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## 论文

### 联合国安理会与国际法治

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#### 摘要:

联合国安理会的权力是由法律和政治环境规定的。《联合国宪章》赋予安理会在国际关系中至高无上的法律权威,使其能够对国家产生约束力,并且代表联合国所有成员采取集体行动。但这一法律权威只有在安理会常任理事国一致同意的情况下才能发挥作用,同时还需要其他国家认可安理会在国际体系中享有的合法性。因此,仅从法律或者政治角度来认识安理会都不足以了解安理会的实际权力,我们必须结合法律和政治两种角度来进行分析。从这两个角度看,安理会可以被用来更普遍地解释国际法和国际政治之间的复杂关系。服从的内容是国家实践的职责,而不是一个首要和客观的范畴。最后,国际法治不能简单地理解为国内法治在国际社会中的应用。

关键词: 安理会 联合国宪章 国际法 大国利益 国际法治

### The UN Security Council and the International Rule of Law

Ian Hurd

#### Abstract:

This article examines the relationship between the Security Council, legitimacy, and international law. The Council centralizes international political and military power to a degree that is unprecedented in global history, and in doing so it raises important questions about the relationship between law, politics, and power. The article considers first how the power of the Council is constructed by the legal framework set out in the UN Charter. This entails a close reading of the Charter and shows both how it centralizes the power of UN member states but also how it limits Council authority. The legal authority of the Council is important but it must be understood alongside other forces that may enhance, limit, or modify it. The second section of the article therefore examines how the Council's power is influenced by two extra-legal forces: (1) perceptions of its legitimacy, and (2) the interests of the permanent members. The Council has no practical power unless its legal authority is mobilized by the interests of powerful states and sustained by a sense of its legitimacy. The decision-rule in the Council ensures that no action can be taken without the support of the five permanent members. This is an institutional requirement that is set by the Charter. Alongside this, the Council equally rests on a sense of its legitimacy. This is an important source of power which has recently become the subject of much scholarly attention. Legitimacy is the belief of an agent that a ruler or institution has a right to be obeyed. It is a subjective perception, located in the beliefs of the actor. For the Security Council, this is exemplified by the widely shared sense that the Council is an important and appropriate player on international security issues. The position of the Council depends on its legitimacy -- and this is in the eyes of both the permanent members and the rank and file UN members. The Security Council is extremely powerful when the political conditions align with its legal framework. At such moments, it has unparalleled capacity to take decisive action in international politics. This was in evidence in 2011 when it authorized the military intervention that overthrew the Libyan government. When its members are politically united behind a course of action, the Council can mobilize legal and material resources almost without limit, and its legitimacy in the international system makes it immensely powerful. At

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such moments, it is reasonable to worry about the “imperial Council,” a body unchecked by other institutions and empowered by law and the control of resources to impose itself anywhere in the world. However, when its permanent members are not united, the Council falls into paralysis. Between empire and paralysis sits the Security Council in practice. The evidence in the article shows how difficult it is to apply the idea of the ‘rule of law’ to the operation of the Security Council, and indeed to apply it to international politics more generally. The rule of law is often used to describe the international system, either as it actually is or as an ideal which should be sought. This generally refers to the idea that international politics should take place within a framework of law. States might argue over the meaning and content of international law, but it is uncontroversial to maintain that international law exists and that it makes a contribution to international order. However, the relation between law and politics that exists in the Security Council shows how tenuous is this concept of the rule of law as it relates to international politics. It is difficult to clearly specify the content of the rules that bind the Council, as they shift under pressure from the practice of the Council. Some violations of the Charter are understood as informal amendments to it, and therefore as not violations at all. Others are held up as threats to international peace and security and therefore as authorizing enforcement action. The distinction between compliance and non-compliance with the law follows from state action, rather than standing independent of it as is expected by the theory of the rule of law. In conclusion, the political power of the Council in practice is a combination of the three forces at the center of this essay: international law in the Charter, perceptions of its legitimacy, and the interests of powerful states. Together, these mean that the Council may sometime act in ways that contradict the black-letter law of the Charter, while at others its adherence to the Charter leaves powerful actors dissatisfied. This ambiguity in the law and practice of the United Nations is inherent in the nature of the organization itself: it straddles the boundary between law and politics, and shows that the two categories cannot be neatly divided.

Keywords: the Security Council the United Nations Charter international law the interests of great powers international rule of law

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