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QUESTIONING THE LEGIBUS SOLUTUS OF THE UN SECURITY COUNCIL

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A. PREAMBLATORY CLAUSE.

I. Introduction.

The Security Council is established in Chapter V of the United Nations Charter and is charged with the primary responsibility for the maintenance of international peace and security, and carries out these duties on behalf of its members, pursuant to article 24, 25 and 26 of the United Nations Charter.¹ It is one of the six main organs of the United Nations.

Due to the ever-changing nature of threats to international peace and security, the Security Council has acted on widely differing topics.² Given the Security Council's role, it is important to understand the structure, rules, and governing principles that define its unique responsibilities and mandate. These are contained in Chapters V to VII of the Charter of the United Nations.

According to article 24 of the United Nations Charter, its member States agree to accept and carry out the decisions of the Security Council, which means that, unlike the decisions of other UN organs, the decisions of the Security Council are legally binding.³ The decision-making criteria in the Security Council is through voting. It is important to note the organization and functioning of the United Nations Security Council. It is composed of 15 Member States; five of the seats on the Council are permanent, and the remaining ten seats are rotating. The permanent members of the Council are the Member States that emerged victorious in World War II: which include China, France, the Russian Federation (formerly the Union of Soviet Socialist Republic), the United States, and the United Kingdom. Rotating members are elected by the General Assembly for non-renewable two-year terms. According to the General Assembly Rules of Procedure 52/Rev.17, each year the General Assembly elects five new non-permanent members of the Security Council based on equitable geographic distribution, the contribution of the Member State to the maintenance of international peace and security, and its contribution to the other purposes of the Council.⁴

Article 27 of the UN Charter further formulates the *principle of great power unanimity*, that the Security Council's decisions on procedural matters are taken by the affirmative vote of any

¹ Charter of the United Nations 1945, chapter V.

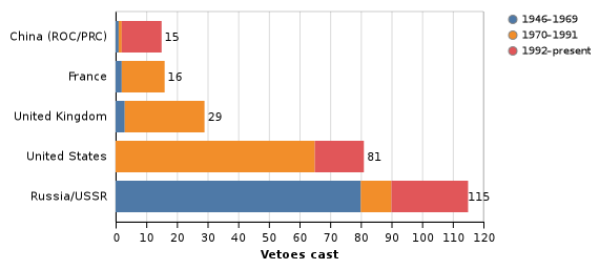
² The Osgood Centre for International Studies, 'History of the Security Council' <www.osgoodcenter.org/SC_BGG_2016> accessed 28 January, 2020.

³ UN Charter, article 24.

⁴ UNGA Rules of Procedure of the General Assembly, UN Doc 52/Rev.17 (2007).

nine members, while the decisions on all substantive matters are taken by the affirmative vote of nine members, including the concurring votes by the permanent members.⁵ The veto power as explained in article 27 of the United Nations Charter further states that a negative vote from any of the permanent members would block the adoption of a draft resolution. However, a permanent member that abstains or is absent from the vote will not block a resolution from being passed.

The principle of great power unanimity guarantees that the Security Council would not take action contrary to the interests of the five permanent members. The following diagram seeks to show the effectiveness of the *principle of great power unanimity* by showing a depiction of resolutions vetoed by each of the five permanent members of the Security Council from 1946 until present.⁶



That said, would the Security Council be considered *legibus solutus*? We need to understand what *legibus solutus* means. *Legibus solutus* is the exemption of a particular body or entity in power from the observance of certain legal rules that leads to the entity acquiring irresponsible absolutism that might be subject to misuse.⁷ In doing so, it would then be important to ascertain how the Security Council carries out its mandate to ensure that the promotion of international peace and security is advanced.

Article 1 of the UN Charter, provides that the Security Council is required to act in conformity with the principles of justice and international law, among them being in the premise of pacific settlement of disputes as provided in article 33 of the United Nations Charter, to include the

⁵ UN Charter, article 27.

⁶ The Osgood Centre for International Studies, 'History of the Security Council' <www.osgoodcenter.org/SC_BGG_2016> accessed 28th January, 2020.

⁷ Brian Tierney, 'Comparative Studies in Society and History' 5(4) CUP (1963) 378-400

use of negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements.

Article 39 of the United Nations Charter, provides that the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and in order to prevent the situation from being worse, article 40 of the Charter states that the Security Council may, before making the recommendations, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable.⁸ If the State parties involved fail to comply, the Security Council then invokes article 41 of the United Nations Charter and decide on measures that it would employ that do not involve the use of armed force to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. Such measures may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.⁹ Article 42 of the United Nations Charter is further invoked once the Security Council considers that measures it had decided on, would be inadequate or have proved to be inadequate, and this is the point where it applies the use of force. It may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of members of the United Nations.¹⁰

In the event of a conflict between the obligations of the member States of the United Nations under the United Nations Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail.

