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Turning the focus inwards: the decision-making process in the security council and the international rule of law

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TURNING THE FOCUS INWARDS: THE DECISION-MAKING
PROCESS IN THE SECURITY COUNCIL AND THE INTERNATIONAL
RULE OF LAW

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ABSTRACT

The United Nations Security Council is entrusted under the UN Charter with primary responsibility for the maintenance and restoration of the international peace; it is the only body with the power to legally authorise military intervention and impose international sanctions where it decides. However, its decision-making process has hitherto been obscure and allegations of political bias have been made against the Security Council in its responses to potential international threats. Despite the rule of law featuring on the Security Council's agenda for over a decade and a UN General Assembly declaration in 2012 establishing that the rule of law should apply internally to the UN, the Security Council has yet to formulate or incorporate a rule of law framework that would govern its decision-making process.

This thesis explains the necessity of a rule of law framework for the Security Council before analysing existing literature and UN documents on the domestic and international rule of law in search of concepts suitable for transposition to the arena of the Security Council. My analysis emerges with eight core components, which form a bespoke rule of law framework for the Security Council. I then evaluate the Security Council's decision-making process since 1990 against this framework, illustrating where and how the rule of law has been undermined or neglected in its behaviour. I conclude by finding that the Council and other bodies are unwilling or unable to adequately regulate the decision-making process against a suitable rule of law framework, before arguing for the establishment of a *Rule of Law Tribunal* as a subsidiary organ to the Council under its Charter powers that would be solely responsible for both the regulation of Council practice and judicial review of its decisions.

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DECLARATION

I declare that all the material contained in this thesis is my own work.

Sherif Elgebeily

DEFINITIONS AND ABBREVIATIONS

Assembly/UNGA	United Nations General Assembly
Chapter VII	United Nations Charter, Chapter VII
Charter	United Nations Charter (1945)
Council/UNSC	United Nations Security Council
CTC	United Nations Counter Terrorism Committee
DPRK	Democratic People's Republic of Korea
DRC	Democratic Republic of Congo
GDP	Gross Domestic Product
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
MONUSCO	UN Stabilization Mission in the Democratic Republic of the Congo
OHCHR	Office of the High Commissioner for Human Rights
R2P	Responsibility to Protect
Res	Resolution
Russia	The Russian Federation
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNJHRO	United Nations Joint Human Rights Office (DRC)
UNMIBH	United Nations Mission in Bosnia Herzegovina
UNMIL	United Nations Mission in Liberia
US	United States of America
USSR	Union of Soviet Socialist Republics

CHAPTER I

SOURCES AND THEORIES RELATED TO THE INTERNATIONAL RULE OF LAW AT THE COUNCIL

I.1 Introduction

The rule of law has become synonymous with principles of democracy, equality, freedom, good governance and other elements of a civilised society which are generally agreed to be beneficial to mankind. Similarly, the United Nations may conjure up images for many of a utopian ideal that values strength in diversity and leads the way in impartiality of procedure and composition. After all, the General Assembly offers in its structure, amongst other benefits, a means of placing less developed nations on a par with industrialized States – Nauru and China on the same stage despite their massive size difference, the DRC alongside the United States despite their divergent respective GDPs and States hostile towards one another such as Iran and Israel are viewed equally in the Assembly chamber and granted equal rights. Indeed, even the seating arrangement of States, ordered alphabetically and in proximity to the front rotated based on a ballot, is swimming in even-handedness and fairness. However, whereas UN member States in the General Assembly are equally represented, meaning each has a single vote irrespective of size, population, economic size or other distinguishing feature, the Security Council is an inherently different system altogether.

Although not in contradiction with the international principles of State sovereignty due to the fact that all Members of the UN have entered voluntarily to be bound by the UN Charter which regulates the Security Council mechanism in all manners, it can appear this way at first glance. The Council is formed of 15 members,¹ only 10 of which are alternated every two years on a staggered basis: 5 each year. The remaining 5 permanent members are equipped with the power to unilaterally prevent a resolution from even coming into existence through the power of veto.² Furthermore, the Security Council has been mandated by the UN Charter to maintain the international peace and security by any means necessary, including but not limited to the use of sanctions and the use of force. Recent decades have seen the definition of international *peace*

¹ UN Charter (1945) art 23(1)

² *ibid* art 17(3)

and security expand, although not without concern by member States, non-governmental organizations and scholars.³

Thus, with a third of seats within the organ occupied by permanent members wielding the veto and the Security Council's apparently unfettered powers to subject UN Member States to legally binding obligations without their consent,⁴ the Security Council is far from proportionally representative or equal in its composition. Calls for reform have fallen on deaf ears for decades, with the exception of token changes such as the 1963 expansion of the number of non-permanent seats on the Council from 6 to 10, bringing the total from 11 to 15 members.⁵ It would seem, then, that despite purporting to be an organ that claims to represent the entirety of the United Nations member States, the Security Council must be accepted as a flawed system, at least from the perspective of the proportional representation, standards of equality and other democratic principles that the General Assembly displays. Perhaps more concerning than the flawed system itself is the notion that Security Council action is not subject to any adjudication, review, standards of accountability or other elements of what those involved in the fields of law, politics and international relations might term *the rule of law*.

However, this situation seems on the cusp of change: on 24th September 2012, the UN General Assembly adopted a landmark declaration that “the rule of law applies to all States equally, and to international organizations, *including the United Nations and its principal organs*, and that *respect for and promotion of the rule of law and justice should guide all of their activities* and accord predictability and legitimacy to their actions.”⁶ After years of debate on UN reform and discussion on how the rule of law can be internationalised, the question has transited from *whether* the rule of law should be applied to the United Nations and its organs to *how* this can be done.

³ eg Jacob Cogan, ‘Noncompliance and the International Rule of Law’ (2006) 31 Yale J Intl L 189; Simon Chesterman, ‘The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-based International System- Final Report and Recommendations from the Austrian Initiative, 2004-2008’, ¶33 (Institute for International Law and Justice 2008); Jared Schott, ‘Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency’ (2008) 6(1) Northwestern J Intl Hum Rts 24; Björn Elberling, ‘The *ultra vires* Character of Legislative Action by the Security Council’ (2005) 2 IOLR 337

⁴ eg UNSC Res 955 (8 November 1994) UN Doc S/RES/955, where the International Criminal Tribunal for Rwanda was created despite the objections of Rwandan delegate. A more recent example is the referral of several members of the Sudanese government, including President Omar Al-Bashir, to the International Criminal Court, despite Sudan not being a State Party to the governing Rome Statute

⁵ UNGA Res 1991A (1963) UN Doc A/RES/17/1991A.

⁶ Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UNGA Res 67/1 (2012) UN Doc A/RES/67/1, ¶2 [emphasis added]

The UN Charter allows the Security Council to set its own agenda in maintaining international peace and security, without defining the term or giving it a specific mandate with respect to armed conflict or any other definition. Whilst the expansive nature of a “threat to the peace”⁷ can be argued to have evolved since 1945, when the Security Council was established, from the perspective of an inquisitive and legal researcher, the lack of oversight or monitoring of Security Council decisions is a metaphorical thorn in the side. The competence of the Council to self-regulate as well as regulating others, such as appointments to the International Court of Justice⁸ and the post of Secretary-General of the UN⁹, allows it a great deal of freedom without the type of review one may traditionally associate with comparable domestic organisations.¹⁰ Similarly, as arguably the closest organisation to a ‘world government’, with the power to impose economic sanctions, military intervention and, most recently, criminal sentences,¹¹ the Council does not benefit from the impartiality and separation of powers that a domestic government that abides by the principles of a rule of law might.

To add to this situation, the focus of the United Nations, as well as other international organisations and governments,¹² has shifted increasingly towards the establishment of the rule of law. It is found in the doctrines, resolutions, statements and official records of the United Nations at all levels and has been cited as one of the core foundations for peace and security. Indeed, since 2004, the rule of law has increasingly featured on the agenda of the Security Council itself and held numerous thematic debates on the subject;¹³ yet it was only recently that the United Nations began looking internally when discussing the rule of law and even more recently that any action was taken in moving the United Nations towards compliance with a rule of law. In the aftermath of the General Assembly’s recent declaration on the rule of law, I ask

⁷ UN Charter (1945) art 39

⁸ Statute of the International Court of Justice (1945) art 4(1)

⁹ UN Charter (1945) art 97

¹⁰ Domestic governments are traditionally subject to checks and balances to ensure that the rule of law is maintained effectively

¹¹ The subsidiary organs of the ICTY and ICTR, in addition to the ICC to which the Council may refer situations under Rome statute art 16, are enabled with the power to hand down criminal sentences to convicted parties. This is attributable to the Security Council and thus, indirectly, the Security Council has granted itself the power to hand down criminal sentences. For imputability of actions of a subsidiary to an organ back to the parent organ, see generally, Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (OUP 2011) and Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (OUP 1999)

¹² eg States’ constitutions and UN resolution

¹³ See eg UNSC Presidential Statement 15 (2003) UN Doc S/PRST/2003/15, UNSC Presidential Statement 2 (2004) UN Doc S/PRST/2004/2, UNSC Presidential Statement 32 (2004) UN Doc S/PRST/2004/32, UNSC Presidential Statement 30 (2005) UN Doc S/PRST/2005/30; UNSC Presidential Statement 28 (2006) UN Doc S/PRST/2006/28

how the rule of law can be applied to the Security Council, what it would be comprised of and how it can inform decisions taken under Chapter VII of the UN Charter dealing with threats to the international peace.

1.2 Research Methodology

1.2.1 Research Questions

It can be said that there are three basic aims of research: *exploration*, *testing out* and *problem solving*.¹⁴ This thesis fits into the scope of both *exploration* and *testing out*, as it attempts to create a definition of the international rule of law for the Security Council and then make generalisations from specific instances and cases within this framework. It will identify individual components of the international rule of law and refer to decisions taken by the Council either passing a resolution or deciding not to do so, exploring whether the Council has acted differently in similar circumstances and whether it has complied with the rule of law. In this thesis, I will establish what the components of an international rule of law for the Security Council are and how they differ from a domestic or general international rule of law. I will also identify situations where the Council acted according to these principles and situations where it failed to do.

As such, there appear to be two distinct elements to this thesis: defining the rule of law as it pertains to the Security Council and measuring the Security Council's decision-making process in Chapter VII resolutions against this standard. A successful project should have clearly articulated research questions, pursued through appropriate methods and using appropriate data. Thus, there are two core questions that I wish to tackle in this thesis:

- 1) What should the rule of law be at the Security Council level?
- 2) Have the Security Council responses under Chapter VII of the United Nations Charter to actual or potential *threats to the peace* incorporated these elements of the rule of law into its decision-making process, where pertinent?

¹⁴ See eg Nicholas Walliman, *Your Research Project* (2nd edn, Sage 2005) 249; Estelle Phillips and Derek S. Pugh, *How to get a PhD* (Open UP 2010) 58-9

Within the framework of the above two questions, there are several sub-questions that shall be answered:

- i. What is the rule of law in the domestic and international spheres?
- ii. How and why does a rule of law for the Security Council differ from the rule of law in other contexts?
- iii. Why should the Security Council be subject to a rule of law?
- iv. What are the comparable cases of *threats to the peace* that the Council has dealt with?
- v. Is there a case for subjecting the Security Council to either judicial or independent review as part of compliance with the rule of law? If so, do suitable means of review currently exist? If not, what means can be used?

1.2.2 Research Scope

It is important at this stage to explicitly note the focus of my research- although it would be interesting to analyse how a rule of law can be implemented across the board in Security Council decisions, including administrative decisions or those, for example, that elect judges to the ICJ or recommend a Secretary-General to the UN General Assembly, this thesis will focus exclusively on the rule of law within the framework of the Council's primary responsibility to maintain the international peace and security as outlined in the UN Charter. It will not address the rule of law outside of this scope, meaning that only decisions taken by the Security Council to maintain international peace and security will be examined against rule of law elements.

To analyse every decision taken by the Security Council, or even all resolutions that have been passed with reference to or under Chapter VII since its establishment, would be a herculean task that, moreover, would not result in concise and manageable outcomes or findings. It is for this reason that this thesis will benefit from purposeful sampling relating to selected cases that highlight instances where the Council may have avoided, neglected or side-stepped the implementation of rule of law components in its decision-making process. Temporal limitations for data collection are normally vital to research- as Walliman notes, data "only provide a fleeting and partial glimpse of events, opinions, beliefs or conditions. What may be an accurate and valuable observation today, might be irrelevant and incorrect tomorrow. Data are not only

ephemeral but corruptible.”¹⁵ However, any shifting standards in Council behaviour will be useful in this research, since it may suggest a change in the stance of the Council or an acceptance that its process requires amendment to bring itself more in line with the underlying principles of equality, fairness, transparency or any of the other rule of law components; as this thesis will demonstrate, for example, with respect to incorporation of human rights considerations in sanction regimes or the expansion of the term “threat to the international peace”, the act of contrasting resolutions that emerged decades apart grants an insight into the evolution of the thinking of Council Members and marks a shift in what is considered integral to its responsibilities.

This thesis does not primarily seek to explicitly trace an evolution in practice, although evolving practices will indicate a willingness of the Council to change its approach to responding to threats to the international peace as well as the UN’s – and by extension the Council’s – ability to self-reflect on the most appropriate methods of upholding its responsibilities under the UN Charter; this thesis primarily focuses on the establishment of a bespoke rule of law for the Council and the comparison of Council behaviour with this rule of law. Therefore, due to the concept of peace and security and its development throughout the decades since the establishment of the United Nations, I have chosen not to exclusively temporally limit the scope of this thesis; however, although resolutions dating back to the establishment of the Council in 1946 are not precluded, I anticipate that resolutions dating from 1990 – after the fall of communism and the collapse of the USSR – will be more useful to my research and I expect to rely more heavily on these for numerous reasons.¹⁶

Firstly, the end of the Cold War appears to be a point that scholars agree constituted a great shift in Council politics and heralded the beginning of an increased activity on its part in the maintenance of international peace and security.¹⁷ The impact of the Cold War on the work

¹⁵ Walliman (n 14) 241

¹⁶ Some analysis of resolutions prior to this will be necessary to derive Council interpretation of its mandate and powers at the time of and shortly after its establishment. For example, the Council’s approach to its reform, its transparency, its interaction with other UN organs and the use of the veto are not issues that must be necessarily temporally limited

¹⁷ See eg Susan Lamb, ‘Legal Limits to UN Security Council Powers’ in Guy Goodwin-Gill & Stefan Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (OUP 1999) 361; Antonios Tzanakopoulos, ‘Transparency in the Security Council’ in Andrea Bianchi & Anne Peters (eds), *Transparency in International Law* (CUP 2012) 368; Elberling (n 3); John Dunbabin, ‘The Security Council in the Wings: Exploring the Security Council’s Non-involvement in War’ in Vaughan Lowe and others (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, (OUP 2010) 495

of the Council is starkly contrasted by a post-Soviet Security Council, exemplified most clearly by the juxtaposition of the paralysis suffered prior to 1990 to the cascade of Council-mandated and related activity on the front of peacekeeping activities,¹⁸ adopted Council resolutions,¹⁹ proliferation of subsidiary bodies²⁰ and significant decline in the number of vetoes used by P5 member States;²¹ this increased cooperation of the Council members after 1990 is sure to have impacted on the stance and behaviour of its decision-making process. Secondly, to discuss the threat to international peace from the early 20th Century, in the aftermath of World War II, at the height of the Cold War or prior to the expansion of the definition of a *threat* by the Council would be irrelevant; ultimately, the emergence of new threats to the international peace²² and a greater focus on the impact of *intra-State* conflict on regional stability rather than the now antiquated *inter-State* conflicts²³ highlights that the international arena the peace of which the Council is tasked to maintain or restore has change drastically. Thirdly, this work must endeavour to remain relevant and contemporary – the decision-making process of the Council may well have changed over the course of seventy years and to identify a pattern in the mid-twentieth century that no longer exists would produce no answers as to the extent to which the Council maintains the rule of law today. As a result, the focus of this research must be relatively recent and a quarter of a decade appears a naturally suitable period of time for examination whilst also allowing sufficient scope for detailed and varied illustrations of Council behaviour.

¹⁸ Between 1990 and 1994, the UN's annual peacekeeping budget rose from \$500m to over \$3bn; during the same period, the number of peacekeepers deployed rose from 10,000 to 70,000 troops. See, Security Council Report, 'UN Peacekeeping: Deployments and Budgets, 1946-2013' (2014)

¹⁹ In the years 1985-89, 87 resolutions were passed – an average of 17 per year; in the period 1990-1994, a total of 323 resolutions were passed – around 64 per year

²⁰ There are only a handful of existing subsidiary organs that date back prior to 1990: three standing committees (Committee of Experts (1946); the Committee on Admission of New Member States (1946); and the Committee on Meetings away from UN Headquarters (1972)) and one Charter-mandated subsidiary body (the Military Staff Committee (1946)). Since 1990 the Council has created three ad-hoc committees (the UN Compensation Committee (1991), the Counter-Terrorism Committee (2001) and the Weapons of Mass Destruction Committee (2004)), three ad hoc International Tribunals (the ICTY (1993), the ICTR (1994) and the International Residual Mechanism (2010)), six working groups (on Peacekeeping operations (2001), on Resolution 1566 (2004), on Children and Armed Conflict (2005), on Conflict Prevention and Resolution in Africa (2002), on Documentation and other Procedural Questions (1993), on International Tribunals (2000)) and thirteen sanctions committees (on Somalia and Eritrea (2002, 2009), Al-Qaeda (1999, 2011), the Taliban (2011), Iraq (2003), Liberia (2003), Democratic Republic of Congo (2003), Cote d'Ivoire (2004), Sudan (2005), Lebanon (2005), Democratic People's Republic of Korea (2006), Iran (2006), Libya (2011) and Guinea-Bissau (2012))

²¹ In 1989 the same number of veto votes were cast as throughout the entire decade of the 1990s (9 in total); the 1970s saw 51 vetoes and the 1980s saw 72, whilst the 1990s saw only 9 and the 2000s saw 16

²² Eg non-proliferation, international terrorism, climate change, gender inequality and others

²³ Typified by the discussions and responses of the Council on and to the former Yugoslavia, Rwanda, Libya, Syria, Kosovo, Iraq, Haiti and numerous other internal State conflicts

Finally, it would be remiss to attempt to impose a standard of the rule of law, mention of which as a concept itself only appeared on the Council agenda at the advent of the new millennium, with the standards of the Charter drafters at San Francisco in 1945; as a concept only recently acknowledged as applying internally to the UN system, there would be little use in measuring the decision-making process of the Council against a standard that did not exist a quarter of a century ago. Such analysis would attempt an *ex post facto* critique of the Council that violates the principle of *nullem crimen sine lege*. Nonetheless, there remains a vast quantity of Council material for comparison and numerous conflicts and threats that are ripe for discussion even within the period 1990 onwards; since 1990, the Council has passed over 1500 resolutions,²⁴ which seems a wealthy pool of resources from which to derive patterns of behaviour and, most importantly, timely, relevant and pertinent examples.

In contrast to the definition of international peace and security, the rule of law can benefit from a long-standing history of attempts to define it. The rule of law varies not as a result of temporal differences but rather ideological, geographical, philosophical and other ethereal and abstract reasons; the rule of law, then, is defined differently depending on the individual or State defining it and what may be valued as paramount to some will not necessarily be held inviolable to others. As Chapter II will illustrate, the components of a rule of law are far from agreed upon, but the core thread or concept itself has existed for centuries without being defined in detail. Attempts to define it, rather than superseding or replacing previous definitions appear to have augmented and enhanced predecessors' classifications and descriptions whilst simultaneously leaving the core values of a rule of law intact; it is a case of refinement rather than replacement. Thus, temporal limitation will not be necessary when it comes to defining the rule of law, since its definition can be said to benefit from the extensive examination that it has undergone.

1.2.3 Methods

The exact detail of how each component of the rule of law can be established will be addressed in Chapter III, but this short overview aims to give an insight into the overarching structure that this thesis will take. This thesis intends to be a legal study of the rule of law principles in the decision-making process by the United Nations Security Council; it will address the process by

²⁴ Figure calculated through author's own analysis of UN documents. There were 646 resolutions passed between the years 1946 and 1989; since then there have been over 1500 resolutions passed.

which the Council reaches a decision to adopt or reject a resolution, as well as its inaction, which in itself can be seen as a concerted decision. Therefore, this thesis will not simply be an empirical study of what is (*lex lata*), but also a normative study of what the rule of law at the level of the Security Council should be (*lex ferenda*). In doing so, of course, an element of empirical research will be necessary – most notably the analysis of Security Council resolutions, Council President statements, verbatim records and other primary sources – to establish a frame of reference of the *status quo* as opposed to my proposition for Security Council rule of law; this will be particularly relevant when addressing the current definition of the rule of law, which has been discussed at length and at various echelons of society from the individual to international organisations. I intend to juxtapose these types of Security Council documents with a bespoke rule of law framework that I will derive from existing literature and UN documents themselves, such as UNGA Res 67/1 and Secretary-General Kofi Annan’s 2004 report outlining the components of the rule of law.²⁵

My primary focus will be the work of the Council itself, as well as the reactions and statements of its constituent Members and the wider international community; Council resolutions and Presidential statements are central to my research but verbatim records and voting statistics will assist in analysing not only the end result but also the reasoning behind the outcome and the process through which it was reached. This work draws primarily on qualitative methods, where the theory of a bespoke rule of law is applied in practice to the Council decision-making process. I do not attempt to deeply immerse myself in only a few situations as case study methods may necessitate, but rather I will take a thematic approach to derive only the necessary data of the response of the Council to numerous situations at different stages, each illustration²⁶ supporting my argument in relation to a particular facet of the rule of law – from the tabling of an agenda item to the adoption of a Council resolution – from a wide range of selected examples of Council behaviour and hold these against the principles and norms of a bespoke rule of law derived from existing literature and UN documents. Thus, in doing so, I focus only on the relevant extracts of the Council decision-making process; I have also studied the threats that have

²⁵ Report of the Secretary-General, ‘The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies’ (2004) UN Doc S/2004/616

²⁶ I have termed the examples used later in this thesis as *illustrations* rather than case studies to differentiate between the connotations attributed typically to case studies and the selective elements of the examples where Council behaviour will be measured, the latter of which is what I intend to make use of.

been discussed at the Council and have selected certain situations as the basis of my illustrations that highlight where the Council is lacking in compliance with the rule of law.

Since the international rule of law is at the heart of this research, selecting appropriate cases to highlight specific examples of Council action within a framework of the individual components of the international rule of law appears more logical than attempting to fit the components to a small number of cases that may not be truly representative of the nature of the Council's work. I intend to interpret these resolutions side-by-side, using juxtaposition in a comparative analysis of Council action, contrasting the similarities and patterns in their decisions and the process leading up to a decision to either pass or fail a proposed resolution. Resolutions will be examined according to their relevance to the rule of law component under discussion, since I predict that there will be more pertinent examples depending on the particular strand of the rule of law in question. In essence, rather than selecting a handful of resolutions against which to compare all of the elements of the rule of law, I will select different resolutions for each rule of law component depending on their relevance to the argument being made. It is for this reason that a case study approach or a purely quantitative analysis has not been selected for this thesis.²⁷ However, this is not to say that quantitative methods are entirely unhelpful in the research of this thesis; historical data forms a part of the analysis of my research insofar as concluding whether a pattern exists and in juxtaposing the behaviour of the Council today with its decision-making process in the past.

I intend to select two types of resolutions of the Security Council: those dealing with situations that contain similar features but where the course of action taken by the Council was different – for example, the reactions to popular uprisings in Libya and Syria – or where the situations were different but the course of action taken by the Security Council was the same – such as the use of the veto under different circumstances. This thesis will not limit itself to resolutions that have been passed, but will also address resolutions which have been proposed but failed as well as situations that might constitute a threat to the international peace where resolutions were not posed at all. In doing so, I aim to examine a wide cross-section of Council action over the decades since its creation, attempting to chart the rise of the international rule of law in Council action, if at all, with a particular focus on Council decisions since the rule of law

²⁷ Quantitative analysis may also have allowed me to enter into historical data analysis, finding patterns in the way that the Council has reacted to situations since 1945; however, it would have failed to establish the rule of law itself as a standard against which Council action can be measured.

began to appear on its agenda in 2003 and was mentioned as relating internally to the UN in Annan's report of 2004. However, I also intend to ask whether the rule of law for the Security Council is enshrined in its responsibilities as outlined in the UN Charter, and therefore must relate examples back to Council action as far back as 1946.

I have chosen to examine all substantive resolutions²⁸ and Presidential statements that have emerged from the Council since 1990, with a particular focus on those dealing with the maintenance of the international peace, before narrowing these down to examples where I have found relevant data to be extrapolated. This thesis firstly argues that the Council should be held to standards of the rule of law and, accordingly, the crux of my original research focus in this thesis is to analyse examples where the Council has failed to do so. In researching these documents, as well as the Council discussions that have taken place,²⁹ I have highlighted in my research situations where the Council has departed from adherence to the rule of law. I have chosen the illustrations contained in this thesis based on their relevance to each of the components of the rule of law; each illustration is included by design to prove a point, help demonstrate a pattern of behaviour or accentuate a variance in approach by the Council. As a result, although there may be instances where the Council *does* adhere to the rule of law in its decisions, by definition the rule of law is a standard from which no deviation should be permitted. Accordingly, a failure on the part of the Council to adhere in some situations with the rule of law cannot be found to be a simple deviation but rather, given the nature of the Council's powers and position within the UN system, a symptom of wider nonconformity.

This thesis will draw upon both the doctrinal and reform-oriented approaches, using a black letter definition of the law based upon the Vienna Convention on the Law of Treaties as a framework for analysis. Although the rule of law itself is not clearly defined and one cannot speak of a black letter definition of the rule of law in the same way as some fields of law may benefit from, this thesis establishes a rule of law framework and the black letter law approach will be used to apply the technical legal rules of the components outlined in Chapter III to the behaviour of the Council in Chapter IV - XI. My research attempts to analyse the Council's adherence to the principles of the rule of law, whilst also evaluating the adequacy of the existing structure of the Council and its subsidiary, complementary and peripheral bodies, organs and

²⁸ These are non-procedural resolutions that do not deal with issues such as the appointment of ICJ judges, Secretary-General, etc.

²⁹ This was carried out through analysis of verbatim records.

establishments in relation to its work; this thesis will identify if it is appropriate and feasible to impose a structure of the rule of law upon the Council and whether it would be appropriate and feasible for an external entity to monitor its compliance. I identify that there exists a need for a rule of law framework, expand on potential areas of friction between current practice and best practice³⁰ and attempt to predict future developments within the Council, whilst simultaneously suggesting means to incorporate these rule of law components within Council activity.

1.2.4 Sources

The overarching primary source for this thesis will be the UN Charter, which operates as the sole governing text that empowers the Security Council to take actions including sanctions, military intervention and the creation of subsidiary organs. Within this framework there are additional considerations which impact on the duties and responsibilities of the Council, such as State practice and compliance, the Council's Rules of Procedure or the interaction between the Council and the International Criminal Court under the Rome Statute; however, as the document from which the Council draws its legitimacy, power and the legality of its actions, the UN Charter must be central to this thesis and it must be the standard against which its actions are measured, particularly with respect to the case studies on *ultra vires* action. Similarly, the Council has adopted its own Rules of Procedure – albeit provisional in name – by which it should abide and these Rules will also serve as central to the thesis.

Other primary sources for this research will consist of United Nations documents including Council resolutions, General Assembly resolutions and decisions and judgements of international courts such as the International Court of Justice, ICC, International Tribunals for the former Yugoslavia and Rwanda insofar as they mention, interact with or review the actions of the Council. These are all widely available electronically through either the respective court's websites or the United Nations News Centre.³¹ They are also collated in volumes of Council resolutions, Assembly resolutions and other tomes of central UN and UN organ literature.³² Other primary sources will include State declarations and statements.

³⁰ “Best practice” is defined as action by the Council in compliance with the rule of law components.

³¹ <www.un.org/news> accessed 16 December 2014, <www.un.org/Docs/sc> accessed 16 December 2014, <www.un.org/en/unpress> accessed 16 December 2014.

³² eg United Nations Resolutions, UN Juridical Yearbooks, ICJ Yearbooks, Annual Review of United Nations Affairs, Law and Practice of International Courts and Tribunals.

This thesis will therefore make use of a wide variety of resolutions and treaties as primary sources. In interpreting these, I have chosen the guidelines of the Vienna Convention on the Law of Treaties to ensure that my analysis is consistent and transparent and thus it is vital to establish my theoretical perspective when doing so. Interpretation of international treaties are regulated by articles 31-33 of the Vienna Convention and as such I will use this framework to interpret all international treaties and the UN Charter, since this is, in essence, the largest multi-lateral treaty in international law.³³ Despite the Vienna Convention entering into effect several decades after the UN Charter was established, it remains the framework that I choose for interpretation.³⁴ Far from being an example of *ex post facto* law, the Vienna Convention was in part a codification of existing norms and law.³⁵

Resolutions, however, are more difficult to analyse, as they are not strictly treaties and therefore cannot be analysed within the same Vienna Convention framework *mutatis mutandis*. The Vienna Convention, can, however, serve as a fine starting point for the interpretation of

³³ Some commentators interpret the UN Charter as a constitution. See eg Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Brill Nijhoff 2009) 169; Ernst-Ulrich Petermann, ‘Constitutional Justice and the Perennial Task of ‘Constitutionalizing’ Law and Society through ‘Participatory Justice’’ (2010) European University Institute Working Paper Law 2010/03, 2 <http://cadmus.eui.eu/bitstream/handle/1814/13590/LAW_2010_03.pdf?sequence=1> accessed 16 December 2014. However, this would colour the UN in a different light – more as a governmental entity with intertwining and inter-supportive judiciary, executive and legislative branches – and therefore would shift the perspective of analysis for this thesis, particularly when discussing rule of law elements such as separation of powers in Chapter II. I strongly disagree with this view given the voluntary accession of States to the UN, the independence of UN organs from one another and the non-vertical nature of international law. The United Nations system was created so that organs are independent of one another, which is one of the reasons why issues such as my research questions are being posed. As such, the Charter should be interpreted under article 31 and 33 of the Vienna Convention (Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331)

³⁴ To take a traditional view of the Charter would mean abiding rigidly to the definitions and meanings of the drafters of the Charter, as derived from documents and State practice of the time; to take a liberal view would be to accept the changing thresholds, values, standards and practices of international law, international politics, diplomacy and inter-state relationships. This is the crux of the debate between a positive and negative interpretation of the definition of a threat to the international peace and security. For further discussion of positive and negative interpretations of the threat to the peace, see Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart 2004) 138-139

³⁵ The concept of codification of existing customary law into a treaty is one that has previously been supported by the ICJ in the *Continental Shelf case*; therefore, the principles that are enshrined in it can be sufficiently recognised to have been principles of customary law at the time of the Charter’s creation. See, *Continental Shelf case (Libyan Arab Jamahiriya v Malta)* (Judgment) [1985] ICJ Rep 13, ¶27, where the ICJ found that “the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them”. See, also, cases where customary law is reflected in article 31 of the Vienna Convention: *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (Judgment) [1994] ICJ Rep 6, ¶41; *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objections) [1996] ICJ Rep 803, ¶23; *Kasikili/Sedudu Island (Botswana/Namibia)* (Judgment) [1999] ICJ Rep 1045, ¶18; *LaGrand (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466, ¶99

Security Council resolutions.³⁶ In contrast to legal treaties, most Security Council resolutions are not self-contained and are a continuation of previous decisions or resolutions; thus, all Security Council documents or other reports referred to in the opening of a resolution should be considered the *travaux preparatoires* of the resolution and are relevant to the interpretation of the object and purpose of the resolution.³⁷ For instance, the agreement of States in itself is a method of establishing the meaning or intent of a resolution and comments, statements and press releases frequently supplement the black letter text of the resolution, adding facets to the often skeletal resolution.

The Security Council in its decisions often veers outside of the scope of traditional black-letter law into the sphere of international politics and relations and the full depth of their meaning is often only discovered when the “legal documents” of resolutions are taken in conjunction with non-legal texts and verbal statements that assist in further defining the purpose and intention of a resolution. Even treaties cannot be addressed as exclusive self-contained entities as, particularly when referring to documents that were drafted over half a century ago, often the debates that raged between States on exact wordings apprise us of the potential hidden meanings that were included or excluded from the finished legal texts.³⁸ This leads to my decision to use the *travaux preparatoires* as a supplementary means of interpretation

The following section examines existing secondary sources in a brief literature review, explaining where my research is located and why existing works do not fully answer the research questions I have proposed above.

1.3 Literature Review

Existing discussions of the international rule of law either approach the questions of its existence, relationship to the Security Council and intersection with the maintenance of international peace and security from isolated perspectives, that is to say from one particular

³⁶ Sir Michael Wood has written an article on the matter, although he by no means intended it to be definitive. See, Michael C Wood ‘The Interpretations of Security Council resolutions’ (1998) 2 Max Planck Yrbk UN L 73

³⁷ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331, art 32. This is supplemented by the principles highlighted in Article 31 of the Vienna Convention to interpret in good faith, in a general context as *lex generalis*— unless otherwise stated to be *lex specialis* — and the fact that with Security Council resolutions, State practice can often serve as an indicator of the nature of a resolution.

