibilities by taking advantage of the action of such organizations might be accused of abuse of right sufficient to trigger *state* responsibility. These risks may prompt states, including members of the Council, to take greater care to respect the rule of law.

I would argue that these developments suggest that as a matter of good practice, the Council needs to adhere to a clear statement rule. If the Council thinks that dealing with a threat to the peace requires taking action that would otherwise violate a treaty or a norm of custom, it must in my view on the face of its resolution specifically indicate that this is the case and that it is

exercising its art. 103 authority to trump those rules. In the absence of such explicit textual reference in the resolution, interpreters of the resolution, including courts, are free to interpret the Council's edicts as requiring conformity with international legal obligations. Such a clear statement rule – which is sometimes applied by courts dealing with legal limits presumed to apply to national legislatures – will make Council violations of the rule of law rare indeed. Getting nine votes for the proposition that, for example, “states must take the required action notwithstanding their obligations under the ICCPR or ICESCR” will be difficult.

Let me address a second point: what does the rule of law require of the Council when it deploys, as it has in the case of Libya and Sudan, the tool of referring a situation to the International Criminal Court (I CC)?

As the concept paper prepared for this meeting suggests, these Council referrals might be seen as efforts by that body to prevent the reoccurrence of conflict and build peace by using the principal tool for international criminal accountability that we have. It is plausible to see these referrals as attempts to strengthen the crime prevention role of the ICC and as a ways to affirm states' so-called “responsibility to protect.” The Rome Statute for the ICC succeeded beyond all expectations in establishing a relatively independent tool for the enforcing the rule of law. The ICC's negotiators successfully defeated a strong push from the United States, among others, that would have made both court and prosecutor subject to the whims of the UN Security Council. They created an independent prosecutor with a nine year tenure in office not subject to renewal along with a court with permanent judges who have demonstrated “high moral character.” They gave the office of the prosecutor, subject to judicial checks, the power

to initiate investigations proprio motu, without need for permission from either the states parties to the Court or the Security Council. At the same time, they constructed an elaborate system of checks and balances within the Court to alleviate concerns over an “out of control” or runaway prosecutor. These included limited jurisdiction over the most serious of crimes, judicial review by pre-trial chamber over prosecutorial decisions, the principle of complementarity, restrictions on the election and removal of prosecutors and judges, and oversight over the entire Court by the ICC’s Assembly of States Parties—now consisting of over 120 states each with one vote. As a political compromise, they also enabled the Court to be somewhat responsive to the political needs of the Security Council and the P-5. While they rejected the Council as exclusive gatekeeper, they left open the possibility of the Council as occasional interloper and not merely disinterested spectator. Art. 13(b) of the Rome Statute enables the Security Council to refer situations to the Court and its art. 16 permits it to defer for up to 12 months certain investigations and prosecutions. The Council, in other words, can start the process and for a while delay it but both options require nine votes (including those of the P-5).

But the Council’s Libyan and Sudan referrals are not a ringing endorsement of the rule of law and the ICC’s careful efforts to protect it. It *is* remarkable that in these two cases non-parties to the Rome Statute like the U.S., Russia, China, and India voted in favor or refused to block using a court that these members do not fully support. These Council actions suggest that the ICC has now become part of the Council’s regular toolbox to deal with threats to the peace. But that is precisely the problem. These resolutions are a mixed blessing for the Court’s and the prosecutor’s perceived and real independence. These referrals might be seen as turning

the Court – and its prosecutor – into a “mere” tool of diplomacy that does not fully respect the rule of law. In these cases, the Council was within its rights to refer complex situations involving on-going conflict within two African states to the Court in instances where the countries involved had not freely consented to the Rome Statute, where the situations were likely to require politically risky, and expensive investigations as well as extremely controversial high level indictments (including of then sitting presidents). At the same time, however, the way the Council used its power, that is, the questionable short-cuts that it took in these referrals, undermine the legitimacy of its actions – and indirectly of the Court.

It referred these cases while refusing to pay itself for the resulting expenses – despite art. 115(b) of the Rome Statute which clearly states that UN funds should be used for expenses incurred due to referrals by the Security Council.