The case of *Kadi and Al Barakaat International Foundation v Council and Commission*¹¹ was about the hierarchy between international law and general principles of European Union law. The European Court of Justice quashed the determination of the judgement made by the General Court and held that the resolution was invalid under the European Union law, but valid under international law. This is because the General Court had no jurisdiction to review the legality of the Security Council's Resolutions, but it could review European Union regulations. The regulation was adopted to give effect to member State obligations under international law;

⁸ UN Charter, article 39 & 40

⁹ UN Charter, Chapter V, Article 41

¹⁰ UN Charter, Chapter V, Article 42

¹¹ [2008] ECR 2008 I-06351 (GC)

since under international law, the Security Council Resolutions prevail, while under European Union law, the hierarchy of norms differs from country to country.¹²

To this end, it is important to question whether certain actions that have been carried out by the Security Council can be said to be draconian in a way that makes it *legibus solutus*, hence the following issues.

II. Issues.

a) The nuclear weapon situation in North Korea.

The Democratic People's Republic of Korea (DPRK) since her creation, has repeatedly ignored the United Nations Security Council's resolutions on issues relating to acts of aggression and the creation of a non-peaceful nuclear program. The Security Council has suggested talks and implemented sanctions pursuant to article 39 to 51 of the United Nations Charter, regarding the DPRK's pursuance of a non-peaceful nuclear weapons program, and both ideas have proven to be ineffective. This was seen during the culmination of World War II, when the Korean Peninsula was split into two countries, the DPRK and the Republic of Korea (ROK), and the DPRK, crossed over its borders and invaded the Republic of Korea, hence inciting the Korean War. The Security Council acted swiftly and passed its first resolution, the *UN SC Resolution 82 (1950)* where it demanded that DPRK ceases the invasion of the Republic of Korea.¹³ The Security Council then passed Resolutions 83 and 84 further establishing a United Nations Command force to help the Republic of Korea resist the DPRK's forces. The Security Council determined that the DPRK had breached peace by its invasion to the territory of the Republic of Korea.

Currently, the International Atomic Energy Agency (IAEA) and the Security Council believe that the nuclear weapons program pursued by DPRK, could result in the destabilization of the Asian continent and would threaten international peace and security, which is a core mandate of the Security Council. The Foreign Minister of the DPRK wrote to the President of the Security Council stating its intentions to withdraw from the Nuclear Non-Proliferation Treaty

¹² Kadi and Al Barakaat International Foundation v Council and Commission [2008] ECR 2008 I-06351 (GC)

¹³ UNSC, 'Complaint of aggression upon the Republic of Korea' Res 82 (25 June 1950) UN Doc S/1501.

(NPT),¹⁴ which resulted in the Security Council passing Resolution 825 (1993), which would disrupt the non-proliferation measures on the region, and around the world; since the DPRK was unable to comply with the IAEA safeguards and protocols on nuclear weapons.¹⁵

In 2006, the DPRK launched seven missiles, which was perceived by the Western powers to be an act of provocation. The Security Council further adopted the UN SC Resolution 1695 (2006), demanding that the DPRK suspend its nuclear weapons program.¹⁶ In 2007, DPRK agreed to shut down its nuclear weapons facilities in return for the lifting of some of the financial sanctions that were imposed on it by the Security Council. When the sanctions were lifted, the DPRK after some time launched two long range ballistic missiles. Not only did the DPRK withdraw from the Nuclear Non-Proliferation Treaty, and from all talks, but also refused to comply with any Security Council resolutions or agreements that the DPRK had signed, and further refused to allow International Atomic Energy Agency investigators to enter into the country. It was now clear proof that the DPRK was hell-bent to pursue its weapon programs, breach of international law obligations and Security Council's resolutions notwithstanding.

Not only has DPRK threatened other states, but also committed human rights abuses against its citizens. The then United Nations Security Council President, Elbio Rosselli, released a statement stating that the members of the Security Council had strongly condemned the nuclear weapon tests, and promised to take further significant measures to ensure international peace and security. This would be realized by member States as they would work immediately on those measures as per Chapter VII of the United Nations Charter.¹⁷ The then UN High Commissioner for Human Rights, Navi Pillay, stated that there was a great concern that all the attention was been levelled towards the DPRK's nuclear weapon mechanisms, which was distracting the world from the need to address human rights abuses in that country. *The 2013 Human Rights Watch Report* on the DPRK stated how "arbitrary arrest, detention, lack of due process, and torture, ill-treatment of detainees, enslavement of hundreds of thousands of citizens in prison camps, including children, remains serious and pervasive problems in that

¹⁴ Treaty on the Non-Proliferation of Nuclear Weapons (adopted in 1 July 1968 , entered into force in 5 March 1970) (NPT)

¹⁵ UNSC 'The intention of the Government of the DPRK to withdraw from the Treaty on the Non-Proliferation of Nuclear Weapons' Res 825 (11 May 1993) UN Doc S/RES/825.

