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# Limitations in the UN Security Council's Power In Post-Conflict Situations

Tayyaba Khokhar

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Tayyaba Khokhar

Professor Freamon

Legal Implications of the Mid East Revolutions

January 13, 2012

## Limitations on the UN Security Council's Power

### In Post-Conflict Situations

#### **Introduction**

On December 17, 2010, Mohammad Bouazizi, a 26 year old Tunisian, set himself on fire in front of a municipal office building after a policewoman confiscated the scales for his fruit and vegetable stand and spit on him. His act reflected a generalized Tunisian frustration over living standards, police violence, unemployment, and lack of recognition of human rights. Outraged Tunisians took to the streets to protest and, within a month, Tunisia's president of over 20 years, Ben Ali fell from power.<sup>1</sup>

Within a few days of Ben Ali's demise, massive peaceful protests erupted in Egypt, the most populous Middle Eastern country. In February, after 18 days of protest, and after losing military support,<sup>2</sup> Egypt's president of 30 years, Hosni Mubarak, resigned and turned over power to a military council.<sup>3</sup>

Protesters have also taken to the streets in Syria, Yemen and Bahrain. In Syria, President Assad has been brutal in repressing the protestors. In October, the United Nations reported the

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<sup>1</sup> Ryan Rifai, *Timeline: Tunisia's Uprising*, ALJAZEERA, <http://www.aljazeera.com/indepth/spotlight/tunisia/2011/01/201114142223827361.html> (last updated Jan. 23 2011).

<sup>2</sup> *Egypt News—Revolution and Aftermath*, THE NEW YORK TIMES, <http://topics.nytimes.com/top/news/international/countriesandterritories/egypt/index.html>, (Last updated Dec. 16, 2011).

<sup>3</sup> Gary Blight et al, *Arab Spring: An Interactive Timeline of Middle East Protests*, THE GUARDIAN (Nov. 29, 2011), <http://www.guardian.co.uk/world/interactive/2011/mar/22/middle-east-protest-interactive-timeline>.

death toll in Syria had reached 3,000 civilians.<sup>4</sup> The regime has not yet fallen. The UN Security Council has failed to pass a resolution denouncing the violence in Syria. This is mainly due to Russia and China's veto over any resolutions against Syria.<sup>5</sup> Therefore, the international community has not been involved in Syria's revolution despite the mass killings taking place there.<sup>6</sup>

Most recently, Muammar Gaddafi, president of Libya for 42 years was captured and killed.<sup>7</sup> Libya's revolution started because the Libyan people were inspired by the events in Egypt and Tunisia. As the uprising deepened, Gaddafi refused to resign and insisted that he would remain in power. Unlike the peaceful protesters in Tunisia and Egypt, the anti-Gaddafi movement in Libya took up arms against the regime. When the Libyan government began indiscriminately killing rebels and civilians alike, the international community took action to help protect civilians.<sup>8</sup>

Libya is a unique situation in the Middle Eastern uprisings because the international community actively supported the rebel movement. In March 2011, the United Nations' Security Council unanimously agreed to intervene in Libya. Through Resolution 1973, the Council

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<sup>4</sup> *Syria Uprising: The UN Says Protest Death Toll hits 3,000*, BBC, (Oct. 14, 2011) <http://www.bbc.co.uk/news/world-middle-east-15304741>.

<sup>5</sup> Salman Shaikh, *As Syria Crisis Worsens, UN Security Council Must Act*, THE CHRISTIAN SCIENCE MONITOR (Dec 15, 2011) <http://www.csmonitor.com/Commentary/Opinion/2011/1215/As-Syria-crisis-worsens-UN-Security-Council-must-act>.

<sup>6</sup> This paper will not focus on Syria, Bahrain or Kuwait. It will only examine situations in the Arab Spring where the UN is involved in transitional government assistance where the dictator has already fallen.

<sup>7</sup> *Timeline: Gaddafi's 42 Years in Power*, REUTERS (Oct. 23, 2011), <http://www.reuters.com/article/2011/10/23/us-libya-gaddafi-power-idUSTRE79M13C20111023>.

<sup>8</sup> Gary Blight et al, *Arab Spring: An Interactive Timeline of Middle East Protests*, THE GUARDIAN (Nov. 29, 2011), <http://www.guardian.co.uk/world/interactive/2011/mar/22/middle-east-protest-interactive-timeline>.

established a no-fly zone over Libya and authorized air strikes, commanded by NATO, to protect civilians.<sup>9</sup> On October 20, 2011, Gaddafi was killed and Libya was officially liberated.<sup>10</sup>

This wave of popular movements against longstanding dictators in Tunisia, Egypt, Libya and the general push for democracy in the region is now commonly referred to as the “Arab Spring.”<sup>11</sup> Now, these countries are in the process of transitioning to a more democratic system of governance. While the UN has not played a major role in assisting the Egyptian or Tunisian during their transition, the UN has exercised much greater influence in Libya.

The UN’s involvement in Libya’s governmental transition, apart from the military presence, began on September 7, 2011 when UN Secretary-General Ban Ki Moon dispatched a letter welcoming an initial deployment of personnel in Libya at the request of Libyan authorities.<sup>12</sup> Dr. Mahmoud Jibril, Prime Minister of the National Transitional Council of Libya sent a letter to the Secretary General expressing his gratitude to UN efforts to build a sustainable peaceful solution in Libya.<sup>13</sup> Then, on September 16, 2011 the council passed S/2011/580.<sup>14</sup> The resolution established the UN Support Mission in Libya (UNSMIL) for an initial, but renewable, period of three months.<sup>15</sup> UNSMIL’s mandate calls for “the restoration of public security, order and promote the rule of law,” promotion and protection of human rights, initiation of economic recovery, extending state authority and to “embark upon the constitution-making and electoral process.”<sup>16</sup> While the Security Council voted to end the NATO mission in Libya in Resolution

<sup>9</sup> S.C. Res. 1973, U.N. Doc. S/2011/1793 (Mar. 17, 2011).