³⁸ This is certainly the case where the UN Charter is concerned and the definition of *peace and security* is examined. In order to discover this, the text of the Charter alone is wholly insufficient and the conferences at Yalta, San Francisco and other formative meetings must be considered.

facet, or insufficiently address the complexities of an international rule of law as it pertains to the Security Council. This thesis is also located in the void left by previous authors and researchers that have focused on an international rule of law solely with reference to isolated fields of international law – such as that of international refugee law³⁹ – or on the existence of an international rule of law as a general concept,⁴⁰ the fruits of which would be borne on the domestic level. The imposition of a rule of law upon the Security Council internally, as opposed to its numerous resolutions and statements emphasising the importance of a rule of law at the domestic level in the pursuit of good governance, human rights and democratic principles, is a new initiative that has been years in the making. Indeed, “the international rule of law is most commonly understood as the regulation of horizontal relations between states”⁴¹ and hitherto, any notion of abidance by the rule of law would have been almost unthinkable for the Security Council, which had, and continues to practice, *compétence de la compétence*⁴² insofar as its decision-making process. A different understanding of the international rule of law is evident amongst scholars, excluding the Security Council as subject to its components and regulation and focusing either on the interaction between the domestic and international spheres or the horizontal application of a vertical system upon States themselves⁴³ or on the Council’s role in

³⁹ eg Susan Kneebone, ‘The Rule of Law and the Role of Law: Refugees and Asylum Seekers’ in Susan Kneebone (ed.), *Refugees, Asylum Seekers and the Rule of Law* (CUP 2009), 32-77

⁴⁰ eg Thomas Bingham, *The Rule of Law* (Penguin 2011), 110-29, in which an international rule of law would include the reliance on law as opposed to arbitrary power in international relations, the settlement by law for settlement by force and the use of law for the cooperative international furtherance of social aims; Jeremy Waldron, ‘The Rule of International Law’ (2006) 30 Harv J L & Pub Pol’y 15, where an international rule of law constrains states in the same way that domestic law constrains lawmakers; Simon Chesterman, ‘An International Rule of Law?’ (2008) 56(2) Am J Comp L 331, in which an international rule of law can be understood to be the application of rule of law principles to relations between States and other subjects of international law; Dennis Jacobs, ‘What is an International Rule of Law?’ (2006) 30 Harv J L & Pub Pol’y 3, where cultural activities create linkages that bypass national and governmental designations.

⁴¹ Machiko Kanetake, ‘The Interfaces between the National and International Rule of Law: A Framework Paper’ (2006) Amsterdam Centre for International Law Research Paper No 2014-44, 6 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2480965> accessed 16 December 2014

⁴² This is the power of a Court to determine the scope of its own jurisdiction. The UN Charter clearly states that “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace . . .” UN Charter (1945) art 39

⁴³ eg Thomas A Vandamme & Jan-Herman Reestman (eds), *Ambiguity in the Rule of Law: The interface between National and International Legal Systems* (Europa Law 2001) is an example of this phenomenon and takes as its central theme the interface between national and international legal systems; Dennis Jacobs, André Nollkaemper and Simon Chesterman each briefly introduce the international rule of law in their respective pieces, where an international rule of law constrains states in the same way that domestic law constrains lawmakers- Jacobs (n 40); Chesterman (n 40); André Nollkaemper, ‘The Internationalized Rule of Law’ (2009) 1 HJRL 74. *The Internationalized Rule of Law* addresses the dichotomy between the rule of law at the domestic and international levels, finding that the international rule of law “influences and often even determines the domestic rule of law”, at 75, the “application of international law . . . depends on the rule of law at the domestic level”, at 75, and that

promoting the rule of law in post-conflict States.⁴⁴ No authors have created a bespoke rule of law for the Council⁴⁵ and very few have put forward the concept of a rule of law to govern the actual decisions or the resolutions of the Security Council;⁴⁶ other authors that have broached the topic of a Council rule of law have taken a piecemeal style. Such authors have typically taken one of three approaches to discussion on the rule of law for the Council: analysis of specific components of the rule of law in relation to Council behaviour, such as transparency⁴⁷ or *ultra vires* action;⁴⁸ thematic discussions of the Council's part in broader issues such as UN sanctions,⁴⁹ collective security⁵⁰ and non-proliferation;⁵¹ or examination of post-facto responses to the Council's actions, including State disobedience⁵² and judicial review mechanisms.⁵³ This

“domestic institutions can fill rule of law gaps at the international level”, at 76. Waldron (n 40) is a short introduction to the 2006 International Law and the State of the Constitution symposium and as such, it is a very brief account of international rule of law from an American perspective, drawing heavily on US constitutional protections as a reference point.

⁴⁴ See eg David Toblert & Andrew Solomon, ‘United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies’ (2006) 19 Harv Hum Rts J 29

⁴⁵ Thomas Fitschen, ‘Inventing the Rule of Law for the United Nations’ (2008) in 12 Max Planck Yrbk UN L 347 discusses the rule of law for the Council but stops short a detailed analysis of the rule of law components on the decision-making process of the Council itself. Simon Chesterman was the drafter of the final report and recommendations that emerged from the Austrian Initiative on the role of the Security Council in strengthening a rules-based international system that ran from 2004 to 2008: Chesterman (n 3) ¶33. This report approached the rule of law and Security Council in tandem, emerging with seventeen recommendations for the Council but does not enter into an academic analysis of the rule of law or the role of the Security Council and, much like government documents and reports, focuses on the practical application without encompassing the theoretical framework necessary for a scholarly piece. Accordingly, it is more akin to a policy paper, with suggestions, recommendations and assumptions without referential support.

⁴⁶ Ian Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (Nijhoff 1998), 214-18; Simon Chesterman, ‘I’ll Take Manhattan’: The International Rule of Law and the United Nations Security Council’ (2009) 1 HJRL 1 67; Jason Dominguez Meyer, ‘From Paralysis in Rwanda to Boldness in Libya: Has the International Community taken “Responsibility to protect” from abstract principle to concrete norm under International Law?’ (2012) 34(1) Hous J Int’l L 87

⁴⁷ Tzanakopoulos (n 17)

⁴⁸ Schott (n 3); Benedetto Conforti, ‘The Legal Effect of Non-compliance with Rules of Procedure in the UN General Assembly and Security Council’ (1969) 63 AJIL 479; Bardo Fassbender, ‘*Quis judicabit?* The Security Council, Its Powers and Its Legal Control’ (2000) 11 EJIL 219; Elberling (n 3); Eric Rosand, ‘The Security Council As ‘Global Legislator’: Ultra Vires or Ultra Innovative?’ (2004) 28(3) Fordham Int’l L J 542

⁴⁹ Christopher Michaelsen, ‘The Security Council’s Practice of Blacklisting Alleged Terrorists and Associates: Rule of Law Concerns and Prospects for Reform’ (2010) 8 New Zealand J Public Int’l L 71; Enzo Cannizzaro, ‘A Machiavellian Moment? The UN Security Council and the Rule of Law’ (2006) 3 IOLR 189; August Reinisch, ‘Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions’ (2011) 95(4) AJIL 851

⁵⁰ Sarooshi (n 11); Karel Wellens, ‘The UN Security Council and New Threats to the Peace: Back to the Future’ (2003) 8(1) J C & S L 15

⁵¹ Daniel Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (OUP 2009); Daniel Joyner, ‘The Security Council as a Legal Hegemon’ (2012) 43 Geo J Int’l L 225, 227

⁵² eg Cogan (n 3); Tzanakopoulos (n 11)

fragmentary and disconnected mosaic of works even when read together cannot provide the interconnectivity I seek to achieve in a holistic approach to a system of rule of law components, tailored to the characteristics of the Council as defined by the UN Charter and held against the realities of its decision-making process and composition.

Accordingly, existing literature does not suffice in answering the research questions that I have posed in section 2.1 of this Chapter. The focus of this thesis can be distinguished, for example, from studies exclusively centred on the *intra* or *ultra vires* action of the Council, “whether the body’s powers under Chapter VII of the UN Charter are virtually unlimited, how far the Council can extend the scope of its activities, and whether there are sufficient means of legal control.”⁵⁴ Although accountability and review of Council action forms part of this thesis, it is but one component of a wider rule of law system and it is this system that is original in its proposal. Individual components addressed in isolation will not serve to explain whether and how the Council complies with the rule of law; nor will such isolated examinations provide a full picture as to of what the rule of law for the Council would consist and to what extent the Council has made efforts to bring itself in line with such standards since 1990. This thesis will not examine one component of the rule of law, but rather all components; as the thesis will show, there is clear overlap between components of the rule of law and the sole means of gaining an accurate picture of the Council’s compliance with the rule of law is to examine the system in its entirety, as opposed to existing literature on a single theme, component or aspect of Council procedure. Existing literature is also incapable of being read in light of the new situation that the Security Council finds itself in after the adoption of the General Assembly declaration on the Rule of Law in 2004;⁵⁵ whilst the Council’s decision-making process will be examined since 1990 when a new stage of cooperation between Members can be seen, it is the adoption of UNGA Res 67/1 that supposedly heralded a new era in steps taken internal to the UN system for compliance with the rule of law.

This thesis is therefore unique, too, in the temporal scope of its analysis; from a political standpoint, scholarly books that exist on the functions and powers of the Security Council seem

⁵³ Alexander Orakhelashvili, ‘The Acts of the Security Council: Meaning and Standards of Review’ (2007) 11 Max Planck Yrbk UN L 143; Bernd Martenczuk, ‘The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?’ (1999) 10(3) EJIL 517

⁵⁴ Fassbender (n 48)

⁵⁵ UNGA Res 67/1 (n 6)

outdated, having been published in the 1990s or early 2000s,⁵⁶ although there are examples of journal articles that have addressed this topic more recently.⁵⁷ However, this literature predates the declarations relating to the rule of law that have emerged from the various organs of the UN since 2004, the increased focus on the recent wave of revolutions and depositions of Heads of State that have taken place in Tunisia, Egypt, in which Syria currently finds itself mired and of which Libya finds itself in the aftermath. Moreover, in addition from benefiting from a decade of Council activity since UNGA Res 67/1, this thesis is a unique study of the Council's decision-making process over the 25 years since fall of Communism.⁵⁸ It will look for patterns and themes in Council action, evolution in its decision-making process, search for reform, self-awareness and autonomous review mechanisms. Studies, even within the framework of components of the rule law and their applicability to the Council, have not attempted to chart a course of action by the Council. Therefore, despite a broad spectrum of literature that exists on the international rule of law, the limits of the Security Council or attempts to define and interpret the meaning of an international peace and security, there exists a gap in the existing field of research that I aim to fill with my choice of thesis.

I.4 Thesis Overview

Chapter II will introduce the need for a rule of law framework for the Council and will elaborate on the goals and sources of the rule of law in both the domestic and international spheres. The concept of the rule of law has been much-debated for many centuries, yet no common terminology or definition has been agreed upon. My research will therefore begin by isolating the relevant components of a rule of law for the Security Council before settling on eight components for a bespoke rule of law framework in *Chapter III*. This Chapter will then investigate in depth these components – each aspect of the definition will be examined, explaining the standards to which Council decision-making should be held and how to identify

⁵⁶ eg Hazel Fox (ed), *The Changing Constitution of the United Nations* (BIICL 1997); Sarooshi (n 11); de Wet (n 34); Lamb (n 17) 361

⁵⁷ eg Fitschen (n 45); Tzanakopoulos (n 17); Hitoshi Nasu, 'The UN Security Council's Responsibility and the 'Responsibility to Protect'' (2011) 15 Max Planck Yrbk UN L 377

⁵⁸ Some analyses have been undertaken on the formative years; see, eg, Frederic L Kirgis Jr, 'The Security Council's First Fifty Years' (1995) 89(3) AJIL 506. However, as highlighted previously, the Council's work has grown exponentially since 1990 and any conclusions derived from such analyses are likely to be outdated both in terms of the Council's attitude towards the definition of a "threat to the international peace" as well as the Council's self-proclaimed powers to respond.

where the Council has reached these goals. *Chapters IV to XI* will compare and juxtapose the components of the rule of law that I have described in further detail against Council decisions and resolutions in order to discern whether a pattern of behaviour exists and if this pattern falls within the definition of a rule of law. *Chapter XII* will examine external mechanisms for review and propose the establishment of a *Rule of Law Tribunal* for the Council, dealing specifically and exclusively with Council rule of law issues and holding it accountable for its decisions. The thesis will come to an end in *Chapter XIII* with general conclusions.

CHAPTER II

DEFINING AN INTERNATIONAL RULE OF LAW FOR THE COUNCIL: HOW, WHY AND WHAT?

II.1 Introduction

This Chapter aims to answer the first of my research questions, by addressing three of the sub-questions:

- i. What is the rule of law in the domestic and international spheres?
- ii. How and why does a rule of law for the Security Council differ from this?
- iii. Why should the Security Council be subject to a rule of law?

In order to answer these questions we must first have an understanding of the general concept of the rule of law. Despite the almost sacred importance and the religious connotations of the rule of law in the above citation, “[t]he ‘rule of law’ is widely embraced at the domestic and international levels without much precision as to what the term means”⁵⁹; for example, although the UK’s Constitutional Reform Act states that “[n]othing in this Act shall detract from the existing constitutional principle of the Rule of Law”⁶⁰, it does not seek to offer a definition of what that principle is.⁶¹

In many minds⁶² and political systems⁶³ the national incarnation of the rule of law has become synonymous with good governance, maintenance of human rights and an equitable,

⁵⁹ Chesterman (n 3) Executive Summary ¶ii

⁶⁰ Constitutional Reform Act 2005, s 1(1)

⁶¹ See, also Venice Commission, ‘The Rule of Law: Concept, Guiding Principle and Framework’ (2010) Council of Europe Doc CDL-UDT(2010)022, 3, where “[t]he rule of law is part of the inseparable and steadfast triangle, trilogy, trinity, or triumvirate “*human rights, democracy and rule of law*”. It is the cornerstone of national political and legal systems. The principle’s importance within this framework has stimulated debate leading to what scholars often describe as a profoundly contested concept. It is therefore indispensable and worthwhile that more international organisations and bodies take a firm stand with regard to its content”; generally, UNGA Res 67/1 (n 6)

⁶² See eg, Brian Z Tamanaha, ‘The Rule of Law for Everyone?’ (2002) 55 CLP 97, 107; EP Thompson, *Whigs and Hunters: the origin of the Black Act* (Penguin 1975) 266; International Commission of Jurists, *The Rule of Law in a Free Society: A Report on the International Congress on Jurists, New Delhi, India January 5-10, 1959* (International Commission of Jurists 1959), vii

⁶³ In addition to UN declarations on the rule of law, which are formed of sovereign States and therefore political systems, individual states such as Russia and China have come forward to highlight the importance of the rule of law. See, eg Alexander Lebed, ‘Rule of Law for Russia’, *The Moscow Times* (1 June 1996) <<http://www.themoscowtimes.com/news/article/rule-of-law-for-russia/323583.html>> accessed 16 December 2014; Erik Eckholm, ‘China Sign UN Pact on Rights and Rule of Law’, *New York Times* (21 November 2000) <<http://www.nytimes.com/2000/11/21/world/china-signs-un-pact-on-rights-and-rule-of-law.html>> accessed 16 December 2014

robust judicial system- it is “a signal virtue of civilized societies.”⁶⁴ However, surprisingly, it is certain that there is no singular, simplified definition of a domestic rule of law; indeed it has been described as “an exceedingly elusive notion.”⁶⁵ It is truly a labyrinthine and tortuous term that would not be difficult imagining collapsing under its own weight. In fact, it has been posited that “the phrase ‘the Rule of Law’ has become meaningless thanks to ideological abuse and general overuse”⁶⁶. There are at least five pertinent points that all contribute to the tortuously meandering convolutions of the term “the rule of law”.

Firstly, the definition itself of the term in the legal domain is obscure and opinion is divided on its components: curiously for a legal term, none have agreed on an exact definition.⁶⁷ Secondly, the exact meaning of the concept differs not only between academics and scholars, but also along geographical lines: despite the rule of law featuring heavily for centuries in literature and legal texts, after the end of the Cold War – when the concept itself spread most notably – in Latin America the rule of law meant a focus on judicial reform, in the Eastern European States legal change alone was thought sufficient and the US viewed the phrase “rule of law” to mean assistance efforts to support legal judicial and law enforcement reform efforts undertaken by foreign governments.⁶⁸ Thirdly, beyond geographical borders, the term “rule of law” has transgressed the legal borders, pervading discussions in the economic arena, where it “is held to be not only good in itself, because it embodies and encourages a just society, but also as a cause of other good things, notably growth.”⁶⁹ Fourthly, as this chapter will show, the rule of law has also evolved to become not only a concept related to *what* rules should be included, but also now

⁶⁴ Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (OUP 2009) 12

⁶⁵ Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) 9

⁶⁶ Judith N Shklar, ‘Political Theory and the Rule of Law’ in Allan C Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology?* (Transnational 1987) 1.

⁶⁷ Lord Bingham suggested that it meant “that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts”, Bingham (n 40) 8; Hayak stated that “stripped of all technicalities this means that a government in all its actions is bound by rules fixed and announced beforehand -- rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge”, Fredrich Hayek, *The Road to Serfdom* (Routledge 1994) 54; Allott states that it is “the judicial control of the legal terms and conditions of all public realm powers”, Philip Allott, ‘Law and the Re-Making of Humanity’ in Prosser Gifford & Norman Dorsen (eds), *Democracy and the Rule of Law* (CQ Publications, 2001) 19. See, also Brownlie (n 46) 213-4; Tamanaha (n 62) 102; Cheryl Saunders & Katherine Le Roy, ‘Perspectives on the Rule of Law’ in Cheryl Saunders and Katherine Le Roy, *The Rule of Law* (Federation Press 2003) 5; Jean Ely and Richard Ely (eds), *Lionel Murphy: The Rule of Law* (Akron Press 1986)

⁶⁸ Rachel Kleinfeld, ‘Competing Definitions of the Rule of Law’ in Thomas Carothers (ed), *Promoting the Rule of Law: In Search of Knowledge* (Carnegie Endowment for International Peace 2006) 33

⁶⁹ ‘Economics and the Rule of Law: Order in the Jungle’, *The Economist* (13 March 2008) <<http://www.economist.com/node/10849115>> accessed 16 December 2014.

how these rules are created, enforced and maintained.⁷⁰ Finally, the rule of law has transitioned from being a strictly domestic concept to one that is now discussed and incorporated in international law; as such, there are two types of the rule of law that need to be discussed: the domestic rule of law and the international rule of law.

Noteworthy, then, are the different dynamics of the domestic and international spheres, which appear to be in a constant state of polar opposition: codified laws are *necessarily* binding on subjects at the domestic level but only *voluntarily* at the international level; un-codified norms are *not* binding at the domestic level but *necessarily* binding at the international level without consent of States. Whilst a domestic legislation features a hierarchical *vertical* structure, where promulgated laws are imposed upon citizens of a State, under international treaty law in the international sphere this vertical hierarchy is instead replaced with a *horizontal* architecture that is built upon voluntary accession of States to international legal obligations, treaty accession and permissive of reservations.⁷¹ Indeed, voluntary adjudication of States is an integral part of international law, where States must first accede to treaties governing the mandate of international courts⁷² or accept the jurisdiction of international courts on an *ad hoc* or compulsory basis.⁷³ Contrastingly, customary international norms are binding on all States without their prior consent, in contrast to the clear codification strived for in domestic legislation.⁷⁴ Finally, at the domestic level, a constitution takes precedence over government powers, which is not the case at the international level; there is no hierarchy where a constitution can be proven to trump State sovereignty.⁷⁵

This chapter attempts to define the rule of law for the purposes of a comparative analysis between the elements of a domestic rule of law and the rule of law at a level of the Security

⁷⁰ Kleinfeld (n 68) 33-4, where the rule of law encompasses not only “the goods that the rule of law brings to society . . . such as law and order, a government bound by the law, and human rights . . . [but also] the institutions a society must have to be considered to possess the rule of law . . . such as an efficient and trained judiciary, a noncorrupt police force, and published, publicly known laws”

⁷¹ Although allowed under the Vienna Convention, reservations should not defeat the purpose of the treaty. See, Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331, art 19

⁷² Such as the Rome Statute of the International Criminal Court, without which the ICC has no jurisdiction save that over situations referred to it by Security Council Chapter VII resolutions relating to peace and security, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute)

⁷³ Such as the ICJ. See Statute of the International Court of Justice (1945) arts 36(2)-(5)

⁷⁴ The public promulgation of laws is a central theme of the domestic rule of law, as this chapter will explore.

⁷⁵ This thesis has already discussed the proposition advocated by Fassbender that the UN Charter is a constitution and rejected it in Chapter I.

Council – what would rule of law for the Security Council look like? What would its goals be and where would the sources of such a rule of law be rooted? It will also address the question why the Security Council should be subjected to the rule of law and to what extent; this thesis does not attempt to suggest a rule of law should be abided by in all aspects of Security Council business, but rather – due to constraints of length – will discuss only the legally binding decisions of the Security Council.

This chapter will therefore begin by examining why the Security Council should be subjected to a rule of law at all, focusing on four core reasons why the establishment of such a framework for the Council’s work is essential. It will then continue to address what the rule of law entails at the domestic level and how it can inform a definition of the rule of law on the international plane. It will then address the argument that the international rule of law can be directly transposed from the domestic rule of law, which some academics have attempted to suggest. Based upon international rule of law principles, this chapter will then establish a rule of law specific to the Security Council drawing on primary sources of the UN itself, such as declarations, resolutions and statements. This will result in a comprehensive definition of the international rule of law as it pertains to the Security Council. The chapter will conclude by examining each of these components in detail with reference to Security Council action, in order to discover to what extent the Council has been abiding by the international rule of law and in what ways it can implement international rule of law elements further in its decisions and resolutions.

II.2 Why is the rule of law necessary for the Security Council?

We remain convinced that the best way for the Security Council to promote international law and the rule of law is to lead by example. We challenge the view—and, to some extent, the conventional wisdom—that regards the Council as a purely political body. Its authority is based on the world's supreme international treaty, the United Nations Charter. The Council is legally bound by the applicable rules of the Charter and of international law. Those rules leave the Council much room to take decisions based on political, legal and other considerations—but that room is not without limits. It is both a legal necessity and a wise policy choice for the Council to respect and promote international law and the rule of law.⁷⁶

⁷⁶ Liechtenstein, UNSC Verbatim Record (29 June 2010), UN Doc S/PV.6347 (Resumption 1), 6

The notion that the Council “cannot be subject to the rule of law in any meaningful way”⁷⁷ is antiquated; such a theory predates the 2012 declaration bringing the Council under the scrutiny of rule of law elements. This declaration by the Assembly has made it clear that the rule of law can and must form part of the working practices of the Security Council; the existence and need for implementation of an international rule of law for the Security Council is no longer debatable nor, indeed, is it necessary to intricately examine the reasons and arguments for and against such a rule of law. Nonetheless, it would be prudent to identify four clear arguments favouring a rule of law for the Security Council in order to highlight the focus of this particular thesis, in line with the facets of the research questions and sub-questions that it intends to answer.

II.2.1 The limited composition of the Security Council

Although the Council consists of only 15 members,⁷⁸ originally 11, it is tasked with acting on behalf of them all⁷⁹– these members represent 193 States, each with its own respective government, political agenda and interests. Without doubt, frequently the interests of States are aligned and cooperation is assured; however, the Security Council was created as maintainer of international peace and security. Given that the UN Charter provides that “[t]he Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council,”⁸⁰ (P5) one can infer that their interests and the interests of those aligned to them will be perpetually represented on the Council. But selected interests and topics of discussion and debate will not suffice for a body that purports to truly represent all States; the question then arises- how does the Security Council ensure that it is truly representative as it was created to be? This thesis proposes that, given the low ratio of Council members to UN Member States, a rule of law would ensure that its procedures and decisions are more representative of the general will of the UN member States, as it was arguably envisioned in the Charter.⁸¹

⁷⁷ Christine Gray, 'The Security Council and the Rule of Law: An overview' (2009) 103 ASIL 245, 246

⁷⁸ UN Charter (1945) art 23(1)

⁷⁹ UN Charter (1945) art 24(1): The UN Charter states that “[i]n 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”

⁸⁰ UN Charter (1945) art 23

⁸¹ Although the Charter does not explicitly state that the Council should be *representative* of Member States, Article 24(1) does state that “the Security Council acts on [UN Members’] behalf.” The allusion to “equitable geographical distribution” in Article 23(1) and the fact that the non-permanent members of the Council are rotated on a staggered

II.2.2 The decision-making process and use of the veto

The manner, too, in which decisions are reached should also be noted: “[d]ecisions of the Security Council on [non-procedural] matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.”⁸² This is the clause upon which the power of veto,⁸³ held by the P5 members, is built; in essence, all non-procedural matters are conditioned on the non-opposition⁸⁴ of all P5 members. Thus, no Chapter VII resolution emerges from the Security Council without at least P5 acquiescence, and it is not difficult to imagine, given this power, how self-serving political agendas can rapidly colour the decision-making process in order to protect the P5 members and their allies from the far-reaching jurisdiction of the Council. This was an issue raised by both the Ecuadorian and Venezuelan delegates at San Francisco in 1945, who were concerned that the Charter “contains such a broad delegation of the powers of the [United Nations] to the Security Council that it appears practically unacceptable . . .”⁸⁵ Stretching beyond the previous point on the representative nature of the Council, and taking into consideration the inherent bias attributed to the veto power given to the P5, the question here, then, is how does the Security Council ensure that its decisions are free of improperly biased agenda?⁸⁶

II.2.3 The extended competence of the Council

The scope of Security Council jurisdiction has expanded far beyond that initially envisioned at the time of its creation- issues that have been deemed to pose a threat to the international peace and security such as the AIDS epidemic in Africa⁸⁷, climate change⁸⁸ and women in conflict⁸⁹

basis every two years for a four year term also heavily suggest that all Member States can and should be part of the decision-making process, both directly as serving Council members and indirectly through their geographical blocs.

⁸² UN Charter (1945) art 27(3)

⁸³ The word *veto* is Latin and translates as “I forbid”. Its usage within the context of the Security Council denotes a decision to unilaterally cease the passing of a resolution or to overrule a decision being made by other members, which is the substantive effect of Article 27(3) of the UN Charter.

⁸⁴ That is to say, P5 members must not vote against; either affirmative votes or abstentions are acceptable.

⁸⁵ United Nations Conference on International Organization (UNCIO), Vol 4 (1945), 253

⁸⁶ As political decisions, resolutions of the Security Council will inherently be politically biased, for example, in situations where the Council decides to take action against a State by means of sanctions, which will be fundamentally biased against the State in question. However, the issue is how to ensure this political bias used appropriately to ensure that veto-holders do not abuse the powers they have been granted under the Charter.

⁸⁷ UNSC Res 1983 (June 7 2011) UN Doc S/RES/1983

⁸⁸ UNSC Verbatim Record (20 July 2011) UN Doc S/PV.6587, 2

⁸⁹ UNSC Res 1325 (31 October 2000) UN Doc S/RES/1325

have slowly crept into the remit of the Security Council's Chapter VII powers during the last 60 years. Whilst these are all valid issues in their own rights, the question must be whether they were originally envisioned in the minds of drafters when granting the Council such all-pervasive control. As Palau's Permanent Representative to the UN noted, "the Council may employ 'such action...as may be necessary to maintain or restore' [international peace and security]. Such constitutional carte blanche, as well as the Council's increasing invocation of Chapter VII to justify quasi- legislative and quasi-judicial actions, gives cause for concern to detractors wary of an unrepresentative Council whose powers continue to broaden in scope faster than do corresponding guarantors of accountability and legitimacy."⁹⁰ Indeed, as the representative from Brazil argued at the establishment of the ICTY,

[i]t is precisely because the Council exercises a delegated responsibility in a field as politically sensitive as the maintenance of international peace and security that the task of interpreting its competences calls for extreme caution, in particular when invoking language of Chapter VII of the Charter . . . [T]he definition of such powers must be construed strictly on the basis of the text of the relevant Charter provisions. To go beyond that would be legally inconsistent and politically unwise.

Joyner comments on the expansion of both the scope and quality of the expansion of Security Council powers, stating that the Council now believes that it

is empowered not only to act as an *executive body*, but rather also to act as a *legislative body* crafting proactive and permanent legal edicts covering important areas of international relations including terrorism (UNSC Resolution 1373) and weapons of mass destruction proliferation (UNSC Resolution 1540) and even further to act as a *judicial body* determining the legal rights and obligations of UN members (UNSC Resolutions 1874 and 1929)⁹¹

This is in direct correlation to the fears of Ecuador at San Francisco, who wished to "forbid the Council – as the Inter-American Juridical Committee has wisely suggested – to establish or modify principles or rules of law"⁹² and which submitted an amendment to this effect,⁹³ unsuccessful though it may have been.

⁹⁰ Schott (n 3)

⁹¹ Joyner, 'Legal Hegemon' (n 51) 226

⁹² United Nations Conference on International Organization (UNCIO), Vol 3 (1945), 408

II.2.4 *The legally binding nature of Council resolutions*

Membership to the United Nations obliges all States to “agree to accept and carry out the decisions of the Security Council in accordance with the [UN] Charter.”⁹⁴ At times, these decisions are even to be imposed on non-Members, since the UN is also charged with ensuring that “states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.”⁹⁵ This effectively brings non-Member States under the jurisdiction and control of the Security Council and its decisions. The debate over what constitutes a legally-binding decision of the Security Council as opposed to an advisory opinion or non-binding resolution is one that has been entered into by other authors⁹⁶ and which I will not enter into at length, but which, due the integral necessity for a *legally binding* resolution to exist in order for there to be a *rule of law*, a brief encounter with arguments for and against the binding nature of Council resolutions is required.

Briefly, the parameters of a legally binding resolution have been argued to be not necessarily analogous with any resolution adopted under Chapter VII of the UN Charter; that is to say, there are some resolutions the obeisance to which is paramount, whereas other resolutions might tolerate less compliant behaviour. There appear to be clear examples of situations where

⁹³ Ecuador’s proposed amendment read: “In the fulfilment of the duties inherent in its responsibility to maintain international peace and security, the Security Council shall not establish or modify principles or rules of law but shall respect and enforce and apply the principles or rules of existing law”, United Nations Conference on International Organization (UNCIO), Vol 3 (1945), 438

⁹⁴ UN Charter (1945) art 25; see also, arts 2(5) and 49

⁹⁵ *ibid* art 2(6)

⁹⁶ Orakhelashvili argues that the “Security Council’s interaction with international law can take place in two dimensions . . . represented by the number of Council resolutions in which the Council confirms its support for the validity and enforcement of the relevant international norms and instruments . . . [or] resolutions by which the Council either purports to impact, qualify or modify the existing legal position under international law . . .”, Orakhelashvili (n 53) 143-195. Wood’s standard definition of the legally binding nature of resolutions comprises three segments: [W]hen the resolution in question (or an earlier closely related one) states that the Council has determined that such-and-such is, or continues to be, a threat to the peace; that it is acting under “Chapter VII” or under a specific provision in Chapter VII, such as Article 41; and that it ‘*decides*’ that something shall be done”, Michael C Wood, ‘The UN Security Council and International Law’ (Hersch Lauterpacht Memorial Lectures 2006, Cambridge, 7 November 2006) <http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/lectures/2006_hersch_lecture_1.pdf> accessed 16 December 2014, ¶39 [emphasis in original]. Hurd argues that resolutions “are generally seen as important documents in international politics, but this certainly does not mean they are automatically followed. Despite the legal obligations they might create, Council resolutions clearly do not necessarily elicit full and complete compliance by nation-states. States still seem to ‘pick and choose’ from Council decisions those elements they respect while pretending other elements do not exist”, Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton UP 2008), 4. In support of this assertion, Hurd refers to Joseph Grieco, ‘Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism’, in David A Baldwin (ed), *Neorealism and Neoliberalisation: The Contemporary Debate* (Columbia UP 1993) and John J Mearsheimer, ‘The False Promise of International Institutions’ (1994/5) 19(3) Int’l Sec 5.

Council action is not legally binding; for example, under article 26 of the UN Charter, the Council has the authority to formulate plans “for the establishment of a system for the regulation of armaments”⁹⁷ with the goal of “the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources”⁹⁸. However, both Joyner and Kelsen observed that “[m]embers may . . . choose either to accept or reject these plans”⁹⁹ and that such plans “are binding upon the members only if accepted by them . . . Article 26 does not provide expressly for the ‘adoption’ of the plan by the members . . .”¹⁰⁰ Nonetheless, whilst both Chapters VI and VII relate to the Council’s responsibilities with respect to international peace and security, some scholars argue that it is only Chapter VII that allows the Council to pass legally binding resolutions.¹⁰¹ In its *Namibia* case,¹⁰² the ICJ suggested that Article 25 of the UN Charter¹⁰³ was an obligation that should be carried through on *all* Security Council when it stated that,

Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter.¹⁰⁴

⁹⁷ UN Charter (1945) art 26.

⁹⁸ *ibid.*

⁹⁹ Joyner, ‘Legal Hegemon’ (n 51) 233.

¹⁰⁰ Hans Kelsen, *Collective Security under International Law* (Lawbook Exchange 2011) 214.

¹⁰¹ For the non-binding nature of Chapter VI resolutions see eg Philippe Sands & Pierre Klein (eds), *Bowett's Law of International Institutions* (Sweet and Maxwell 2011) 46; David Schweigman, *The Authority of the Security Council Under Chapter VII of the UN Charter* (Kluwer Law International 2001) 33; Ken Matthews, *The Gulf Conflict and International Relations* (Routledge 1993) 130; André De Hoogh, *Obligations Erga Omnes and International Crimes* (Nijhoff 2012) 371

¹⁰² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, (Advisory Opinion) [1971] ICJ Rep 16

¹⁰³ UN Charter (1945) art 25: “Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”

¹⁰⁴ *Namibia* (n 102) ¶113. The ICJ continues to qualify this statement, however, by noting that “[t]he language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect”, *Namibia* (n 102) ¶ 114. Wood builds on this suggestion, finding that, although there are no definite standards, a resolution should have three elements to be legally binding: “*First*, a determination by the Council, under Article 39 of the Charter, of the existence of a threat to the peace, breach of the peace, or act of aggression. *Second*, evidence that the Council is indeed acting under Chapter VII. And *third*, that the Council has taken a decision within the meaning of Article 25”, Wood (n 96) ¶38 [emphasis in original].

The debate rages on the exact definition of a legally-binding resolution and where obligations of compliance cease for States. However, one point upon which almost all parties appear to agree is that there exists a point at which resolutions *do* become legally-binding upon States. The question of exactly where these boundaries lie is not central to the current thesis; it is sufficient to note that the Council, in certain circumstances, benefits from the discretion to impose legal obligations upon States Member to the UN.