¹⁶ UNSC Res 1695 (15 July 2006) UN Doc S/RES/1695.

¹⁷ UN Charter, chapter VII

country.¹⁸ Although the DPRK has ratified multiple human rights treaties including the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights (UDHR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR),¹⁹ the DPRK has perpetually violated these international agreements. These human rights violations by the DPRK have resulted in multiple human rights organizations petitioning the UN Human Rights Council to create a committee to investigate the human rights violations and potential crimes against humanity committed by the DPRK against its citizens.

The Security Council can at this scenario be said to be subject to the law. This is seen in how it applied Chapter VII of the United Nations Charter on the nuclear weapon situation in North Korea, to see to it that international peace and security was maintained. It can however, be seen from the aforementioned scenarios, that the Security Council was being bulldozed by the Democratic People's Republic of Korea (DPRK).

The International Court of Justice (ICJ) in the case involving nuclear-armed India, Pakistan, and the United Kingdom(UK) by the Republic of the Marshall Islands, contended that the UK had failed to meet disarmament obligations under Article VI of the nuclear Non-proliferation Treaty (NPT) and the NPT non signatories, India and Pakistan had breached nuclear disarmament obligations established under customary international law.²⁰ The ICJ through the *'advisory opinion on the the legality of threat of or use of nuclear weapons of 1966'* held that the threat and use of nuclear weapons was generally illegal, but could not decide whether the illegality applied in an extreme circumstance of self-defence in which the very survival of a State would be at stake. In April 2014, the Marshall Islands instituted proceedings in the ICJ against all nine of the world's nuclear-armed states. But only India, Pakistan, and the UK

¹⁸Human Rights Watch, 'World Report 2013: North Korea' (Human Rights Watch, 12 June 2013) <www.hrw.org/world-report/2013/country-chapters/north-korea> accessed 29 January, 2020.

¹⁹ See the International Bill of Rights, to include the Universal Declaration of Human Rights (adopted 10 December 1948) (UDHR), the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) (ICESCR)

²⁰ Owen B Toon, Charles G Bardeen & Alan Robock, 'Rapidly expanding nuclear arsenals in Pakistan and India portend regional and global catastrophe' (2019) 5(10) Science Advances <www.advances.sciencemag.org/content/5/10/eaay5478&hl=en-KE> accessed 28 January 2020.

accepted the compulsory jurisdiction of the court and appeared to argue their side in the case. The other nuclear-armed states were invited to respond, but China declined and the others did not respond.²¹ The ICJ held that it did not have jurisdiction to hear nuclear disarmament cases against the UK, India and Pakistan.²²

b) The Security Council's role in combating terrorism.

In 2013, the then acting president of the Security Council, Ambassador Masood Khan focused his presidency on terrorism and United Nations peacekeeping.²³ He recognized that the Security Council had increasingly attempted to address terrorism as it had identified terrorism as a threat to international peace and security.

Terrorism threatens citizens and creates challenges that bedevils the actors responsible to act effectively to combat terrorism since individual terrorists are replacing terrorist organizations like the Al-Qaeda. This change is key in understanding counter terrorism because it shows which solutions have aided the UN in combating terrorism, and which have not. Further, it is necessary to understand the counter-terrorism organizations and why there is a need to enhance international cooperation between them and to further understand the main drawbacks to international cooperation. Terrorism was an issue addressed solely by sanctions issued by the Security Council and there was need for a more intensified approach on strategies regarding counter-terrorism, hence the Security Council established a subsidiary body, the Security Council Counter-Terrorism Committee (CTC). This committee was established through UN SC Resolution 1373 (2001), and is charged with monitoring the implementation of the resolution.²⁴ The Security Council called upon member States to redouble and coordinate their efforts to prevent and suppress terrorist acts as well as urged to intensify their efforts to stem the flow of foreign terrorist fighters in Iraq and Syria and to prevent and suppress the financing of terrorism. Additionally, the Security Council unanimously adopted the UN SC RES 2258,

²¹ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan)* [2016] ICJ 159

²² Daryl G Kimball, 'Challenges on Disarmament and Opportunities for Progress' (Arms Control Association, 18 April 2016) <www.armscontrol.org/act/2016-03/news-briefs/icj-hears-nuclear-disarmament-case > accessed 29 January 2020.