<sup>10</sup> *Libya Profile*, BBC, <http://www.bbc.co.uk/news/world-africa-13755445>, (last updated Dec. 1, 2011).

<sup>11</sup> *Ouster of Tunisia president: An Opportunity for Arab Autocrats to Respond to the People*, THE CHRISTIAN SCIENCE MONITOR, (Jan. 14, 2011), <http://www.csmonitor.com/Commentary/the-monitors-view/2011/0114/Ouster-of-Tunisia-president-An-opportunity-for-Arab-autocrats-to-respond-to-the-people>.

<sup>12</sup> S.C. Res. 580, U.N. Doc. S/2011/580 (Sept. 16, 2011).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at ¶ 12.

<sup>16</sup> *Id.*

2016 on October 27, 2011, following Gaddafi's death, the UNSMIL mission continues to assist Libya's transition to democracy.<sup>17</sup>

The Security Council has granted UNSMIL broad authority in assisting the Libyan government in its transitional process. The Council also established missions in 1999 to assist Kosovo and East Timor transition to new governments. The mandates for both missions granted the UN broad powers to assist in the legislative, judiciary, and executive functions of government. The Security Council, through these missions, is playing a larger role in national politics. While the UN Charter and the International Court of Justice have the potential of limiting the Security Council's powers, they have instead bolstered the Council's power by supporting and reaffirming the Council's actions, not striking them down. Nevertheless, the UN's role in assisting transitional governments can have a beneficial consequence as the UN can bring in expertise and experience into the field to make a more successful constitution. The Security Council, however, should not go unchecked. States must create international law limiting the Council's influence in post-conflict countries, or a *jus post bellum*.

UN missions are vested with powers that often extend beyond technical assistance. This paper examines the legal limits of the Security Council's power in assisting states in their transition to a democratic form of governance. Section I provides a general overview of the Security Council's powers, functions, and limitations as enumerated by the UN Charter. It also explores the International Court of Justice as a check on the Council's Power. Section II takes an in-depth look at the UN missions in East Timor and Kosovo which helped the countries establish democratic governance. Section III explores the problem of UN infringement on state sovereignty and possible limitations on Security Council powers. It looks ahead to how the

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<sup>17</sup> S.C. Res. 2016, UN Doc. S/Res/2016 (Oct. 27, 2011).

Council's power in post conflict societies can be limited. Section IV determines whether the UN is ultimately a positive influence in assisting post conflict states transition to democracy.

The paper concludes that in countries where there is a complete lack of political institutions, like in Libya, the UN is a positive force in establishing the rule of law. The UN is a powerful organization that does not abuse its power but assists transitions to democracy by bringing expertise and experience to the affected country. While the Security Council is now largely unchecked, issues of state sovereignty should be addressed through creating a *jus post bellum* where international law would limit the scope of the Security Council's power in peacekeeping operations. A *jus post bellum* will allow the UN to be involved in transitional governments but will constrain its power so as not to infringe on national sovereignty.

### **I. Limitations on Security Council Powers**

The United Nations Charter, drafted and signed in 1945 by the 51 states at the time,<sup>18</sup> enumerates the UN Security Council's powers. The Charter establishes the General Assembly, Security Council, Trusteeship Council, International Court of Justice, and the UN Economic and Social Council as the main organs of the UN.<sup>19</sup> The Charter is divided into 19 chapters containing 111 articles which explain the role, functions, and powers of each of the organs. As a simple analogy, the UN parallels a governmental structure, with a legislature, judicial and executive branch. In theory, the General Assembly can be seen as the Legislature, the International Court of Justice as the judicial branch, and the Security Council as the executive, enforcing the legislatures' decisions. In reality, the Security Council is more than just an

<sup>18</sup> *Growth in United Nations Member States, 1945-present*, UN, <http://www.un.org/en/members/growth.shtml> (last visited Nov. 14, 2011).

<sup>19</sup> *Main Bodies*, UNITED NATIONS, <http://www.un.org/en/mainbodies/index.shtml>, (last accessed Oct. 28, 2011).



executive. It is capable of passing resolutions on its own, acting as a legislature, and enforcing them as an executive.

One of the UN's many objectives is to maintain international peace and security. Recently, the UN has espoused the notion of promoting democratic governance and order in countries like Kosovo and East Timor. Historically, this concept of establishing the "rule of law" was included in early UN missions. In fact the term itself came about in the 1990s when President George H.W. Bush pushed the idea that international peace and security can be established through the rule of law.<sup>20</sup> Secretary General Kofi Annan further promoted this concept by including it in his annual report in 2006 which supported "enhancing UN support for the rule of law."<sup>21</sup> Since then, the concept of establishing the rule of law in post conflict countries has become quite prevalent. But this has not been without controversy. The rule of law is often associated with western style democracies.<sup>22</sup> The west criticizes the east for having a lack of rule of law.<sup>23</sup> However, the east criticizes the west for imposing western style liberal democracies.<sup>24</sup>