Thus, there is nothing and, seemingly, no State beyond the reach of the Security Council.¹⁰⁵ The Council is tasked with representing all States, yet the great power bestowed upon it by the founding delegates in San Francisco is undoubtedly at risk of abuse by some in the decision-making process. More hazardously, perhaps, these politicised decisions are binding on Member States. Brownlie noted in 1998 that “[t]he active agenda of the Security Council and its relative solidarity creates a paradox. Its increased political power is a source of hope but the modalities of the exercise of power present problems of principle and of legal control.”¹⁰⁶ In the years since he made this observation, the international political arena has not become any less complex or dark: terrorist attacks have struck the United States, UK, Spain, Nigeria and elsewhere; wars have since broken out in Afghanistan, Iraq; internal conflict has fatally fragmented countries such as Syria, Sudan, Myanmar, Sri Lanka and others. As Tamanaha remarked in 2002, “[o]ne must wonder whether the same has not been said at all times, but around the world today there appears to be more than the usual doses of war, oppression, and insecurity.”¹⁰⁷ Indeed, the Security Council was born of war¹⁰⁸ and found itself confronted with its first ideological conflict “[o]n 19 January 1946, before the first Security Council had ever met, [when] the Iranian ambassador addressed to it a letter complaining about the failure of Soviet troops to evacuate Azerbaijan . . .”¹⁰⁹ It is therefore of the utmost importance for the

¹⁰⁵ The advent of International Criminal Law in the late 20th Century was not foreseen in its entirety when the Council was created, despite ad hoc trials such as the Nuremburg and Tokyo trials. I will examine the relationship between the Security Council and the International Criminal Court in a later chapter, as this relationship appears to be an additional route for Security Council jurisdiction to be extended to cover the new field of International Criminal Law.

¹⁰⁶ Brownlie (n 46) vii.

¹⁰⁷ Tamanaha (n 62) 97.

¹⁰⁸ The Security Council, and indeed the United Nations as a whole, was created in the wake of World War II and the permanent five members of the Council reflect the victors and major powers at the time.

¹⁰⁹ Evan Luard, *A History of the United Nations: Vol. I* (St. Martin's Press 1982) 106

Security Council to work as effectively and impartially as possible, in order to maintain international peace and security as it has been tasked with.

II.3 *The rule of law in domestic legal orders*

Whilst Dicey was perhaps the first to popularise the phrase “rule of law”¹¹⁰, the ethereal content of his tripartite proposal¹¹¹ dates back to Greek philosopher Plato’s *Politicus*,¹¹² in which he advocates the notion that law should be a means through which to rule, but not an impediment to the ruler himself,¹¹³ and later *Laws*.¹¹⁴ Subsequently, his student Aristotle expounded this notion¹¹⁵ recognising, as Plato before him, the corruptibility and fluidity of man’s nature: “he who entrusts man with [absolute power], gives it to a wild beast, for such his appetites sometimes make him; for passion influences those who are in power, even the very best of men: for which reason law is reason without desire.”¹¹⁶

In the centuries even before the Middle Ages, during the eras of the Ancient Romans¹¹⁷ and the Ancient Chinese,¹¹⁸ the rule of law underscored revolutionary political theories of

¹¹⁰ Albert V Dicey, *An Introduction to the Study of the Law of the Constitution* (8th edn, Liberty Classics 1982) 107.

¹¹¹ No one can be punished or made to suffer except for a breach of law proved in an ordinary court; No one is above the law and everyone is equal before the law regardless of social, economic, or political status; The rule of law includes the results of judicial decisions determining the rights of private persons.

¹¹² Julia Annas and Robin Waterfield (eds), *Plato: The Statesman* (CUP 1995).

¹¹³ Such a hypothetical ruler would needs act benevolently and in the best interests of his people: “[H]e who has knowledge and is a true Statesman, will do many things within his own sphere of action by his art without regard to the laws, when he is of opinion that something other than that which he has written down and enjoined to be observed during his absence would be better,” Plato, *The Dialogues of Plato translated into English with Analyses and Introductions by B. Jowett, M.A. in Five Volumes* (3rd edn, OUP 1892), 504 <<http://oll.libertyfund.org/titles/768504>> accessed 16 December 2014.

¹¹⁴ “Mankind must have laws and conform to them, or their life would be as bad as that of the most savage beast”, Plato, *Laws* (trans. Benjamin Jowett, Cosimo 2008) 221. In his earlier *Republic*, Plato supported the rule of “Philosopher Kings”, ruled by knowledge but above the law. This was to change gradually throughout his writings until *Laws*, where notions of “super-legal” rulers were replaced by a comprehensive system of laws used to found his Cretan utopia of Magnesia. Noting the temptation of corruption and self-interest, Plato finally arrived at the conclusion that human nature’s fallibility and vulnerability resulted in the fact that “no man’s nature is able to know what is best for human society; or knowing, always able and willing to do what is best,” *ibid*

¹¹⁵ “It is more proper that law should govern than any one of the citizens: upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians, and the servants of the laws”, Aristotle, *Politics* (William Ellis trans, Echo Library 2006) 79 [emphasis added].

¹¹⁶ *ibid*.

¹¹⁷ “The mind, and spirit, and wisdom, and intentions of the city are all situated in the laws . . . The ministers of the law are the magistrates; the interpreters of the law are the judges; lastly, *we are all servants of the laws*, for the very purpose of being able to be freemen,” Marcus Tullius Cicero, *The Orations of Marcus Tullius Cicero* (Charles D Yonge trans, London 1856) Ch 53 s 146 <<http://www.perseus.tufts.edu/hopper/text?doc=Cic.%20Clu.%2053.146&lang=original>> accessed 16 December 2014 [emphasis added].

¹¹⁸ eg Randall P Peerenboom, *Law and Morality in Ancient China: The Silk Manuscripts of Huang-Lao* (SUNY Press 1993) 171, which reports that Huang-Lao school of Daoist thought found inadequate the widely accepted,

governance and popular equality; indeed, under the Islamic Caliphates the subordination of rulers to the supremacy of law was heavily entrenched from the outset in accordance to Sharia Law.¹¹⁹ The fledgling insistence on what we recognise today as being a rule of law gradually formed in the West more solidly through such works as Samuel Rutherford's *Lex, Rex*. John Locke's *Second Treatise of Government* and Montesquieu's *Esprit des Lois* each coined a branch of the *trias politica* theory of separation of powers that lies at the core of modern Western governments. Such works entrenched themselves in direct opposition to the theories of Thomas Hobbes¹²⁰ and other advocates of absolutist monarchies¹²¹ and, although it can be argued that the *Magna Carta* of 1215 was the start of the imposition of limitations on the powers of a monarch, it was not until the Bill of Rights Act 1689, that British "kings could no longer suspend or dispense with the laws, were obliged to acknowledge the privileges of Parliament and to seek legislative approval to raise revenue,"¹²² essentially entrenching the subjugation of the monarchy to the representatives of the people. Since this time, legal professionals,¹²³ international declarations,¹²⁴ UN resolutions¹²⁵ and academic scholars¹²⁶ have consolidated the

contemporary Confucian sage-justices legal order, revealing the belief that "[l]aw is not what the ruler says it is. Rather, it is discovered in and determined by the Way . . . Huang-Lao foundational naturalism serves to curtail both aristocratic and imperial powers by subjugating everyone to an objective natural standard."

¹¹⁹ See, eg Bernard Lewis, *The Political Language of Islam* (Chicago UP 1991) 91, where "[t]he Muslim ruler may be and usually is an autocrat, but . . . [h]is office, and his tenure of that office, are established and regulated by the law, by which he is bound no less than the humblest of his slaves . . . His task is to maintain and enforce the law and . . . if he fails in these tasks, still more if he violates the law, then he is in breach of his duty and of the contract . . . by which he was installed as ruler . . ."; Christopher G Weeramantry, *Justice Without Frontiers: Furthering Human Rights (Vol. 1)* (Kluwer Law International 1997) 132, where "[n]o Sovereign and no official could claim to be above the law . . . [T]here was a strong tradition that the power of the judge derived from a higher source than the mere authority of the state."

¹²⁰ See eg Thomas Hobbes, *Leviathan* (Oxford World's Classics 2008).

¹²¹ For an examination of absolute monarchist and enlightened absolute monarchist themes see eg Niccolò Machiavelli, *The Prince* (Penguin 1988); Voltaire, *Candide* (Penguin 1998).

¹²² Caroline A Edie, 'Revolution and The Rule of Law: The End of the Dispensing Power, 1689' (1977) 10 *Eighteenth Century Studies* 434

¹²³ See, International Commission of Jurists conferences, which brought together judges, lawyers and professors from 53 countries at Act of Athens (1955); Declaration of Delhi (1959); Law of Lagos (1961); Resolution of Rio (1962); Declaration of Bangkok (1965); Declaration of Colombo (1966).

¹²⁴ eg Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), preamble; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), preamble.

¹²⁵ eg UNGA Res 61/39 (18 December 2006) UN Doc A/RES/61/39; UNGA Res 62/70, (8 January 2008) UN Doc A/RES/62/70; UNGA Res 63/128 (15 January 2009) UN Doc A/RES/63/128; UNGA Res 64/116 (15 January 2010) A/RES/64/116; UNGA Res 65/32 (10 January 2011) UN Doc A/RES/65/32.

¹²⁶ eg Ronald Dworkin, *Law's Empire* (Hart 1998); Bingham (n 40); Freidrich A Hayek, *The Constitution of Liberty* (Routledge 1976).

existence of the domestic rule of law, leading to its enshrining at the foundation of modern democratic societies around the globe.

As a result of these myriad influences no exhaustive list of components of a rule of law has emerged. The reason for these discrepancies in interpretation appears to be that the rule of law represents different ideas to each analyst or theorist; indeed, as Chesterman notes, “[s]uch a high degree of consensus on the virtues of the rule of law is possible only because of dissensus as to its meaning.”¹²⁷ Referring to judges’ varying interpretations of law, Dworkin suggests that “the artist can create nothing without interpreting as he creates, [and the critic] creates as he interprets.”¹²⁸ If one takes this analogy further, it seems logical that the rule of law might seem slightly, if not vastly, different according to one’s positioning and environment. Each individual’s experiences, outlooks and moral school of thought subtly but significantly colour their personal definition not only of the rule of law itself as a concept, but also all others’ definitions- a constant echo of interpretative reverberations.

There are, however, certain elements that appear to be inherently shared between all of these varied descriptions and the purpose of this thesis is to analyse whether such elements of a domestic system can be transposed or adapted to fit the international legal model. In order to do so, one must first analyse the domestic model: the definition of a “political ruler” and the various components of “a rule of law” as opposed, for example, to “rule *by* law”. This latter notion is not technically opposed to absolute monarchic system since a political ruler who imposes laws arbitrarily and for the sake of personal gain, for example, would still be ruling *by* law; what the rule *of* law encapsulates at its very inception is the subjugation of all individuals, irrespective of stature, creed or other defining characteristic, to laws promulgated by the representatives that are appointed to do so by democratic means. Paradoxically, the “rule of law” is in itself a misnomer- law cannot rule; “being a human creation, [it] must be subject to human will.”¹²⁹ Therefore, to assess the rule of law requires analysis of both the “political ruler” and the intended beneficiaries, as well as the standards to which actions will be held accountable. In such a system, actions taken by any actor, ranging from the individual citizen to the government itself, are accountable- normative law. One should recall, however, that incorporation of elements of

¹²⁷ Chesterman (n 40) 332.

¹²⁸ Ronald Dworkin, ‘Law as Interpretation’ in Dennis Patterson (ed), *Philosophy of Law and Legal Theory: An Anthology* (Wiley-Blackwell 2003) 382.

¹²⁹ Gifford & Dorsen (n 67) 62

the rule of law does not amount to comprehensive definition. The transient nature of the rule of law is reflected in the difficulty of identifying an exhaustive list of its components and the hitherto lack of precise definition; it seems that there is much literature¹³⁰ and debate¹³¹ about its origins, what it might consist of and what it might seek to avoid, yet no standard or all-encompassing pithy delineation.

Holmes argues that two major features of the domestic rule of law are predictability and equality, enumerating various hypotheses as to why “political actors might furiously resist or warmly embrace the rule of law.”¹³² Indeed, Holmes begins his thesis with the assumption that any given ruler has at their disposition the means of repression and makes the coherent, rational choice whether to make use of it or not, depending on the benefits each of the actions promises to yield. In other words, the rule of law to Holmes is merely a form of governance that has little to do with ensuring that society has full access to equal, transparent and predictable rights under the laws of the land and more to do with a self-centred vested interest in personal gains and goals. Citing Machiavelli’s statement that “[p]rinces must make others responsible for imposing burdens, while handing out gracious gifts themselves,”¹³³ what Holmes is truly suggesting is that political impetus lies at the root of all legal norms associated with a “rule of law”.¹³⁴

¹³⁰ Further to the literature review in Chapter I, there is a wealth of literature discussing either the rule of law, examples of its (re)construction or elements of it. See eg Bruce Broomhall, *International Justice and the International Criminal Court- Between Sovereignty and the Rule of Law* (OUP 2003); Gerhard Werle, ‘We asked for justice and got the Rule of Law’: German Courts and the Totalitarian Past’ (1995) 11 S Afr J Hum Rts 70; Tolbert and Solomon (n 44); Davis R Robinson, ‘The Role of Politics in the Election and the Work of Judges of the International Court of Justice’ (2003) 97 ASIL PROC 277; Eric A Posner and John C Yoo, ‘Judicial Independence in International Tribunals’ (2005) 93 CLR 1; Gerald Fitzmaurice, ‘The Law and Procedure of the International Court of Justice, 1951-54: Treaty Interpretation and Other Treaty Points’ (1957) 33 British Ybk Intl L 203; Kneebone (n 39); John Laughland, *Travesty: The Trial of Slobodan Milosevic and the Corruption of International Justice* (Pluto Press 2006); Simon Chesterman, *Just War or Just Peace?: Humanitarian Intervention and International Law* (OUP 2010); Ruth MacKenzie and others, *Selecting International Judges: Principle, Process, and Politics* (OUP 2010); Jennifer A Widner, *Building the Rule of Law* (Norton 2001).

¹³¹ Chesterman (n 3); International Bar Association ‘Rule of Law Resolution’ (September 2005) <<http://www.ibanet.org/Document/Default.aspx?DocumentUId=a19de354-a0d7-4b17-a7ff-f6948081cd85>> accessed 16 December 2014.

¹³² Allott (n 67).

¹³³ Machiavelli (n 121).

¹³⁴ Gifford and Dorsen (n 67) 39: “According to the standard list, a constitutional government maintains its legitimacy, and thereby ensures a relatively high degree of compliance, by issuing its commands in the form of general rules (not ad hoc instructions) that are spelled out publicly and in advance, that are understandable, that are mutually consistent, that are stable over time (though changeable), that are not retroactive, and that are enforced reliably by the various professional agencies that make up the system of justice, including an independent judiciary. Public readiness to comply also seems to increase if the government observably obeys its own rules . . . [and] if the public believes that rules are being enforced fairly, so that privileged groups with special access are not allowed to exempt themselves egregiously from laws that should apply to all.”

Two overarching attributes of the rule of law emerge from this discourse: the first is that a set of laws is established; the second is that this set of laws is equally enforced. The two exist in unison and are inter-reliant: a set of laws that is arbitrarily or sporadically enforced is ineffective in achieving the goals of uniformity and would reduce the rule of law to a game of probabilities, where committing an illegal act is balanced against the likelihood of repercussions for its commission, or a corrupt and nepotistic system whereby those in select positions such as those of government and power are above the laws and able to escape the negative consequences of illegal acts with impunity; similarly, in order to follow a set of laws effectively and consistently, the framework of laws by which a structure is governed must be put in place based upon stable pillars that are communicated to those it governs, with a clearly evident chain of events that enumerates both what acts or actions are outlawed and the punishment for the commission of said acts or actions.

However, no strict definition of the rule of law exists. The International Bar Association (IBA) has deemed the rule of law to be “the foundation of a civilised society”,¹³⁵ incorporating, non-exhaustively, “[a]n independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client [and] equality of all before the law.”¹³⁶ To add even further complication, as the Council of Europe found, ‘the discussion is also muddled by the fact that the meaning of the term *‘rule of law’* may not be the same in different languages;¹³⁷ the term is subject to various definitional and normative disputations in the respective countries.”¹³⁸ The United States Supreme Court has offered yet another slightly different definition,¹³⁹ shifting the

¹³⁵ ‘Rule of Law Resolution’ (n 131).

¹³⁶ *ibid.*

¹³⁷ For example ‘*Etat de droit*’ (France), ‘*Rechtsstaat*’ (Germany), ‘*Stato di diritto*’ (Italy), ‘*verkhovensto prava*’ (Russia) or ‘*estado de derecho*’ (Spain).

¹³⁸ ‘The Rule of Law: Concept, Guiding Principle and Framework’ (n 61) [emphasis in original].

¹³⁹ “The law is superior to, and thus binds, the government and all its officials. The law must respect and preserve the dignity, equality, and human rights of all persons. To these ends, the law must establish and safeguard the constitutional structures necessary to build a free society in which all citizens have a meaningful voice in shaping and enacting the rules that govern them. The law must devise and maintain systems to advise all persons of their rights, and it must empower them to fulfil just expectations and seek redress of grievances without fear of penalty and retaliation”, Justice Anthony Kennedy, ‘Remarks to the American Bar Association’, (ABA Annual Meeting, Honolulu, 5 August 2006).

passive role of law as being an avenue that should be made available if and when needed to an active role where the law is obliged to *devise, maintain* and *empower*.¹⁴⁰

The concern that emerges, then, is that with differing contextual practices and laws, standards between nations can differ depending on the specific circumstances of that environment. For example, where a government dictates that certain moral codes allow for employment discrimination in favour of previously disadvantaged groups, the social backgrounds or racial profile of potential employees become disproportionately important in relation to qualifications, allowing, or even encouraging, employers to choose those who will fulfil certain criteria on paper and leaving a significant number of the population struggling to compete in the job market. Moreover, the rule of law is adapted to serve specific national needs that would be irrelevant or even counter-intuitive in other States. In post-Apartheid South Africa the introduction of Black Economic Empowerment (BEE) legislation¹⁴¹ may be deemed appropriate for social cohesion and political, economic or other national advancement, but would clearly be erroneous and abhorrently discriminatory if imposed in another nation. Thus, the rule of law in this case is clearly only judged as being equal and transparently rational relative to the domain to which it relates.

The rule of law as a concept must, nevertheless, have certain elements upon which most, if not all, parties can agree. The phrase “rule of law”, or a variation thereof, is explicitly mentioned as being at the core of domestic constitutions the world over;¹⁴² the elements, nonetheless, remain elusive. The late practitioner and rule of law authority Thomas Bingham attempted to unravel the mystery of a definition of its elements in one volume, entitled quite

¹⁴⁰ Once again, this is diametrically opposed to the prevalent Hobbesian theory of government in the 17th Century. See eg Thomas Hobbes, *Leviathan* (Oxford World’s Classics 2008).

¹⁴¹ The Broad-Based Black Economic Empowerment Act 53 of 2003. A points-based system encourages businesses to employ ethnic groups including black Africans, Coloureds and Indians, in an attempt to “redress[. . .] the imbalances of the past by seeking to substantially and equitably transfer and confer ownership, management and control of South Africa’s financial and economic resources to the majority of the citizens”, ‘Report of the Black Empowerment Commission’ (Skotaville Press, 2001) 2.

¹⁴² “[t]he Republic of South Africa is one, sovereign, democratic state founded on . . . [s]upremacy of the constitution and the rule of law”, Constitution of the Republic of South Africa, 1996, ¶1(c); “Canada is founded upon principles that recognize the supremacy of God and the rule of law”, Constitution Act, c. 11 (U.K.), Schedule B, 1982, preamble; France the constitution shall “*assure l’égalité devant la loi de tous les citoyens sans distinction d’origine, de race ou de religion . . . [et elle] respecte toutes les croyances*”, [ensure the equality of all citizens before the law, without distinction of origin, race or religion and respect all beliefs] Constitution de la République française, 1958, art 1; Spain’s constitution “*proclama su voluntad de . . . [c]onsolidar un Estado de Derecho que asegure el imperio de la Ley como expresión de la voluntad popular*”, [proclaims its will to . . . consolidate a state of law which insures the rule of law as the expression of the popular will]. La Constitución Española, 1978, preamble

aply *The Rule of Law*.¹⁴³ A detailed analysis of the individual components of a domestic rule of law feature heavily in Bingham's work and a comprehensive list of seven elements emerges: accessibility of the law;¹⁴⁴ applicability of the law as opposed to the use of discretion;¹⁴⁵ equality before the law;¹⁴⁶ judicial review of public entities and servants;¹⁴⁷ protection of human rights;¹⁴⁸ the enforceability of rights and laws;¹⁴⁹ and the availability of a fair trial.¹⁵⁰ These sum up the definition of the rule of law at the domestic level and encompass issues that might be debated when discussing the domestic rule of law; for example, judicial review ensures lack of corruption, abuse of powers and the dominance of the law over all persons regardless of their stature or power.

The principles identified by Bingham in *The Rule of Law* were no doubt derived from intensive study of different constitutions; they are enshrined widely across nations as being at the core of the rule of law at the domestic level. Equality can be seen in Belgium's constitutional protection that "[n]o class distinctions exist in the State . . . Belgians are equal before the law"¹⁵¹ or Australia's affirmation that "all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth"¹⁵². Judicial review through the separation of powers is woven into the fabric of many constitutions, such as those of the United States,¹⁵³ South Africa,¹⁵⁴ Brazil,¹⁵⁵ Belgium¹⁵⁶ and France.¹⁵⁷ The right to a fair trial is also enshrined in the constitutions of South Africa¹⁵⁸ and Canada¹⁵⁹, as are the accessibility of the law, also understood as clarity or legal

¹⁴³ Bingham (n 40).

¹⁴⁴ *ibid* 37.

¹⁴⁵ *ibid* 48.

¹⁴⁶ *ibid* 55.

¹⁴⁷ *ibid* 60.

¹⁴⁸ *ibid* 66.

¹⁴⁹ *ibid* 85.

¹⁵⁰ *ibid* 90.

¹⁵¹ The Constitution of Belgium, 2012, art 10. For similar rights, see also South African constitution (n 142) art 9; Constitution of Brazil, 1998, art 5; Constitution of India, 2011, art 14; Canadian Constitution (n 142) art 15(1).

¹⁵² An Act to constitute the Commonwealth of Australia [1900] 63- 64 Victoria, Chapter 12, ¶5 ¶¶ See also South African Constitution (n 142) art 9.

¹⁵³ Articles I, II, III of the U.S. Constitution delineate the exact roles of the legislative, executive and judiciary branches of the U.S. government. United States Constitution (1787).

¹⁵⁴ South African constitution (n 142) art 40.

¹⁵⁵ Brazilian constitution (n 151) art 18.

¹⁵⁶ Belgian constitution (n 151) art 36.

¹⁵⁷ French constitution (n 151) art 34.

¹⁵⁸ South African constitution (n 142) art 34.

¹⁵⁹ Canadian constitution (n 142) art 11.

certainty,¹⁶⁰ and non-arbitrariness, which incorporates the prohibition of *ex post facto* law and *habeas corpus* rights.¹⁶¹ Legal aid, or dispute resolution as Bingham names it, is also available in some nations¹⁶² but does not appear to have reached the level of being a constitutional right.¹⁶³ Therefore, although there are undoubtedly a relatively large number of elements upon which many States and scholars are able to agree, the exact definition of a rule of law remains debatable; this in turn makes the definition of an international rule of law all the more difficult. Despite the fact that there are inherent differences between the two systems of domestic and international law, there do exist arguments both for and against the motion to use the domestic rule of law as the foundation for an international rule of law.

II.4 Searching for a definition of the international rule of law for the Council

There appear to be two paths available when making the leap between domestic and international rule of law systems – the more straightforward approach is to isolate each component of the domestic rule of law and simply attempt to apply these to international law; however, as this section will explore, there are elements of the domestic rule of law that are unsuitable for transposition in this manner, since the structure of domestic law frequently differs greatly from that of the international sphere. Therefore, this approach is simply the starting point. The second, more complex, bespoke method of deducing an international rule of law is to build upon this first approach, examining each of these components and attempting to add to or detract from them in order to create the most legitimately applicable rule of law system possible; this would be far more suitable to the idiosyncrasies of the international legal system and pays heed to the dissimilarities between it and the domestic legal model. It is for this reason that I have elected to commence with the generic transposition of domestic norms, before narrowing my focus to

¹⁶⁰ *ibid*; Indian constitution (n 151) art 20.

¹⁶¹ Indian constitution (n 151) art 22; Constitution of the United States, 1787, Amendment VI; Canadian constitution (n 142) arts 9-10; South African constitution (n 142) art 35; Belgian constitution (n 151) art 12.

¹⁶² In the EU, States must provide legal aid in accordance with the Charter of Fundamental Rights of the European Union, 2000, art 47, although the UK in 2010 removed funding from legal aid pertaining to cases of family law, clinical negligence, education, employment, immigration, benefits, debt and housing cases under Schedule 2 of the Access to Justice Act 1999; India guarantees legal aid under art 39A of its constitution; In New Zealand this is covered by the Legal Services Regulation 2011.

¹⁶³ In Canada, legal aid was identified in *Canadian Bar Assn v British Columbia*, 2008 BCCA 92, to not be a constitutionally protected right. The USA provides State-funded legal aid in criminal cases to those unable to afford legal services themselves, but does not do so in civil cases; in Australia there are eight legal aid commissions established in partnership with the government under the National Partnership Agreement on Legal Assistance Services 2010.

whittle away irrelevant components at the international level and add elements customised to the international sphere.

II.4.1 Direct transposition of domestic norms to the international plane

Although Bingham quite proficiently discusses the domestic rule of law, he does not address in depth how it might look in the international arena¹⁶⁴, which is a particularly important issue now that the rule of law has also gained recognition as a necessary aspect of international law and given the recent General Assembly declaration on the rule of law that “the rule of law applies to . . . the United Nations and its principal organs.”¹⁶⁵ Brownlie states that “it would be absurd if it were not possible to evaluate the workings of the international system in terms of the Rule of Law”¹⁶⁶ but stops short of filling in the blanks.¹⁶⁷ Bingham’s assertion that “the rule of law in the international order is, to a considerable extent at least, the domestic rule of law writ large”¹⁶⁸ is not unanimously shared within the academic community.¹⁶⁹ There is some debate over the distinction to be made between the rule of law at the domestic level and the international rule of law.

The argument against direct transposition is strengthened by the fact that traditional concepts of international law such as State sovereignty must be accommodated in a discourse on

¹⁶⁴ Bingham touches on the use of the rule of law in international instruments briefly at the beginning of his book and dedicates a chapter to ‘The Rule of Law in the International Legal Order’ but does not expand greatly. See Bingham (n 40) at 6-7, 110-133.

¹⁶⁵ UNGA Res 67/1 (n 6) ¶2.

¹⁶⁶ Brownlie (n 46) 213.

¹⁶⁷ See also, William Bishop, ‘The International Rule of Law’ (1961) 59 Mich L Rev 553, where “[w]ithout precise definition . . . the concept includes reliance on law as opposed to arbitrary power in international relations; the substitution of settlement by law for settlement by force; and the realization that law can and should be used as an instrumentality for the cooperative international furtherance of social aims, in such fashion as to preserve and promote the values of freedom and human dignity for individuals.”

¹⁶⁸ Bingham (n 40) 111.

¹⁶⁹ See, eg Thomas Eijsbouts, ‘Introduction’ in Vandamme and Reestman (n 43) 6, where “[a]t first blush, there is a sheer contradiction between rule of law and the sphere of international relations, diplomacy, where executive rule reigns . . . It shuns forms of control to which executive power almost instinctively reverts.”; Chesterman (n 3) ¶12, where although there exist transferable components of the rule of law, “[n]ot all concepts will translate directly, however. If the domestic legal order may be thought of as a vertical hierarchy, the ‘anarchical society’ lacks such an ordering principle. Applying the rule of law to the international level thus requires an examination of the functions that it is intended to serve”; Saunders and Le Roy suggest that one dimension of the rule of law at the international level “concerns its effect on governments, in the exercise of external sovereignty, contributing to or reacting against the developments of an international kind. Theoretically, even in this context, governments are bound by rule of law principles. The practical effect, however, is different. The subtle balance of institutions and powers that has produced the rule of law domestically does not carry through to the international sphere”, Saunders and Le Roy (n 67) 14; Franz L Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society* (Berg 1985) 4, where he argues that State sovereignty and the rule of law are fundamentally opposed constitutive elements of a modern state.

the rule of law at the international level. Moreover, the fields of diplomacy and international politics are reliant on undocumented negotiations, which although one might find at the domestic level appear to be more prevalent in international relations and politics. As Eijsbouts notes, “[e]ven in the European Union, with its relatively high degree of transparency in the legislative process, there is no record of the final exchanges leading up to the enactment of legal instruments . . .”¹⁷⁰ There are, of course, the *travaux préparatoires* of the meetings that result in these documents; nonetheless, one cannot say the same of all UN Security Council resolutions, for example, which may begin with a closed-door meeting of selected Council members, allowing for political bargaining or negotiations the details of which will never see the light of day and may merely be distilled to a yes or no vote in the Council chambers with no subsequent explanation.¹⁷¹

Another fundamental distinction that must be made between the rule of law at the domestic level and any comparable rule of law at the Security Council level is that, whereas at the domestic level an integral part of the rule of law is that no individual should be beyond the reach of the law, no organisation above scrutiny and no *body* exempt from judicial oversight, the Security Council appears to be all three. Although the UN Charter stands as both the founding text and regulatory document for the Security Council, there is no independent judiciary that reviews its actions or decisions. In a domestic rule of law setting, clearly enumerated laws are promulgated by the legislature to be uniformly enforced upon all citizens irrespective of power or status. These laws are heavily scrutinised by an independent judiciary to ensure they are not unconstitutional or similarly invalid and in the event that a citizen wishes to challenge the validity of a law, adequate channels of impartial judicial recourse are made available. Such a separation of powers ensures that there exists an environment for the rule of law to be established and continue to thrive.

¹⁷⁰ Eijsbouts, *ibid.*

¹⁷¹ See eg Reisman, ‘The Constitutional Crisis in the United Nations’ (1993) 87 *American Journal of International Law* 83, 85, where the Council “contains ever-smaller ‘mini-Councils’, each meeting behind closed doors without keeping records, and each taking decisions secretly. Before the plenary Council meets ‘in consultation’ . . . the P-5 have met in ‘consultation’ . . . and before they meet, the P-3, composed of the United States, the United Kingdom and France, have met in ‘consultation’ in one of their missions in New York . . . After the fifteen members of the Council have consulted and reached their decisions, they adjourn to the Council’s chamber, where they go through the formal motions of voting and announcing their decision. Decisions that appear to go further than at any time in the history of the United Nations are now ultimately being taken, it seems, by a small group of states separately meeting in secret.”

Transposing this to the Security Council framework, the UN Charter contains a hazy definition of Security Council powers, which has led to a plethora of understandings and interpretations; nevertheless, in the hypothetical scenario that it was more specific and expansively definitive, there exists no body established to ensure that the Council adheres to its mandate- a counterpart to the judiciary on the domestic level. Thus, in the event that the Security Council is capable of acting *ultra vires*, there exists no mechanism to state this fact; “the Security Council may request the International Court of Justice to give an *advisory opinion* on any legal question”¹⁷² but as a principal organ of the United Nations on a par with the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council and the Secretariat,¹⁷³ and with the Statute annexed to and forming part of the UN Charter, the ICJ does not have any jurisdiction over the Security Council, particularly given that the Court’s jurisdiction is over any “legal question”¹⁷⁴ and “[t]he Council is a political body *par excellence*.”¹⁷⁵ As an organ of the UN parallel to the Security Council, a sibling relationship between the ICJ and Security Council cannot suffice.

For these reasons, Chesterman’s cautious approach is the more pragmatic and adoptable of proposals for the framework of a rule of law for the Council. In his report for the Austrian Initiative, Chesterman expands on this notion and identifies more acutely the discrepancy between the domestic rule of law and the international rule of law, finding that

[a]t the national level, [the rule of law] requires a government of laws, the supremacy of the law, and equality before the law. Strengthening a rules-based international system by applying these principles at the international level would increase predictability of behaviour, prevent arbitrariness, and ensure basic fairness. For the Council, greater use of existing law and greater emphasis on its own grounding in the law will ensure greater respect for its decisions.¹⁷⁶

¹⁷² UN Charter (1945) art 96(1) [emphasis added]

¹⁷³ *ibid* art 7(1).

¹⁷⁴ *ibid* art 96(1). For a legal analysis of the political question doctrine see the US Supreme Court’s discussions, definition and reasoning in *Marbury v Madison*, 5 U.S. 137 (1803) and *Baker v Carr*, 369 U.S. 186, 217 (1962). See also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* [2010] (Advisory Opinion) ICJ Rep 403.

¹⁷⁵ Morten Bergsmo, ‘Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relationship between the Court and the Security Council’ (2000) 69 *Nordic J Intl L* 87, 111.

¹⁷⁶ Chesterman (n 3) i).

The structure of the international plane, in addition to the legal obligations on States as opposed to citizens, are poles apart from the domestic counterpart and the mechanisms and structures in place are accordingly disparate. Chesterman's understated assertion that not all norms may translate well to the international sphere calls for a measured approach to which norms can work and which are obsolete or unsuitable for the international level.

