Chapter Four

'Constitutionalization' of International Law: A Sceptical Voice

Michael Wood*

On 14 March 2007, Colin and I took part in a conference at the Centre for International Governance, University of Leeds, entitled *The 'Constitutionalization' of International Law; Sceptical Voices*.[1] The present contribution draws on what I said on that occasion.

After some preliminary remarks, I look at certain 'constitutionalist' approaches to international law that are found in the literature. I then examine briefly the nature of the Charter of the United Nations and the Security Council. Is the Charter a world constitution? Is the Council an executive, a legislature, or quasi-judicial? At Leeds, I went on to offer some thoughts about Article 103 (priority of Charter obligations over other obligations), a provision of the Charter of the United Nations that may be considered to have a constitutional function within the international community; and about possible limits on the powers of the Council, deriving either from the Purposes and Principles of the United Nations (Articles 1 and 2 of the Charter) or from peremptory norms of international law (*jus cogens*) – but I shall not repeat those thoughts here.[2]

* Sir Michael Wood, KCMG; Former Legal Adviser, Foreign and Commonwealth Office; Senior Fellow, Lauterpacht Centre for International Law, University of Cambridge, and a member of the International Law Commission.

1 The participants took part at the kind invitation of Steven Wheatley. Colin Warbrick spoke on 'Constitutionalism and European Court of Human Rights', David Anderson on '"Constitutionalization" and the Law of the Sea', while I spoke on 'The Security Council and the 'Constitutionalization' of International Law'. The three contributions at the conference are (as of May 2009) available on the website of the Centre for International Governance, University of Leeds.

2 I have already set out some views on these matters in my 2006 Hersch Lauterpacht Memorial Lectures entitled 'The UN Security Council and International Law'. These are available on

K.H. Kaikobad & M. Bohlander (eds.), *International Law and Power: Perspectives on Legal Order and Justice*. Essays in Honour of Colin Warbrick, pp. 85–97.

1. Preliminary Remarks

When speaking to persons coming new to international law, particularly non-lawyers, I sometimes offer three 'health warnings.' Beware of idealists and cynics! Beware of single-issue lawyers![3] Beware of policy-driven lawyers![4] In the case of some friends and colleagues, all three warnings may be appropriate. None is needed in the case of Colin Warbrick.

I shall say just a few words about the first of these health warnings. Scepticism should not be confused with cynicism, though the two may overlap. The sceptics and the cynics were followers of different teachers in ancient Greece, and the latter may seem less admirable to the modern mind. A dictionary definition of 'sceptical' reads 'Inclined to suspend judgement, given to questioning truth of fact(s) and soundness of inference(s), critical, incredulous'; 'cynical', on the other hand, is defined as 'Like a cynic [one who sarcastically doubts human sincerity and merit], incredulous of human goodness; sneering.'[5] We all recognize the cynics when we come across them. 'Idealists', on the other hand, tend to act as though international law is a panacea that will save the planet (or at least the whale); stamp out human rights abuses; prevent war and terrorism; eliminate weapons of mass destruction; usher in an era of harmony in world trade; eliminate poverty, etc., etc. International law has, of course, a contribution to make towards each of these important aspirations, but their achievement is ultimately a matter for policy-makers. As Vaughan Lowe puts it in the concluding sentence of his *International Law*, '[t]here are many times when it is better to call upon a politician, or a priest, or a doctor, or a plumber'.[6] To overstate the role of international law can be as harmful as to understate it.

The 'idealist' approach has been around for a long time, and is not confined to (and not necessarily to be found in) those working for non-governmental organizations. Early in the twentieth century there was a strong movement among the foreign policy establishment in the United States, inspired in part by the success of the *Alabama* arbitration, that believed that war could replaced by international arbitration, that the establishment of an international court would

the website of the Lauterpacht Centre for International Law, University of Cambridge (and will be expanded and published as a book in due course).

3 That is, those specializing in a single field, such as the law of the sea, international environmental law, or international human rights law.

4 Such as those associated with a particular cause or the adherents of certain policy-oriented 'Schools', not least in the United States. For what seems to be a 'sceptical' view of these Schools, see J.-P. Cot, 'Tableau de la pensée juridique américaine', 110 (2006) *RGDIP* 537.

5 *Concise Oxford Dictionary*.