After the Cold War, The Security Council has exercised its powers with greater frequency. For nearly the first 40 years of the UN's creation, between 1945 and 1988, the UN only created thirteen peacekeeping missions. But, after the Cold War, from 1988 to 2008, over fifty new UN peacekeeping missions were established. This may be due partly to the US and

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<sup>20</sup> THE ROLE OF INTERNATIONAL LAW IN REBUILDING SOCIETIES AFTER CONFLICT 136 (Brett Bowden et al. eds. 2009)

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 139.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

Russia agreeing on more issues, leading to fewer resolutions being vetoed. But more UN missions may also reflect the broader role for the UN in the recent decades.<sup>25</sup>

On June 26, 1945, 51 nations<sup>26</sup> met in San Francisco and signed the UN Charter. Since then, the Security Council has expanded its powers and is now dealing with issues such as the rule of law and national constitution making that were not readily foreseeable to the states when they originally created the organization. This raises the issue of whether there should be a check on UN Security Council power, and whether such a check was drafted into the Charter.

### **A. The UN Charter**

The United Nations Charter gives the Security Council broad powers to maintain international peace and security.<sup>27</sup> The Security Council has used these powers widely and in varying ways by issuing resolutions, imposing sanctions, as it did to stop Iran's nuclear program in 2010,<sup>28</sup> and even calling for military action, as it did in the Gulf War.<sup>29</sup> Chapter V of the UN Charter lays out the structure, function and powers of the Security Council. The Council is composed of five permanent members, the United States, United Kingdom, France, Russia, and China. In addition, there are ten rotating, nonpermanent members. Security Council resolutions must have an affirmative vote by at least nine members, including all five of the permanent members in order to pass a resolution. Thus, the most basic check on Council power is the structure itself where there must be a majority vote to pass a resolution. If states do not agree with a resolution, it simply cannot leave the Council.

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<sup>25</sup>*Id.*

<sup>26</sup> *Growth in United Nations Member States, 1945-present*, UN, <http://www.un.org/en/members/growth.shtml> (last visited Nov. 14, 2011).

<sup>27</sup> U.N. Charter art. 24, para. 1.

<sup>28</sup> S.C. Res. 1929, U.N. Doc. S/Res/1929 (Jun. 9, 2010).

<sup>29</sup> S.C. Res. 686, U.N. Doc. S/Res/686 (Mar. 2, 1991).



The functions and powers of the Security Council are laid out in Article 24 of the UN Charter, which states that “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”<sup>30</sup> This is a broad function for the Council but is somewhat limited by subsequent articles.

Chapter VI of the charter explores how the Security Council can promote the pacific settlement of disputes and encourages states to settle disputes in a peaceful matter. Article 33 maintains that “states shall, first of all, seek a solution by negotiation, enquiry, meditation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”<sup>31</sup> The Charter encourages states going to the International Court of Justice.

Chapter VII, deals with action with respect to “threats to the peace, breaches of the peace, and acts of aggression.”<sup>32</sup> Here, the UN recommends that UN members apply certain measures before resorting to force. Article 41 lists these measures as “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.”<sup>33</sup> If these sanctions seem inadequate or prove to be inadequate, the Council may take action by air, sea, or land forces as may be necessary to maintain or restores international peace and security.<sup>34</sup> Furthermore, the action required out to carry out the Council’s resolutions do not necessarily need the consent of all UN

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<sup>30</sup> U.N. Charter art. 24, para. 1.

<sup>31</sup> *Id.* at art. 33, para. 1.

<sup>32</sup> *Id.* at art. 39.

<sup>33</sup> *Id.* at art. 42.

<sup>34</sup> *Id.*

member states, or even a majority of the states. Under Article 48, the Security Council determines how the decisions are carried out.<sup>35</sup>

Thus, the UN Charter grants the Security Council the very broad responsibility to maintain international peace and security. While the Charter describes a certain procedure to be followed when attempting to resolve disputes, through first diplomacy, then sanctions, with force reserved as a last resort, the Security Council is able to bypass these steps if it deems necessary. In doing so, it does not need the approval of other UN member states.

### **B. The International Court of Justice**

While the Charter itself gives the Security Council much deference, the International Court of Justice (ICJ) can also be seen as a check on the Council's power. Nevertheless, the Court has not exercised these powers and has not challenged the Council's authority on any of its decisions.<sup>36</sup>

Recently, the International Court of Justice decided two cases, *Prosecutor v. Tadic* and the Lockerbie case, which explored the Security Council's powers. *Prosecutor v. Tadic* raised the issue of the ICJ's jurisdiction.<sup>37</sup> Tadic, a Bosnian Serb war criminal, was tried for 31 breaches of the Geneva Conventions, violations of the laws and customs of war and crimes against humanity related to the torture and murder of Muslims in a Serb run prison camp in Bosnia.<sup>38</sup> He challenged the ICJ's jurisdiction and argued it was not legitimately exercising jurisdiction in his case. In addition, he argued that the UN did not have the power to create a

<sup>35</sup> U.N. Charter art 48, para 1.

<sup>36</sup> Thomas M. Franck. *The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?*, 86 Am. J Int'l L. 519, 519-523 (1992).

<sup>37</sup> *Prosecutor v. Tadic*, IT-94-1-T ICJ (May 7, 1997)

<sup>38</sup> *Tadic Case: The Verdict*, UN ICTY, <http://www.icty.org/sid/7537>, (last visited Dec. 19, 2011).

judicial branch. The court concluded that Court derives its jurisdiction through the body that formed it. The ICJ is a body under the Security Council, therefore the Council can determine the ICJ's jurisdiction.<sup>39</sup>

In the Lockerbie case, the ICJ could have expanded the Court's influence and assumed power as a check to the Security Council. In that case, the ICJ could have established the principle of judicial review and could have given itself unchecked power, within the limits of the UN Charter, much like *Marbury v. Madison* functioned for the Supreme Court of the United States.<sup>40</sup> Instead, the Court chose to answer the question more narrowly.