II.4.2 A more cautious examination

UNGA Res 67/1 tackled these issues and enumerates several aspects of what an international rule of law should strive for; in addition to “predictability and legitimacy”¹⁷⁷, the declaration calls for the international rule of law to comprise “fair, stable and predictable legal frameworks”¹⁷⁸, “economic, financial or trade measures”¹⁷⁹ that are consistent with international law, “the independence of the judicial system, together with its impartiality and integrity”¹⁸⁰; and “equal access to justice for all”¹⁸¹. Furthermore, it identifies that the “rule of law and development are strongly interrelated and mutually reinforcing.”¹⁸² It is clear from this description that the rule of law at the international level differs quite significantly from the rule of law at the domestic level; in addition to direct references to the work of four of the principal organs of the United Nations – the Security Council¹⁸³, the Economic and Social Council¹⁸⁴, the International Court of Justice¹⁸⁵ and the General Assembly¹⁸⁶ – mention of supra-national organisations such as the International Criminal Court¹⁸⁷ and “the International Tribunal for the Law of the Sea as well as other international courts and tribunals”¹⁸⁸ show not only that the scope of this declaration, and the concept of the international rule of law of which it speaks, is far broader and more far reaching than that of the domestic rule of law, but also that the United Nations itself is one, if not the main, member of the audience to which the declaration speaks. The declaration also stresses “the importance of strengthened international cooperation, based on

¹⁷⁷ UNGA Res 67/1 (n 6) ¶2.

¹⁷⁸ *ibid* ¶8.

¹⁷⁹ *ibid* ¶9.

¹⁸⁰ *ibid* ¶13.

¹⁸¹ *ibid* ¶14.

¹⁸² *ibid* ¶7.

¹⁸³ *ibid* ¶28-29.

¹⁸⁴ *ibid* ¶30.

¹⁸⁵ *ibid* ¶31.

¹⁸⁶ *ibid* ¶41.

¹⁸⁷ *ibid* ¶23.

¹⁸⁸ *ibid* ¶32.

the principles of shared responsibility and in accordance with international law”¹⁸⁹, stressing its international direction. Though it enumerates too many beneficial results that the international rule of law can and should create – “the protection of the rights of the child, . . . conflict prevention, peacekeeping, conflict resolution and peacebuilding”¹⁹⁰ – and potential threats and hindrances to the rule of law – “illicit networks and counter the world drug problem and transnational organized crime . . . corruption . . . [and] terrorism in all its forms and manifestations”¹⁹¹ – there is no exhaustive list of where the parameters of an international rule of law might lie. Reinforcing the need for an expansive approach as noted in Chapter I, in order to delve deeper into the question of what an international rule of law comprises, it is necessary to read this declaration in conjunction with other documents that have emerged from the General Assembly or United Nations in general.

Bühler noted in 2008 that “it is only since a few years that the United Nations has started to develop comprehensive common concepts, coordinate, and give coherent policy direction to the manifold activities of the UN system in the field of rule of law . . . [before which] activities of the United Nations followed a piecemeal approach, were limited in scope . . . and lacked coordination and a coherent policy.”¹⁹² Indeed, despite the fact that the Assembly has considered rule of law as an agenda item since 1992¹⁹³ and numerous thematic debates spearheaded by the Security Council¹⁹⁴, until recently the internalised rule of law for the United Nations, and in particular the Security Council, appeared to be neither a feasible reality nor a goal towards which the evidence suggested the Council could be seen to be working. Although the Council had in the past adopted resolutions reiterating the importance of the international rule of law, it had always

¹⁸⁹ *ibid* ¶24.

¹⁹⁰ *ibid* ¶17-18.

¹⁹¹ *ibid* ¶24-26.

¹⁹² Konrad G Bühler, ‘The Austrian Rule of Law Initiative 2004-2008’ (2008) 12 *Max Planck Yrbk UN L* 409, 410.

¹⁹³ See UNGA Res 61/39 (18 December 2006) UN Doc A/RES/61/39; UNGA Res 62/70, (8 January 2008) UN Doc A/RES/62/70; UNGA Res 63/128 (15 January 2009) UN Doc A/RES/63/128; UNGA Res 64/116 (15 January 2010) A/RES/64/116; UNGA Res 65/32 (10 January 2011) UN Doc A/RES/65/32.

¹⁹⁴ See UNSC Presidential Statement 15 (2003) UN Doc S/PRST/2003/15 on “Justice and the Rule of Law: the United Nations Role”; UNSC Presidential Statement 2 (2004) UN Doc S/PRST/2004/2 on “Post-conflict national reconciliation: role of the United Nations”; UNGA Res 67/1 (n 6); UNSC Presidential Statement 30 (2005) UN Doc S/PRST/2005/30 on “The maintenance of international peace and security: the role of the Security Council in humanitarian crises: challenges, lessons learned & the way ahead”; UNSC Presidential Statement 28 (2006) UN Doc S/PRST/2006/28 on “Strengthening international law: rule of law and maintenance of international peace and security”; UNSC Presidential Statement 28 (2006) UN Doc S/PRST/2006/28; UNSC Presidential Statement 11 (2010) UN Doc S/PRST/2010/11.

done so within the framework of connected issues such as women, peace and security¹⁹⁵, children in armed conflict¹⁹⁶, the protection of civilians in armed conflict¹⁹⁷ and counter-terrorism.¹⁹⁸

In so far as a bespoke working definition of the rule of law for the Council as a tool for comparison to its decision-making process, there has been none. The *Austrian Rule of Law Initiative*¹⁹⁹ attempted to address this gap but falls short of creating a comprehensive or requisite standard. The report is an initiative of a Member State – Austria – and is an external analysis commissioned neither by the Security Council nor any other UN organ despite the wide range of scholars, practitioners and other knowledgeable individuals it purports to have consulted in its creation.²⁰⁰ Notwithstanding the seventeen bespoke recommendations for the Security Council outlined,²⁰¹ each pertaining to an aspect of Council behaviour within the framework of the rule of law, the report does not enumerate a list of components of the rule of law, resorting instead to a piecemeal approach of Council actions that revolve centrally around issues of transparency,²⁰² accountability²⁰³ and review²⁰⁴. Although it does not direct them towards Council action directly, it is fortunate, however, that the United Nations itself expanded quite substantially on the simple definition of a rule of law to incorporate different strands within these three principle features that accommodate the expansive nature of an *international* rule of law as opposed to its *domestic* counterpart.

¹⁹⁵ UNSC Res 1325 (31 October 2000) UN Doc S/RES/1325; UNSC Res 1820 (19 June 2008) UN Doc S/RES/1820; UNSC Res 1888 (30 September 2009) UN Doc S/RES/1888.

¹⁹⁶ UNSC Res 1612 (26 July 2005) UN Doc S/RES/1612; UNSC Res 1882 (4 August 2009) UN Doc S/RES/1882.

¹⁹⁷ UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674; UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894.

¹⁹⁸ UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373; UNSC Res 1456 (20 January 2003) UN Doc S/RES/1456; UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566; UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904.

¹⁹⁹ Chesterman (n 3)

²⁰⁰ Nonetheless, the report can be useful in identifying three basic elements of the rule of law: “First, the powers of the sovereign may not be exercised arbitrarily. This incorporates the rejection of ‘rule of man’ and requires that laws be prospective, accessible, and clear. Secondly, the law must apply also to the sovereign and instruments of the State, with an independent institution such as a judiciary to apply the law to specific cases. This implies a distinction from ‘rule by law’. Thirdly, the law must apply to all subjects of the law equally, offering equal protection without prejudicial discrimination. The law should be of general application and consistent implementation; it should be capable of being obeyed. These elements of the core definition are usually promulgated in national constitutions and may be summarized as (i) a government of laws, (ii) the supremacy of the law, and (iii) equality before the law”, *ibid* ¶11.

²⁰¹ *ibid* i-iii.

²⁰² *ibid* ¶42.

²⁰³ *ibid* ¶30.

²⁰⁴ *ibid* ¶29.

There are quite clearly elements of the rule of law in domestic legal orders that can be adopted at the international level; transparency, equality before the law and the avoidance of arbitrariness are all examples of rule of law elements that are equally important at the international level as at the domestic. However, there are components that need to be added to the domestic elements to reflect the international nature of law governing and between States – international human rights law and the abidance by international human rights treaties is a prime example of this, as well as elements that are not applicable to the Security Council, such as the public promulgation of laws. This thesis will therefore adapt the elements of the international rule of law to fit the mould of the Security Council.

For the purposes of delineating the specificities of an international rule of law, perhaps the most important document is the definition given by the then-serving Secretary-General of the United Nations, Kofi Annan, in 2004. The work of the Secretary-General Ban Ki-Moon is referred to explicitly in UNGA Res 67/1²⁰⁵, specifically with reference to the 2012 Report of the Secretary-General ‘Delivering justice: programme of action to strengthen the rule of law at the national and international levels’²⁰⁶; however, this report also does not create a list of international rule of law components. Rather, it refers²⁰⁷ back to Annan’s 2004 report to the Security Council and uses the same definition of the rule of law which Annan announced four years prior. This definition, which relates to “a concept at the very heart of the Organization’s mission . . .”²⁰⁸ can be read to apply not only to States themselves, but also to international organisations and the United Nations itself. It stated that the rule of law was

a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.²⁰⁹

²⁰⁵ UNGA Res 67/1 (n 6) ¶39.

²⁰⁶ Report of the Secretary-General, ‘Delivering justice: programme of action to strengthen the rule of law at the national and international levels: Report of the Secretary-General’ (2012) UN Doc A/66/749.

²⁰⁷ *ibid* ¶2.

²⁰⁸ *ibid* ¶6.

²⁰⁹ Report of the Secretary-General (n 25) ¶6.

Fitschen comments that Annan “identifies no less than fifteen elements that are decisive for his understanding of the rule of law.”²¹⁰ Insofar as the content of Annan’s definition is concerned, whilst I am convinced that the former Secretary-General succeeded in encompassing the numerous elements of a very broad concept, I note repetition in the definitions given. There appear to be only eleven components of an international rule of law suitable for application to the Security Council, as derived from the Annan’s report: public promulgation of laws; consistency with international human rights norms and standards; supremacy of the law; equality before the law; accountability to the law; fairness in the application of the law; the separation of powers; the equitable participation in decision-making processes; legal certainty; the avoidance of arbitrariness; and procedural and legal transparency. These are the components that this thesis accepts as the definition of an international rule of law.

One potential reason for this discrepancy in the number of elements to Annan’s definition could be that, just as at the domestic level, the international rule of law can be divided into two mutually supportive and symbiotic elements: the existence of laws and their impartial maintenance. Whilst there are undoubtedly differences between, for example, the principle of a government that is accountable to laws that are equally enforced, and measures to ensure the adherence to these standards, the crux of the definition centres around the existence of the latter list of principles. That is to say that measures of enforcement and adherence are secondary to the existence of laws to enforce and adhere to, for what is a court without laws to uphold but an establishment devoid of meaning and reason? What would a judge use if not the laws themselves?

Nonetheless, Annan points to an integral issue in adding to the definition of a rule of law the entities that will uphold them. A law may well be publicly promulgated, legally certain, avoid arbitrariness and so forth, but without an independent adjudicator there is no recourse for resolution of inevitable problems such as misinterpretation, not to mention the Aristotelian point mentioned earlier about the corruptibility of Man in positions of power. As Dicey puts it, “whenever there is discretion there is room for arbitrariness and . . . in a republic no less than under a monarchy discretionary authority on the part of the government must mean insecurity for legal freedom on the part of its subjects.”²¹¹ At the heart of this thesis is the same distinction: not

²¹⁰ Fitschen (n 45) 351.

²¹¹ Dicey (n 110) 110.

only must there be a framework for the Council to abide by, but there must also be a form of independent review. The Austrian Initiative found that “the Council’s own voting rules are a check on the unfettered exercise of those powers”²¹²; however, if one approaches the Council not as a self-contained organ of the United Nations but as a legislative, governing international body,²¹³ self-regulation is weakly compliant with the principles of a rule of law. Separation of powers and judicial review are two of the core values of a rule of law, both at the domestic and international levels. Dicey’s statement rings true; even if such abuse is not proven in practice, the absence of a mechanism to review Council decisions and ensure that they are in accordance with the rule of law casts doubt on the entire process, and threatens to undermine the goals that the Council is tasked with in maintaining and reinstating the international peace. The existence of an independent body is in itself an aspect of transparency and accountability – without such an entity, the Council will continue to be subject to allegations of political corruption, national gain by permanent members and general inequality.

With respect to the applicability of these principles to the Security Council, whilst Fitschen might take a pessimistic view of the report,²¹⁴ stating that the Secretary-General “strictly avoids even to suggest that what he has termed a ‘concept’ for internal use by the United Nations was meant to define the rule of law in a way that could apply also outside the Secretariat [i.e. other organs of the United Nations]”²¹⁵, I am in agreement with the UN High Commissioner for Human Rights and others²¹⁶ that this constitutes a definition of the rule of law that can be taken *for all United Nations organs*. This seems particularly the case given the 2012 General Assembly declaration that seems to put to rest any arguments over whether the rule of law should be applied internally to the United Nations – Fitschen’s position in 2008 seems untenable today. Naturally, this did not immediately end all debate about the components of the rule of law, nor

²¹² Chesterman (n 3) ¶29.

²¹³ The expansion of Council action and its encroachment on the legislative field are the subjects of a wealth of literature, some of which have been discussed in Chapter I of this thesis. See eg Joyner, ‘Legal Hegemon’ (n 51); Lamb (n 17); Elberling (n 3); Sarooshi (n 11); Tzanakopoulos (n 17).

²¹⁴ Fitschen (n 45) 379-80: “Whether all Member States of the United Nations, despite the myriad of general references to the importance of the rule of law in protecting human rights and strengthening the administration of justice in the resolutions of the General Assembly, would subscribe to all or even most of the elements provided in those reports, remains doubtful.”

²¹⁵ *ibid* 355.

²¹⁶ Report of the High Commissioner for Human Rights, ‘Human Rights and Transitional Justice’ (2006) UN Doc A/HRC/4/87, ¶3; Scott Carlson, ‘Legal and Judicial Rule of Law Work in Multi-dimensional Peacekeeping Operations: Lessons-Learned Study’ (2006), 22 <<http://www.peacekeepingbestpractices.unlb.org/PBPS/Library/ROL%20Lessons%20Learned%20Report%20%20March%202006%20FINAL.pdf>> accessed 16 December 2014.

stem the debate about the concept. As a later working paper emerging from the Secretariat stated quite explicitly “there is no universal agreement as to what the term rule of law actually means The rule of law is a system of interrelated principles that extend widely into social, economic, cultural and other structures in present-day societies.”²¹⁷ However, perhaps spurred on by the necessity of establishing a working definition of the term *rule of law* given the attention it has been given in recent years imposed on both the Secretariat and General Assembly the obligation to adopt one and Annan’s has seemingly been the reference to which resolutions have pointed since.

Thus, generally – and as a foundation for the purposes of this thesis – Annan’s is an excellent summary of the principles of the rule of law that may serve as the parameters for comparison with the decisions of the Security Council. The fact that the definition was furnished by the then-serving Secretary-General of the United Nations imports additional relevancy to the definition for the purposes of this thesis, for who could be better placed than he to know the mandate of the United Nations, its regulations, direction and the intricate workings of the organisation, allowing his report pin-point accuracy and topical pertinence to this thesis? In addition, given the questions this thesis raises around the impartiality and independence of the Security Council, a definition from the Secretary-General is more reliably independent than one from the Council itself and will ensure that any standards of the rule of law compared to Council actions will not be tautologous, biased or self-serving.

Following Annan’s report to the Council, Member States unanimously recognized the need for “universal adherence to and implementation of the rule of law at both the national and international levels” and reaffirmed their commitment to “an international order based on the rule of law and international law”²¹⁸ at the United Nations World Summit in September 2005. This echoed far earlier calls in documents such as the Declaration on Friendly Relations,²¹⁹ which in 1970 referred to the “promotion of the rule of law among nations”²²⁰ and inextricably linked the rule of law to a “contribut[ion] to the strengthening of world peace.”²²¹ This declaration, which was adopted without a vote, also proclaimed that “States shall comply in good

²¹⁷ ‘Promoting the Rule of Law and Strengthening the Criminal Justice System: Working Paper prepared by the Secretariat’ Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Vienna 10-17 April 2000) (14 December 1999) UN Doc A/CONF.187/3, ¶5.

²¹⁸ UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, ¶134.

²¹⁹ UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/25/2625, 121.

²²⁰ *ibid* preamble.

²²¹ *ibid*.

faith with their obligations under the generally recognized principles and rules of international law with respect to the maintenance of international peace and security, and shall endeavour to make the United Nations security system based on the Charter more effective.”²²² In 2012, the Assembly indeed found that “the Charter . . . , international law and justice, and . . . an international order based on the rule of law . . . are indispensable foundations for a more peaceful, prosperous and just world.”²²³ The seeds of the international rule of law can be viewed as having been sown several decades ago, in the drafting States’ decisions to “promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms . . . the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence . . . [or] the duty to comply fully and in good faith with its international obligations.”²²⁴ Similarly, in the 2000 *Millennium Declaration*,²²⁵ Member States resolved to “strengthen respect for the rule of law in international as in national affairs.”²²⁶ Although the rule of law was mentioned in passing in this document, it is significant that it was done within the section dealing with “Peace, security and disarmament”²²⁷ as this couches the rule of law in the pursuit of peace and security.

It is, perhaps, also worthy of note at this point that there is no specific role laid out for the Security Council in Annan’s definition; all organs of the United Nations are treated in the same way. That each organ of the United Nations would interpret the provisions of the Charter and the means of implementation of its provisions which concerned its activities was a decision taken at the very outset of the creation of the United Nations;²²⁸ it therefore follows that each organ should decide how best to implement the international rule of law, particularly in light of the *equality* and *competence* principles²²⁹ that prohibit organs from either instructing one another or depending upon another organ in the conduct of their mandates and missions. Indeed, just as

²²² *ibid* s 1.

²²³ *ibid* ¶1.

²²⁴ *ibid*.

²²⁵ UNGA Res 55/2 (18 September 2000) UN Doc A/RES/55/2.

²²⁶ *ibid* ¶9.

²²⁷ *ibid* II.

²²⁸ United Nations Conference on International Organization (UNCIO), Vol 13 (1945), 709-710; United Nations Conference on International Organization (UNCIO), Vol 13 (1945), 831.

²²⁹ These are two of four essential principles defined by Bedjaoui that govern the United Nations system and relate to autonomy of conduct and Charter interpretation respectively. Mohammed Bedjaoui, *The New World Order and The Security Council: Testing the Legality of Its Acts* (Nijhoff 1994) 12-13.

organs can and should be independent in deciding the manner or path chosen in reaching their respective goals, so too in the implementation of the rule of law internally it would be remiss for the Secretary-General, or the Assembly, to impose structures and specificities upon the Council's behaviour. Annan's definition of the rule of law understandably, then, does not distinguish between the organs of the United Nations; however, there can be no doubt that Annan's definition of the rule of law is sufficient, having been included, and thereby endorsed, by Secretary-General Ban Ki Moon in the Secretary-General's 2008 *Delivering Justice* report and again by the General Assembly in UNGA Res 67/1.

Although not unilaterally legally binding,²³⁰ certain resolutions of the General Assembly²³¹ can still be argued to amount to the custom of States for the purposes of international customary law.²³² Indeed, it has been posited in relation to resolutions of the UN on the use of outer space that there is a concept of "instant customary law", where "unanimously adopted General Assembly resolutions (or draft texts of other bodies) reflect a *communis opinio juris* which in itself will suffice for the formation 'overnight' of customary law."²³³ The Statute of the International Court of Justice does not elaborate on the components of customary law, stating simply that customary norms must be supported by "evidence of a general practice accepted as law."²³⁴ Indeed, although the International Court of Justice agreed in principle with the possibility of General Assembly resolutions bearing some weight under some circumstances, any interpretations of customary law still require the two-fold standard of "the material element

²³⁰UN Charter, arts. 10, 11(1), 13(1), 14 refer to the Assembly's authority to "recommend measures" or "make recommendations" in matters not dealing with internal UN regulation eg peace and security, legal matters, etc. In contrast, the binding nature of certain resolutions emerging from the Security Council are referred to in eg UN Charter (1945) arts 2(6), 25, 48(1).

²³¹ eg UNGA Res 67/1 (n 6).

²³² For the ICJ definition of a customary norm, see, *Continental Shelf case (Libyan Arab Jamahiriya v Malta)* (Judgment) [1985] ICJ Rep 13, ¶27, where "the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States". For a discussion of the impact of General Assembly resolutions on peremptory norms, see eg Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 117-119. See also, Mark E Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practices of the Interrelation of Sources* (Nijhoff 1997) 52, where European Commission of Human Rights senior lawyer Mark E Villiger's notes that "'Instant' customary law is not without logical force insofar as it extrapolates on the basis of the widely accepted acceleration of the formation of customary law in the UN."

²³³ Bin Cheng, *UN Resolutions on Outer Space: "Instant" International Customary Law?* (1965) 5 *Indian J Intl L* 23. Whilst the unanimous adoption of an Assembly resolution may be argued to achieve a threshold of a general practice, this notion of instant customary law does not appear to have found major support. For a discussion of custom as both habit and convention see also, James Bernard Murphy, 'Habit and Convention at the Foundation of Custom', in Amanda Perreau-Sassine and James B Murphy, *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (2007) 53-78.

²³⁴ Statute of the International Court of Justice (1945) art 38.

of State practice and psychological element of acceptance of norms thus practiced as legally binding”²³⁵, which has previously been supported by the ICJ.²³⁶

In the ICJ’s *Nicaragua* case, both the near-universal acceptance of the UN Charter and the wide approval of relevant General Assembly resolutions resulted in finding that the non-intervention rule had reached a customary legal status.²³⁷ Indeed, individual General Assembly resolutions have also been recognised as representing *opinio juris*: in the *Nicaragua* case, “the adoption by States of [resolution 2625(XXV) on *Friendly Relations Between States*] afford[ed] an indication of their *opinio juris* as to customary international law on the question.”²³⁸ UNGA Res 67/1 shows a similar *opinio juris* to UNGA Res 2625(XXV); both were adopted by consensus²³⁹ and enumerated rules and standards that had been accepted by a large number of States, most importantly without record of opposition.²⁴⁰

Supportive of State practice are the sheer number of represented States²⁴¹ and organisations²⁴² at the high-level meeting, in addition to the existing actions taken and efforts made by States to

²³⁵ Orakhelashvili (n 232) 113.

²³⁶ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, ¶70: “General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule”

²³⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits, Judgment) [1986] ICJ Rep 14, ¶188.

²³⁸ *ibid* ¶191. The ICJ found that “[t]he effect of consent to the text of such resolutions cannot be understood as merely that of a ‘reiteration or elucidation’ of the treaty commitment undertaken in the Charter. . . [but] an acceptance of the validity of the rule or set of rules declared by the resolution by themselves”, *ibid* ¶188.

²³⁹ UNGA Verbatim records (24 October 1970) UN Doc A/PV.1883, ¶7 for the adoption of resolution 2625(XXV) In contrast, although in *Nuclear Weapons* (n 236) ¶70 the ICJ found no “conventional rule of general scope, nor a customary rule specifically proscribing the threat or use of nuclear weapons *per se*” this was due to “tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other”(ibid ¶73) – essentially, the fact that “resolutions under consideration in the present case [had] been adopted with substantial numbers of negative votes and abstentions” (ibid ¶71) undermined any assertions of *opinio juris*.

²⁴⁰ UNGA Verbatim records (24 September 2012) UN Doc A/67/PV.3 (UNGA Res 67/1 Verbatim records). It has been recognised that “the statements in the preparatory and plenary phases, the absence of ‘reservations’ by States, and the voting records (namely unanimous patterns) may constitute first instances of State practice, which contribute towards a new customary rule by stating its substance and effects, and by revealing the *opinio juris* of member States”, Villiger (n 232). See also, *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, ¶32; *Barcelona Traction, Light and Power Company, Limited* (Judgment) [1970] ICJ Rep 3, ¶320; *South West Africa, Second Phase* (Judgment) (Judge Tanaka Dissenting Opinion) [1966] ICJ Rep 6 ¶291.

²⁴¹ Heads of State from Benin, Cyprus, Estonia, Honduras, Austria, Iran, Latvia, Finland, Bulgaria, Maldives, Equatorial Guinea, Mongolia, Gabon, Albania, Nigeria, Ghana, Kenya, Liberia, Namibia, Rwanda, South Africa, Zambia, Bangladesh, Croatia, Haiti, Lesotho, Samoa, Switzerland and Guatemala were all in attendance, with a further 35 nations represented by senior ministers and other high-level officials.

implement the core themes of UNGA Res 67/1 at the domestic level.²⁴³ UNGA Res 67/1 can be seen, then, not only as an affirmation of State willingness but as an exercise in stock-taking; States attending the high-level meeting put forward examples, some over a decade-old, of how they have been implementing the rule of law at both the international and domestic levels. UNGA Res 67/1 is, in a sense, reiterating the existing practices and willingness in the form of an official written document and setting out a plan for further expansion of State practice in the form of pledges – it is a codification of principles that does amount to the existence of a customary norm. The rule of law, then can only be seen as an obligatory norm for a modern democratic society.²⁴⁴

Whilst comments of States focus mainly on the rule of law at the national level and how to implement international obligations domestically, a few States have commented on the relationship between the UN system and the need for a rule of law to apply to it internally, which is at the core of this thesis and of primary significance to its argument. On the whole, however, Member States did so within the context of criticism of the Security Council itself to be failing to implement the rule of law internally, be that through “the undemocratic and unrepresentative nature of the Security Council”²⁴⁵, the need to “completely reform and change the rules and regulations governing the Security Council, in terms of both its powers and its structures”²⁴⁶ or simply the belief “that [the Council] is far from making a positive contribution to the rule of law.”²⁴⁷ In fact, the rule of law for the Security Council, or even the United Nations system as a

²⁴² Addressing the meeting were the High Commissioner for Human Rights, the UNDP Administrator, UNODC Executive Director, President of the Security Council as well as representatives of the UN Commission on International Trade Law, International Development Law Organisation, International Crisis Group and the International Institute of Higher Studies in Criminal Science.

²⁴³ In Maldives a “2008 Constitution guarantees the separation of powers, a universal bill of rights and a free media”, UNGA Res 67/1 Verbatim records (n 240) 18; Mongolia has already enacted “more than 20 legislative acts aimed at bringing about the structural reform of [their] legal system”, UNGA Res 67/1 Verbatim records (n 240) 21.; Gabon’s multi-party system established in 1990 was tested in 2009, “when Gabon successfully navigated a delicate political transition that was praised by the international community”, UNGA Res 67/1 Verbatim records (n 240) 21; Kenya’s “democratic enterprise over the past 49 years has been to strengthen the rule of law . . . [and its 2010 Constitution] implemented far-reaching legal, institutional and administrative reforms which have further strengthened the rule of law in Kenya”, UNGA Res 67/1 Verbatim records (n 240) 26; and Bangladesh “made legal services affordable to such vulnerable and marginalized groups as women and minorities by enacting the 2001 Legal Aid Services Regulation Act”, UNGA Res 67/1 Verbatim records (n 240) 33.

²⁴⁴ Notably, many States used the opportunity to comment on the dramatic situation in Syria as a concrete example of a lack of rule of law and the resulting violence and human suffering. See, eg the comments of the EU at *ibid* 32; Austria, *ibid* 13; Bulgaria, *ibid* 17; Albania, *ibid* 23.

²⁴⁵ President Jacob Zuma of South Africa, *ibid* 29.

²⁴⁶ President Mahmoud Ahmadinejad of Iran, *ibid* 14

²⁴⁷ Venezuela, *ibid* 40. See also, Cuba, *ibid* 41; and Bolivia, *ibid* 42-43.

whole, is explicitly mentioned but a handful of times throughout the comments – the UN Secretary-General, argued that “rule of law activities . . . deserve a central place in the structure of [UN] work”²⁴⁸; the President of the ICJ articulated his view that “the concept of the rule of law is, and should be at the very heart of the Organization’s mission”²⁴⁹; and the European Commission’s President recognised “the importance of linking the rule of law agenda to the work of the United Nations on peace and security, human rights and development, which are simultaneously preconditions for and enablers of democracy and the rule of law.”²⁵⁰

In light of these statements, UNGA Res 67/1 therefore grants authority and gravitas to the concept of an international rule of law for the Security Council – leaders from more than 80 States were reportedly present at the meeting.²⁵¹ As the deliberative organ of the UN tasked to “initiate studies and make recommendations for the purpose of . . . promoting international co-operation in the political field and encouraging the progressive development of international law and its codification”²⁵², the Assembly’s official recognition of the applicability of the rule of law internally to the United Nations and its organ signifies a landmark event in the organisation’s history and a concrete base for this thesis. However, it cannot be said to yet constitute international customary law in relation to the applicability of the rule of law to the Security Council, or even the United Nations in general.

The Council itself has also previously emphasised its commitment “to ensure that all United Nations efforts to restore peace and security themselves respect and promote the rule of law”²⁵³ and maintained that “the rule of law is an important concept in the work of the Security Council”²⁵⁴, citing the thematic debates, presidential statements and Council resolutions on the topic of the rule of law. Somewhat promisingly, the President of the Council offered measurable targets for change in Council procedure in the form of Council commitment “to fair and clear procedures for placing individuals and entities on sanctions lists and for removing them, as well

²⁴⁸ Ban Ki-Moon, *ibid* 3.

²⁴⁹ Peter Tomka, *ibid*.

²⁵⁰ Jose Manuel Barroso, *ibid* 32.

²⁵¹ UN Press release, ‘World Leaders Adopt Declaration Reaffirming Rule of Law as Foundation for Building Equitable State Relations, Just Societies’ (24 September 2012) <<http://www.un.org/press/en/2012/ga11290.doc.htm>> accessed 16 December 2014.

²⁵² UN Charter (1945) art 13(1).

²⁵³ UNSC Presidential Statement 11 (2010) UN Doc S/PRST/2010/11. See also, President of the Security Council, UNGA Res 67/1 Verbatim records (n 240) 5.

²⁵⁴ *ibid*

as for granting humanitarian exemptions”²⁵⁵, although this could cynically also be argued to have been either a moot point in light of or a direct result of the quasi-judicial review undertaken by the European Court of Justice in the *Kadi* decision.²⁵⁶ The fact remains, though, that the Council acknowledges the need for the rule of law in its own decision-making process and attempts to place on record its willingness, intent and quantifiable steps to do so.

²⁵⁵ *ibid* 6.

²⁵⁶ Joined Cases C-402/05P and C-415/05P *Yassin Abdullah Kadi and Al Barakaat International Foundation. v Council of the European Union and Commission* [2008] ECR I-06351, where the implementation of the Council’s sanctions regime was nullified after the Court found EU law to enjoy primacy over Security Council resolutions in its ruling that the application of a Security Council sanction to the plaintiff constituted a violation of his human rights.

CHAPTER III

THE COMPONENTS OF AN INTERNATIONAL RULE OF LAW

The successive failures of the Council show that the permanent members have not kept their part of the bargain struck in 1945: permanent seats and a veto in exchange for responsibility to the broader membership. Indeed, they are clearly making any attempt at reform in terms of composition or working methods impossible. It is time for them reconsider and to make possible true change that will revitalize the Organization and enable it to fulfil its purposes and principles.²⁵⁷

Whereas a wider discussion on international law might incorporate different fields of international law, from human rights or the law of the sea to public international law or trade law, this thesis is specifically focused on Security Council action, particularly when faced with a threat to the international peace. Therefore, for the purposes of this thesis, certain components of the rule of law are addressed together due to the fact that they may not perhaps examine various independent elements of the vast field of international law, but rather different facets of Security Council action. These groups, which will be examined in greater detail below, are as follows: clarity of action (incorporating procedural transparency and public promulgation); legal certainty; equality before the law; The Predictability Paradox (incorporating the avoidance of arbitrariness, supremacy of the law and fairness in the application of the law); consistency with international human rights norms and standards; the separation of powers; the equitable participation in the decision-making process; and accountability before the law. It is also essential to note that there is a great deal of overlap between some of the components; at times it seems that the same concept is referred to in two different components. However, this could be as a result of different facets to Council actions, as mentioned previously, or similar means to decipher if the Council is abiding by the rule of law. For example, a clear legal basis underpins the component of both legal certainty and the predictability paradox, incorporating the avoidance of arbitrariness, supremacy of the law and fairness in the application of the law, just as a clear pattern is necessary for equality before the law.

²⁵⁷ Argentina, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 16.

III.1 Clarity of action: Transparency and public promulgation

Although these two components are separate concepts under the rule of law at the domestic level, I have chosen to merge them for the purposes of this thesis due to their similarity in practice when discussing the international rule of law as it pertains to the Security Council. They are, essentially, two facets of the same theme of clarity in Security Council action and I have elected to address them first for the simple reason that they are the information channels through which all other elements are measured; together they form the administrative component of the rule of law. The primary sources that emerge from the Security Council are only as beneficial as they are detailed and widely available. It may hypothetically be the case that the Council conducts its work with the utmost respect for the rule of law. However, without clarity of material and the public dissemination of material, it would be impossible for both this thesis and any State in general to discern the facts of Council decisions.

Firstly, procedural and substantive transparency is vital to the work of the Council, meaning that the way in which a decision of the Council was taken and the reasons for this outcome must be comprehensible. The language should be accessible and understandable, the goals should be clear and the decisions taken should be unambiguous; this last aspect on decisions is doubly important for States when duties are imposed upon them. Resolutions displaying a high level of procedural transparency would include full verbatim minutes and a full outline of voting, allowing those wishing to access the information to clearly view whether decisions have been taken in accordance with the correct procedure and what factors, if any, played a role in the final decisions. Verbatim records allow the reader to gain full details on the political stance of each voting State and gives the most accurate picture of the sequence of events leading from the introduction of a proposed resolution and the conclusion of the meeting. Verbatim records are also vital for pursuing a specific situation or debate through various resolution proposals, some of which may have failed to be adopted. Verbatim records should therefore also be available for meetings where resolutions were not adopted, as well as for meetings where they were.