6 Oxford, 2007, p. 290.

herald an era of universal peace.[7] Such idealism was not confined to the New World. In 1904 the *Institut de Droit International* received the Nobel Peace Prize in recognition of its contribution to peaceful conflict resolution.

Perhaps the most influential international lawyers are the realists with a healthy dose of idealism. Sir Hersch Lauterpacht, for example, was undoubtedly imbued with a considerable degree of idealism, but at the same time was realistic as to what international law could achieve and hence not without influence in what were then such new fields as the punishment of war crimes and the prosecution of human rights.

There are two further points to make at the outset. First, the use of domestic law analogies in international law is often misleading. The 'international community' – itself a much misused term[8] – has little in common with society within a State. The Appeals Chamber of the Yugoslav Tribunal pointed out that:

> [D]omestic judicial views or approaches should be handled with the greatest caution at the international level, lest one should fail to make due allowance for the unique characteristics of international criminal proceedings,[9]

and, in rejecting a domestic judicial analogy, stated emphatically that:

> The setting is totally different in the international community. It is known *omnibus lippis et tonsoribus* that the international community lacks any central government with the attendant separation of powers and checks and balances. . . . the transposition onto the international community of legal institutions, constructs

[7] The early movers of the American Society of International Law were mostly in this camp. See Kirgis, *The American Society of International Law's First Century 1906–2006*, Leiden, 2006, pp. 1–53. Kirgis recalls that 'the American peace movement . . . gave birth to the American Society of International law' (at p. 1), and refers to '[a]rbitration as an instrument of peace – the motivating force behind the creation of the Society' (at p. 33).

[8] The ambiguous concept 'international community' appears in various contexts in international law: as 'the international community of States as a whole' in article 53 of the Vienna Convention on the Law of Treaties; and (following the language of the ICJ in *Barcelona Traction*) as 'the international community as a whole' in Articles 42 (b) and 48 (1) (b) of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts: see Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge, 2002, pp. 276–280. The term is much used – or abused – by politicians, who invoke it to justify all kinds of actions: for the literature, see the works cited in the various contributions in: Byers and Nolte (eds.), *United States Hegemony and the Foundations of International Law*, Hart Publishing, Oxford/Portland, 2003; Warbrick and Tierney (eds.), *Towards an 'International Legal Community'? The Sovereignty of States and the Sovereignty of International Law*, London, 2006; and see ICJ President Guillaume's comment in his Separate Opinion in the *Arrest Warrant of 11 April 2000* case: *ICJ Reports 2002*, p. 3, at p. 43, paragraph 15.

[9] *Blaskić*, Judgment of the Appeals Chamber of 29 October 1997 on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997: IT-95-A, 110 *ILR* 688, at 697, paragraph 23.

> or approaches prevailing in national law may be a source of great confusion and misapprehension.[10]

Second, it is important for international lawyers to distinguish clearly between law and policy. Lawyers may be well qualified to give views on policy in certain fields, not least on issues within the field now often referred to as 'governance', but if they do they are not advising on the law. It is obviously necessary to distinguish clearly between law and policy when facing litigation. Any court that is true to its nature will decide questions of fact and law, not policy. But even when litigation is not in prospect, an international lawyer needs to distinguish carefully (not least in his or her own mind) between the function of advising on the law and expressing views on policy. This is important for the credibility both of the lawyer and of the law. Policy advice is worth what it is worth; legal advice has a special authority precisely because it is advice on the law, and the law itself has authority.

II. 'Constitutionalism' and International law

There is an increasing literature on the 'constitutionalization' of international law.[11] By way of example, reference could be made to two recent articles focusing on the 'constitutionalization' of international law within the European Union. The first refers to three approaches to international law.[12] The Germans think of international law as a set of value norms, with the United Nations at its centre. The French model perceives it more as a means to safeguard national interests and to strengthen international influence. The British concept is shaped more by the common law approach that international law norms are developing, but do not necessarily constitute a complete system of

[10] Ibid, at 709–710, paragraph 40.

[11] See, for example, Walter, 'Constitutionalising (Inter)national Governance – Possibilities for and Limits to the Development of an International Criminal Law', 44 (2001) *GYIL* 192; Macdonald and Johnston (eds.), *Towards World Constitutionalism, Issues in the Legal Ordering of the World Community*, Leiden, 2005; Cass, *The Constitutionalization of the World Trade Organization; Legitimacy, Democracy, and Community in the International Trading System*, Oxford, 2005; Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 (2006) *Leiden Journal of International Law* 579; de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order', 19 (2006) *Leiden Journal of International Law* 611; Petersmann, 'Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society', 19 (2006) *Leiden Journal of International Law* 633; and de Wet, 'The International Constitutional Order', 55 (2006) *ICLQ* 51.