In *Questions of Interpretation and application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, or more commonly known as the Lockerbie case, the United States and United Kingdom requested that Libya surrender the two nationals charged with bombing Pan Am flight 103 in 1988 over Lockerbie Scotland. Libya challenged the validity of Resolution 748, which issued sanctions against Libya, and raised the issue of "whether a decision by the Security Council may override the legal rights of States and if so...are there any limits to the Council's powers of appreciation?...and what body, if other than the Security Council, is competent to say what those limits are?"<sup>41</sup> The court maintained that while the Council's powers are broad, they are not unlimited. The Council is limited by the UN Charter under Article 2 which states that a state must exercise their rights in good faith,<sup>42</sup> meaning that states have a duty under the Charter to act in good faith in an individual capacity and as an

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<sup>39</sup> *Id.*

<sup>40</sup> Franck, *supra* note 36.

<sup>41</sup> Vera Gowlland-Debbas. *The Relationship Between the International Court of Justice and the Security Council in Light of the Lockerbie Case*. 88 Am. J. Int'l L. 643, 643-677 (1994).

<sup>42</sup> U.N. Charter art. 2, para. 2.

organ.<sup>43</sup> The court also pointed out that the Security Council and General Assembly are both subject to recourse form an ad hoc committee which can be composed of jurists or, the UN organs can create a joint conference. The General Assembly or Security Council can pass a resolution to form such a committee if they feel a need to review the legality of their decisions. Therefore, the ICJ should not be considered the only body capable of reviewing UN resolutions.

In the Lockerbie case, the Court pointed out that when the Charter was drafted, proposals to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted.<sup>44</sup> However, some form of judicial review was not ruled out altogether.<sup>45</sup> Therefore, the ICJ and ad hoc committees are still in place if the need arises to review UN decisions.<sup>46</sup> Nevertheless, these ad hoc committees have never been used to review the legality of UN missions.<sup>47</sup> Therefore, the notion of such committees being a check on the Council's power is yet to be realized.

Thus, the ICJ did not establish a real limit on the Security Council's power. The Lockerbie holding indicates that the Charter is a limit on the Council's power but in its current form, the Charter sets loose boundaries on the Council's function. As the Court has never exercised its power to hold a Council decision to be contrary to the objectives of UN goals, it remains a force to legitimize and bolster Council decisions, not to strike them down. Nevertheless, establishing a method of judicial review may be beneficial to the legitimacy of UN

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<sup>43</sup> Erika de Wet, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 195 (Hart Publ'g 2004).

<sup>44</sup> Gowlland-Debbas, *supra* note 41.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

A new type peacekeeping mission called third generation peacekeeping is now emerging.<sup>53</sup> Here, the UN plays an even greater role than in first or second generation missions. The UN assumes all the functions of governing the territory while the country transitions to build up its own institutions. Third generation operations are a relatively recent creation and are rarely used. The two predominant examples are in East Timor and Kosovo, both in 1999.<sup>54</sup> The legal basis for establishing a civilian government in third generation peacekeeping operations is established under Chapter VII of the Charter. The Security Council has the implied power to establish a civilian administration from the express power in Article 41 to take non-military measures for the maintenance and restoration of international peace and security.<sup>55</sup> Though these third generation peacekeeping efforts, some argue that the UN is taking on too great a role in national politics.

#### **A. Past UN Missions**

Between 1976 and 1999, Indonesia occupied East-Timor, a former Portuguese colony.<sup>56</sup> In 1999, the UN sponsored a popular referendum in which the East-Timorese voted for independence from Indonesia. On October 25, 1999 the UN Security Council established the United Nations Transitional Administration in East Timor (UNTAET) to assist in the formation of the new government. The UN gave UNTAET unparalleled power for the new country's administration. The mission's main functions were to administer the territory, exercise legislative and executive authority during the transition period, and support capacity-building for self-

<sup>53</sup> *Id.*

<sup>54</sup> S.C. Res. 1244, U.N. Doc. S/RES/1244 (Jun. 10, 1999); S.C. Res. 1410, U.N. Doc. S/RES/1410 (Mar. 17, 1999).

<sup>55</sup> de Wet, *supra* note 43 at 311-336.

<sup>56</sup> *East Timor*, CIA: THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/tt.html> (last updated Nov. 10, 2011)



government.<sup>57</sup> The UN passed regulations establishing financial and judicial reform, and addressed issues of taxation, military discipline and legal aid.<sup>58</sup>

The international community felt conditions on the ground were conducive to a successful outcome.<sup>59</sup> Most Timorese people welcomed UN intervention and saw its presence as benign.<sup>60</sup> There was a general desire to form a successful new government. However, critics of the mission argued that a western laws and ideals were imposed in a country whose citizens could not readily understand the laws.<sup>61</sup> The UN adopted idea of good governance was not what the East Timorese would necessarily want for themselves.

The UNTAET mission ended on May 20, 2002, when the country became fully independent.<sup>62</sup> However, UN involvement in East Timor did not stop there. On May 17, 2002, the Security Council established the United Nations Mission of Support in East Timor (UNMISET) under resolution 1410.<sup>63</sup> This new and continuing mission provides “assistance to core administrative structures critical to the viability and political stability of East Timor,”<sup>64</sup> thus maintaining a limited UN presence.