Running parallel to this is public promulgation, which in the case of the Security Council requires the full dissemination of each resolution and the debates around its adoption. Although debates and discussions are frequent between States on either bi-lateral or multi-lateral diplomatic levels, the finalised text should contain elements such as when the resolution shall

come into force, the temporal limits of the resolution and should be publicly and readily available prior to its adoption. Resolutions that are effectively publicly promulgated “should be legible and accessible in the formal sense of having been . . . brought forth in public debate, having made their appearance in and become part of the public realm and having attracted the public’s involvement and attention.”²⁵⁸ In the case of the Security Council, the immediate concern is for that of member States of the UN, although these resolutions and peripheral material such as voting records should also be accessible to the general public directly.

Clarity of action is integral to the work of the Security Council for several reasons, most notably as a means of establishing the actual meaning of a resolution, for “there cannot be a Rule of Law without rules of law . . . Values like legal certainty and legal security can be realized only to the extent that a state is governed according to pre-announced rules that are clear and intelligible themselves.”²⁵⁹ Clarity of action is therefore central to the process of resolutions themselves; it would render futile even the most pioneering resolution on reinstating peace or eliminating a threat if the Member States that are bound to abide by it did not agree on the meaning of the content, were not in swift receipt of it or, indeed, if they did not comprehend how the result was reached. Indeed, to fail to comprehend the path taken by the Council or the reasons behind a resolution’s passing or the use of a veto would reduce all but the serving Council members at the time obsolete and would subvert the Charter’s stipulation that the Council “acts on their behalf.”²⁶⁰

It is key also for the purposes of transparency; of the 195 UN State Members, only 15 are allocated seats in the Council chamber and therefore, for the vast majority of States wide-ranging, swift dissemination of high calibre, transparent and complete information is one of the key means of maintaining credibility of Council decisions among UN Member States. However, a transparent legal text does not ensure that it will be enforced consistently, nor that it is constitutionally sound, nor indeed that the law itself is impartial. In a domestic example of a government that abides by the rule of law, citizens are assured of the knowledge that should a government pass an unconstitutional law or engage in pernicious behaviour, citizens have the option to refer to a legal system or, more simply, vote in a new government at the following elections; there is no such assurance with the Council. Indeed, the P5 members, in whose hands

²⁵⁸ Eijsbouts in Vandamme and Reestman (n 43).

²⁵⁹ MacCormick (n 64) 12.

²⁶⁰ UN Charter (1945) art 24(1).

the greatest power lies, are the ultimate example of hereditary peers, continuing through the years from one government to another. Although the citizens of each P5 member have the option to vote in new governments, which might in turn change their foreign policy stances and therefore elicit a political shift in the outlook of the Council, this is a matter of serendipity for the rest of the UN Members and their own citizens, who may stand a chance of a 4 year term serving on the Council and effecting change themselves, but will always face the insurmountable might of the P5 will. It is for this reason that the remainder of the elements of the rule of law, and the Council's absolute adherence, is paramount.

III.2 Legal Certainty

This element of the rule of law asks whether Chapter VII resolutions, which contain legally binding elements and can be seen as parallel to legislation on the domestic level, are accessible, clear and predictable. This component explores whether States can be reasonably expected to comprehend the regulations and stipulations of the resolutions, or whether there are elements of the resolutions that are vague, convoluted or open to interpretation.

Legal certainty would firstly require that the results of non-compliance by States to a resolution be predictable in order to allow UN member States to regulate their conduct in accordance with the legally binding obligations of a resolution.²⁶¹ The lack of legal certainty risks not only eliciting confusion amongst the correct means of compliance but also paves the way for the legitimate refusal of a Member State to comply, with the defence that the legal text did not stipulate sufficiently the provisions and parameters of its scope. An example of the necessity for legal certainty would be in cases where sanctions have been imposed upon a UN Member State, in which case other Member States would be barred from conducting trade or other business. It is not difficult to imagine a scenario where vague or ambiguous terminology might result in certain States inadvertently, or perhaps knowingly, acting in contravention of a resolution where sanctions have been imposed, or where the Council has passed the imposition of a no-fly zone, arms embargo or repercussions.

²⁶¹ At the domestic level, the UK House of Lords found that “the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case . . . a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”, *Sunday Times v United Kingdom* (1979) 2 EHRR 245, 271, ¶49.

Legal certainty, then, also assists in predicting future violations of resolutions. In an equation where the Council acts to maintain the international peace, legal certainty of resolutions should enable States to reasonably predict other actions that might result in similar resolutions. For example, resolutions based on human rights violations or the failure of a State to adhere to an international principle should contain structured and detailed examples of the exact threats to the international peace, in order to allow States to predict under what circumstances their behaviour might fall foul of the Council. Similarly, where similar violations have been committed by States, one would expect to find that the Council has responded in the same manner, to the same extent and with the same degree of proportionality.

This thesis will therefore look for a clear legal basis in all Chapter VII resolutions. In the first instance, resolutions that are taken under Chapter VII should explicitly state that the Council is acting under these Charter powers and should enumerate whether this is under article 41, article 42 or any other relevant provisions. All resolutions relating to maintenance of peace and security must explicitly state this in the text and must delineate the boundaries of both Council action and the action of entities, States or organs that it tasks with any related action, for example, in cases of military intervention; the legal justification for this action must also be apparent and clearly explained. The existence of this in a resolution would be a clear indication that the Council views legal certainty as being imperative to its role; conversely, failure to stipulate this could suggest one of a number of options. The second legal basis that I will seek is the identification of the exact threat to the peace that the Council is aiming to eliminate by taking such Chapter VII action. Moreover, it is essential that the Council stipulate specifically what the nexus between the threat and its proposed action is; that is to say, the Council has an obligation to explain how the actions outlined in the Council resolution will assist in the restoration of international peace and security.

Contrastingly, the absence of legal bases might primarily suggest that the Council does not value the importance of legal certainty and, by virtue of this element, the rule of law; secondly, it could suggest that the Council cherishes its prerogative to ambiguity, in which case this thesis will establish where the Council provides a legal basis and where it neglects to do so, attempting also to discover why; finally, the lack of legal clarity could suggest an abuse of power on the part of the Council that is thinly veiled behind its uncertainty of legality, which is indicated by its failure to clearly justify its actions within the boundaries of law.

III.3 Equality before the law

On a domestic level, equality before the law ensures that all individuals are subject to the same laws and the same rights, avoiding a hierarchical structure in which monarchs or other State rulers were above the law. At the Council level, where legally-binding resolutions are being discussed, the question has two core elements. The first is ensuring the equitable application of the resolution to all States and avoiding targeting resolutions that would inherently impede or adversely affect either individual or a selection of States; put simply, resolutions should not arbitrarily target a particular faith, nationality, ethnicity or other characteristic – this is most easily compared to non-discrimination laws at the domestic level and is, perhaps, the simpler of the two to maintain in an increasingly globalised, open world where cosmopolitan lifestyles, open borders and multi-nationalism is increasingly becoming the norm for a larger proportion of the global population, in contrast to the more closed world in which the UN was created. The second element is that all States should be subject to the same standards, whether these are human rights norms, financial sanctions or any other stipulations of a resolution. Essentially, there should not be one rule for the powerful, and another for the weak. The Charter explicitly states that “the Security Council acts on [UN Member States’] behalf”²⁶² and Bingham writes that “although the citizens of a democracy empower their representative institutions to make laws which, duly made, bind all to whom they apply . . . nothing ordinarily authorizes the executive to act otherwise than in strict accordance with those laws.”²⁶³ Within the Council context it is vital, then, that the States passing the resolution are seen to adhere to its contents, meaning and purposes. Resolutions that display a high level of adherence to equality before the law will contain provisions that are applied to all members of the Security Council as well as the intended subjects of a resolution.

Resolutions will also adhere to the component of equality before the law when there is a similar reaction by the Council to similar threats or situations; it seems self-evident that where an armed conflict has broken out the Council must act to quash the threat to the peace. Although the sources of the conflict are often different and require different approaches, the Council has a responsibility to end bloodshed, violence and conflict as soon as possible. Most recently the lack of military intervention in Syria in the aftermath of Council-mandated NATO action in Libya

²⁶² UN Charter (1945) art 24(1).

²⁶³ Bingham (n 40) 60.

for, arguably, equally threatening security issues raises has resulted in criticism of the Council for shunning its primary responsibility to maintain peace, both internally from Council members that voted *for* action and external observers. As a result, Council members are obliged to provide reasoned arguments for their actions or inaction- where clear evidence of the necessity for Council intervention is apparent through the statements, declarations and resolutions of other UN organs, agencies and representatives and the Council fails to act, the risk of inequality before the law is high.

This component will explore why the Council acts immediately in certain circumstances and more slowly, if at all, in others. Potential explanations for this might be the necessity to wait for results of fact-finding missions, UN reports or other information gathering projects before taking definitive action; more cynically, however, it could also be due to a hesitation on the part of the Council to act against the interests of its allies, the victimisation of States in opposition to the P5 members, strategically geographical locations that Council members are reluctant to tamper with due to their own vested interests or simply a lack of interest by Council members due to its lack of political value. Through comparison of different resolutions and situations, this thesis will identify whether this element of the rule of law has been adequately upheld in the decisions of the Council and, if not, what the reasons for this failure were.

This thesis will also argue that resolutions should impose the same standards upon all States, as opposed to different standards for different States. Equality before the law requires that resolutions contain provisions that are equally applied to all members – for example, the possession of nuclear weaponry or the reaction to armed conflict. However, Council members are highly unlikely to state outright that their actions were taken with biased or self-serving motivations at their root; as such, concrete evidence to suggest that a double-standard exists is unlikely to result from analysis of verbatim meeting records or other material emerging from the Council directly.

Therefore, at its core, this component is fundamentally speculative, although certain evidence of bias can be found in statements made on the domestic level – for example, the declaration of P5 member’s unwavering support for another State.²⁶⁴ Nonetheless, the most that this component

²⁶⁴ It can also be found in the internal criticism found in verbatim records of meetings, such as the vitriolic assault on China and Russia by several members, including the P5 members of France, UK and USA, over the use of the veto in UNSC Draft Res S/2012/77 (2012), see China, UNSC Verbatim Record (21 February 2012) UN Doc S/PV/6717, 5-6; Russia, UNSC Verbatim Record (21 February 2012) UN Doc S/PV/6717, 5-6.

can hope to prove is that certain decisions of the Council *appear* to contravene the principle of equality before the law.

This element of the rule of law also links inextricably into the absence of arbitrariness, another element of the rule of law. As Justice Jackson noted over half a century ago,

there is no more effective practical guaranty against arbitrary and unreasonable government than to require the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation . . . Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.²⁶⁵

III.4 The Predictability Paradox: the avoidance of arbitrariness, supremacy of the law and fairness in the application of the law

Whereas equality before the law deals with potential biases that might be found at the core of the Council in its decision-making process and the potential blind eye that it turns to certain situations in contrast to others, The Predictability Paradox component asks whether decisions of the Council are taken with discretion or based on a set of principles that allow States to reasonably regulate their behaviour in accordance with standards derived from existing Council decisions, resolutions and discussions. The reference to a paradox is fitting for the Council, which must ensure that it allows States to reasonably anticipate its response based on a precedent of Council action, or inaction, in the past, whilst also addressing each individual threat on a case-by-case basis. The plethora of tools at the disposal of the Council were granted by design to allow it to respond effectively to any threat that the international community might face; nonetheless, it should ensure that its response is not disproportionate, contradictory or unsuitable. The Predictability Paradox is the amalgamation of non-arbitrary action, the supremacy of the law in decision-making processes and fairness in the application of the law. It is highly successful when States are able to forecast the Council's decisions based upon existing clearly elucidated

²⁶⁵ As Justice Jackson noted over half a century ago, “there is no more effective practical guaranty against arbitrary and unreasonable government than to require the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation . . . Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation”, *Railway Express Agency, Inc v New York* (1949) 336 US 106, 112-113.

decisions (as highlighted in the component on clarity of action), the legal basis for comparable situations (as in legal certainty), the knowledge that the Council's actions will not be arbitrary and that legally sound decisions will be fairly applied. The difficulty lies, however, in analysing where the Council has reacted either similarly or differently to a similar threat and has done so unfairly or arbitrarily. The Council, as a political body that was established to adapt to shifting definitions of a threat, must necessarily change its approach accordingly when faced with each threat; therefore it is insufficient to claim that where it has reacted differently to an analogous threat, it has failed in the principle of fairness or avoidance of arbitrariness. Conversely, where there has been a marked shift in approach or where States are not held accountable to the same principles or standards, without compelling and thorough explanation of the reasons for the Council shift in approach, it will be clear that there has been arbitrary behaviour and a lack of fairness and equality in the application of its powers.

The Council is, by definition, a political body and to impose upon it the stiff restrictions of an unwavering set of standards would both defeat the purpose of its existence by crippling its diplomatic and political capabilities and run contrary to the intentions of the drafters at San Francisco to allow it a wide berth in which to operate. Indeed, as Bingham notes, even “judges should enjoy a measure of discretion when passing sentence on convicted criminals, since if they are obliged to impose a prescribed penalty for a given offence they are unable to take account of the difference between one offence and another and between one offender and another . . . The rule of law does not require that official or judicial decision-makers should be deprived of all discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. *No discretions may be legally unfettered.*”²⁶⁶

Concern arises when “the behaviour of states, on which the rule of law ultimately depends, often is arbitrary and self-interested, in a way that is the antithesis of rule of law norms.”²⁶⁷ The Council is charged with the primary maintenance of international peace and is tasked with “discharging these duties . . . in accordance with the Purposes and Principles of the United Nations,”²⁶⁸ which include “international co-operation in solving international problems . . . [and] harmonizing the actions of nations in the attainment of these common ends.”²⁶⁹

²⁶⁶ Bingham (n 40) 53-54 [emphasis added].

²⁶⁷ Saunders and Le Roy (n 67) 15; see also Brownlie (n 46) and Martin Lughlin, *Sword and Scales* (Hart 2000).

²⁶⁸ UN Charter (1945) art 24.

²⁶⁹ *ibid* art 1(3)-(4).

This thesis will argue that Council members, when acting on official Council business, should pay primary attention to the maintenance of the peace above their own national interests; that is to say, the maintenance of international peace should be valued at all costs, even at the expense of domestic welfare. Whilst it may seem to be politically naive to suggest this hierarchy, and it would not be surprising to find that such a system did not exist, this thesis confines its approach to the letter of the UN Charter, which states that the Council shall exercise its duties within the parameters of the purposes and principles of the UN²⁷⁰ – far from advocating unilateral decisions and self-serving actions, article 1(1) of the Charter refers to “collective measures”. To use a domestic analogy, representatives of the subjects of the law – members of parliament – are the source of outrage when it is revealed that laws and decisions are taken to benefit their own personal, affiliated or company interests and in some cases are fatal to their political careers²⁷¹; fairness and supremacy of law for the Council should elicit the same standards of integrity, particularly given the high stakes of international peace and the repercussions that Council decisions have not only on individuals but on entire populations. Two potential examples of this are sanctions, which often do not result in targeting the governments of a targeted State but rather the people of that State due to diversion of funds internally, and the failure to intervene in situations where human rights are being grossly violated on a wide scale level, which requires international intervention.

The first element of non-arbitrary behaviour of the Council is a clear legal basis for its action or decision – this is an example of the overlap between Security Council rule of law components. In the case of resolutions, they should contain the component of legal certainty and in the case of decisions that do not result in the passing of a resolution, sound judgement must be displayed with a reasoned argument for the decision that is clearly outlined in the statements or speeches made. Secondly, a clear pattern of action should be evident; for example, when dealing with the same situation, previous decisions and resolutions should be taken into consideration to ensure that a clear trajectory is charted, rather than an ad hoc response that differs in proportionality, direction and substance. Thirdly, resolutions should take account of comparable situations, where Council action should not vastly differ. In essence, this means that where

²⁷⁰ *ibid* art 24(2).

²⁷¹ An example of this was the criticism that was directed in the US towards representatives who vote for lower taxation on companies or those earning above a certain threshold, due to the personal gain that they or others connected to them will benefit.

similar situations have a clear causal link it should be evident why the same action was taken or why a different course was pursued.

III.5 Consistency with international human rights norms and standards

Recent decades have heralded a wave of concern from international bodies with respect to the human rights implications of actions and decisions; indeed, they have even been at the core of decisions to create international criminal tribunals and at the root of relatively new phenomena such as the erosion of State sovereignty²⁷² and the new hierarchy that places human rights above State immunities. The potential impact of project outcomes on the human rights situation are carefully assessed by the UN, certainly more expansively than initially envisioned in the UN Charter.²⁷³ Human rights elements can be found as considerations in resolutions that primarily deal with other issues; for example, UNSC Res 1373 on the freezing of terrorist assets might not initially be seen to concern human rights, but it was based on “the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights”²⁷⁴ as well as the “unjustified restriction of his right to property”²⁷⁵ that the European Court of Justice overturned the Council of the EU’s implementation of the resolution. It would appear, then, that the Council at times does not fully contemplate the human rights effect of its resolutions and this sub-section intends to discover the extent of this phenomenon.

Human rights can be relevant to the Security Council in two ways: as a competence and as a limitation. Whereas the competence element relates to a catalyst for Council action, this component also explores whether Council action is bound by some limitations imposed on it by human rights law. However, the debate reaches further than this to one of the Council’s adherence to *jus cogens* and international customary norms relating to human rights. This component asks whether the Council is bound by these norms or the Council can act outside of international human rights law, asking whether the Council has acted consistently with *jus cogens* and customary norms and if so, how it balances these with the maintenance of international peace and security. Resolutions and decisions that include smart sanctions and the

²⁷² For example, the responsibility to protect (R2P).

²⁷³ Although “promoting and encouraging respect for human rights” is stated in the purposes of the UN at 1(3) of the UN Charter, human rights are not explicitly linked to the work of the Security Council. Indeed, they are only mentioned as being directly within the remit of the General Assembly (UN Charter (1945) art 13(b)), ECOSOC (UN Charter (1945) art 62(2); UN Charter (1945) art 68) and the Trusteeship Council (UN Charter (1945) art 76(c)).

²⁷⁴ *Kadi and AlBarakat*, (n 256) ¶334.

²⁷⁵ *ibid* ¶370.

establishment of review committees might suggest that the Council considers it bound by them, whereas the absence of their mention in resolutions could suggest that the Council sees its role as maintainer of peace and security to incorporate an exemption. This thesis will address this by examining whether *jus cogens* norms and customary international law are noted, mentioned and respected in Council action.

In either case, human rights protections extend further than this and potential violations can be seen not only as the effects of a resolution to be considered during deliberations on the drafting and passing of a resolution, but also as the reason for the creation of a resolution itself. Although human rights often lie at the root of a decision to act, there is the argument that human rights violations are not always effectively handled in a timely fashion, or even that certain States block the passing of resolutions that centre around human rights issues for reasons that run contrary to the philanthropic goals upon which the UN is built. The question is, then, whether every decision of the Security Council to act, or not to act, accommodates its responsibility to ensure the protection of human rights or whether there is a selective approach to the response to human rights depending on other factors. If the latter is true, these factors will be addressed.

III.6 The separation of powers and acting 'ultra vires'

Linked to the accountability issue, at first glance this particular element of the rule of law might not stand out as applicable to the Security Council, given the independent core organs that the UN system is formed of and the horizontal nature of the international sphere in comparison to the domestic system. However, it is in fact a pertinent topic for discussion when addressing the Council; as referred to in my literature review, authors such as Joyner, Elberling and Nollkaemper have raised substantial concerns regarding the encroachment of the Council on the judicial realm of the ICJ and the legislative space that should be occupied by national governments. Bingham states that “[t]he constitution of a modern democracy governed by the rule of law must . . . guarantee the independence of judicial decision-makers, an expression [he uses] to embrace all those making decisions of a judicial character, whether they are judges (or jurors or magistrates) or not.”²⁷⁶ Sharing these concerns, this thesis takes the view that it is vitally important that the Security Council ensure that it does not act *ultra vires* in the course of its action. This component discusses the limits to Chapter VII resolutions and the expansion of

²⁷⁶ Bingham (n 40) 91.

its powers to include legislative authority in pursuing apparent breaches of or threats to the peace.

In the wake of international terrorist attacks in the early 21st Century, the Council took the unprecedented step of imposing legally binding, general and non-temporally limited obligations upon States through Chapter VII resolutions;²⁷⁷ this precedent was recently bolstered by another general resolution combatting terrorism in 2014.²⁷⁸ In 2005, by imposing binding obligations on all States to adopt legislation to prevent the proliferation of nuclear, chemical and biological weapons,²⁷⁹ the Council's powers were again called into question, as it was alleged to have installed itself as a form of global governor in contravention to principles of State sovereignty. The separation of powers component intends to identify any situations where the Council appears to have overstepped the boundaries defined for it in the UN Charter, either by trespassing on the territory of another UN organ or extending its reach to impose legally binding obligations upon States that were not in accordance with its powers in the Charter, both of which should be examined within the constraints of the parameters set out for the Council in the UN Charter.

III.7 The equitable participation in decision-making processes

This is the counterweight to the above point on equality before the law; whereas equality before the law relates to the subjects of a law – in the context of the Council, Member States that are bound to abide by the stipulations of a given Chapter VII resolution – and is therefore *externally-facing*, the equitable participation in decision-making is introspective. It relates to the background of such resolutions and the history of a given resolution from tabling to passing, or failure, incorporating consultations with Member States and the inclusion or at least consideration of the diverse opinions that are often expressed in the Security Council chamber during resolution discussions.

Perhaps the most obvious of issues that spring to mind when discussing the equitable participation of States in the decision-making process of the Security Council is the existence of the veto power available to the P5 members. This thesis will not broach the topic of altering the *status quo* of P5 veto power, but rather attempts to define how an equitable participation in the

²⁷⁷ UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

²⁷⁸ UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178.

²⁷⁹ UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540.

decision-making process can exist alongside it. The existence of a select group of members that have the power to unilaterally block the passing of a resolution may appear to be a lop-sided system that undermines the very fabric of equitable participation, but it is a structure that has not changed since the conception of the Council and, despite repeated reform efforts, looks to remain cemented thus for the foreseeable future.

The equitable participation in the decision-making process demands that representatives of the UN Member States be consulted on all decisions of the Council. In order to discern whether this element has been satisfied, I will firstly examine the Charter for the principles relating to voting and composition of the Council, as well as the Rules of Procedure of the Council. Does the Charter contain specific provisions that oblige the Council to offer equitable participation? If so, it would suggest that, with the exception of the veto, an equitable process for Council decision-making was envisioned for the Council under the Charter. However, if not it would suggest that an inherent bias was created from the outset, although this does not negate the need for it entirely as a component of the rule of law for the Council. If, as expected, this element exists, I will then address the procedure of the Council in its decision-making and try to establish whether a practice of closed-door meeting and agreement between States, in the same vein as took place prior to the establishment of the UN at Yalta and Dumbarton Oaks, still exists or whether decisions, debates and full and frank disclosure have been incorporated in the Council's decision-making process. Even in instances where the veto has been used, it is vital that the P5 member making use of this privilege be forthcoming in its explanation of the reasons why it feels the course of action it disagrees with cannot benefit the restoration and maintenance of the international peace. In order to discern these points, it is not the text of the resolutions that will be most important but rather the comments of States – the verbatim records – that will grant proof of compliance. For example, evidentially-based accusations by member States of collusion or agreement of some States prior to official Council meetings would run contrary to this component of the rule of law.

III.8 Accountability before the law

Accountability is akin to a thread that runs through all elements of Council decision. If clarity of action and transparency are the starting points of the rule of law for the Council, accountability is the end; it is the means of measuring and reviewing how effectively the Council has adhered to

the principles of the rule of law and gives a forum for amendments to Council practice. Accountability of the Council is not something that is likely to be found entrenched in the resolutions of the Council, since the notion of its accountability is clearly not a matter that the Council considers a requirement.

Identifying that “[a]n important element of the rule of law is the ability to have one’s grievances heard before an impartial judge”,²⁸⁰ accountability requires a mechanism in place to which States may turn should they suspect that the Council has taken an illegitimate or *ultra vires* decision; accountability also requires the existence of an independent monitor of the Council’s compliance with the rule of law. Article 24(3) of the UN Charter stipulates that the Council is to “submit annual and, when necessary, special reports to the General Assembly for its consideration.” However, these reports are insufficient for the purposes of accountability, since they do not fulfil the requirements of judicial review and fit more within the context of sub-heading 5.1 on the administrative elements of procedural transparency and public promulgation. The structure of the Council and its position as an organ of the United Nations dictates that any accountability mechanisms be horizontal; discussions on the benefits and disadvantages, as well as the feasibility and practicality of review by a fellow UN organ such as the ICJ have been conducted by delegate States at the formational meetings of the United Nations itself in addition to more recently by scholars such as Sarooshi, Tsanakopoulos and Joyner, as already referred to in the literature review. This component will build on these proposals by discussing the powers of UN organs to monitor and review the decision-making process of the Council itself.

III.9 Chapter Conclusions

These components of the rule of law have been tailored to fit the Council and reflect the behaviour expected of it in order to abide by its principles. They delineate the approach that I will use to enter into an in-depth analysis of each component with reference to the primary material that I outlined in Chapter I, including the UN Charter, Security Council resolutions and verbatim records. I have grouped certain components together due to similarities in both substance and methodology, as well for ease of examination since certain elements are inherently linked or overlap. In reaching this stage, I have partly answered the first of my two thesis research questions, namely, what the rule of law, if any, is at the Security Council level; the next

²⁸⁰ Widner (n 130).

chapter will continue to answer this question by expanding on the points that I have highlighted here and giving further detail on how the Council has or has not complied with the provisions of each element. I have also succeeded in answering the three sub-questions that I aimed to address at the start of this chapter: what the rule of law is in the domestic and international spheres; how and why a rule of law for the Security Council differs from this; and why the Council should be subject to the rule of law at all. The following chapters will now examine the components that I have identified in this chapter in more detail.

CHAPTER IV

CLARITY OF ACTION: PROCEDURAL TRANSPARENCY AND PUBLIC PROMULGATION

IV.1 Introduction

This element of the rule of law examines the extent to which the Council's decision-making process is clear, transparent and publicly available to other Council member States, non-Council Member States and the general public. The dissemination of information around the path taken to reach any given decision by the Council is integral to public awareness of Council action and reflects a transparent procedural process. The absence of clear information is the hallmark of secretive decision-making; it is vital that all States are able to understand the options considered by the Council and the reasoning behind the decision that emerged from their meeting and discussions. Similarly, if such information exists but is not released to the public, this might suggest a hierarchy in the United Nations, wherein some States are permitted to be privy to discussions and knowledge and others are not. The same principle applies to the citizens of each Member State, to whom the governments and authorities on a domestic level, represented at the United Nations by delegates and ambassadors, are ultimately answerable.

Therefore one could advance the theory that any lack of public promulgation of detailed documents and information at the Council level impacts upon the rule of law at a domestic level in each Member State and that this element of the rule of law for the Council has a global domestic knock-on effect. Tzanakopoulos argues that transparency

is not a free-standing primary norm, which prescribes or proscribes or permits certain action, but rather it is a norm without any independent normative charge. It is an ancillary obligation (of the Council) and right (of the Member States) which mediates between the powers of the Council to act, and the residual powers of Member States to exercise diffuse control over the exercise of those Council powers.²⁸¹

Clarity of action, then, is to the remainder of the components of the rule of law what the Vienna Convention on the Laws of Treaties is to international law – a secondary source of interpretation. Transparency of itself provides little independent use, but is valuable when examined in tandem

²⁸¹ Tzanakopoulos (n 17) 386. See, also Vaughan Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?' in Michael Byers (ed), *The Role of Law in International Politics* (OUP 2000) 213-216.

with another component of the rule of law. In this sense, too, it is integral to accountability,²⁸² as “it enables critique and control by the public of the actor one is seeking to hold accountable.”²⁸³ Accordingly, it is also the gateway to interpretation – without transparency, it is unlikely that any component of the rule of law can be examined fully, as the information accessible would be unreliable, incomplete or erroneous. Clarity of Action is linked to other components of the rule of law – for example, *The Equitable Participation in Decision-making Processes*. The presence in Council discussions of non-member States and non-State actors is part of the issue of procedural transparency and closely linked also to the rule of law at the domestic level.²⁸⁴ The inability, should it exist, of a relevant non-state actor or Member State to participate in proceedings would surely be a substantial failing of the component of both *Clarity of Action* and *Equitable Participation*.

I have identified two major elements to this component of the rule of law: the first is whether mandatory official documents, as stipulated in the Rules of Procedure, UN Charter or other governing text, exist and are available to parties permitted access to them by these texts. This requires examining what rules are in place for the dissemination of official Council documents and whether the Council complies with these obligations. The second element focuses on the composition of these documents and the transparency of the information contained in them. This requires an examination of the texts themselves and whether all relevant information that should be contained in the documents can indeed be found in all official Council documents.

IV.2 Council obligations for procedural transparency

Under the UN Charter, the Council is obligated to present the Assembly “annual and special reports. . . includ[ing] an account of the measures that the Security Council has decided upon or taken to maintain international peace and security.”²⁸⁵ Moreover, as part of the Secretary-General’s responsibility to “make an annual report to the General Assembly on the work of the

²⁸² See eg Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009) 327; Carol Harlow, *Accountability in the European Union* (OUP 2002) 7.

²⁸³ Tzanakopoulos (n 17) 392

²⁸⁴ In order for the criteria of transparency to be fully satisfied, it is essential that all parties to an issue be given fair and equitable access to the floor to highlight potential issues from, undoubtedly, a closer and more knowledgeable perspective.

²⁸⁵ UN Charter (1945) art 15.

Organization”,²⁸⁶ an inference exists that communication between the Council and Secretariat will be forthright, transparent and timely in order to facilitate the preparation of the report. The Security Council’s Rules of Procedure are also clear on the requirement that verbatim records, “records of meetings . . . [a]ll resolutions and other documents shall be published in the languages of the Security Council”²⁸⁷ and to be made simultaneously available in all five official, working languages of the United Nations – English, French, Arabic, Spanish and Standard Chinese.²⁸⁸ Leaving the door open for contingency situations where translation into other languages might be necessary, the rules go on to stipulate that “[d]ocuments of the Security Council shall, if the Security Council so decides, be published in any language other than the languages of the Council.”²⁸⁹ Arabic was introduced as an official language in the General Assembly on 18th December 1973²⁹⁰, though it would be almost a further decade before the Security Council recognised Arabic as such in an amendment to its Rules of Procedure based on the Assembly request of 1980.²⁹¹ Subsequently, resolutions prior to 18th January 1983²⁹² are unavailable.²⁹³

The Council’s Rules of Procedure also take into consideration the necessity of rapid and accurate documentation of meeting minutes, imposing a standard that “the verbatim record of each meeting of the Security Council shall be made available to the representatives on the Security Council and to the representatives of any other States which have participated in the meeting not later than 10 a.m. of the first working day following the meeting.”²⁹⁴ There is a similar deadline on the dissemination of the public record to States and parties that did not participate in the meeting. Indeed, even for members of the public and academics such as this author, the ease of access to the repertoire, rules of procedure, working methods, annual reports,

²⁸⁶ *ibid* art 98.

²⁸⁷ UNSC Provisional Rules of Procedure (1946) UN Doc S/96/Rev.7, r 45-6.

²⁸⁸ *ibid* r 41.

²⁸⁹ *ibid* r 47.

²⁹⁰ UNGA Res 3190 (XXVIII) (18 December 1973).

²⁹¹ UNGA Res 35/219 (17 December 1980) UN Doc A/RES/35/219.

²⁹² UNSC Res 529 (18 January 1983) UN Doc S/RES/529.

²⁹³ A hyperlink to the English language versions is displayed with the statement “Security Council resolutions prior to 1983 are available via this link in English”: “قرارات مجلس الأمن لما قبل عام 1983 متوفرة على هذا الرابط باللغة الإنكليزية” [author’s own translation] <<http://www.un.org/ar/sc/documents/resolutions/index.shtml>> accessed 16 December 2014. Although all resolutions since this date appear to be available online, it is disappointing to find that resolutions prior to 1983 have not been translated retroactively; carrying out such translation and making it available would allow Arabic speakers to review and inform themselves of Council action prior to this date. Indeed, a thesis such as this could not be carried out in Arabic alone and this eliminates the possibility of full, direct engagement with the actions of the Security Council in a large number of Arabic speaking countries.

²⁹⁴ UNSC Rules of Procedure (n 287) r 49.

letter exchanges, official statements, meeting records, voting records, a full history of resolutions and a variety of other recent Council-related documents are easily accessible online in the English language.²⁹⁵

However, there are several formats of meetings that can take place at the Council level and this is where compliance by the Council to the component of clarity of action begins to deteriorate. Meetings of the Security Council can be held in public – including open debate,²⁹⁶ debates,²⁹⁷ briefings²⁹⁸ or adoption²⁹⁹ meetings – or private – including both closed public private meetings³⁰⁰ and Troop Contributing Country (TCC)³⁰¹ meetings. Although official records of public meetings are minuted and made available to the public, official records of private, or closed, meetings are made in single copy and kept by the Secretary-General, with access to this copy only being granted to the select few Council Member States that participated in the meetings. Perhaps more worryingly, meetings of the Members of the Security Council can take place in “informal consultations of the whole” to which non-Council members are not invited and no official record is made; indeed, the French delegation expressed concern as early as 1994 at the fact that “nearly all the work of the Council takes place in the form of informal consultations to which States not members of the Council do not have access.”³⁰² Moreover, speaking on behalf of the 115 Non-Aligned Movement States in 2006, the representative from Cuba addressed the Council with a damning list of examples of Council behaviour undermining transparency, openness and consistency, including

unscheduled open debates with selective notification, reluctance in convening open debates on some issues of high significance, frequent restrictions on the participation in some of the debates and discrimination between members and non-members of the Council, particularly with regard to sequencing and time limits of statements during the open debates, failure to submit special reports to the General Assembly, as required under Article 24 of the Charter, the submission

²⁹⁵ <<http://www.un.org/en/sc/documents>> accessed 16 December 2014.

²⁹⁶ Non-Council members may be invited to participate in the discussion upon their request.