[12] Gosalbo-Bono, 'Some Reflections on the CFSP Legal Order', 43 (2006) *CMLR* 337.

law. The second article adopts a somewhat similar approach.[13] Thus, the United Kingdom (and, according to the author, Denmark) closely follow the leading superpower. France (with support from Belgium, Luxembourg, Spain, Portugal and Greece) is more focused on building a unified Europe, thereby helping to shape international law in a more distinct European way. And a constitutionalist Germany[14] (followed by Austria, Sweden, Finland, together with The Netherlands) strives for a global legal community that frames and directs the power of all international actors alike. These are very broad generalisations, albeit perhaps not without a grain of truth – caricatures rather than reality. It seems improbable that the world can be divided up so simply, certainly not when it comes to the approaches of governments and their advisers.[15] Why, if this is true, has the United Kingdom accepted the compulsory jurisdiction of the International Court of Justice for decades,[16] whilst Germany has done so only in the last year?

Many international legal theories, including those that may be seen to fall under the heading of 'constitutionalism,' are essentially policy approaches.[17] As such they may be instructive, even at times useful, but they are policy constructs, not law. At the risk of oversimplifying, they might include the following:

(a) The idea of the '*constitutionalization*' of international law. This includes, but goes beyond, the concept of a hierarchy among international legal rules, deriving in part from widespread acceptance of the existence of *jus cogens* and the priority accorded to Charter obligations by the United Nations Charter – sometimes referred to as 'relative normativity'.[18] Constitutionalist approaches seem to be especially popular with those writing on the law of the World Trade Organisation and United Nations law. Those who adopt a 'constitutional perspective' towards the Charter, or indeed towards other areas of international law, seek to import into international affairs legal concepts from various domestic laws, while sometimes admitting that the analogy is imprecise, and that national constitu-

[13] von Bogdandy, 'Constitutionalism in International Law: Comment on Proposal from Germany', 47 (2006) *Harvard International Law Journal* 223.

[14] The explanation could be simply that academic international lawyers in Germany also teach constitutional law.

[15] Wood, 'A European Vision of International Law: To What End?', in Ruiz-Fabri, Jouannet and Tomkiewicz (eds.), *Proceedings of the Second Biennial Conference of the European Society of International Law*, Hart Publishing, Oxford/Portland, 2008.

[16] Wood, 'The United Kingdom's Acceptance of the Compulsory Jurisdiction of the International Court', in Fauchald, Jakhelln and Syse (eds.), *Festkrift til Carl August Fleischer Fred er ej det Bedste*, Oslo, 2006, p. 621.

[17] Scobbie, 'Wicked Heresies or Legitimate Perspectives? Theory and International Law', in Evans (ed.), *International Law* (Second edition), Oxford, 2006, p. 83.

[18] Weil, 'Towards Relative Normativity in International Law?', 77 (1983) *AJIL* 413; and Shelton, 'International Law and "Relative Normativity"', in Evans (note 17), p. 159.

tional concepts (which of course themselves vary from State to State and over time within each State) are not directly transferable to the international sphere. Often they fail to clarify in what sense they are using the word 'constitution'.[19]

(b) The less prescriptive idea of '*global administrative law*', or '*global public law*', or '*global governance*.'[20] This is a more modest approach than that of the 'constitutionalists'. 'Global administrative law ... asks whether and to what extent ideas from domestic administrative law can help us solve accountability problems in global governance. ... [i]n the circumstances of global governance, attempts at 'constitutionalising' the political order by forcing it into a coherent, unified framework are problematic as they tend to downplay the extent of legitimate diversity in the global polity. ... the shape of global administrative law is likely to be, and should be, essentially different from that of domestic administrative law.'[21]

What the proponents of this idea seem to be saying is that when international bodies engage in regulation they should (as a matter of policy) apply public law principles comparable to, though not necessarily identical to, those found in many domestic systems. And that if they do not, they may find their legitimacy lessened and run the risk that domestic courts are more ready to question what they have done.