The United Nations Interim Administration Mission in Kosovo (UNMIK) is a second example of third generation peacekeeping. The UN Security Council did not authorize force in Kosovo. The military operation was led by NATO. However, the UN led efforts to assist Kosovo

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<sup>57</sup> *East Timor*, UN, <http://www.un.org/en/peacekeeping/missions/past/etimor/etimor.htm> (last visited Dec. 18, 2011).

<sup>58</sup> Kristin Boon, *Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers*, 50 McGill L.J. 285, 313-14 (2005).

<sup>59</sup> THE ROLE OF INTERNATIONAL LAW IN REBUILDING SOCIETIES AFTER CONFLICT, *supra* note 20 at 136

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *East Timor*, *supra* note 57.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*



in transitioning to a stable government.<sup>65</sup> UNMIK operated under resolution 1244 which granted the mission extensive powers in establishing a civilian government.<sup>66</sup> The main responsibilities of the mission included performing basic civilian administrative functions, such as organizing and overseeing the development of provisional institutions for democratic and autonomous self-government.<sup>67</sup> This included holding elections, supporting reconstruction of the economy and infrastructure, humanitarian organization, maintaining law and order, and protecting human rights.<sup>68</sup> Under the mandate, the mission could continue for as long as necessary.<sup>69</sup>

UNMIK was a joint effort with NATO and the European Union. The UN established a multilateral Kosovo Force (KFOR) and civilian presence which was UNMIK's main responsibility. UNMIK established a four part structure. The UN led the civil administration component, focusing on improving health, education, the police, and courts. The UN also coordinated the humanitarian component, led by the UN High Commissioner for Refugees, where it provided support to refugees and cleared landmines. The Organization of Security and Cooperation in Europe led an institution building component led and promoted democratization and training of local administrators. Lastly, the European Union led to rebuild infrastructure and promote a market based economic system.<sup>70</sup> The mandate gave a special representative of the Secretary General (SRSG) the power to oversee all four aspects of UNMIK.<sup>71</sup>

<sup>65</sup> *NATO's Role in Kosovo*, NATO, <http://www.nato.int/kosovo/history.htm> (last visited Dec. 19, 2011).

<sup>66</sup> S.C. Res. 1244, U.N. Doc. S/RES 1244 (Jun 10, 1999).

<sup>67</sup> S.C. Res. 1244, ¶ 5, U.N. Doc. S/RES/1244 (Jun. 10, 1999).

<sup>68</sup> *United Nations Resolution 1244*, UNMIK, <http://www.unmikonline.org/Pages/1244.aspx> (last visited Dec. 13, 2011).

<sup>69</sup> *Id.*

<sup>70</sup> Matheson, *supra* note 51 at 114.

<sup>71</sup> Gregory H. Fox, HUMANITARIAN OCCUPATION 308 (James Crawford et al. eds., 2008)

UNMIK played a very significant role in Kosovo's new government. It decreed certain laws made while Kosovo was not an autonomous state as invalid.<sup>72</sup> It established a constitutional framework for self government which planed to transfer power to the new self government.<sup>73</sup> It also held elections for the Kosovo assembly and municipalities.<sup>74</sup> Thus, UNMIK is an example of a situation where the UN was basically governing the interim state.

Libya's situation is similar to East Timor in that the Libyan transitional authorities asked the UN to assist in their transition to democracy. The transitional authorities in East Timor also asked the UN to come in to assist with the new constitution. Thus, the initial step of the UN mission in East Timor, in being asked to come in, is similar to Libya's. On the other hand, Libyans, and the Middle East at large is wary of western influence in the region after having a bitter history of European imperialism and colonialism. The UN seems to support a western style of government, by promoting liberal democracies. Like the UNTAET critics, Libyans may not be so willing to welcome the UN style of rule of law governance.

UNSMIL, like UNMIK, was also established under the leadership of a Special Representative of the Secretary General.<sup>75</sup> However, the mandate, as discussed above, does not give the SRSG as broad and sweeping powers as in the UNMIK mandate. Under UNSMIL, the SRSG has broad powers of restoring public security and the rule of law, among other responsibilities.<sup>76</sup> We have yet to see how the mission will play out and how much power the UN will ultimately exercise in Libya.

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> S.C. Res. 580, ¶ 12, U.N. Doc. S/2011/580 (Sept. 16, 2011).

<sup>76</sup> *Id.*

Similar to the European Union's involvement in rebuilding Kosovo's economy, the Arab League has the potential to play a key role in Libya's reconstruction. The Arab League is a regional organization consisting of 22 member states and is based in Cairo.<sup>77</sup> While the League has been factitious, it recently came together in denouncing the human rights abuses in Syria. The Arab League may come together again in helping Libya stimulate its economy and the country at large.

So far, Libya's National Transitional Council (NTC) is moving slowly towards democracy. When the NTC declared Libya liberated after Gaddafi's death, it established a timeline for the transition.<sup>78</sup> No elections have taken place yet. Under current plans in Libya, elections to choose members of a constitutional panel will be held in June.<sup>79</sup> This would set the stage for presidential and legislative elections. Presidential elections are planned to occur in 18 months.<sup>80</sup> While Libya awaits a new government, hundreds of revolutionary militias are maintaining order across the country.<sup>81</sup>

As the elections and the constitution making process have not begun yet, it is difficult to see what role the UN is playing in Libya's reconstruction. Whether the UN will play as large a role as it did in East Timor and Kosovo is yet to be seen. Nevertheless, the Security Council has given UNSMIL broad powers to have great influence in the country.