²⁹⁷ Non-Council members that are directly concerned or affected or have special interest in the matter under consideration may be invited to participate in the discussion upon their request.

²⁹⁸ Only Council members may deliver statements following briefings.

²⁹⁹ Non-Council members may or may not be invited to participate in the discussion upon their request.

³⁰⁰ Non-Council members may be invited to participate in the discussion upon their request.

³⁰¹ Parties prescribed in resolution 1353 (2001) are invited to participate in the discussion, in accordance with the resolution.

³⁰² ‘Letter dated 9 November 1994 from the Permanent Representative of France to the United Nations addressed to the Secretary-General’ (11 November 1994) UN Doc S/1994/1279 (Annex), 2.

of annual reports still lacking sufficient information and analytical content, and lack of minimal parameters for the drawing up of the monthly assessment by the Security Council presidencies.³⁰³

There is, therefore, a problem that arises with the actual information both made available through attendance at Council meetings and contained within the documentation disseminated.

IV.3 Private (closed) meetings

Although implicitly permitted by the Council's own Rules of Procedure,³⁰⁴ private meetings run contrary to a transparent Council; whereas *public* meetings are a matter of *public* record and the verbatim records and other documents are easily accessible by not only UN Member States but also the wider public in many guises and media, *private* meetings are almost wholly segregated from the public eye. Whilst it might seem reasonable for the Security Council – which deals with matters of international security and potentially sensitive and classified information – to conceal sensitive information, private meetings are concerning for two primary reasons: firstly, there appears to be no threshold that needs to be met in order to trigger a private meeting, and secondly, private meetings have steadily increased in usage by States in place of the public forum.³⁰⁵ What this means, in reality, is that a Council member may decide, for whatever reason, that it wishes to meet with another Council member to discuss a matter in private, with no obligation to divulge the details of the topics discussed. Nonetheless, they are frequently made use of, can be attended by any number of invited members and carry with them no stipulation for compulsory records analogous to public meetings. Although this is inherent to the nature of politics – and the Council is, after all, a political body – the risk then comes with the repeated use of behind the scenes discussions that leave other Member States and the wider international community at a loss as to what has been discussed:

Like a parliamentary matryoshka (doll), [the Council] now contains ever-smaller 'mini-Councils', each meeting behind closed doors without keeping records, and each taking decisions secretly. Before the plenary Council meets 'in consultation' . . . the P-5 have met in 'consultation' . . . and before they meet, the P-3, composed of the United States, the United Kingdom and France, have met in

³⁰³ Cuba, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968, 32-33.

³⁰⁴ UNSC Rules of Procedure (n 287) r 51.

³⁰⁵ 6 meetings 1956-58; 7 meetings 1969-71; 5 meetings 1972-74; 8 meetings 1981-84; 5 meetings 1989-92.

‘consultation’ in one of their missions in New York . . . After the fifteen members of the Council have consulted and reached their decisions, they adjourn to the Council’s chamber, where they go through the formal motions of voting and announcing their decision. Decisions that appear to go further than at any time in the history of the United Nations are now ultimately being taken, it seems, by a small group of states separately meeting in secret.³⁰⁶

Reisman’s observation in 1993 appears only to have gained momentum as the years have passed expanding to include other discussion topics besides those initially criticised. Despite increased recourse to Council action in the 1990s, the use of closed meetings has grown rapidly since 1999, prior to which closed meetings were used for specifically mandated reasons such as the re-appointment of the Secretary-General in 1996:³⁰⁷ 1999 saw only four closed meetings³⁰⁸ leaping drastically to nineteen in 2000³⁰⁹. Since 2000, there have been over four hundred closed meetings³¹⁰ and at one point over 20% of Council meetings were conducted in private.³¹¹ The fact that the usage of private meetings has only increased since their introduction – and shows no signs of relenting to this day³¹² – flies in the face of the Council’s 2010 reaffirmation of “its commitment to increase recourse to open meetings, particularly at the early stage in its

³⁰⁶ Reisman (n 171).

³⁰⁷ UNSC Verbatim Record (19 November 1996) UN Doc S/PV.3714, on the reappointment of the Secretary-General, which can be argued to be necessarily held in private and is specifically mandated by Rule 48 of the Council’s Rules of Procedure.

³⁰⁸ UNSC Official Communiqué (26 October 1999) UN Doc S/PV.4058; UNSC Official Communiqué (5 November 1999) UN Doc S/PV.4061; UNSC Official Communiqué (8 November 1999) UN Doc S/PV.4062; UNSC Official Communiqué (30 December 1999) UN Doc S/PV.4086.

³⁰⁹ UNSC Official Communiqué (16 February 2000) UN Doc S/PV.4102; UNSC Official Communiqué (6 March 2000) UN Doc S/PV.4108; UNSC Official Communiqué (25 April 2000) UN Doc S/PV.4132; UNSC Official Communiqué (15 June 2000) UN Doc S/PV.4157; UNSC Official Communiqué (16 June 2000) UN Doc S/PV.4158; UNSC Official Communiqué (21 June 2000) UN Doc S/PV.4163; UNSC Official Communiqué (3 August 2000) UN Doc S/PV.4183; UNSC Official Communiqué (14 September 2000) UN Doc S/PV.4196; UNSC Official Communiqué (19 September 2000) UN Doc S/PV.4198; UNSC Official Communiqué (29 September 2000) UN Doc S/PV.4202; UNSC Official Communiqué (12 October 2000) UN Doc S/PV.4206; UNSC Official Communiqué (26 October 2000) UN Doc S/PV.4210; UNSC Official Communiqué (31 October 2000) UN Doc S/PV.4212; UNSC Official Communiqué (10 November 2000) UN Doc S/PV.4217; UNSC Official Communiqué (10 November 2000) UN Doc S/PV.4218; UNSC Official Communiqué (17 November 2000) UN Doc S/PV.4226; UNSC Official Communiqué (20 November 2000) UN Doc S/PV.4228; UNSC Official Communiqué (27 November 2000) UN Doc S/PV.4233; UNSC Official Communiqué (27 November 2000) UN Doc S/PV.4234.

³¹⁰ 19 in 2000; 34 in 2001, 55 in 2002, 31 in 2003, 27 in 2004, 35 in 2005, 49 in 2006, 20 in 2007, 26 in 2008, 20 in 2009, 28 in 2010, 21 in 2011, 15 in 2012 and 20 in 2013. Source- UN Security Council Meeting Records <<http://www.un.org/en/sc/meetings>> accessed 16 December 2014.

³¹¹ In 2002, 55 of the 272 Council meetings were conducted in private, equating to 20.22% of all Council meetings. Source- UN Meeting Records <<http://www.un.org/en/sc/meetings/records/2002.shtml>> accessed 16 December 2014.

³¹² Since 2010, there have been 84 closed meetings, an average of 21 per year. There were more closed meetings in 2013 (20) than in 2012 (15); thus there cannot be said to exist a downward trend in the usage of closed meetings.

consideration of a matter.”³¹³ The reliance on closed meetings, to which the public have no access, raises grave concerns of transparency and has long led to calls for reform by non-Council member States.³¹⁴ The Representative of Kazakhstan summed up the sentiment when he stated that

[w]e non-member States of the Security Council have the right to know first-hand what are the possible decisions being discussed within the Council and what are the positions of each Council member on current issues, and should not have to find this out through the prism of the mass media. Complete knowledge of the nature of internal developments in the Council, which are important for the entire international community, are of critical importance for our Governments, which depend upon objective information in adopting decisions. As concerned members of the international community, we believe that we have the right to be informed.³¹⁵

One of the principal concerns with this format, aside from the selective nature of participation in the meetings themselves,³¹⁶ is that the Council “may decide that for a private meeting the record shall be made in a single copy alone . . . [to be] kept by the Secretary-General.”³¹⁷ Corrections to this record are permitted only through the Secretary-General, by States that have attended these private meetings and within a timeframe of ten days;³¹⁸ access to this sole copy is limited to “representatives of the Members of the United Nations which have taken part in a private meeting . . . or authorized representatives of other Members of the United Nations”³¹⁹ and the release of meeting records are subject to the Council’s discretion. Indeed, “in the case of informal consultations, there have also been instances in which the most directly concerned parties were denied participation in open meetings.”³²⁰

It can be argued that such private meetings appear not to be entirely segregated from the public eye; at “the close of each private meeting the Security Council shall issue a communiqué

³¹³ UNSC ‘Note by the President of the Security Council’ (26 July 2010) UN Doc S/2010/507, ¶28.

³¹⁴ See eg Djibouti, UNSC Verbatim Record (16 December 2014) UN Doc S/PV.3483, 14; New Zealand, UNSC Verbatim Record (16 December 2014) UN Doc S/PV.3483, 11; Italy, UNSC Verbatim Record (16 December 2014) UN Doc S/PV.3483, 15; Austria, UNSC Verbatim Record (16 December 2014) UN Doc S/PV.3483, 19; Iran, UNSC Verbatim Record (16 December 2014) UN Doc S/PV.3483, 22.

³¹⁵ UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 4.

³¹⁶ These meetings are always closed to the public and closed to non-Council Member States unless they are granted express permission to attend.

³¹⁷ UNSC Rules of Procedure (n 287) r 51.

³¹⁸ *ibid* 51.

³¹⁹ *ibid* 56. Such authority is granted by the Security Council, although criteria for allowing this access are lacking.

³²⁰ Pakistan, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 24.

through the Secretary-General³²¹ and in the instances where they have taken place, communiqués have indeed been submitted.³²² However, they are heavily redacted or brief to the point of undermining the worth of their issuance in the first place. Indeed, the extent that is known about these meetings is the intended topic of discussion, the parties privy to the meeting and, usually, that there has been “an exchange of views”.³²³ There is no means of determining the nature of the discussion, arguments, counter-arguments or, indeed, any elements of the discussion or exchange; by all measures, these private meetings are selective, exclusive – in the sense of excluding some Council member states – and divisive, as they encourage the formation and consolidation of pro and con camps for resolutions with respect to voting.

Closed meetings pose a problem primarily for non-Council Members, due to the lack of transparency that is inevitably associated with them. For example, “States that are not members of the Security Council are forced to spend more time searching for information in any way they can. As a result, they learn either too late or not at all about closed consultations.”³²⁴ States must therefore sometimes refer to the information gleaned from interviews given to the press by Council Members in attendance in order to derive any semblance of awareness of the subject and content of the meetings.³²⁵ Other UN States Members, too, have noted this deficiency in the transparency of the Council proposing that in compliance with its requirements “the Security Council should consider the wisdom and propriety of granting the wish of Member States, particularly non-Council members, to receive full information on issues discussed by the Council.”³²⁶ Speaking on behalf of the Pacific small island developing States, the representative of Tonga noted that “[m]any of the agreements reached by the Council are negotiated through experts meetings, which are not open to non-members . . . and the summaries of the discussions are not readily available.”³²⁷

³²¹ UNSC Rules of Procedure (n 287) r 55.

³²² See eg UNSC Official Communiqué (19 December 2010) UN Doc S/PV.6456; UNSC Official Communiqué (10 December 2010) UN Doc S/PV.6443; UNSC Official Communiqué (3 December 2010) UN Doc S/PV.6433; UNSC Official Communiqué (11 November 2010) UN Doc S/PV.6420.

³²³ See, eg UNSC Official Communiqué (30 October 2010) UN Doc S/PV.5558, where “Members of the Council, General Cissé and His Excellency Mr. Elie Dote, Prime Minister of the Central African Republic, had an exchange of views”; UNSC Official Communiqué (30 April 2013) UN Doc S/PV.6957, where “The members of the Council heard a briefing by the representative of Jordan . . . [and] had an exchange of views.”

³²⁴ Venezuela, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 4.

³²⁵ *ibid.*

³²⁶ Philippines, *ibid.* 9. See also, Canada, *ibid.* 10.

³²⁷ Tonga, *ibid.* 21.

The issue does not appear to centre entirely on the lack of a structure or regulation of the type of meetings, but rather the fact that the existing structure is being abused or mis-interpreted. There are agreed measures in place for the holding of meetings, both public and private, as well as rules governing the appropriate circumstances under which each should be held.³²⁸ At the heart of the matter, then, seems to be that “these provisions, which are mostly agreed provisions, are not being faithfully implemented . . . [which] has a direct negative bearing on the Council’s efficiency, effectiveness and legitimacy . . . [and calls into question whether] the Council is effective in carrying out its core mandate, namely, the maintenance of international peace and security.”³²⁹ Such closed or restricted meetings, whilst perhaps serving a political imperative as an “indispensable tool to facilitate prompt and timely decisions,”³³⁰ clearly run contrary to the rule of law. They are, however, seen by UN staff as “a valuable time-saving device”³³¹ and an inhibition to “diplomats and U.N. officials from using the U.N. organization as a forum to attain personal political goals.”³³² Quantitative research has led to the explanation that, “[a]ccording to one former Security Council President, under these circumstances, the real issues are discussed, whereas in larger meetings, members tend to use ‘more diplomatic, but less clear language,’ which is likely to obscure rather than clarify important issues.”³³³

IV.4 Informal consultations

A further element of concern comes in the form of informal consultations of the whole, to which non-Council State members are not invited, and the even more exclusive informal dialogues that frequently now precede any actual vote of the Security Council, thereby reducing it from a forum of discussion to a forum of formalisation of pre-conceived and pre-agreed decisions:

In many cases the general membership and even the countries concerned are kept totally uninformed of the negotiations on draft resolutions or statements directly affecting them, let alone being asked their views on the Council’s outcome

³²⁸ Chapter XI of the Council’s Rules of Procedure is dedicated to the publicity of meetings and records.

³²⁹ Pakistan, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 24.

³³⁰ ‘Letter dated 4 August 2008 from the Permanent Representative of Belgium to the United Nations addressed to the Secretary-General’ (6 August 2008) UN Doc S/2008/528 (Annex), 3.

³³¹ Discussion with Secretariat official (Mar. 9, 1984) and discussion with Secretariat official (Mar. 1, 1984), in Feuerle, Loie ‘Informal consultation: A Mechanism in Security Council decision-making’ (1985-1986) 8 N Y U J Intl L & Pol 267, 272-3 (1985-1986). cf. Chesterman (n 3)

³³² Feuerle, *ibid* 271.

³³³ *ibid* 272.

documents. That is also the case with regard to non-permanent members, which frequently face situations of secretive negotiation between a few permanent members on important issues.³³⁴

Informal meetings can be central to the achievement of diplomatic and political goals, allowing the achievement of “compromises that delegations initially accept ad referendum and not on the basis of instructions from the Governments. Holding such negotiations in public would obviously slow them and paralyse them.”³³⁵ This was shown to be the case after the collapse of the USSR “when, after a long period of paralysis owing to the cold war, the Security Council has had to learn to work as a unit in order to ensure prompt and effective action by the Organization in accordance with Article 24 of the Charter.”³³⁶ However, the same cannot be said to be true today, over two decades later, when the stagnant condition of Council affairs owing to the rigidity of the US and USSR has loosened considerably.³³⁷ In contrast to the factual evidence of increased Council activity since the fall of the Soviet Union,³³⁸ transparent meetings have decreased and informal meetings appear to be increasingly relied upon.

This upwards trend of usage of informal meetings worryingly has only sought to increase during the last decade: prior to 2006, there are only two documented instances of informal meetings being used – once in 1996 for a General discussion of Council issues in connection with the visit of the President of Italy to the UN and a special meeting in 2006 on the Relationship between the UN and the USA briefed by the Chairman of the United States Senate Committee on Foreign Relations. Conversely, in the years between 2006 and 2011, a total of 25 informal meetings are documented to have taken place – an average of 5 a year and over twelve times the number in the preceding decade. Informal consultations – undocumented, entirely verbal discussions between States – are even more concerning and prompted the French Foreign

³³⁴ Iran, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 11-12.

³³⁵ France, UNSC Verbatim Record (16 December 2014) UN Doc S/PV.3483, 3.

³³⁶ ‘Letter dated 9 November 1994 from the Permanent Representative of France to the United Nations addressed to the Secretary-General’ (11 November 1994) UN Doc S/1994/1279 (Annex), 2.

³³⁷ The renewed anti-US sentiments harboured by the Sino-Russian partnership in recent years will be covered briefly in a later sub-chapter; nonetheless, it cannot compare with the precarious Cold War deadlock that lasted for decades and ended in the 1990.

³³⁸ In the years 1985-1989 a total of 86 resolutions were passed by the Council; in the years 1990-1994, the total was 323. In fact, more resolutions were passed in 1993 alone than in 1985-89 combined.

Minister to transmit an aide-memoire to the Secretary-General on 9th November 1994,³³⁹ in which he lamented the evolution of Council procedure:

“there is a certain uneasiness in relations between the Security Council and Members of the United Nations . . . result[ing] in large part from the fact that *informal consultations have become the Council's characteristic working method*, while public meetings, originally the norm, are increasingly rare and increasingly devoid of content: *everyone knows that when the Council goes into public meeting everything has been decided in advance*. Thus, all of the Council’s work takes place behind closed doors, without observers and without a written record. We think this is a dangerous departure. First of all, it runs counter to rule 48 of the Council's provisional rules of procedure . . . Public meetings are therefore the rule, and non-public meetings the exception. *I should note that informal meetings are not even real Council meetings at all; they have no official existence, and are assigned no number. Yet it is in these meetings that all the Council's work is carried out*. The result of this situation is strong frustration and a lack of information. There is frustration among nonmembers of the Council; and members of the Council have inadequate information because there are too few opportunities for debate for them to understand the general feelings of those interested in items on the Council's agenda.³⁴⁰

IV.5 Council efforts to reform

The 3483rd meeting, held on 16th December 1994 – almost 50 years from the establishment of the Security Council – was the first instance that the Security Council ever held an open meeting to discuss its working methods and procedure. Parallel to this is the fact that since the early 1990s, the Security Council has been faced with a volume of work not theretofore encountered; it is estimated that “[n]inety-three percent of all Chapter VII resolutions passed from 1946 to 2002 have been adopted since the end of the Cold War.”³⁴¹ However, it would appear that the Council began carrying out most of its work in its closed consultation room, meeting in public only to adopt resolutions already agreed upon, to provide a forum for set speeches regarding the resolutions or to give the Council's President a platform for statements reflecting understandings reached in private consultation. The adoption of UNSC Res 1695 (2006) highlights this in the verbatim records, where the Argentinian delegate ended his speech by thanking “the Ambassador

³³⁹ ‘Letter dated 9 November 1994 from the Permanent Representative of France to the United Nations addressed to the Secretary-General’ (11 November 1994) UN Doc S/1994/1279.

³⁴⁰ UNSC Verbatim Record (16 December 2014) UN Doc S/PV.3483 [emphasis added]; See also the reports of Security Council presidential statements, eg UNSC Presidential Statement (14 October 1994) UN Doc S/PV.3436, 2.

³⁴¹ *ibid* 19.

of the United Kingdom for his intervention to achieve agreement.”³⁴² Non-Council Member States – and the wider international community – are left wondering what the extent of this intervention was and why the representative of the UK was singled out for thanks when the UK delegation was one of eight members - Denmark, France, Greece, Japan, Peru, Slovakia and the US being the other seven – to have sponsored the original draft resolution, S/2006/488. What exactly transpired in the meeting that brought about harmony in the wording of the resolution remains privy only to the members attending the informal consultation.

The Council has taken some steps to improve the process by which it addresses issues concerning its documentation; “the desire to enhance the flow of information and the exchange of views between the Security Council and the General Assembly lay behind the Council’s decision of June 1993 to establish an informal working group on documentation and other procedural matters.”³⁴³ This Informal Working Group (IWG) was designed to make recommendations concerning the Council’s documentation and other procedural questions and in order to promote “efficiency and transparency of the Council’s work, as well as interaction and dialogue with non-Council members, the members of the Security Council are committed to implementing [these] measures.”³⁴⁴ Indeed, the IWG “has met regularly, and a number of important steps have been taken following recommendations made by it”³⁴⁵ such as making available draft resolutions to non-members of the Council and the tentative forecast of the Council’s monthly work programme, as well as briefing Member States on the progress of informal consultations. The United Nations Journal now announces both formal and informal consultations of the Council. However, as the representative of Lichtenstein noted in 2008, the frequency of their meetings has decreased rapidly,³⁴⁶ and there have been calls for its formalisation following questions as to why it remains an *informal* working group when it deals with such an integral and vital aspect of the Council’s work.³⁴⁷

³⁴² Argentina, UNSC Verbatim Record (15 July 2006) UN Doc S/PV.5490, 6-7.

³⁴³ UK, UNSC Verbatim Record (16 December 2014) UN Doc S/PV.3483, 3.

³⁴⁴ UNSC ‘Note by the President of the Security Council’ (26 July 2010) UN Doc S/2010/507, 1.

³⁴⁵ UK, UNSC ‘Note by the President of the Security Council’ (26 July 2010) UN Doc S/PV.3483, 3.

³⁴⁶ Lichtenstein, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 12.

³⁴⁷ Egypt, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 2.

IV.6 Conclusions

In theory, there should be a wide range of methods through which information is disseminated to non-Council Member States. However, it would appear that these are not fully made use of, or in some cases neglected entirely. Interactive wrap-up sessions at the end of a Council presidency that were designed “to take into account an assessment and evaluation of its work during the preceding month”³⁴⁸ and “to be somewhat interactive, so that members would ask questions and raise issues”³⁴⁹ gradually waned,³⁵⁰ were not subject to any set procedure³⁵¹ and were last formally held in March 2005.³⁵² Similarly, more substantive and analytical reports would improve the transparency of Council procedure. “Publications and submissions of the Council could be qualitatively improved to allow the wider membership to gain more insight into its work”³⁵³; in particular, the annual reports submitted by the Council in accordance with article 24(3) of the UN Charter require refinement “to add analytical value, rather than merely giving descriptions of the work of the Council during a given year.”³⁵⁴

Many States have lamented the fact that Security Council reform, particularly review of Council working methods, has “not been accorded due attention.”³⁵⁵ Such States have emerged with reasonable and feasible amendments that would ameliorate the current situation and improve transparency in the Council’s working methods but these have been ignored or cast aside by Council practice. In essence, despite repeated protestations by smaller and medium-sized States for Council reform of its working methods no substantive changes have come about. The use of informal mechanisms that render the Council landscape opaque seem to show no signs of tapering; votes in the official meetings are undermined by private discussions between all or a selection of Council Members, rendering them a formality that is necessitated by the Charter and the Council’s Working Methods; and non-Council Member States continue to

³⁴⁸ UNSC ‘Note by the President of the Security Council’ (29 June 2001) UN Doc S/PV.4343, 2.

³⁴⁹ *ibid* 4-5.

³⁵⁰ Five sessions were held in 2002; three in 2003; none in 2004; one in 2005.

³⁵¹ Some were held in public, such as UNSC Verbatim Record (30 April 2003) UN Doc S/PV.4748 under Mexico and UNSC Verbatim Record (30 March 2005) UN Doc S/PV.5156 under Brazil, whereas others were held in private.

³⁵² Since then, some Council members have held informal briefings such as Brazil in February 2011, South Africa in January 2012. Pakistan held a private meeting in January 2013 as a wrap-up for its work for the month; however, details are not available as the record exists to the public only as a communiqué (UNSC Verbatim Record (31 January 2013) UN Doc S/PV.6914).

³⁵³ Korea, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 19.

³⁵⁴ *ibid*.

³⁵⁵ Iran, *ibid* 11. See also, Canada, *ibid* 11; Phillipines, *ibid* 8; Lichtenstein, *ibid* 14; Argentina, *ibid* 16.

scramble for information not only relating to meetings to which they were barred from attending, but also the locations or existence of meetings that they were eligible or invited to attend. These practices, omissions or reluctance to include non-Council Member States cannot be seen as compatible with any but the most basic degree of clarity of action: there is superficial transparency insofar as information on public meetings can be found after the event; however, there is still a great deal to be done on the part of the Council to ensure that the inclusion of all UN Member States is adequately accommodated.

CHAPTER V
LEGAL CERTAINTY

V.1 Introduction

The element of legal certainty is inherently linked to both the legality and legitimacy of Security Council action under Chapter VII. This component examines the legal argument for Council action; resolutions should highlight which article of Chapter VII any resolutions are taken under and its parameters, as well as clearly stating the legal justification for taking such action, the nature of the threat that the resolution intends to address and the nexus between the threat and the course of action pursued. That is to say, legal certainty is the explanatory element of a resolution, showing what the Council has identified as a threat, why it has chosen to respond in this way and what the extent of such response should be. Whilst initially eager to adhere to the letter of the law after the hard-fought negotiations and text that emerged from the Dumbarton Oaks, Yalta and San Francisco meetings and conferences, it is documented that the practice of referring legal questions to a committee of legal experts quickly fell by the wayside as the years progressed, essentially heralding the age of Council unilateralism that can be argued to exemplify the current *status quo*.³⁵⁶

This practice runs contrary to the provisions of the Charter, which very clearly stipulate the exact procedure that the Council must follow if it is to invoke the clauses of Chapter VII.³⁵⁷ With the argument of Chapter II in mind, stating that the Council and all its actions are governed by its founding text – the UN Charter – it is vital that Council action abide by the stipulations therein. Thus, the Charter is the first port of call when exploring what the Council is permitted to carry out and what, if any, constraints are imposed upon it. As such, the Charter is quite clear in the opening article of Chapter VII on what the Council must provide prior to any further Chapter VII action:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or

³⁵⁶ See Louis B Sohn, ‘The UN System as Authoritative Interpreter of Its Law’ in Oscar Schachter and Christopher C Joyner (eds) *United Nations Legal Order: Vol 1* 169, 227 (CUP 1995)

³⁵⁷ UN Charter (1945) art 39: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.³⁵⁸

Articles 41 and 42 of the Charter, authorising non-military and military action respectively, are subordinate to the above article 39, which provides the threshold of identification of a threat *prior* to any action being instigated under the Council's Chapter VII powers. There is, then, a staged progression that safeguards from arbitrary or frivolous use of articles 41 and 42, albeit a caveat that is wildly ambiguous in itself. Nonetheless, in order for Chapter VII to be invoked, the threat, breach or act *must* be expressly stated in the resolution. A determination under Article 39, however, does not immediately presuppose action under Chapter VII to follow; that is to say, all Chapter VII resolutions should have a determination under Article 39, but not all determinations under Chapter 39 lead to Chapter VII resolutions. Two clear examples of this are UNSC Res 1976 (2011)³⁵⁹ and UNSC Res 1078 (1996),³⁶⁰ both of which contain determinations under Article 39 but no Chapter VII references or elements.³⁶¹ Article 39, therefore, is the "portal" through which the Council must enter in order to access its Chapter VII powers and without such determination, any Chapter VII resolution would technically be a subversion of the law governing the Council;³⁶² indeed, it has been referred to as "the single most important provision of the Charter."³⁶³ In essence, what this amounts to is the need to state explicitly the nature of the threat to or breach of the peace, in addition to the determination that the Council is acting under Chapter VII of the Charter, which grants the decision a legally binding and more authoritative nature.

³⁵⁸ *ibid.*

³⁵⁹ Where a determination was made that "incidents of piracy and armed robbery at sea off the coast of Somalia exacerbate the situation in Somalia, which continues to constitute a threat to international peace and security in the region" but no Chapter VII action was contained in the resolution.

³⁶⁰ Where "the magnitude of the present humanitarian crisis in eastern Zaire constitutes a threat to peace and security in the region" but again no Chapter VII action was taken.

³⁶¹ See also, eg UNSC Res 867 (23 September 1993) UN Doc S/RES/867 and UNSC Res 862 (31 August 1993) UN Doc S/RES/862.

³⁶² It is worth noting that a positive determination under Art 39 does not immediately and automatically result in Chapter VII action, but merely provides the option to proceed further eg UNSC Res 1078 (9 November 1996) UN Doc S/RES1078.

³⁶³ US Secretary of State, 'Report to the President on the Result of the San Francisco Conference (1945)' in Jochen Frowien and Nico Krisch 'Article 39' in Bruno Simma with others (eds), *The Charter of the United Nations: A Commentary* (OUP 2002) 718.

V.2 *Determination of a threat under Article 39*

However, such explicit enumeration of the specific threat to the peace is not always given by the Council, leading to ambiguity, confusion and disarray. As such, certain resolutions refer to explicit determinations under article 39, whilst others determine a threat to the peace either implicitly or not at all. These *explicit* determinations are unequivocal – they leave no room for doubt as to what the trigger of any subsequent Chapter VII action might be. Such determinations date back almost to the very origins of the Council itself in 1948 – and its first Chapter VII resolution – when the Council “determine[d] that the situation in Palestine constitute[d] a threat to the peace within the meaning of Article 39 of the Charter of the United Nations.”³⁶⁴ Throughout the decades since, there have been numerous examples of explicit determinations from the 50s,³⁶⁵ 60s,³⁶⁶ 70s,³⁶⁷ 80s,³⁶⁸ 90s³⁶⁹ and even the early 21st Century.³⁷⁰ Moreover, once a determination has been made under Article 39, Council practice suggests that it would be necessary to reiterate this determination in any and all related resolutions, rather than simply referring back to the original resolution in which the determination can be found; that is to say, the determination of a threat under Article 39 is valid only for the single resolution in which it is made and not subsequent resolutions that make reference to it.³⁷¹

Orakhelashvili would dispute any exceptions as being invalid, as he opts for “the standard principle of interpretation of plain and ordinary meaning of terms, which means that nothing that is expressed can be disregarded and nothing that is not expressed can be implied, unless directly following from an express provision.”³⁷² What Orakhelashvili is advocating is a

³⁶⁴ UNSC Res 54 (15 July 1948) UN Doc S/RES/54, preamble.

³⁶⁵ eg UNSC Res 82 (25 June 1950) UN Doc S/RES/82; UNSC Res 83 (27 June 1950) UN Doc S/RES/83; UNSC Res 84 (7 July 1950) UN Doc S/RES/84.

³⁶⁶ eg UNSC Res 161 (21 February 1961) UN Doc S/RES/161; UNSC Res 217 (20 November 1965) UN Doc S/RES/217.

³⁶⁷ eg UNSC Res 277 (18 March 1970) UN Doc S/RES/277; UNSC Res 418 (4 November 1977) UN Doc S/RES/418.

³⁶⁸ eg UNSC Res 502 (3 April 1982) UN Doc S/RES/502; UNSC Res 598 (20 July 1987) UN Doc S/RES/598; UNSC Res 611 (25 April 1988) UN Doc S/RES/611.

³⁶⁹ eg UNSC Res 864 (15 September 1993) UN Doc S/RES/864; UNSC Res 1234 (9 April 1999) UN Doc S/RES/1234.

³⁷⁰ eg UNSC Res 1315 (14 August 2000) UN Doc S/RES/1315; UNSC Res 1590 (24 March 2005) UN Doc S/RES/1590; UNSC Res 1641 (30 November 2005) UN Doc S/RES/1641.

³⁷¹ There are, of course, exceptions to this; for example, UNSC Res 169 (24 November 1961) UN Doc S/RES/169, ¶6, relating to the Congo requested “the Secretary-General to take all necessary measures to prevent the entry or return of . . . foreign military and paramilitary personnel and political advisors not under the United Nations Command” based on a recollection of resolution 143 (1960) in which the original determination under Article 39 was made.

³⁷² Orakhelashvili (n 53) 161.

closed interpretation of resolutions, where meeting records, statements, comments and other peripheral material to a resolution are not used to interpret the meaning of a resolution. Although this is generally in stark contrast to my methodology, which, along the lines of Sir Michael Wood's views³⁷³ on the manner in which Council resolutions should be interpreted, considers a resolution as benefiting from related material not necessarily included in the text of a resolution, I am in agreement with his narrow scope of interpretation with respect to a determination of the threat to the peace. Orakhelashvili uses this closed definition to discuss *jus ad bellum*, specifically his view that "[t]he authorisation of the use of force by the Council cannot be presumed unless the Council's explicit intention is expressed."³⁷⁴ In principle this is true: in the military intervention in Libya, the phrase "all necessary measures"³⁷⁵ was tantamount to a green light for NATO to mobilise; UNSC Res 1441 on Iraq³⁷⁶ featured no such terminology and accordingly, according to the serving Secretary-General, "from the charter point of view, it was illegal."³⁷⁷

Therefore, Orakhelashvili's assertion that "whether or not the Vienna Convention formally applies to Security Council resolutions, or whether such application takes place by analogy, the textual principle is still the dominant principle in interpreting these treaties"³⁷⁸ is evidenced by Council practice itself and in the vast majority of cases, references have been made on each occasion where Article 39 determinations would be necessary, in addition to various Article 39 determinations that were not succeeded by explicit Chapter VII action. The following five illustrations clearly show that, while there has been a pattern in the behaviour of the Council on this point, there are at times various exceptions to the rule and the Council has not rigidly stuck to any specific routine, varying it slightly depending on the situations called for.

V.2.1 Angola

The case of Angola is perhaps the most straightforward of all; here, the Council made clear the reference to Article 39 in 1993 when first "[d]etermining that the . . . situation in Angola

³⁷³ Wood (n 36) 73-95.

³⁷⁴ Orakhelashvili (n 53) 162.

³⁷⁵ UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973, ¶4.

³⁷⁶ UNSC Res 1441 (8 November 2002) UN Doc S/RES/1441.

³⁷⁷ 'Iraq war illegal, says Annan', *BBC News* (16 September 2004) <http://news.bbc.co.uk/1/hi/world/middle_east/3661134.stm> accessed 16 December 2014.

³⁷⁸ Orakhelashvili (n 53) 157

constitute[d] a threat to international peace and security in the region.”³⁷⁹ The subsequent resolutions that span the years till 2002³⁸⁰ all make reference to a threat to the peace that the Council has identified, thereby satisfying the criteria of Article 39. There is a clear pattern of reference to Article 39 determinations in every case where Chapter VII powers are invoked; this can be seen as the ideal standard to which the Council should adhere in all Chapter VII resolutions.