It referred these situations subject to time restrictions – in the case of Libya, for crimes committed only since Feb. 15, 2011. This limited time frame precludes the fuller inquiry needed to achieve the wider truth-seeking goals of international justice.

It referred these situations without any follow-up enforcement actions by the Security Council to date; that is, without any positive responses to the prosecutor’s subsequent requests for assistance on securing arrests or evidence. Indeed, the very referrals to the Court specifically indicate that non-Rome party states incur no obligation to cooperate with the Court or the Prosecutor; and in both cases, the Councils’ referrals specifically excluded the possibility that non-Rome party nationals could be prosecuted by the ICC, even for crimes committed in the Sudan or Libya by their own nationals during the relevant period.

These limitations suggest a Council that refuses to permit the reciprocal application of the rule of law to itself or its members. These referrals are not the expressions of faith in the independent criminal process that some described them to be. With friends like the Security Council dumping selective cases on the Court without paying for them, who needs enemies? In both instances, the Council may have misused the Court if its goal was merely to put political pressure on the regimes in the Sudan and in Libya – without, in either case, really supporting the possibility that high level perpetrators would be arrested and actually tried by the Court. The fact that at one point the Council even considered deferring the situation in the Sudan under art. 16 of the Rome Statute once its immediate goals for South Sudan were achieved also suggests that the Council sees the ICC as a mere political tool that can be traded away if politically expedient – and not part of an emerging –if fragile – rule of law system for criminal accountability for those who commit the most grievous acts known to man. Some see the Libyan referral as perhaps only a strategy to delegitimize a regime that some members of the Security Council wanted to take down—even if this exceeded the formal “humanitarian” mandate of Council Resolution 1973 authorizing the limited use of force in Libya. Indeed, it is not hard to see the Feb. 15th temporal limits on the Court’s jurisdiction in the Libya case as a transparent ploy to preclude inquiries into periods when certain members of the P-5 were implicated in the most noxious aspects of Qaddafi’s regime. Transposed to the national level, this would seem a clear instance of political intrusion into prosecutorial discretion.

The Security Council’s arguably cynical misuse of the Court exacerbates the perception that the ICC unduly focuses on African cases, does not adjudicate crimes by nationals of certain members of the Council itself, and does not constitute an impartial application of international

criminal law. The fact that all of these flaws in this instance emerge from the actions of the Council, and not the Court or its prosecutor, is likely to be lost on critics of the ICC who see it as undermined by bias and selectivity.

The budgetary hypocrisy evident in the Council's Sudan and Libyan referrals is particularly egregious. A time honored way to undermine prosecutorial independence – and the rule of law -- is, after all, to starve the prosecution of resources to do its job effectively.

The Council's Libyan and Sudan referrals do not clearly violate the UN Charter. But in my view they potentially damage the Court as a legitimate agent of transitional justice and conflict prevention.

The greater lesson for those working on the successful promotion of the rule of law in Africa is that not every use of the ICC by the Council is a good thing – not if such referrals undermine the appearance and reality of reciprocal application of the rule of law. It would be better if the Council's future interactions with the ICC would show a greater sensitivity to the needs of the rule of law and not just the needs of the P-5. Those outside the Council – including the General Assembly and NGOs-- who are capable of exercising “political checks” on the Council, need to act accordingly and not just applaud whenever the Council manages to find the votes to refer a situation to the ICC. They should insist that such referrals be backed by a Council commitment to enforce what the independent agents of the Court do with such referrals.

The flaws in the Sudan and Libyan referrals suggest that these issues should not be left to international lawyers to resolve. We should be interested in a Council that is politically, morally, and legally legitimate over the long term. We should be interested in encouraging

Council institutional “precedents” that promote, not undermine, the rule of law and affirm, for example, self-imposed prudential limits on what the Council can do pursuant to Chapter VII.

We should be interested in a circumspect Council that is aware of its tenuous political legitimacy (given its composition and voting structure) – and not just a body that adheres to the very minimal Charter restrictions to which it is formally subject.

Thank you.