### III. Infringement on State Sovereignty

<sup>77</sup> *Arab League*, THE NEW YORK TIMES, [http://topics.nytimes.com/topics/reference/timestopics/organizations/a/arab\\_league/index.html](http://topics.nytimes.com/topics/reference/timestopics/organizations/a/arab_league/index.html) (last updated Nov. 28, 2011).

<sup>78</sup> Mary Beth Sheridan, *Libyan Leader wants to Speed up Elections*, THE WASHINGTON POST (Oct. 30, 2011), [http://www.washingtonpost.com/world/libyan-leader-wants-to-speed-up-elections/2011/10/30/gIQAdmGFXM\\_story.html](http://www.washingtonpost.com/world/libyan-leader-wants-to-speed-up-elections/2011/10/30/gIQAdmGFXM_story.html).

<sup>79</sup> *Id.*

<sup>80</sup> *Libyan Elections in Eight Months Says Jibril*, BBC, <http://www.bbc.co.uk/news/world-africa-15417653> (last updated Oct. 22, 2011).

<sup>81</sup> Sheridan, *supra* note 78.

Black's Law dictionary defines sovereignty as a "state vested with independent and supreme authority."<sup>82</sup> This notion of sovereignty entails the notion that a state is independent and autonomous. It should be able to govern itself and make its own laws. When an outside body influences its legislative process, it is infringing on state sovereignty.

The UN's establishment of third generation peacekeeping missions is a significant expansion of UN powers and raises the issue of whether these missions and the UN's involvement in domestic politics infringes on state sovereignty. In East Timor, Kosovo, and now in Libya, the UN established assistance missions for countries undergoing governmental transitions. In these situations, there is a danger that the UN may impose a system of governance that may not be well suited for the state. In a sense, the UN, as an outside force in a sovereign state, may be seen as an occupier.<sup>83</sup> The "occupation," however, is not in any way belligerent, nor is it against the country's will. The transitional authorities in Kosovo, East Timor, and Libya have all consented to the UN mission to support the new government.<sup>84</sup>

There is established international law governing occupations. In cases where there is belligerent occupation, there are a number of conventions establishing laws in the time of war. Some of these conventions include the 1907 Hague Regulations Respecting the Laws and Customs of War on Land, the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in the Time of war, and the Additional Protocols of 1977.<sup>85</sup> These conventions preserve the "conservation principle," which calls for occupying forces to make an effort to

<sup>82</sup> Bryan A. Garner, BLACKS LAW DICTIONARY 1430 (8th ed. 2004).

<sup>83</sup> Fox, *supra* note 71 at 308.

<sup>84</sup> S.C. Res. 1244, U.N. Doc. S/RES/1244 (Jun. 10, 1999); S.C. Res. 1410, U.N. Doc. S/RES/1410 (Mar. 17, 1999); S.C. Res. 2016, UN Doc. S/Res/2016 (Oct. 27, 2011).

<sup>85</sup> Jean L. Cohen. *The Role of International Law in Post-Conflict Constitution Making: Toward a Jus Post Bellum for "Interim Occupations"*, 51 N.Y.L. Sch. L. Rev. 498, 498-532 (2007).

preserve the social, political, and economic institutions of the prior regime.<sup>86</sup> This has the effect of preserving the citizens' sovereignty.

However, international laws mentioned above do not constrain Security Council action for two reasons. First, the UN is certainly not a belligerent force and it is highly controversial to call it an occupier. These laws apply exclusively to belligerent forces occupying a nation. Second, these conventions are only binding on the individual states that ratify them. Because International Organizations, such as the UN, are not parties to these conventions, they are not bound by the laws.<sup>87</sup> Thus, it is difficult to instill international law applying to belligerent occupations. International law must be reformed to establish limits on what the Security Council can and cannot do in post conflict situations.

Furthermore, the Arab Spring may require a completely different approach from that used by previous institutions as nations transition from autocracy to democracy. Thus, the conservation principle must be abandoned. Preserving the prior regimes' institutions would mean to continue with authoritarian rule. Prior means of governance must be abandoned for more inclusive and transparent governance.

There must be, however, some limitations on UN power in post conflict countries. The international community must reform occupation law to encompass peaceful "occupations" such as transitional missions set up by the UN. The reforms governing post conflict areas, called *jus post bellum*, must reflect contemporary conditions and expectations of the UN missions conducted today.<sup>88</sup> There should be an increased emphasis on issues such as human rights and

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<sup>86</sup> *Id.*

<sup>87</sup> Kristin Boon, *Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers*, 50 McGill L.J. 285, 300 (2005).

<sup>88</sup> Cohen, *supra* note 85 at 498.



democracy.<sup>89</sup> Such a law could restrict the way in which the UN may legislate and guarantee that the UN is not infringing on sovereignty. Furthermore, *jus post bellum* would apply to international organizations as well as states that have signed onto any treaties.

With the UN assisting a number of countries in their transitional or constitution making process, the issue arises as to whether the UN's involvement is an interference with a state's right to self determination, or its right to choose its own style of government and laws. The UN Security Council strongly adopts democracy as the best method of governance,<sup>90</sup> even though not all of the permanent five members ascribe to this ideology, like China. In fact, the UN has even established the United Nations Democracy Fund to promote civilian participation in the democratic process.<sup>91</sup> Nevertheless, the UN might be seen as imposing a style of a western liberal democracy. Just because the Council deems this to be the best style of government, it may not actually be the best option available for the particular country in question.

