I. Introduction

It is by no means unorthodox to characterize the United Nations (UN) Security Council as a political organ charged with the task of ensuring international peace and security. In the words of the UN Charter, the UN Security Council has the ‘primary responsibility’ for the maintenance of international peace and security. In carrying out this highly political function the Security Council will often also ensure that states behave in a law-abiding fashion. However, already the UN’s constituent instrument carefully avoids language that would clearly oblige the Security Council to strictly follow the law when carrying out its policing function.

For a considerable time, more or less coextensive with the Cold War period, the de facto inability of the Security Council’s permanent members to come to a common understanding that would have allowed them to take decisions as envisaged in the UN Charter led to a situation where the built-in tension between the Council’s (political) peace-securing tasks and its (potential) law-enforcing and/or law-abiding duties has remained unnoticed.

II. The Emergence of Possible Conflicts in Practice

This changed radically with the end of the Cold War and the new activism of the UN’s main political organ in the 1990s. The activation of its Chapter VII powers produced a number of situations in which the measures adopted by the UN Security Council appeared to collide with values espoused by

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1 Art. 24(1) UN Charter.
the international community in general and the UN in particular, such as
the rule of law, human rights or good governance.

A. The Establishment of the *ad hoc* Criminal Tribunals for
Yugoslavia and Rwanda

In 1993, Security Council activities reached a new quality. The creation
of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia
(ICTY), soon to be followed by the establishment of the *ad hoc* International
Criminal Tribunal for Rwanda (ICTR), through Security Council resolu-
tions pursuant to Chapter VII UN Charter raised many public international
law issues, touching, among others, on the limits of the UN’s implied
powers, the legality of law-making resolutions by an executive organ, the
scope and limits of the non-military powers under Article 41 UN Charter,
the existence of judicial review, etc.

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2 UN SC Res. 827 (1993).
3 UN SC Res. 955 (1994).
4 See J.E. Alvarez, International Organizations as Law-Makers (2005); J.D. Aston,
‘Die Bekämpfung abstrakter Gefahren für den Weltfrieden durch legislative
ZaöRV (2002) 257; I. Brownlie, ‘The Decisions of Political Organs of the
The Adoption of (Quasi-)Judicial Decisions’, in R. Wolfrum/V. Röben (eds.),
Developments in International Law in Treaty Making (2005) 183; K. Harper,
‘Does the United Nations Security Council Have the Competence to Act as
Court and Legislature?’, 27 Int’l L. & Pol. (1994) 103; A. Marschik, ‘The
Security Council as World Legislator?: Theory, Practice and Consequences of
an Expanding World Power’, 18 NYU International Law and Justice Working
as “Global Legislator”: Ultra Vires or Ultra Innovative?’, 28 Fordham Int’l
AJIL (2005) 175.
in G. Goodwin-Gill *et al.* (eds.), The Reality of International Law. Essays in
Council: Is there Room for Judicial Control of Decisions of the Political Organs
of the United Nations?’, 46 The International and Comparative Law Quarterly