(c) An '*international rule of law*' approach. The term 'rule of law' (*l'état de droit*, *Rechtsstaat*) has no fixed meaning, even at the domestic level.[22] At the international level, the term is used in a variety of contexts and with a range of meanings: see, for example, the Security Council's debates on the rule of law,[23] the numerous references in the 2005 World Summit Outcome[24] and the debate on the item 'The Rule of Law at the International and National Levels' in the Sixth (Legal) Committee of the General Assembly from 2006.[25]

[19] For a discussion of the term in the context of the United Nations Charter, see Crawford, 'Multilateral Rights and Obligations in International Law', 319 (2006) *RCADI* 325, at pp. 363–391; and Fox (ed.), *The Changing Constitution of the United Nations*, London, 1997.

[20] See Kingsbury, Krisch, Stewart and Wiener, 'The Emergence of Global Administrative Law', 68 (2005) *Law and Contemporary Problems* 1; (symposium with extensive bibliography); Krisch, 'The Pluralism of Global Administrative Law', 17 (2006) *EJIL* 247.

[21] Krisch (note 20), at p. 248.

[22] On the rule of law in the United Kingdom, see (with reference to the first incorporation of the concept into statute in section 1 of the Constitutional Reform Act, 2005) the Sixth Sir David Williams Lecture, entitled *The Rule of Law given* by Lord Bingham at the Law Faculty, University of Cambridge, on 17 November 2006. The annual meeting of the French Society for International Law in 2008 (Brussels/Louvain) was devoted to *L'Etat de droit en droit international*.

[23] Most recently, see the UN Secretary-General's Report, *Uniting our Strengths; Enhancing United Nations Support for the Rule of Law*, UN Doc. A/61/636-S/2006/980.

[24] UN General Assembly Resolution 60/1 of 16 September 2005.

[25] UN General Assembly Resolutions 61/39 of 4 December 2006; 62/70 of 6 December 2007 and 63/128 of 15 January 2009.

Expressions of support for 'the rule of law in international affairs' or 'the international rule of law' usually seem to mean little more than that States (and other international legal persons) should act in accordance with their obligations under international law. (This also appears to be the sense of the curious term, a 'rules-based' international society.) Sometimes 'rule of law' is used in the context of post-conflict institution-building, where it presumably has a domestic meaning. And occasionally (though largely in the literature) the term is used in its domestic sense but with reference to international bodies such as the UN Security Council.[26] Attempts have been made by some authors to see how far domestic notions of the rule of law might be applicable to international affairs, but these have not been particularly convincing – unsurprising, given the differences between society within a State and international society.

(d) And then there are a multitude of other '*values-based*' theories of international law, including those based on concepts such as 'legitimacy',[27] 'fairness'[28] 'legality'[29] and 'democracy',[30] or in the past 'world public order',[31] which likewise have but tenuous links to the actual practice of States.

At this point, it may be worth offering a word of caution about the use of language. The followers of particular theories have a tendency to create their own closed world, in which words are used with special meanings, understood only by the initiated. Terms such as 'international community'[32] and 'accountability'[33] are in vogue. Let us take, by way of example, the term 'global governance.' What does it mean, and why is it used? The word 'global' is apparently used in place of 'international' to signify that we are not only concerned with States. But then the word 'international' does not necessarily refer only to States, so

[26] For a critique, see H.E. (Former) Judge Rosalyn Higgins, 'The ICJ, the United Nations System, and the Rule of Law': a talk delivered at the London School of Economics, 13 November 2006 (available on the LSE website); and see her Grotius lecture delivered in Middle Temple Hall on 16 October 2007. See also Watts, 'The International Rule of Law', 36 (1993) *GYIL* 15.

[27] Franck, *The Power of Legitimacy Among Nations*, New York/Oxford, 1990; and see also ibid, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Disequilibrium,' 100 (2006) *AJIL* 88.

[28] Franck, *Fairness in International Law and Institutions*, Oxford, 2005.

[29] Manusama, *The United Nations Security Council in the Post-Cold War Era Applying the Principle of Legality*, Leiden, 2006.

[30] Franck, 'The Emerging Right to Democratic Governance', 86 (1992) *AJIL* 46.

[31] That is to say, the New Haven School.

[32] As Warbrick has written, 'Although it is common to speak of States being members of "the international community", it is probably better to regard them as members of an international system … which avoids misleading assumptions about quite what the values and processes of this international community might be': see 'States and Recognition in International Law', in Evans (note 17), p. 217, at p. 223.