While the issue of state sovereignty and UN occupation may seem problematic, one must remember that the UN is an international organization that states have created. While no state has done so, a member state can always withdraw from the UN for any reason. When a state becomes a UN member, it agrees to the principles laid out in the UN Charter. States are well aware of the Security Council's power. It is common knowledge that the UN espouses the idea of basic freedoms, and human rights, among other values. If a country is in disagreement with such beliefs, it can withdraw its membership. However, membership revocation may be a harsh step for states, as they may lose many benefits they enjoy with UN membership. Thus, the idea

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<sup>89</sup>*Id.*

<sup>90</sup>*Governance*, UN, <http://www.un.org/en/globalissues/governance/> (last visited Nov. 27, 2011).

<sup>91</sup> UNITED NATIONS DEMOCRACY FUND, <http://www.un.org/democracyfund/index.htm> (last visited Dec. 2, 2011)



that state is impliedly consenting to UN missions by simply being a member may not be a strong argument.<sup>92</sup>

Nevertheless, it should be noted, in most cases where the UN has assisted in constitution making, they have been asked to be there.<sup>93</sup> States have not seen UN missions as an infringement to their sovereignty. If a state does not wish to impose the type of government it thinks the UN will endorse, it need not ask them for their expertise. For example, while Libya's transitional government called on UN assistance, Egypt and Tunisia did not. Egyptians and Tunisians are more confident of transitioning to a democratic regime on their own.

#### **IV. Is UN Involvement Beneficial?**

We have seen that thus far, the UN's authority is largely unchecked in third generation peacekeeping missions. Ultimately, is this power beneficial or a detriment to states? While the UN still has a minimal presence in Kosovo and East Timor, both countries have had a relatively smooth transition to democracy and independence.<sup>94</sup>

Critics often raise issues on state sovereignty and the concern of creating a hegemonic international law.<sup>95</sup> By abandoning the conservation principle, the UN will be free to instill whatever laws it deems appropriate. This imposition of laws could even be seen as a form of neo-colonialism.<sup>96</sup> The UN approach in many situations is to theorize a blueprint that seems successful and to apply it in different countries.<sup>97</sup> This approach would apply a generic solution to similar problems that may arise in a government's transition. However, each country is unique

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<sup>92</sup> Fox, *supra* note 71 at 308.

<sup>93</sup> *Id.*

<sup>94</sup> Fox, *supra* note 71.

<sup>95</sup> Cohen, *supra* note 85, at 501.

<sup>96</sup> *Id.*

<sup>97</sup> THE ROLE OF INTERNATIONAL LAW IN REBUILDING SOCIETIES AFTER CONFLICT, *supra* note 20 at 136.

in its history, politics, social and cultural background. A generic formula may not work in all countries.

Nevertheless, the UN is a positive influence in assisting transitional authorities in post-conflict situations. The UN brings in expertise. It has a over 60 years of experience as an international organization and now 193 member states from which to collect data on issues such as constitution making and election assistance.<sup>98</sup> For example, the UN's report on constitution making assists transitional governments and constitutional committees in drafting a successful constitution. Such a report can assist countries like Kosovo or Libya in their transition. The study found that a more inclusive constitution making process and greater civilian participation led to a more successful constitution.<sup>99</sup> The study examined a number of states in the process of creating their constitutions. Some of the countries investigated were South Africa, Namibia, Spain, Ethiopia, Venezuela, and Zimbabwe, among others. The UN was not involved in the process for many of these states but nevertheless noted what was and was not successful in the countries' experiences. While the study noted the importance of an inclusive constitution-making process, it noted that too much participation can just lead to a short term compromise instead of a lasting constitution that actually works. The report also stressed the importance of preparatory work, that the process is not dominated by a single party, and found that constitutions are more successful when there is a non-elected commission but also elected constituent assemblies. For example, in Namibia, the constitutional committee was able to revise a draft that the constituent assembly had drafted.<sup>100</sup>

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<sup>98</sup> *Growth in United Nations Member States, 1945-present*, *supra* note 18.

<sup>99</sup> Jamal Benomar. *Constitution-Making and Peace Building: Lessons Learned from the Constitution-Making Process of Post-Conflict Countries*, UNDP (August 2003)

<sup>100</sup> *Id.*

In terms of participation, the report also found that African countries were successful in promoting participation by creating a grassroots movement to raise awareness.<sup>101</sup> Eritrea reached people through radio and by going to villages. However, in larger countries, with isolated populations like in Brazil, Columbia and Nicaragua, this proved to be a more difficult task. Nevertheless, it is important to first have a draft constitution that is written by the elite and to present that to the citizens than to gather their opinions first, or the task of building consensus among both the people and the elite becomes quite difficult, as was the case in Brazil.<sup>102</sup>

Similarly, the UN can bring in expertise in electoral assistance. A UNDP report on electoral assistance stressed that electoral assistance is most effective when it is focused on long-term capacity development.<sup>103</sup> Transparent elections are important to creating a credible and legitimate election process as the UN learned in Yemen and Mali.<sup>104</sup> Election assistance can also provide an entry point for broader government programs. For example, in Pakistan, the UNDP collaborated with other agencies to develop the Women's Political Participation Project which reserved 33% of the local government seats for women.<sup>105</sup> Women were trained in gender sensitivity, awareness raising, advocacy, budgeting and executive legislative relations. This led to 36,000 women being elected in the 2001 elections.<sup>106</sup>

It is important to have public participation in elections which should be inclusive and work to build broad coalitions. The UN electoral assistance report found that "democracy

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Electoral Assistance*, UNDP (14 Dec. 2003),

[http://204.200.211.31/Publications/Governance/Gov\\_Prac\\_doc/Essentials%20Electoral%20Assistance.pdf](http://204.200.211.31/Publications/Governance/Gov_Prac_doc/Essentials%20Electoral%20Assistance.pdf).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

building depends on inclusive, representative and transformative participation.”<sup>107</sup> In Kosovo, the government made an effort to make elections as inclusive as possible. The International Organization for Migration established hot-lines and conducted in-person polls to allow nearly 90% of Kosovars who were living out of the state to participate in the elections.<sup>108</sup> Thus, the UN can bring in particularized expertise in election assistance by promoting certain values like gender equality in Pakistan but also work with other organizations to assist in greater civilian participation in elections.