V.2.2 Somalia

Somalia first appeared on the agenda of the Security Council in 1992, when “the continuation of [conflict and loss of human life] constitute[d], as stated in the report of the Secretary-General, a threat to international peace and security”³⁸¹ and a weapons and military embargo was imposed on Somalia under Chapter VII.³⁸² In over two decades since, myriad Chapter VII resolutions have emanated from the Council on subjects ranging from internal conflict to regional disputes to piracy and armed robbery at sea – over 50 resolutions in total.³⁸³ With the exception of three

³⁷⁹ UNSC Res 864 (15 September 1993) UN Doc S/RES/864, B preamble.

³⁸⁰ UNSC Res 1127 (29 August 1997) UN Doc S/RES/1127; UNSC Res 1173 (12 June 1998) UN Doc S/RES/1173; UNSC Res 1237 (7 May 1999) UN Doc S/RES/1237; UNSC Res 1295 (18 April 2000) UN Doc S/RES/1295; UNSC Res 1336 (23 January 2001) UN Doc S/RES/1336; UNSC Res 1348 (23 April 2001) UN Doc S/RES/1348; UNSC Res 1404 (18 April 2002) UN Doc S/RES/1404.

³⁸¹ UNSC Res 733 (23 January 1992) UN Doc S/RES/733, preamble.

³⁸² *ibid* ¶5.

³⁸³ UNSC Res 751 (24 April 1992) UN Doc S/RES/751; UNSC Res 767 (24 July 1992) UN Doc S/RES/767; UNSC Res 775 (28 August 1992) UN Doc S/RES/775; UNSC Res 794 (3 December 1992) UN Doc S/RES/794; UNSC Res 814 (26 March 1993) UN Doc S/RES/814; UNSC Res 837 (6 June 1993) UN Doc S/RES/837; UNSC Res 886 (18 November 1993) UN Doc S/RES/886; UNSC Res 897 (4 February 1994) UN Doc S/RES/897; UNSC Res 923 (31 May 1994) UN Doc S/RES/923; UNSC Res 954 (4 November 1994) UN Doc S/RES/954; UNSC Res 1425 (22 July 2002) UN Doc S/RES/1425; UNSC Res 1474 (8 April 2003) UN Doc S/RES/1474; UNSC Res 1519 (16 December 2003) UN Doc S/RES/1519; UNSC Res 1558 (17 August 2004) UN Doc S/RES/1558; UNSC Res 1587 (15 March 2005) UN Doc S/RES/1587; UNSC Res 1630 (14 October 2005) UN Doc S/RES/1630; UNSC Res 1676 (10 May 2006) UN Doc S/RES/1676; UNSC Res 1724 (29 November 2005) UN Doc S/RES/1724; UNSC Res 1725 (6 December 2006) UN Doc S/RES/1725; UNSC Res 1744 (20 February 2007) UN Doc S/RES/1744; UNSC Res 1766 (23 July 2007) UN Doc S/RES/1766; UNSC Res 1772 (20 August 2007) UN Doc S/RES/1772; UNSC Res 1801 (20 February 2008) UN Doc S/RES/1801; UNSC Res 1811 (29 April 2008) UN Doc S/RES/1811; UNSC Res 1814 (15 May 2008) UN Doc S/RES/1814; UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816; UNSC Res 1831 (19 August 2008) UN Doc S/RES/1831; UNSC Res 1838 (7 October 2008) UN Doc S/RES/1838; UNSC Res 1844 (20 November 2008) UN Doc S/RES/1844; UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846; UNSC Res 1851 (16 December 2008) UN Doc S/RES/1851; UNSC Res 1853 (19 December 2008) UN Doc S/RES/1853; UNSC Res 1863 (16 January 2009) UN Doc S/RES/1863; UNSC Res 1872 (26 May 2009) UN Doc S/RES/1872 (2009); UNSC Res 1897 (30 November 2009) UN Doc S/RES/1897; UNSC Res 1910 (28 January 2010) UN Doc S/RES/1910; UNSC Res 1916 (19 March 2010) UN Doc S/RES/1916; UNSC Res 1950 (23 November 2010) UN Doc S/RES/1950; UNSC Res 1964 (22 December 2010) UN Doc S/RES/1964; UNSC Res 1972 (17 March 2011) UN Doc S/RES/1972; UNSC Res 1976 (11 April 2011) UN Doc S/RES/1976; UNSC Res 2002 (29 July 2011) UN Doc S/RES/2002; UNSC Res 2015 (24 October 2011) UN Doc S/RES/2015; UNSC Res 2020 (22 November 2011)

resolutions, each a decade apart that refer to determinations made previously,³⁸⁴ all Chapter VII resolutions – and even resolutions in relation to Somalia not issued under Chapter VII³⁸⁵ – have reiterated explicit determinations under Article 39. However, determinations have not been forthcoming in every instance – there is slight deviation from the formula of an Article 39 determination leading to Chapter VII action in the case of Somalia.

V.2.3 Haiti

The first Chapter VII resolution to deal with Haiti came about in 1993, when a trade embargo was imposed by the Council following a determination of threat to the peace and subsequent explicit reference to the use of its Chapter VII powers.³⁸⁶ Although Chapter VII resolutions dealing with the situation in Haiti are not as numerous as those dealing with Somalia, they are nevertheless equally consistent. Almost all of the Chapter VII resolutions that deal with the existence of a threat to peace and security in Haiti have explicit determinations made.³⁸⁷ UNSC Res 861 (1993), however, makes no mention of a determination of a threat when referring to the lifting of elements of the trade embargo; nonetheless, it serves to illustrate a different type of Chapter VII resolution that the Council makes use of.

UN Doc S/RES/2020; UNSC Res 2036 (22 February 2012) UN Doc S/RES/2036; UNSC Res 2060 (25 July 2012) UN Doc S/RES/2060; UNSC Res 2072 (31 October 2012) UN Doc S/RES/2072; UNSC Res 2073 (7 November 2012) UN Doc S/RES/2073; UNSC Res 2077 (21 November 2012) UN Doc S/RES/2077; UNSC Res 2093 (6 March 2013) UN Doc S/RES/2093; UNSC Res 2111 (24 July 2013) UN Doc S/RES/2111; UNSC Res 2125 (18 November 2013) UN Doc S/RES/2125.

³⁸⁴ UNSC Res 878 (29 October 1993) UN Doc S/RES/878 reaffirms “resolutions 733 (1992) of 23 January 1992, 746 (1992) of 17 March 1992, 751 (1992) of 24 April 1992, 767 (1992) of 27 July 1992, 775 (1992) of 28 August 1992, 794 (1992) of 3 December 1992, 814 (1993) of 26 March 1993, 837 (1993) of 6 June 1993 and 865 (1993) of 22 September 1993”; S/RES/1356 (2001) “reaffirmed resolutions 733 (1992) of 23 January 1992 and 751 (1992) of 24 April 1992”; UNSC Res 1407 (3 May 2002) UN Doc S/RES/1407 recalled the Council’s “relevant resolutions concerning the situation in Somalia, in particular resolution 733 (1992) of 23 January 1992”; UNSC Res 2111 (24 July 2013) UN Doc S/RES/2111 recalls the Council’s “previous resolutions on the situation in Somalia, in particular resolutions 2036 (2012), 2093 (2013) and 2111 (2013), and statements of its President on the situation in Somalia”.

³⁸⁵ eg UNSC Res 1976 (11 April 2011) UN Doc S/RES/1976; UNSC Res 2102 (2 May 2013) UN Doc S/RES/2102.

³⁸⁶ UNSC Res 841 (16 June 1993) UN Doc S/RES/841.

³⁸⁷ UNSC Res 873 (13 October 1993) UN Doc S/RES/873; UNSC Res 875 (16 October 1993) UN Doc S/RES/875; UNSC Res 917 (6 May 1994) UN Doc S/RES/917; UNSC Res 940 (31 July 1994) UN Doc S/RES/940; UNSC Res 1529 (29 February 2004) UN Doc S/RES/1529; UNSC Res 1542 (30 April 2004) UN Doc S/RES/1542; UNSC Res 1576 (29 November 2004) UN Doc S/RES/1576; UNSC Res 1601 (31 May 2005) UN Doc S/RES/1601; UNSC Res 1608 (22 June 2005) UN Doc S/RES/1608; UNSC Res 1658 (14 February 2006) UN Doc S/RES/1658; UNSC Res 1702 (15 August 2006) UN Doc S/RES/1702; UNSC Res 1743 (15 February 2007) UN Doc S/RES/1743; UNSC Res 1780 (15 October 2007) UN Doc S/RES/1780; UNSC Res 1840 (14 October 2008) UN Doc S/RES/1840; UNSC Res 1892 (13 October 2009) UN Doc S/RES/1892.

As the General Assembly affirmed in UNGA Res 192,³⁸⁸ Chapter VII resolutions “can be revoked only by a decision of the Council and that any unilateral action in this regard would be in violation of the obligation assumed by Member States under Article 25 of the Charter.”³⁸⁹ In short, this principle of “*parallelism of competence*”³⁹⁰ dictates that the Council, as the body to have imposed Chapter VII measures, shall also be the body to terminate those measures as and when it sees fit. Accordingly, a determination of a threat to the peace under Article 39 would not be necessary – and even run contrary to the meaning of a *parallelism of competence* resolution – as the lack of the threat that instigated the Chapter VII measures originally would be the very source of the decision to annul those measures in a *parallelism of competence* resolution; thus, resolutions such as UNSC Res 861 (1993) can legitimately exist as rule of law compliant Chapter VII resolutions without the need for prior Article 39 determinations.³⁹¹ However, this exemption from the norm is a narrow path that accommodates only the most limited of examples; indeed even extensions of a Mission’s mandate require a fresh determination of the threat posed, as evidenced by those of MINUSTAH³⁹² in 2010³⁹³ and 2011.³⁹⁴

Until 2012, the sole exceptions to an otherwise consistent application of an Article 39 determination prior to Chapter VII action are Resolutions 1908³⁹⁵ and 1927,³⁹⁶ both increasing the number of troops deployed under MINUSTAH. It may be argued that these required a determination of their own, as the need for an increase in troops within the context of the perceived threat to peace should have been shown as justification for any increase in troop numbers. However, each of these resolutions, just as can be observed with Resolutions 878, 1356 and 1407 dealing with Somalia, contains a reaffirmation of previous resolutions in which determinations have been made.

³⁸⁸ UNGA Res 34/192 (18 December 1979) UN Doc A/RES/34/192.

³⁸⁹ *ibid* ¶9; this issue was put to rest by the Assembly in response to the unilateral decision of the UK in its letter of 12 December 1979 (UN Doc S/13688) to end mandatory sanctions on Southern Rhodesia imposed by the Council in UNSC Res 232 (16 December 1966) UN Doc S/RES/232 and UNSC Res 253 (29 May 1968) UN Doc S/RES/253.

³⁹⁰ de Wet (n 34) 251.

³⁹¹ See also UNSC Res 944 (29 September 1994) UN Doc S/RES/944, which terminates measures set out in resolutions UNSC Res 841 (1993), UN SC Res 873 (1993) and UNSC Res 917 (1994) in ¶4. This, too, is a “parallelism of competence” resolution.

³⁹² United Nations Stabilization Mission in Haiti.

³⁹³ UNSC Res 1944 (14 October 2010) UN Doc S/RES/1944, preamble.

³⁹⁴ UNSC Res 2012 (14 October 2011) UN Doc S/RES/2012.

³⁹⁵ UNSC Res 1908 (19 January 2010) UN Doc S/RES/1908.

³⁹⁶ UNSC Res 1927 (4 June 2010) UN Doc S/RES/1927.

The same concept applies to both Resolutions 2070³⁹⁷ and 2119,³⁹⁸ each extending the mandate of MINUSTAH. However, the use of the format of reaffirmation in lieu of new determinations is a departure for the Council from its own behaviour and may suggest the start of a new trend; whereas extensions of the mandate in previous years had seen an explicit determination under Article 39,³⁹⁹ resolutions 2070 and 2119 saw only the far weaker reference, “Mindful of its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations”.⁴⁰⁰ There was no fresh determination, no reference to a threat and no reassessment of the determination as there had been in previous years, leading to the question as to what the reasoning behind and purpose of this shift in the Council’s behaviour from existing practice. The case of Haiti, then, exemplifies an even larger departure from the standard seen in the case of Angola.

V.2.4 Afghanistan

The Council’s issuance of resolutions dealing with the threat to the peace in Afghanistan is not only another example where the Council has repeatedly made determinations under article 39 before invoking Chapter VII,⁴⁰¹ but where the use of *parallelism of competence* is highlighted. UNSC Res 1388 in 2002, where sanctions imposed under Chapter VII against Ariana Afghan Airlines were lifted⁴⁰² using a mirror Chapter VII resolution is a minor example of this, but it is Council practice during recent years, where resolutions on Afghanistan have become less frequent, that Council behaviour exemplifies the need for and use of *parallelism of competence*.

³⁹⁷ UNSC Res 2070 (12 October 2012) UN Doc S/RES/2070.

³⁹⁸ UNSC Res 2119 (10 October 2013) UN Doc S/RES/2119.

³⁹⁹ “*Determining* that the situation in Haiti continues to constitute a threat to international peace and security in the region, despite the progress achieved thus far”, UNSC Res 1944 (14 October 2010) UN Doc S/RES/1944, preamble and UNSC Res 2012 (14 October 2011) UN Doc S/RES/2012, preamble [emphasis in original].

⁴⁰⁰ UNSC Res 2070 (12 October 2012) UN Doc S/RES/2070, preamble.

⁴⁰¹ UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267; UNSC Res 1333 (19 December 2000) UN Doc S/RES/1333; UNSC Res 1363 (30 July 2001) UN Doc S/RES/1363; UNSC Res 1386 (20 December 2001) UN Doc S/RES/1386; UNSC Res 1390 (16 January 2002) UN Doc S/RES/1390; UNSC Res 1413 (23 May 2002) UN Doc S/RES/1413; UNSC Res 1444 (27 December 2002) UN Doc S/RES/1444; UNSC Res 1510 (13 October 2003) UN Doc S/RES/1510; UNSC Res 1563 (17 September 2004) UN Doc S/RES/1563; UNSC Res 1623 (13 September 2005) UN Doc S/RES/1623; UNSC Res 1707 (12 September 2006) UN Doc S/RES/1707; UNSC Res 1776 (19 September 2007) UN Doc S/RES/1776; UNSC Res 1833 (22 September 2008) UN Doc S/RES/1833; UNSC Res 1890 (8 October 2009) UN Doc S/RES/1890.

⁴⁰² UNSC Res 1388 (15 January 2002) UN Doc S/RES/1388.

Since 2009 the Council has adopted the habit of issuing two resolutions per year on Afghanistan – one under Chapter VII renewing the mandate of the ISAF⁴⁰³ and another, not taken under Chapter VII, renewing the mandate of UNAMA.⁴⁰⁴ This reflects the origins, and indeed the nature, of each of the projects.⁴⁰⁵ Whilst the latter’s establishment was supported by UNSC Res 1401 (2002), which was not issued under Chapter VII, ISAF was unequivocally, and necessarily, formalised through a Chapter VII resolution. It therefore follows that UNAMA mandate renewals are not taken under Chapter VII,⁴⁰⁶ whereas ISAF mandates must always be renewed under Chapter VII,⁴⁰⁷ with an eye to the threat to the peace that exists, despite the fact that both UNAMA and ISAF are dealing with the same threats in the same country.

V.2.5 Sudan

The majority of Council resolutions dealing with the Sudan, including the conflict in Darfur, comply with the bi-part formula of a standard Chapter VII resolution – both the determination and explicit reference to Chapter VII exist.⁴⁰⁸ As in previous examples, there are examples where

⁴⁰³ International Security Assistance Force.

⁴⁰⁴ United Nations Assistance Mission to Afghanistan.

⁴⁰⁵ Whilst UNAMA is a political mission proposed in to “fulfil the tasks and responsibilities, including those related to human rights, the rule of law and gender issues, entrusted to the United Nations in the Bonn Agreement,” (Report of the Secretary-General, ‘The situation in Afghanistan and its implications for international peace and security’ (2002) UN Doc A/56/875, ¶97(a)), the ISAF was mandated to assist “the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas” (UNSC Res 1386 (20 December 2001) UN Doc S/RES/1386, ¶3) in which participating Member States were authorized “to take all necessary measures to fulfil its mandate” (UNSC Res 1386 (20 December 2001) UN Doc S/RES/1386, ¶3).

⁴⁰⁶ See eg UNSC Res 1868 (23 March 2009) UN Doc S/RES/1868; UNSC Res 1917 (22 March 2010) UN Doc S/RES/1917; UNSC Res 1974 (22 March 2011) UN Doc S/RES/1974; UNSC Res 2041 (22 March 2012) UN Doc S/RES/2041; UNSC Res 2096 (19 March 2013) UN Doc S/RES/2096.

⁴⁰⁷ See eg UNSC Res 1943 (13 October 2010) UN Doc S/RES/1943; UNSC Res 2011 (12 October 2011) UN Doc S/RES/2011; UNSC Res 2069 (9 October 2012) UN Doc S/RES/2069; UNSC Res 2120 (10 October 2013) UN Doc S/RES/2120.

⁴⁰⁸ UNSC Res 1054 (26 April 1996) UN Doc S/RES/1054; UNSC Res 1070 (16 August 1996) UN Doc S/RES/1070; UNSC Res 1556 (30 July 2004) UN Doc S/RES/1556; UNSC Res 1564 (18 September 2004) UN Doc S/RES/1564; UNSC Res 1590 (24 March 2005) UN Doc S/RES/1590; UNSC Res 1591 (29 March 2005) UN Doc S/RES/1591; UNSC Res 1593 (7 April 2005) UN Doc S/RES/1593; UNSC Res 1627 (23 September 2005) UN Doc S/RES/1627; UNSC Res 1651 (21 December 2005) UN Doc S/RES/1651; UNSC Res 1663 (24 March 2006) UN Doc S/RES/1663; UNSC Res 1665 (29 March 2006) UN Doc S/RES/1665; UNSC Res 1672 (25 April 2006) UN Doc S/RES/1672; UNSC Res 1679 (16 May 2006) UN Doc S/RES/1679; UNSC Res 1706 (31 August 2006) UN Doc S/RES/1706; UNSC Res 1709 (22 September 2006) UN Doc S/RES/1709; UNSC Res 1713 (29 September 2006) UN Doc S/RES/1713; UNSC Res 1714 (6 October 2006) UN Doc S/RES/1714; UNSC Res 1755 (30 April 2007) UN Doc S/RES/1755; UNSC Res 1769 (31 July 2007) UN Doc S/RES/1769; UNSC Res 1779 (28 September 2007) UN Doc S/RES/1779; UNSC Res 1784 (31 October 2007) UN Doc S/RES/1784; UNSC Res 1841 (15 October 2008) UN Doc S/RES/1841; UNSC Res 1891 (13 October 2009) UN Doc S/RES/1891; UNSC Res 1945 (14 October 2010) UN Doc S/RES/1945; UNSC Res 1982 (17 May 2011) UN Doc S/RES/1982; UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996; UNSC Res 2035 (17 February 2012) UN Doc S/RES/2035; UNSC Res 2046 (2

Article 39 determinations are made without subsequent Chapter VII invocation⁴⁰⁹ and where the parallelism of competence doctrine lies behind instances in which Chapter VII is legitimately invoked without prior determination of the threat to the peace.⁴¹⁰

However, there are examples where this is not the case, in contrast to the examples of Haiti and Afghanistan. The establishment of the United Nations Interim Security Force for Abyei (UNISFA), for example, emerged from a resolution taken under Chapter VII;⁴¹¹ therefore, any resulting extension of the duration or scope of the mandate should, by virtue of the principle of parallelism of competence, also be issued under Chapter VII. Such was not the case; whilst each of the subsequent resolutions to UNSC Res 1990 included a determination of the threat to the peace, in accordance with Article 39,⁴¹² there was no reference to Chapter VII. This raises the question as to why the Council felt it necessary to deal with the mandate of UNISFA in a way different to MINUSTAH, as already discussed above, and other peacekeeping missions such as UNMIL⁴¹³ and UNOCI.⁴¹⁴

May 2012) UN Doc S/RES/2046; UNSC Res 2063 (31 July 2012) UN Doc S/RES/2063; UNSC Res 2109 (11 July 2013) UN Doc S/RES/2109.

⁴⁰⁹ UNSC Res 1812 (30 April 2008) UN Doc S/RES/1812; UNSC Res 1828 (31 July 2008) UN Doc S/RES/1828; UNSC Res 1870 (30 April 2009) UN Doc S/RES/1870; UNSC Res 1881 (30 July 2009) UN Doc S/RES/1881; UNSC Res 1891 (13 October 2009) UN Doc S/RES/1891; UNSC Res 1935 (30 July 2010) UN Doc S/RES/1935; UNSC Res 1978 (27 April 2011) UN Doc S/RES/1978; UNSC Res 1997 (11 July 2011) UN Doc S/RES/1997; UNSC Res 2003 (29 July 2011) UN Doc S/RES/2003; UNSC Res 2024 (14 December 2011) UN Doc S/RES/2024; UNSC Res 2032 (22 December 2011) UN Doc S/RES/2032; UNSC Res 2047 (17 May 2012) UN Doc S/RES/2047; UNSC Res 2057 (5 July 2012) UN Doc S/RES/2057; UNSC Res 2063 (31 July 2012) UN Doc S/RES/2063; UNSC Res 2113 (30 July 2013) UN Doc S/RES/2113; UNSC Res 2126 (25 November 2013) UN Doc S/RES/2126.

⁴¹⁰ UNSC Res 1372 (28 September 2001) UN Doc S/RES/1372, which terminated elements of Chapter VII resolutions UNSC Res 1054 (1996) and UNSC Res 1070 (1996).

⁴¹¹ UNSC Res 1990 (27 June 2011) UN Doc S/RES/1990.

⁴¹² UNSC Res 2024 (14 December 2011) UN Doc S/RES/2024; UNSC Res 2032 (22 December 2011) UN Doc S/RES/2032; UNSC Res 2047 (17 May 2012) UN Doc S/RES/2047; UNSC Res 2075 (16 November 2012) UN Doc S/RES/2075; UNSC Res 2104 (29 May 2013) UN Doc S/RES/2104; UNSC Res 2126 (25 November 2013) UN Doc S/RES/2126; UNSC Res 2156 (29 May 2014) UN Doc S/RES/2156; UNSC Res 2179 (14 October 2014) UN Doc S/RES/2179.

⁴¹³ Established under Chapter VII by UNSC Res 1509 (19 September 2003) UN Doc S/RES/1509 and renewed under Chapter VII in UNSC Res 1626 (19 September 2005) UN Doc S/RES/1626, UNSC Res 1667 (31 March 2006) UN Doc S/RES/1667, UNSC Res 1712 (29 September 2006) UN Doc S/RES/1712, UNSC Res 1750 (30 March 2007) UN Doc S/RES/1750, UNSC Res 1777 (28 September 2007) UN Doc S/RES/1777, UNSC Res 1836 (29 September 2008) UN Doc S/RES/1836, UNSC Res 1885 (15 September 2009) UN Doc S/RES/1885, UNSC Res 1938 (15 September 2010) UN Doc S/RES/1938, UNSC Res 2008 (16 September 2011) UN Doc S/RES/2008, UNSC Res 2066 (17 September 2012) UN Doc S/RES/2066, UNSC Res 2116 (18 September 2013) UN Doc S/RES/2116, UNSC Res 2176 (15 September 2014) UN Doc S/RES/2176. Interestingly, the very first renewal of the mandate – S/RES/1561 (2004) – was not conducted under Chapter VII. Apart from this resolution, however, all renewal resolutions contained new determinations of a threat to the peace.

⁴¹⁴ Established under Chapter VII by UNSC Res 1528 (27 February 2004) UN Doc S/RES/1528 and renewed under Chapter VII in the following: UNSC Res 1609 (24 June 2005) UN Doc S/RES/1609; UNSC Res 1652 (24 January 2006) UN Doc S/RES/1652; UNSC Res 1726 (15 December 2006) UN Doc S/RES/1726; UNSC Res 1739 (10

V.2.6 Patterns in Council practice

Thus it seems that there exists, in the majority of cases, a determination of threats to the peace prior to, and even in the absence of subsequent, Chapter VII action, particularly in recent years where the practice of the Council appears to have incorporated elements of transparency in ensuring that all States are clearly aware of the obligations of and procedural path to Chapter VII. Even in the case of Iraq – where among the plethora of Chapter VII resolutions on Iraq passed between the years 1990 and 2003⁴¹⁵ only four determinations were made under Article 39⁴¹⁶ – the last decade has seen a significant improvement in the number of determinations in Chapter VII resolutions relating to Iraqi affairs.⁴¹⁷ This is, though, one half of the formula for Chapter VII action, the other being the explicit reference to measures being taken under Chapter VII itself, which will now be addressed.

V.3 Explicit reference to Chapter VII

In addition to the discussions of Chapter II on what constitutes a threat to the peace, there is also disagreement on whether certain resolutions can be classed as constituting a Chapter VII resolution at all. In *The Procedure of the UN Security Council*, Bailey and Daws present a list of

January 2007) UN Doc S/RES/1739; UNSC Res 1763 (29 June 2007) UN Doc S/RES/1763; UNSC Res 1765 (16 July 2007) UN Doc S/RES/1765; UNSC Res 1826 (29 July 2008) UN Doc S/RES/1826; UNSC Res 1880 (30 July 2009) UN Doc S/RES/1880; UNSC Res 1911 (28 January 2010) UN Doc S/RES/1911; UNSC Res 1924 (27 May 2010) UN Doc S/RES/1924; UNSC Res 1933 (30 June 2010) UN Doc S/RES/1933; UNSC Res 1962 (20 December 2010) UN Doc S/RES/1962; UNSC Res 1981 (13 May 2011) UN Doc S/RES/1981; UNSC Res 2000 (27 July 2011) UN Doc S/RES/2000; UNSC Res 2062 (26 July 2012) UN Doc S/RES/2062; UNSC Res 2112 (30 July 2013) UN Doc S/RES/2112; UNSC Res 2162 (25 June 2014) UN Doc S/RES/2162. With the exception of UNSC Res 1981 (2011) all these resolutions contained new determinations of a threat to the peace.

⁴¹⁵ Fifty-nine resolutions in total by this author's count.

⁴¹⁶ UNSC Res 660 (2 August 1990) UN Doc S/RES/660; UNSC Res 687 (3 April 1991) UN Doc S/RES/687; UNSC Res 688 (5 April 1991) UN Doc S/RES/688; UNSC Res 1137 (12 November 1997) UN Doc S/RES/1137. It is also noteworthy that between 1997 and the invasion of Iraq by multi-national forces in 2003, there was no determination of a threat under Article 39.

⁴¹⁷ UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483, UNSC Res 1511 (16 October 2003) UN Doc S/RES/1511, UNSC Res 1518 (24 November 2003) UN Doc S/RES/1518, UNSC Res 1546 (8 June 2004) UN Doc S/RES/1546, UNSC Res 1637 (8 November 2005) UN Doc S/RES/1637, UNSC Res 1723 (28 November 2006) UN Doc S/RES/1723, and UNSC Res 1790 (18 December 2007) UN Doc S/RES/1790 are Chapter VII resolutions that have clear, express determinations of a threat to the peace under Article 39; UNSC Res 1472 (28 March 2003) UN Doc S/RES/1472, UNSC Res 1476 (24 April 2003) UN Doc S/RES/1476, UNSC Res 1490 (3 July 2003) UN Doc S/RES/1490, and UNSC Res 1762 (27 June 2007) UN Doc S/RES/1762 are Chapter VII resolutions that do not make mention of any determination. UNSC Res 1859 (22 December 2008) UN Doc S/RES/1859, UNSC Res 1905 (21 December 2009) UN Doc S/RES/1905, UNSC Res 1956 (15 December 2010) UN Doc S/RES/1956, UNSC Res 1957 (15 December 2010) UN Doc S/RES/1957, UNSC Res 1958 (15 December 2010) UN Doc S/RES/1958 are also Chapter VII resolutions that do not make mention of a determination of threat to the peace; however, they are example of “parallelism of competence”, i.e. necessarily issued under Chapter VII to revoke a previous Chapter VII decision, such as the Oil for Food programme.

129 Chapter VII resolutions from 1946 through 1995⁴¹⁸; however, the Global Issues Research Group of the Foreign and Commonwealth Office counts 17 Chapter VII resolutions between the years of 1946-1989 and 104 Chapter VII resolutions between 1990-1995 – a total of 121 and, perhaps surprisingly, 8 less than Bailey and Daws.⁴¹⁹

This cannot simply be attributed to mathematical error, but reflects two key elements of Chapter VII resolutions. Firstly, it exposes the fluid interpretations of Council resolutions, which are open to different perspectives depending on the reader; such space for intellectual manoeuvring may be appropriate for political and diplomatic situations that encourage a broad interpretation allowing for later negotiation or clarification. One might imagine equivocal language, inconclusive clauses and abstract notions in the manifestos of a political party or pledges of a political candidate that are later spun to reveal an element of hollowness; however, such obscurity has no place in the legal sphere that is frequently criticised for overemphasis and intricate attention to the most miniscule of legal intricacies and avoidance of loopholes. Secondly, it displays a certain failure on the part of the Council itself to abide by the specificity demanded of it by the Charter.

Nonetheless, it would appear that the Council has increasingly shifted its behaviour from one of opacity in its resolutions to one of increased clarity and specificity. Whether in response to the criticism of States such as South Africa, which in 2007, accused the Security Council of having “resorted to Chapter VII of the Charter as an umbrella for addressing issues that may not necessarily pose a threat to international peace and security, when it could have opted for alternative provisions of the Charter to respond more appropriately, utilizing other provisions of the same Charter”⁴²⁰ or due to an increased awareness of the need to implement elements of the rule of law in its behaviour to increase legitimacy on the world stage, there has been a marked shift in the depth of explanatory provisions of resolutions.

In recent times, authorising resolutions have often included three elements: a determination in accordance with article 39; the statement “acting under Chapter VII;” and an explicit decision to authorise member states to use force. Such was the case with authorisations

⁴¹⁸ Sidney Bailey and Sam Daws, *The Procedure of the UN Security Council* (OUP 1998) 271.

⁴¹⁹ Global Issues Research Group, ‘Research Analysts Memorandum: Summary of UN Security Council Resolutions, 1946-1998’ (Foreign and Commonwealth Office, 1999).

⁴²⁰ UNSC Verbatim Record (8 January 2007) UN Doc S/PV.5615.

regarding Iraq,⁴²¹ Bosnia,⁴²² Somalia,⁴²³ Haiti,⁴²⁴ Rwanda,⁴²⁵ the Democratic Republic of the Congo,⁴²⁶ Albania,⁴²⁷ Central African Republic,⁴²⁸ Sierra Leone,⁴²⁹ Kosovo,⁴³⁰ Timor-Leste,⁴³¹ Afghanistan,⁴³² Côte d'Ivoire,⁴³³ Liberia⁴³⁴ and Chad.⁴³⁵ However, such has not always been, nor does it continue to be, the case; historically, Simma notes, there has not been a tendency to explicitly refer to action taken under Chapter VII using an unequivocal phrase in the vein of “acting under Chapter VII of the Charter of the United Nations”⁴³⁶ until the end of the Cold War.⁴³⁷

Although in the teething years of the Security Council explicit reference to “Chapter VII” was not made,⁴³⁸ there were nonetheless numerous references to the relevant articles of Chapter

⁴²¹ UNSC Res 678 (29 November 1990) UN Doc S/RES/678; UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483; UNSC Res 1511 (16 October 2003) UN Doc S/RES/1511.

⁴²² UNSC Res 770 (13 August 1992) UN Doc S/RES/770; UNSC Res 787 (16 November 1992) UN Doc S/RES/787; UNSC Res 816 (31 March 1993) UN Doc S/RES/816; UNSC Res 820 (17 April 1993) UN Doc S/RES/820; UNSC Res 836 (4 June 1993) UN Doc S/RES/836; UNSC Res 908 (31 March 1994) UN Doc S/RES/908; UNSC Res 1031 (15 December 1995) UN Doc S/RES/1031; UNSC Res 1088 (12 December 1996) UN Doc S/RES/1088; UNSC Res 1174 (15 June 1998) UN Doc S/RES/1174; UNSC Res 1575 (22 November 2004) UN Doc S/RES/1575.

⁴²³ UNSC Res 794 (3 December 1992) UN Doc S/RES/794; UNSC Res 1744 (21 February 2007) UN Doc S/RES/1744.

⁴²⁴ UNSC Res 875 (16 October 1993) UN Doc S/RES/875; UNSC Res 940 (31 July 1994) UN Doc S/RES/940; UNSC Res 1529 (29 February 2004) UN Doc S/RES/1529.

⁴²⁵ UNSC Res 929 (22 June 1994) UN Doc S/RES/929.

⁴²⁶ UNSC Res 1080 (15 November 1996) UN Doc S/RES/1080; UNSC Res 1484 (30 May 2003) UN Doc S/RES/1484; UNSC Res 1671 (25 April 2006) UN Doc S/RES/1671.

⁴²⁷ UNSC Res 1101 (28 March 1997) UN Doc S/RES/1101; UNSC Res 1114 (19 June 1997) UN Doc S/RES/1114.

⁴²⁸ UNSC Res 1125 (6 August 1997) UN Doc S/RES/1125.

⁴²⁹ UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132.

⁴³⁰ UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244.

⁴³¹ UNSC Res 1264 (15 September 1999) UN Doc S/RES/1264.

⁴³² UNSC Res 1386 (20 December 2001) UN Doc S/RES/1386; UNSC Res 1510 (13 October 2003) UN Doc S/RES/1510.

⁴³³ UNSC Res 1464 (4 February 2003) UN Doc S/RES/1464; UNSC Res 1528 (27 February 2004) UN Doc S/RES/1528.

⁴³⁴ UNSC Res 1497 (1 August 2003) UN Doc S/RES/1497.

⁴³⁵ UNSC Res 1778 (25 September 2007) UN Doc S/RES/1778.