[33] See 'Accountability of International Organizations, Final Report', in International Law Association, *Report of the Seventy-first Conference: Berlin 2004*, London, 2004, pp. 164–234.

why choose a different word? 'Governance' is a portmanteau word that is often intended to mean something more than 'government', but what?[34]

III. 'Constitutionalism', the United Nations Charter and the Security Council

Much of the literature on the 'constitutionalization' of international law concerns the United Nations Charter and Security Council. As examples of the 'constitutionalist' approach, one could mention Professors Fassbender[35] and de Wet.[36] Fassbender seeks to portray the United Nations Charter as 'the constitution of the international community'. De Wet, on the other and, in an article based on her inaugural lecture as Professor of International Constitutional Law at the University of Amsterdam, 'argues the case for an emerging constitutional order consisting of an international community, an international value system and rudimentary structures for its enforcement', and refers to 'an embryonic international constitutional order with the United Nations Charter as the main connecting factor'.[37] On the more sceptical (pragmatic and practical) side, mention should be made of Professor Szurek.[38] The 'constitutionalist' approach may even become damaging; it risks becoming part of what has been termed the 'demonisation' of the Security Council.[39] Much that is currently written about the Council is theoretical, negative, misleading or just plain wrong. The language is often intemperate.[40] Over

[34] The Centre for International Governance, University of Leeds, has happily retained the word 'international'; perhaps its use of the term 'governance' is forgivable. The term 'world government' may well be one to avoid.

[35] See 'The United Nations Charter As Constitution of The International Community', 36 (1998) *Columbia Journal of Transnational Law* 529; and *UN Security Council Reform and the Right of Veto A Constitutional Perspective*, The Hague, 1998.

[36] *The Chapter VII Powers of the UN Security Council*, Hart Publishing, Oxford/Portland, 2004.

[37] De Wet, The International Constitutional Order (note 11), p. 56.

[38] 'La Charte des Nations Unies: Constitution Mondiale?,' in Cot, Pellet and Forteau, *La Charte des Nations Unies*: *Commentaire article par article* (Third edition), Paris, 2005, at pp. 29–68; Crawford, 'Multilateral Rights and Obligations in International Law', 319 (2006) *RCADI* 325, at pp. 363–391; and generally see Fox (note 19).

[39] The title of my talk to the Swedish Branch of the International Law Association, Stockholm, on 10 May 2004.

[40] See, by way of recent examples (in an otherwise generally thoughtful piece), the reference to Security Council resolution 1540 (2004) as 'a legal travesty' and 'null and void of legal effect', and to its adoption as 'the dangerous exercise of power wielded by the Council, out of all step with both the spirit and letter of the Charter': see Joyner, 'Non-Proliferation Law and the United Nations System: Resolution 1540 and the Limits of the Power of the Security Council', 20 (2007) *Leiden Journal of International Law* 489, at p. 490, p. 515 and p. 518.

the longer term, this may tend to sap the Council's effectiveness as a central instrument of multilateralism. Among the criticisms are the following:

(a) It is said that the Council routinely exceeds its Charter powers and acts *ultra vires*. It determines threats to the peace where there are none, and is beginning to act like a 'super-legislature' or a world government. It pays no attention to the limitations on its powers laid down by the Charter. It does not act in accordance with the Purposes and Principles of the United Nations; it ignores *jus cogens*; it ignores human rights.

(b) It is said that the Council imposes impossible obligations on States, which run counter to their constitutional and/or legal traditions and the implementation of which gives rise to real internal difficulties (political, judicial, human rights).

(c) It is said that the Council is not subject to oversight or control (whether judicial or otherwise); it lacks accountability.

The *Charter of the United Nations* is a treaty between States, a multilateral treaty with (as of May 2009) 192 parties. The parties include virtually all States, a relatively recent state of affairs. It is the constituent instrument (that is to say, constitution) of the organisation known as the United Nations, and as such sets out the composition and powers of its principal organs. The International Court of Justice may have referred to the Charter of the United Nations as a constitution in the *Conditions of Admission* case.[41] But that does not mean that the Charter has the same characteristics as a national constitution.[42] The Charter also embodies certain principles of international law, including those on the peaceful settlement of disputes and the use of force, as well as the right of self-defence. And (and this may be its chief "constitutional" element) it provides in Article 103 that in the event of a conflict between obligations under the Charter and obligations under any other international agreement, the obligations under the Charter prevail.