Furthermore, the UN can instill democratic ideals, promote human rights, create a strong civil society, and promote greater civilian participation in governance. The UN is especially helpful establishing political institutions where there might have been a void, like in East Timor and Kosovo, where the UN took on a governance role.<sup>109</sup> This also gives the states more legitimacy in the international community, as the state governments are backed by the UN.<sup>110</sup> In practice, the world has criticized the UN far more for its inaction, like in the case of the Rwandan genocide, then for exceeding its powers.<sup>111</sup> Neither the ICJ nor the European Court of Justice have struck down a Security Council decision for overstepping its bounds, even when the resolutions might clash with EU laws.<sup>112</sup> The Council’s decisions in East Timor and Kosovo were far more efficient and expeditious than other possible alternatives.<sup>113</sup>

History has demonstrated that in practice, the Charter and the Security Council’s structure itself have been effective in checking the Council’s power. For example, Russia and

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Fox, *supra* note 71 at 202.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Matheson, *supra* note 51 at 224.

China felt that the Council exceeded its bounds in its military intervention in Libya.<sup>114</sup> The states therefore vetoed any resolutions condemning the violence in Syria so that the Council does not exceed its power again. Furthermore, there has been no instance where a country has taken the UN to the International Court of Justice claiming a violation of its sovereignty.<sup>115</sup> Time and time again, countries have instead sought the UN for assistance in transitioning to peace and stability. The very lack of complaints against the UN is a positive sign. East Timor and Kosovo are still new countries, so, while their political, economic and social situations will not be as advanced as other countries', the countries are greatly helped by the expertise and experience that only the United Nations can provide.

States may have to compromise their autonomy by allowing the UN to have an influential role in governance. Despite this, temporarily suspending a state's autonomy is appropriate when the goal is to establish a liberal, autonomous, and sustaining state.<sup>116</sup> Thus, while states are giving up some autonomy, the end goal in establishing successful, lasting, and legitimate institutions is beneficial to them. Ultimately, the overwhelming benefits a state can achieve through UN membership far exceeds any theoretical infringement on sovereignty.

While the Security Council's action in Libya has been criticized using the argument that there should be no foreign intervention in a domestic conflict, there has been criticism for non-intervention in Syria as well.<sup>117</sup> Even though there will, and should be criticism of an institution's actions, the UN must continue to act as an international force promoting peace, stability and security.

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<sup>114</sup> Stephanie Nebehay, *U.N. Urges action in Syria, Russia and China Object*, REUTERS (Dec. 2 2011) <http://www.reuters.com/article/2011/12/02/us-syria-un-rights-idUSTRE7B01M720111202>.

<sup>115</sup> Matheson, *supra* note 51 at 224.

<sup>116</sup> Fox, *supra* note 71 at 308.

<sup>117</sup> Simon Tisdall, *The Consensus on Intervention in Libya has Shattered*, THE GUARDIAN (Mar. 23, 2011) <http://www.guardian.co.uk/commentisfree/2011/mar/23/libya-ceasefire-consensus-russia-china-india>.



In Libya's case where transitional authorities must rebuild civic institutions, the UNSMIL will prove to be a helpful tool. As Libyans have only seen one autocratic ruler for the past 42 years, the UN will bring in much needed expertise and experience on state governance, constitution making, and institution building. Unlike Egypt and Tunisia which have also undergone transitions, Libya involves greater political, social and economic reconstruction. Thus, the UN should be able to assist authorities in a smooth transition to democracy.

### **Conclusion**

This paper discussed the powers and limitations of the Security Council in establishing transitional governance missions in light of the Arab Spring. The International Court of Justice leaves the Security Council to interpret its own role as laid out in the UN Charter. The Charter gives the Council sweeping powers to maintain international peace and security. Ultimately, the states making up the Council act as the biggest check, in that resolutions will not pass if one of the permanent five states or four or more of the ten nonpermanent members find a resolution objectionable.

Past UN missions in Kosovo and East Timor have ushered in a new level of UN involvement in domestic politics. The UN directly governed Kosovo and had a significant role in East Timor's governance. While these states initially forewent their autonomous powers, the end goal of establishing a legitimate, democratic, and legitimate government justified the temporary loss of autonomy.

While UN missions may be beneficial, the Security Council should not have unlimited powers. A political check through states' veto in passing resolutions is not enough. The international community must create a *jus post bellum*, or post conflict law, to establish limits to



the Security Council's power in transitional governance situations. Such a law will not create an absolute blueprint on how the UN must conduct itself in establishing a new government but will create the boundaries of international influence over the affairs of a sovereign state. This will preserve important international norms of state sovereignty and autonomy while states undergoing fundamental political and economic change find themselves vulnerable to outside influence during the transitional phase.