²³ UN News Centre, 'Security Council to give special focus to terrorism and UN peacekeeping.' (UN News, 3 January 2013) <www.un.org/apps/news/story.asp?NewsID=43875#.Uc3smz535r2> accessed 29 January 2020.

²⁴ UNSC Res 1373 (28 September 2001) S/RES/1373

allowing the renewed authorization for cross-border aid delivery for civilians in Syria.²⁵ Member States were also urged to prevent and suppress the flow of foreign terrorist fighters in and out of Syria.

The Security Council and the international community have made it clear that counter-terrorism is an extremely important issue that must be addressed in order to protect the maintenance of international peace and security. Some of the European Court of Justice jurisprudence emphasises that the Security Council resolutions that breach human rights norms will not be enforced by member states.

c) **The Security Council as a judge.**

Resolution 1390 is one of the outstanding resolutions that has been passed by the Security Council, which provide for ‘smart sanctions’ against individuals that entails the freezing of funds of suspected terrorists linked to Osama bin Laden, Al-Qaeda or the Taliban, and requiring states to adopt appropriate measures against individuals designated by the *UN Sanctions Committee*. This resolution was the subject of judicial review before the European Court of Justice in the landmark Kadi case. It held that, due to the United Nations supremacy, established by Articles 25 and 103 of the United Nations Charter and incorporated into European Union law by Article 307 EC, the Court could not indirectly review the Security Council by questioning the legality of the Regulation, unless the Regulation compelled member states to breach norms of jus cogens.

III. CONCLUSION.

The Security Council has insufficient internal checks to ensure that it passes resolutions which sufficiently respect human rights norms. Judicial review powers should therefore be bestowed on the part of the International Court of Justice to ensure that the Security Council passes resolutions, which remain effective and do not humiliate the United Nations system.²⁶ The Security Council can therefore be regarded as *legibus solutus* by virtue of it lacking an

²⁵ UNSC Res 2258 (22 December 2015) S/RES/2258

²⁶ Fraser Galloway, ‘Anti-Terrorism Resolutions: The Security Council’s Threat to the UN System.’ (2011) 2(3) *Journal of Terrorism Research* <<http://doi.org/10.15664/jtr.231>> accessed 29 January 2020.

institution that can check on its excesses, since the United Nations Charter and the Statute of the International Court of Justice does not provide for the same.

B. RECOMMENDATION CLAUSE.

The often question posed in this regard is whether international law supports any form of judicial review since neither the United Nations Charter nor the ICJ Statute directly addresses this question. The ICJ has been unequivocal over whether it has the power of judicial review, but Thomas M. Franck has argued famously that the 1992 Lockerbie case marks the point at which the ICJ established for itself judicial review powers²⁷ analogous to those of the United States Supreme Court established in *Marbury v. Madison*. It was held that the analogy set in the *Madbury case* suggested that the ICJ has both concurrent jurisdiction with the Security Council and power to declare the Council's resolutions ultra vires.

Furthermore, in the 1962 *Certain Expenses case*, the ICJ held that it had authority to offer an opinion on whether peacekeeping costs and operations of the United Nations in the Congo and the Middle East constituted expenses that should have been in conformity with the provisions of the Charter.²⁸

In the 1970 *Namibia case*, it was held that the ICJ does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned before ruling explicitly on the validity of the acts in question that the Security Council resolution was in accordance with the Charter.²⁹ Both the *Certain Expenses and Namibia cases* therefore suggest that the ICJ has implicitly accepted that it may consider the validity of a Security Council resolution when giving an advisory opinion, which may be requested only by a UN organ. Therefore, the ICJ should be accorded full concurrent jurisdiction in order to check on the excesses of the Security Council.

²⁷ Thomas M Franck, 'Fairness in International Law Institutions' [1974] <www/files.pcacpa.org/pcadocs/bic/1.%20Investors/4.%20Legal%20Authorities/CA003.pdf> accessed 30 January 2020.

²⁸ *Certain Expenses of the United Nations (article 17, paragraph 2, of the charter)* (Advisory Opinion) [1962] ICJ 1962/2

²⁹ The Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding the Security Council resolution 276 (1970) Advisory Opinion of 21st June 1971.

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4. Treaty on the Non-Proliferation of Nuclear Weapons (adopted in 1 July 1968 , entered into force in 5 March 1970) (NPT)
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