[41] The Court said that '[t]o ascertain whether an organ has freedom of choice for its decisions, reference must be made to its constitution': see *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion of 28 May 1948, *ICJ Reports 1948*, p. 56, at p. 64.

[42] The constituent instruments of some international organisations are entitled 'Constitution', but they are no different in nature from constituent instruments not so named. The debate over the title of the so-called European Constitution (now overtaken) was essentially political. It had little to do with law. In the end the document was formally called 'Treaty establishing a Constitution for Europe', but often referred to as the 'Constitutional Treaty' or 'European Constitution'. The word 'Constitution' has been studiously avoided in the new draft Treaty which was adopted at an Intergovernmental Conference meeting in Lisbon on 13 December 2007. This is entitled 'Treaty amending the Treaty on European Union and the Treaty establishing the European Community' (Document CIG 1/1/07, REV.1).

None of this makes the Charter a 'constitution of the international community'.[43] The word 'constitution' has no particular meaning in international law.[44] As Colin Warbrick expressed it in his contribution to the Leeds conference, 'We have to put up with a rather messy, plural international order.'[45]

It has occasionally been suggested that the Charter should be interpreted in the same way as a national constitution. Thus, in his essay on the interpretation of the Charter in the Simma Commentary (2002), Ress asserts that 'for the normative side of the founding treaty, the Charter and the organizational law derived from it (secondary law), the applicable parallelism can only be found in domestic public law, e.g. the constitutional and administrative law of the member States'. This must be done, he says, 'because of its similarity to national constitutional law. The general principles of law that are applied to the law of international organizations will therefore be primarily those originating in public law'. He cites in support Zemanek, 1964. And he later explains: 'Of special significance in the interpretation of the Charter [is] the object and purpose of this "constitution for the international society".'[46] Yet Conforti is surely right when he warns that 'extreme caution must be used in transferring onto the plane of the United Nations and international law doctrines that belong to domestic constitutional law'.[47]

I turn now to the *Security Council*, which is the principal organ of the United Nations upon which, in order to ensure prompt and effective action, the Members of the Organisation have conferred primary responsibility for the maintenance of international peace and security. Its powers and functions are those set out in the Charter, as developed in practice. It has, in particular, the power to make recommendations, and to adopt decisions binding on the Members of the United Nations.[48]

Some seek to analyse the Council in terms of the separation of powers at the national level, executive, legislative, or judicial. As already suggested, the use of domestic law analogies in international law is often misleading. It is not helpful

[43] Fassbender (note 35). As early as the 1940s, 'Pollux' referred to the UN Charter as 'the Constitution of a World Society': see 'The Interpretation of the Charter', 23 (1946) *BYIL* 54, at p. 63.

[44] In fact, even within a particular national legal system, the term is used in many different contexts: the basic document of a barristers' chambers or a golf club, for example.

[45] *Supra* (note 2).

[46] Simma (ed.), *The Charter of the United Nations: A Commentary* (Second edition), Oxford, 2002, pp. 13–32, at p. 15 and p. 30.

[47] Conforti, *The Law and Practice of the United Nations* (Third edition), The Hague, 2005, p. 13.

[48] For recent works on the Security Council see Malone (ed.), *The United Nations Security Council: From the Cold War to the 21st Century*, Boulder, Colorado; Matheson, *Council Unbound The Growth of UN Decision Making on Conflict and Postconflict Issues after the Cold War*, Washington, DC, 2006; and Luck, *UN Security Council: Practice and Promise*, London, 2006.

to seek to capture the nature of the Council in a single term, especially one derived from domestic systems. Those who seek to do so often go on to deduce further legal or political consequences: that as a legislature it lacks democratic legitimacy; and that as a quasi-judicial body it should follow certain 'rule of law' principles and be subject to judicial review. But each of these lines of argument starts from a false premise.

Especially in the early days, the Council was referred to as the 'executive organ' of the United Nations. Indeed, in early drafts it was referred to as the Executive Council. To the extent that the Council acts like an executive, this is in only one area of United Nations activity (albeit an important area), the maintenance of international peace and security. In this it is unlike organs of limited membership in some other international organisations, which do have general executive powers between meetings of the plenary organ.

A question often asked nowadays is whether the Council may act as a legislature or, as it has been put, as a 'global legislator'.[49] Here, too, the domestic law analogy is not helpful. The question itself is somewhat abstract. It all depends what is meant by 'legislature'.[50] When criticisms are made of the Council 'legislating' instead of taking specific decisions for specific situations, the real question is whether the mandatory decisions contained in Security Council resolution 1373 (2001) on terrorism, or those in Security Council resolution 1540 (2004) on non-proliferation, are within the powers of the Council, and thus lawfully adopted, or not?

Both resolution 1373 (2001) and resolution 1540 (2004) were, as it happens, adopted unanimously and have been repeatedly reaffirmed. No State has seriously suggested that resolution 1373 (2001) was not lawfully adopted. Such concern as was expressed about resolution 1540 (2004) seems mostly to have been concerned with policy question: 'Should the Council so act?', not, 'Is it within the Council's powers so to act?' In the case of both resolutions,

[49] Rosand, 'The Security Council as "Global Legislator": *Ultra Vires* or *Ultra* Innovative?', 28 (2005) *Fordham International Law Journal* 101.

[50] As Matheson says: '[T]he Council does exercise functions that are normally thought of as "legislative" in character, such as imposing legal obligations and creating subordinate bodies with legal authority. But the Council's jurisdiction is limited to actual threats to the peace, and while such threats can be generic in character rather than limited to specific situations, the Council does not have a mandate to address the broad range of international problems that do not pose such a threat. Nor would States accept that the Council should supersede the treaty-making process as the primary creator of legal obligations, as the debate over the Council's actions on WMD proliferation has shown. States will assent to the imposition of obligations where peace and security requires it, but they will otherwise insist on retaining the right to accept or reject such obligations and to participate in their formulation': *supra* (note 48), pp. 235–236.

virtually all States are doing their best to comply. In the General Assembly's Counter-Terrorism Strategy of 2006, the Members of the United Nations all resolved to 'implement all Security Council resolutions related to international terrorism and to cooperate fully with the counter-terrorism subsidiary bodies of the Security Council in the fulfilment of their tasks'.[51] There is no real support in State practice for those who have suggested that elements of these two resolutions were *ultra vires*, quite the contrary.

It has further been suggested that 'there have been a number of occasions on which … the Security Council has framed its resolutions … in language resembling a judicial determination of the law and of the legal consequences said to flow from the conduct of the State that is arraigned', and that there is a line to be drawn, 'admittedly imprecise', between 'prescriptions of conduct that are directly and immediately related to the termination of the impugned conduct … and those findings that … have a general and long-term legal impact that goes beyond the immediate needs of the situation'. The main conclusion drawn is to suggest that 'quasi-judicial decisions' should be subject to some kind of judicial review.[52]

Yet nothing in the practice of the Council suggests a distinction between two categories of decisions: prescriptions of conduct and findings with a general and long-term impact. The Council's action for the maintenance of international peace and security is no longer (if it ever was) confined to immediate or short- or medium-term steps to restore peace. Much of what it does today is long-term: dispute resolution; peace-keeping; peace-building. It may deploy a wide range of measures for the peaceful settlement of disputes and the investigation of situations. If it considers it necessary to pronounce upon a legal matter, there is no basis in the Charter for saying that to do so is not within its competence. This is reflected in the established practice of the Council, for example when it calls for the non-recognition of a situation in order to maintain or restore international peace and security, as in the cases of the South African 'homelands' and the 'Turkish Republic of Northern Cyprus.'

IV. Conclusion

What conclusion may be drawn as regards the approaches outlined earlier in this article: the idea of the 'constitutionalization' of international law; the less prescriptive idea of 'global administrative law'; an 'international rule of law'

[51] General Assembly Resolution 60/288 of 20 September 2006, Annex, paragraph 2(c).
[52] E. Lauterpacht, *Aspects of the Administration of International Justice*, Cambridge, 1991, pp. 37–48.

approach; and various other 'values-based' approaches, including those based on concepts such as fairness and democracy?

It is submitted that these are each in reality policy proscriptions, which may or may not be reflected in the practice of States and international organisations. Of course, from a policy viewpoint, there is no doubt much that international lawyers may learn from private (and public) law analogies. But it is a mistake, leading to something of a dead-end, to suppose that the various constitutional or public law doctrines found in particular domestic legal systems can be transposed directly into the international legal system. Only to the extent that express provision is made to this effect – and that is still rare – can it be said that international law has been 'constitutionalized'.