⁴³⁶ See eg UNSC Res 955 (8 November 1994) UN Doc S/RES/955 on Rwanda; UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267 on Afghanistan; UNSC Res 1037 (15 January 1996) UN Doc S/RES/1037 on Croatia; UNSC Res 1967 (19 January 2011) UN Doc S/RES/1967 on the Cote D'Ivoire; UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 on Libya. All of these contained this explicit phrase.

⁴³⁷ Simma and others (n 363) 584: “[w]hile in the early practice of the SC it was more often than not preferred not to render the distinction visible, the SC now has taken to making clear what part of a resolution is founded on Chapter VII and therefore is endowed with binding force.”

⁴³⁸ See eg UNSC Verbatim Record (22 August 1947) UN Doc S/PV.138, 2175, where UNSC Res 27 (1947) on the Indonesian question made reference to provisional measures in the same line as article 40 without explicit reference to Chapter VII; in UNSC Verbatim Record (14 May 1970) UN Doc S/PV.1538, UNSC Verbatim Record (14 May 1970) UN Doc S/PV.1540(OR), and UNSC Verbatim Record (15 May 1970) UN Doc S/PV.1541 the same was believed of resolution 279 (1970) on the withdrawal of Israeli forces from Lebanon.

VII or the explicit threat to the peace that was being dealt with, if only to give some audit trail of the process by which the Council has reached its conclusion: UNSC Res 54 (1948) "[d]etermines that the situation in Palestine constitutes a threat the peace within the meaning of Article 39 of the Charter . . . [and] *Orders* the Governments and authorities concerned, pursuant to Article 40 . . . to desist from further military action . . ." ⁴³⁹ Indeed, the UN approval for military intervention in the Korean War of 1950 came about in UNSC Res 83 (1950), which simply "*determined* that the armed attack upon the Republic of Korea by forces from North Korea constitute[d] and breach of the peace" ⁴⁴⁰ and where no explicit mention of the term "Chapter VII" or Article 42 of the Charter was made despite it being implied in the language. However, evolution in the UN did not come only in the form of new Member States, but also in the terminology used to authorise Council action and in 1968, UNSC Res 253 made the first use of the phrase "acting under Chapter VII." ⁴⁴¹ Since this time, the use of the phrase to designate Chapter VII resolutions has been commonplace and yet there are numerous examples of the Council not providing clear Chapter VII status to a resolution that clearly should have been granted such.

The fact that certain resolutions ⁴⁴² are open to interpretation is an indictment of the process by which such decisions emanate from the Council chamber. The simple fact appears to be that resolutions should and must be specific and focused, announcing not only what the threat is but also whether the resolution has been issued under Chapter VII, and if so whether under article 41 or 42 of the Charter. The negligence of the Council in doing so for *all* resolutions results in ambiguity for UN Member States which, as seen in Chapter *IV* forage for information and pore over the records of Council meetings. UN Member States are able to rely far more solidly on a binding, clear Chapter VII resolution when fulfilling their obligations to abide by Council decisions and the more structured and limited the leeway given in any resolution, the more difficult they might find it to undermine or simply deny its implementation. ⁴⁴³ Resolutions

⁴³⁹ UNSC Res 54 (15 July 1948) UN Doc S/RES/54, ¶1-2.

⁴⁴⁰ UNSC Res 83 (27 June 1950) UN Doc S/RES/83; see also UNSC Res 84 (7 July 1950) UN Doc S/RES/84.

⁴⁴¹ UNSC Res 253 (29 May 1968) UN Doc S/RES/253, preamble.

⁴⁴² As far back as 1947, the US argued that UNSC Res (1947) was tantamount to provisional measures under Article 40 of the Charter. See, UNSC Verbatim Record (22 August 1947) UN Doc S/PV.138, 2175; see also, more recently in 1970, the interpretations of Syria (UNSC Verbatim Record (12 May 1970) UN Doc S/PV.1538, ¶120-121), Poland (UNSC Verbatim Record (14 May 1970) UN Doc S/PV.1540(OR), ¶13) and Colombia (UNSC Verbatim Record (15 May 1970) UN Doc S/PV.1541, ¶8), where provisional measures were deemed to have been taken in UNSC Res 280 (1970) despite the absence of specific wording reflecting it.

⁴⁴³ See, eg Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon 1995) 1-46, where "Franck argues that states comply with legal rules they perceive to be fair both in substance (by providing distributive

that are not explicitly binding may not be held as such by States; as Judge Hersch Lauterpacht has noted, “[a] resolution recommending... a specific course of action creates some legal obligation which . . . The state in consideration, while not bound to accept the recommendation, is bound to give it due consideration in good faith.”⁴⁴⁴ An explicit Chapter VII leaves no room for interpretation and would affirm the need for abidance.

Nonetheless, the Security Council has recently continued to blur the lines between resolutions adopted under Chapter VII and those not:

Acting under its special responsibility for the maintenance of international peace and security . . . *Demand*[ed] that the DPRK suspend all activities related to its ballistic missile programme, and . . . *Require*[d] all Member States . . . to exercise vigilance and prevent missile and missile-related items, materials, goods and technology being transferred to DPRK’s missile or WMD programmes . . . and prevent the procurement of missiles or missile related-items, materials, goods and technology from the DPRK, and the transfer of any financial resources in relation to DPRK’s missile or WMD programmes.⁴⁴⁵

This is clearly the terminology of a Chapter VII resolution: the threat to the peace is implied in the affirmation that the North Korean ballistic missile launches “jeopardize peace, stability and security in the region and beyond, particularly in light of the DPRK’s claim that it has developed nuclear weapons”⁴⁴⁶; the Council has imposed demands on North Korea; and it has placed requirements to abide by this resolution upon other Member States. Indeed, the meeting records show that the representative from Japan saw the resolution to include “a set of binding measures that both the Democratic People’s Republic of Korea and Member States are obliged to comply with.”⁴⁴⁷

Other examples, too, illustrate the blurred lines between legally binding and non-legally binding resolutions throughout the history of the Security Council. Some commentators have noted that “when the Security Council invoked Articles 25 and 49 in calling on states to carry out its decisions during the Congo peacekeeping efforts in 1960, it obviously regarded itself as

justice) and in process due (by providing right process), David Armstrong, Theo Farrell and Helene Lambert, *International Law and International Relations*, 113-114 (2012).

⁴⁴⁴ *South-West Africa – Voting Procedure* (Advisory Opinion) [1955] ICJ Rep 67 (Separate Opinion of Judge Lauterpacht) 118-9.

⁴⁴⁵ UNSC Res 1695 (15 July 2006) UN Doc S/RES/1695, preamble [emphasis in original].

⁴⁴⁶ *ibid*; UNSC Presidential Statement 41 (2006) UN Doc S/PRST/2006/41, 1, where “ The Security Council stresses that a nuclear test, if carried out by the DPRK, would represent a clear threat to international peace and security.”

⁴⁴⁷ UNSC Verbatim Record (15 July 2006) UN Doc S/PV.5490, 2.

acting under chapter VII despite having made no express determination under Article 39.”⁴⁴⁸ Decades later, the Council issued another resolution on the Congo that “*Determin[ed]* that the situation in the Democratic Republic of the Congo continues to pose a threat to international peace and security in the region” and where the Council made “[d]emand[s] once again that Kisangani be demilitarized rapidly and unconditionally in accordance with Security Council resolution 1304 (2000) . . .”⁴⁴⁹ Once again, no reference to Chapter VII is made.

One very recent case where the Security Council has made use of Chapter VII language without explicit reference to Chapter VII itself is UNSC Res 2218, in response to chemical attacks carried out by Syrian armed forces against its own citizens and civilians. The resolution, “[d]etermines that the use of chemical weapons anywhere constitutes a threat to international peace and security”⁴⁵⁰ and imposes obligations on the Syrian Arab Republic when it “[d]ecides that the Syrian Arab Republic shall not use, develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to other States or non-State actors.”⁴⁵¹ Bar explicitly stating that the resolution is being taken under Chapter VII, this is the terminology of a Chapter VII resolution.

The ambiguity, however, lies most acutely in two distinct elements of this resolution. The first of these elements is the *threat* of a further resolution under Chapter VII that would follow Syria’s refusal or failure to implement the articles of UNSC Res 2218; the Council “[d]ecides, in the event of non-compliance with this resolution to impose measures under Chapter VII of the United Nations Charter”⁴⁵², thereby introducing a clear distinction between this resolution and a Chapter VII resolution, which would contain actions taken under Articles 41 or 42 of the Charter. The inference is that if a Chapter VII resolution is to follow, then this cannot be a Chapter VII resolution and, therefore, lacks the gravity associated with the provisions of articles 41 and 42 of the Charter. The second confusing element is the decision by the Council – given the terminology of a Chapter VII resolution as discussed – to “underscore that Member States are obligated under Article 25 of the Charter of the United Nations to accept and carry out the

⁴⁴⁸ Kirgis (n 58) 512; see also, E M Miller, ‘Legal Aspects of the United Nations Action in the Congo’ (1961) 55 AJIL 1, 4.

⁴⁴⁹ UNSC Res 1376 (9 November 2001) UN Doc S/RES/1376, preamble [emphasis in original].

⁴⁵⁰ UNSC Res 2118 (27 September 2013) UN Doc S/RES/2118, ¶1.

⁴⁵¹ *ibid* ¶4.

⁴⁵² *ibid* ¶21.

Council's decisions."⁴⁵³ This element clearly attempts to impose a legally binding obligation upon States – particularly Syria itself and its neighbours – to comply with the decisions of the Security Council on a par with a Chapter VII resolution. Indeed, one must question the reason for the insertion of this phrase; if a legally binding resolution is what the Council sought, surely a Chapter VII resolution would have offered this more easily.

It has been suggested that "[t]his lack of formal clarity is sometimes a result of the political environment in which resolutions are negotiated. Pressures to include ambiguities or omit explicit references to Chapter VII in Council resolutions are sometimes accommodated in order to secure political agreement."⁴⁵⁴ John Bellinger suggests that the substitution of Article 25 for Chapter VII reveals the compromise that was necessary in reaching the unanimous approval of the resolution without diluting the legal basis attached to the Council's decisions.⁴⁵⁵ As a political organ, it is understandable that the Council must balance the end with the means, particularly given, as some might argue, that "the Security Council's role under the Charter is to further international peace and security and not the rule of law."⁴⁵⁶ In this vein, certain resolutions that all but mention Chapter VII – that is to say, include explicit reference to a threat to the peace and demand action of some sort – are not issued under Chapter VII, despite the fact that they are clearly intended to relay the same gravity and legal standing.⁴⁵⁷ Other resolutions act under Chapter VII without first determining the precise threat to the peace, therein bypassing the "portal" of Article 39 through which the Council must access its powers under article 41 and 42.⁴⁵⁸

⁴⁵³ *ibid* preamble.

⁴⁵⁴ Security Council Report, 'Security Council Action under Chapter VII: Myths and Realities' (23 June 2008), 5 <<http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Research%20Report%20Chapter%20VII%2023%20June%202008.pdf>> accessed 16 December 2014.

⁴⁵⁵ John Bellinger, 'The Security Council Resolution on Syria: Is it Legally Binding?' (*Lawfare Blog*, 28 September 2013) <<http://www.lawfareblog.com/2013/09/the-security-council-resolution-on-syria-is-it-legally-binding>> accessed 16 December 2014: "The reference to Article 25 (instead of Chapter VI or VII) is very unusual, but does not vitiate the legally binding nature of the resolution. Even without the reference to Article 25, the inclusion of the other elements would be sufficient to make the operative "decides" paragraphs legally binding. The Article 25 reference in fact emphasizes that these "decisions" are binding, but without including references to Chapter VII which were likely resisted by Russia and China."

⁴⁵⁶ Lowe (n 17) 36.

⁴⁵⁷ See, eg UNSC Res 1376 (9 November 2001) UN Doc S/RES/1376 on the Democratic Republic of the Congo (DRC).

⁴⁵⁸ See eg UNSC Res 1737 (27 December 2006) UN Doc S/RES/1737 on Iranian nuclear proliferation, where the Council was "[a]cting under Article 41 of Chapter VII of the Charter of the United Nations" without prior mention of article 39 or a specific threat to the peace [emphasis in original].

In sum, it is clear that terminology of a Chapter VII resolution is being used in non-Chapter VII resolutions, specifically perhaps for the purposes of ensuring agreement amongst the Council members. Whilst this may serve the political motive adequately, it leaves a great deal to be desired in terms of equality and legal certainty and clarity. A Chapter VII resolution indicates the gravity of a particular situation and to fail to adopt a Chapter VII resolution in such circumstances can be argued to both reduce the implied seriousness of the conflict and set the tone for other States to follow in their dealings and attitude to Syria.

V.4 A clear legal basis

Aside from the existence of phrases referring to the procedural requirements of Article 39 and the mention of Chapter VII, *Legal Certainty* requires that there be a legitimate, legally sound basis for the invocation of Chapter VII powers. There is a necessity for the Council to explain what exactly about the situation poses a threat to the international peace. Although the Council has been commendably forthcoming in attempting to increase the clarity and transparency of its decision-making with respect to explicitly stating when it is acting under Chapter VII through the determination of a threat to the peace, the decisions relating to what exactly such a threat is have been far less comprehensible, predictable, consistent and legally reasoned. Whilst equality and predictability will be expanded upon in *Chapters VI* and *VII* of this thesis, it is important to highlight some examples where there has been opacity in the process of determining a threat to the international peace.

There are numerous examples of instances where the Council has not expressly stated the nature of the threat that it conceived existed and where the threats themselves, even where explicitly stated, are tenuous. UNSC Res 733,⁴⁵⁹ imposing an arms embargo on Somalia under Chapter VII in 1992 reiterated the same concerns that the Secretary General had voiced previously in his report, which itself is cited only generally and without specificity; the resolution itself makes a generic reference to Chapter VII being necessary “for the purposes of establishing peace and stability in Somalia”⁴⁶⁰ but does not link the actions taken – namely the embargo – to the desired outcome – the establishment of peace and stability – or the

⁴⁵⁹ UNSC Res 733 (23 January 1992) UN Doc S/RES/733.

⁴⁶⁰ *ibid* ¶5.

“consequences on stability and peace in the region.”⁴⁶¹ UNSC Res 733 was adopted following consultations but no public debate was instigated, shedding no further light on the nexus between the two; consequently, the exact reasoning behind the decision remains elusive and shows no signs of a legal basis.

There are doubts cast, also, on UNSC Res 841 on the subject of Haiti,⁴⁶² where economic sanctions were imposed on the country in an effort to ameliorate the humanitarian situation and bring about the return of President Aristide. The debate surrounding the imposition of economic sanctions in 1993 focused on the humanitarian crisis and the need to reinstate democracy; there was very little reference to any perceived threat to international peace. In fact, only Venezuela – one of three sponsors of UNSC Res 841⁴⁶³ – made any explicit mention of the threat to the peace that formed the determination underscoring the sanctions taken under Chapter VII:⁴⁶⁴ yet even this threat was non-descript, being linked tenuously to the “substantial increase of hundreds of thousands of Haitians, in terrified flight to other countries.”⁴⁶⁵ The threat, then, according to the only representative to have verbalised it explicitly was the flight of refugees out of Haiti to other countries and not, as one might have supposed, the coup that ran contrary to democratically elected President Jean-Bertrand Aristide. This contrasts starkly the tone of the rest of the representatives speeches, which interpret the “main purpose of the resolution [to be] an early political solution to the crisis in Haiti”⁴⁶⁶ and believe that the goals of the sanctions are to “bring the perpetrators of the coup d’état to the negotiating table in order to restore constitutional order in Haiti”⁴⁶⁷ and “to put pressure on those who stand in the way of a solution.”⁴⁶⁸ Once more, those wishing to derive any semblance of structure or definition of the threat to the peace are left without any solid answers.

⁴⁶¹ *ibid* preamble.

⁴⁶² UNSC Res 841 (16 June 1993) UN Doc S/RES/841.

⁴⁶³ UNSC Verbatim Record (16 June 1993) UN Doc S/PV.3238, 3-5.

⁴⁶⁴ *ibid* 11.

⁴⁶⁵ *ibid*. Pakistan also makes mention of the threat to the peace in passing, with reference to the “continuation of the existing situation in Haiti”, *ibid* 14, as does that of China, who hoped “such efforts [would] facilitate a settlement of the Haitian question, thus contributing to peace and stability in the region”, *ibid* 20. Nonetheless, these are both very vague references that lack the substantive explanation of what *exactly* constitutes the threat perceived.

⁴⁶⁶ China, *ibid* 21. See also, Canada (*ibid* 6); France (*ibid* 9); Pakistan (*ibid* 15); Brazil (*ibid* 18); USA (*ibid* 18).

⁴⁶⁷ France, *ibid* [emphasis in original].

⁴⁶⁸ USA, *ibid* 19.

V.5 Conclusions

The Council, therefore fails in some aspects of legal certainty. Although determinations are made frequently under Article 39 and in most cases where Chapter VII is invoked there is a prior determination in accordance with the UN Charter, at least in recent years, the subsequent Chapter VII resolutions hides much of what exactly the actual threat perceived to be consists of. There is little clarity where meetings are not transparent, as seen in section IV.1, and where the reasoning behind a decision is not made by the Council. As the case of Haiti shows, there is misunderstanding where no clear definition of the threat is made; parameters and exactitudes allow all States – both those in attendance and those reading records – to understand fully where the threat lies. An inability to do this suggests, among other likelihoods, volition on the part of the Council to stretch the definition of a threat to the peace in order to fit a political imperative. As this thesis will continue to show, this in turn has a serious effect on the equality of the law amongst UN Member States. Where there is no clear definition of what a threat to the peace is in a given instance where Chapter VII has been resorted to, there can be no pattern emerging from Council behaviour, which subsequently leaves the door open to accusations of arbitrary behaviour and bias on the Council and even actual examples where Chapter VII is used inappropriately, insufficiently or excessively.

CHAPTER VI
EQUALITY BEFORE THE LAW

VI.1 Introduction

Equality before the law is also at the core of both General Assembly⁴⁶⁹ and Security Council's⁴⁷⁰ rule of law activities to support development and the promotion of international standards, particularly in post-conflict societies. At the national level, it is a cross-cutting theme that includes gender equality, self-determination and numerous other elements that are slightly irrelevant to the current discussion of the Security Council, which operates on an entirely different plane to the domestic – this thesis discusses State behaviour and the behaviour of the Council. Nonetheless, there are similarities in the definition of the meaning of equality – and as a result the avoidance of arbitrariness and bias – that can be encapsulated by the position of contemporary philosopher Harry Frankfurt, who discusses the difference between equality and what he terms *respect*, but which for the purposes of this thesis form part of the component of *The Predictability Paradox*, which will form Chapter VII of this thesis:

The most fundamental difference between equality and respect has to do with focus and intent. With regard to any parameter – whether it has to do with resources, welfare, opportunity, respect, rights, consideration, concern, or whatever – equality is merely a matter of each person having the same as others. Respect is more personal. Treating a person with respect means, in the sense that is pertinent here, dealing with him exclusively on the basis of those aspects of his particular character or circumstances that are actually relevant to the issue at hand.⁴⁷¹

The relevance of this definition to the Council's decision-making process can be surmised as follows: failure to react to analogous threats to the peace by the Council would be unequal and contravene the principle of equality before the law; decisions made without fully addressing the idiosyncratic and unique characteristics of each threat on an individual basis would be a misapplication of the principle of fairness, as well as highlighting an aura of arbitrary behaviour

⁴⁶⁹ See eg UNGA Res 61/39 (18 December 2006) UN Doc A/RES/61/39; UNGA Res 62/70, (8 January 2008) UN Doc A/RES/62/70; UNGA Res 63/128 (15 January 2009) UN Doc A/RES/63/128.

⁴⁷⁰ See eg UNSC Presidential Statement 15 (2003) UN Doc S/PRST/2003/15; UNSC Presidential Statement 2 (2004) UN Doc S/PRST/2004/2; UNSC Presidential Statement 32 (2004) UN Doc S/PRST/2004/32; UNSC Presidential Statement 28 (2006) UN Doc S/PRST/2006/28.

⁴⁷¹ Harry Frankfurt, 'Equality and Respect', (1997) 64(1) Soc Res 3, 8.

on the part of the Council.⁴⁷² In real world terms, this means that the Council *should* react to all potential threats to the peace, but should do so whilst identifying any differences between similar threats that might require a different approach to be introduced. This would not only be fair, it would also be predictable. Moreover, although each case should be addressed on its individual merits, States should be able to predict any repercussions to their actions based on the Council's previous responses to analogous situations.

Following this logic, then, more than there being no requirement for the Council to react in the same way to different threats, they are actively discouraged from doing so in order to avoid arbitrariness and ensure fairness, although they are obligated to study and address the situation in order to comply with the element of equality before the law. States, on the other hand, should be able to establish the extent and parameters of Council action based on the precedent of resolutions and other official actions, such as the establishment of tribunals, in order to regulate their own actions in turn. Indeed, what equality can be said to exist if some threats are left unaddressed when comparable situations have been addressed in other countries? And indeed, what country would readily accept a "one-size-fits-all" solution by the Council, which might give the impression not only of lethargy or reluctance but, perhaps more dangerously, limited resources at its disposal to react to different threats? It is an extremely thin line that the Council must be expected to walk, ensuring that it treats all threats equally and consistently, whilst also addressing the potential threat on an individual basis.

It has already been established that the Council has *compétence de la compétence* insofar as its own workload and focus of attention is concerned; however, it is the Secretariat that drafts an agenda for the Council's consideration. Although the Council's own Rules of Procedure grant the Secretariat the power to draft an agenda for its consideration,⁴⁷³ this is more of a "tentative forecast of . . . matters that may be taken up during the month pursuant to earlier decisions of the

⁴⁷² See, eg Thomas M Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 37-38, where the "sense of voluntarist social obligation . . . may be supported by two separate, if sometimes coinciding dynamics. The *first* is the belief that a rule is *legitimate* because it has come into being in accordance with the prescription for right rule-making in a secular community Legitimacy, therefore, is about right process and about community. A *second* dynamic pulling toward voluntary rule compliance is the belief that a rule is *just*, because it incorporates principles of *fairness* as these are understood by a moral community (which may, or may not, be coextant with the secular community to which the rule is addressed)"; Franck (n 443) 260, where the UN system is a "discursive system for applying the rules on a reasoned, principled, case-by-case basis"; Franck (n 443) 232, where Franck finds that the Council "is not a forum conducive to fairness discourse but seems driven almost entirely by short-term policy. This does not mean that its decisions are wrong, unfair or illegitimate. It means that it has largely failed to prove that it has exercised fairness and legitimacy."

⁴⁷³ UNSC Rules of Procedure (n 287) r 7.

Council . . . [and] the actual programme of work will be developed by developments and the views of members of the Council.”⁴⁷⁴ Thus, although many of the topics on the forecasted agendas are indeed discussed,⁴⁷⁵ other topics for discussion are created on an ad hoc basis during meetings “held at the call of the President at any time he deems necessary”⁴⁷⁶; moreover, the Council may meet at the request of any member of the Security Council.⁴⁷⁷ This allows the Council to respond in real-time to threats,⁴⁷⁸ allowing it a reprieve from the rigidity that other UN organs may suffer from.⁴⁷⁹ This also supports the role of the Security Council to respond rapidly to matters posing a threat to the international peace and fits within the framework of powers granted quite clearly by the Charter granting the Council the authority to “determine the existence of any threat to the peace, breach of the peace, or act of aggression.”⁴⁸⁰ In essence, the Council may direct its efforts freely to whichever cause it deems necessary under the wide scope of authority granted by the UN Charter and its rules of procedure.

⁴⁷⁴ Tentative Forecast of the Programme of Work of the Security Council for the month of January 2014 (30 December 2013) <<http://www.un.org/en/sc/inc/pages/pdf/pow/2014/forecast2014-1.pdf>> accessed 16 December 2014. The same wording is found in all programmes of work drafted by the Secretariat, which are unofficial documents for information only.

⁴⁷⁵ eg a meeting of the Security Council with the troop- and police- contributing countries pursuant to resolution 1353 (2001), annex II, sections A and B took place on 21st January and S/RES/2135 (2014) extended the mandate of UNFICYP in Cyprus until 31st July 2014, as expected in the Tentative Forecast of the Programme of Work of the Security Council for the month of January 2014; similar Council activity on Mali, DRC and Sudan was forecast in the Secretariat’s report and took place in January 2014 (UNSC Presidential Statement 2 (2014) UN Doc S/PRST/2014/2; UNSC Verbatim Record (13 January 2014) UN Doc S/PV.7094; UNSC Verbatim Record (23 January 2014) UN Doc S/PV.7100.

⁴⁷⁶ UNSC Rules of Procedure (n 287) r 1.

⁴⁷⁷ *ibid* r 2.

⁴⁷⁸ On August 15th 2013, the UK, France and Australia called for an emergency meeting on the violence in Egypt; the use of chemical weapons was discussed on 20th August 2013, see UNSC Verbatim Record (20 August 2013) UN Doc S/PV.7020 (2013); on 1st March, 2014, the Council held closed-door consultations on the situation in the Ukraine at the request of the Permanent Mission of Ukraine to the UN, see UN Press Release ‘Ukraine, in Emergency Meeting, Calls on Security Council to Stop Military Intervention by Russian Federation’, (1 March 2014) <<http://www.un.org/press/en/2014/sc11302.doc.htm>> accessed 16 December 2014.

⁴⁷⁹ The General Assembly, for example, adopts its provisional agenda on a yearly basis, sixty days in advance of the opening session (UNGA Rules of Procedure, UN Doc A/71/Rev.1, r 12. With the exception of emergency special sessions where the agenda is communicated simultaneously with the communication convening the session, any special session is also subject to a two week wait whilst the agenda is distributed (r 16). Therefore, it moves extremely slowly, by comparison, and forward planning of issues for discussion is paramount, not least also due to the necessity for majority decisions of it almost 200 Member State cadre, by which the Council is not lumbered, of course.

⁴⁸⁰ UN Charter (1945) art 39.

VI.2 Council responses to conflicts

However, the existence of *de jure* equality before the law does not immediately remove the possibility of different justice prevailing *de facto*.⁴⁸¹ Despite the potential for the Council to grant bespoke, rapid and effective responses to each potential threat to the peace due to the ability to meet at a moment's notice and take legally binding decisions implementing both non-military and armed force measures, the reality at times fails to live up to such expectations. It has been alleged that the Council is lethargic in responding to some incidents, whereas others are granted the full attention and force of the Council.⁴⁸²

VI.2.1 The case of Syria

The March 2011 Syrian government crackdowns on civilian protesters first appeared as a topic for Council discussion not – as one might expect – as a stand-alone issue, but rather on the periphery of an existing Council meeting in April 2011 on the Middle East situation focused on the Palestinian question.⁴⁸³ Despite deep concern over “the Government’s brutal crackdown on political protests . . . result[ing] in more than 200 deaths”⁴⁸⁴ at the time, unequivocal condemnation of the violence against and killing of peaceful demonstrators⁴⁸⁵ and calls for the Syrian authorities to “renounce the use of force against demonstrators”⁴⁸⁶ by three of the P5 members, it was deemed by Russia “unacceptable [for] any external interference in Syrian affairs”⁴⁸⁷ to take place. Nonetheless, a public debate was held later that month,⁴⁸⁸ intimating that the Council might have begun to address the situation in Syria as a potential threat to the international peace separate from the Middle East question as a whole; nonetheless, this did not come to fruition and the Syrian situation remained addressed within the general theme of the

⁴⁸¹ See eg Kleinfeld (n 68) 38-9, where the caste system of India, for example, where despite constitutional equality for all citizens the reality is vastly different.

⁴⁸² See eg Pakistan, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 24, where “[t]he determination of the Council’s agenda depends to a large extent on the positions and priorities of the permanent members and major Powers. We have witnessed inaction and delay in the Council, even in the face of the most obvious acts of aggression and breaches of peace. On the other hand, there is proaction, even interference in the internal affairs of sovereign States, even in the absence of a clear threat to international peace and security. Double standards and selectivity, including in the implementation of the Council’s own resolutions, threats and the use of force and other forms of coercion are equally disquieting”

⁴⁸³ UNSC Verbatim Record (21 April 2011) UN Doc S/PV.6520.

⁴⁸⁴ US, *ibid* 13.

⁴⁸⁵ UK, *ibid* 15.

⁴⁸⁶ France, *ibid* 21.

⁴⁸⁷ Russia, *ibid* 27.

⁴⁸⁸ UNSC Verbatim Record (27 April 2011) UN Doc S/PV.6524.

Middle East question for quite some time⁴⁸⁹ and the very first statement by the Council condemning the situation in Syria⁴⁹⁰ came about under the aegis of the situation in the Middle East.

Indeed, even when presented in February 2012 with credible information that “the death toll . . . often exceeds 100 civilians per day . . . [and] the total number of people killed so far [was] certainly well more than 7,500 . . . [with] 25,000 refugees . . . [and b]etween 100,000 and 200,000 people internally displaced”⁴⁹¹, little was done by the Council to intercede in the situation due to a stalemate between the P5 members. Against this backdrop, the only consensus that could be reached was the implementation of a six-point proposal, brokered by former UN Secretary-General Kofi Annan in his capacity as Joint Special Envoy for the UN and League of Arab States.⁴⁹² In the year between Syria first appearing on the Council’s agenda in April 2011 and the first Council resolution in April 2012, two vetoed Chapter VII resolutions⁴⁹³ were tabled; conversely, by this time the number of deaths, including women and children, were “well more than 7,500 . . . [with] 25,000 refugees . . . [and b]etween 100,000 and 200,000 people internally displaced.”⁴⁹⁴ Undermining the Council’s capacity to respond in real-time in contrast to the Assembly, it was the latter that on 19th December 2011 overwhelmingly adopted a resolution cosponsored by 61 States condemning “the continued grave and systematic human rights violations by the Syrian authorities . . . [and calling] upon the Syrian authorities to immediately put an end to all human rights violations . . . and . . . an immediate end to all violence in the Syrian Arab Republic”⁴⁹⁵ whilst the Council had yet implement any binding resolutions and had itself only officially managed to break its silence on the situation in Syria through a presidential statement in August 2011.

Frankfurt has posited that “[t]hose who are concerned with equality aim at outcomes that are in some pertinent way indistinguishable . . .”⁴⁹⁶ this can be interpreted not as an expectation

⁴⁸⁹ See eg UNSC Verbatim Record 6562 (23 June 2011) UN Doc S/PV.6562; UNSC Verbatim Record 6590 (26 July 2011) UN Doc S/PV.6590; UNSC Verbatim Record (3 August 2011) UN Doc S/PV.6598; UNSC Verbatim Record (12 March 2012) UN Doc S/PV.6734. Syria was also mentioned in an open debate on the protection of civilians (UNSC Verbatim Record 6650 (9 November 2011) UN Doc S/PV.6650).

⁴⁹⁰ UNSC Presidential Statement 16 (2011) UN Doc S/PRST/2011/16.

⁴⁹¹ UNSC Verbatim Record (28 February 2012) UN Doc S/PV.6725, 2.

⁴⁹² UNSC Res 2042 (14 April 2012) UN Doc S/RES/2042.

⁴⁹³ UNSC Draft Res (4 October 2011) UN Doc S/2011/612; UNSC Draft Res (4 February 2012) UN Doc S/2012/77.

⁴⁹⁴ UNSC Verbatim Record (28 February 2012) UN Doc S/PV.6725, 2.

⁴⁹⁵ UNGA Res 66/176 (24 February 2012) UN Doc A/RES/66/176, ¶1.

⁴⁹⁶ Frankfurt (n 471) 9.

that the facts themselves should be indistinguishable, but rather that the response should be such. Indeed, it would be misguided to suggest that the situation in Syria is exactly the same as the facts of Libya and, without addressing the deep-rooted political, ethnic and geographical characteristics of each country and its conflict I would be remiss to attempt such a comparison, which indeed divided the Council members during discussions on the situation in Syria: whilst Russia identified that “[t]he situation in Syria cannot be considered in the Council separately from the Libyan experience”⁴⁹⁷, the US defended “strong Council action on Syria . . . [which] is not about military intervention . . . or Libya.”⁴⁹⁸ Clearly, calls for restraint and reflection on the Libyan experience by the Council was key to Russia’s hesitation to intervene in Syria in the same way as Libya.⁴⁹⁹

However, the intersection of the situations in both countries becomes relevant to this component of equality within the framework of the rule of law when addressing how the Council responded to each potential threat; this is particularly true when in the case of Libya, less than a year passed between the first discussion of the situation at the Council⁵⁰⁰ in February 2011 and the declaration of liberation of Libya by the new National Transitional Council,⁵⁰¹ including the passing of a Chapter VII resolution⁵⁰² authorising NATO military involvement in the subsequent Operation Unified Protector, officially ending on 31st October 2011.⁵⁰³ In contrast, this same period of time – a year – was how long elapsed between the situation in Syria reaching the agenda of the Council and its first resolution on the matter; of course, over three years later, the situation is not yet resolved and there has not been a single Chapter VII resolution emerging

⁴⁹⁷ Russia, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627, 4.

⁴⁹⁸ US, *ibid* 8.

⁴⁹⁹ Russia, *ibid* 4: “For us, Members of the United Nations, including in terms of a precedent, it is very important to know how the resolution [on Libya] was implemented and how a Security Council resolution turned into its opposite. The demand for a quick ceasefire turned into a full-fledged civil war, the humanitarian, social, economic and military consequences of which transcend Libyan borders. The situation in connection with the no-fly zone has morphed into the bombing of oil refineries, television stations and other civilian sites. The arms embargo has morphed into a naval blockade in western Libya, including a blockade of humanitarian goods. Today the tragedy of Benghazi has spread to other western Libyan towns — Sirte and Bani Walid. These types of models should be excluded from global practices once and for all.”

⁵⁰⁰ UNSC Verbatim Record (22 February 2011) UN Doc S/PV.6486, in which Under-Secretary-General for Political Affairs B. Lynn Pascoe briefed the Council on the situation in Libya, subsequent to which a press release by the Council condemned the use of force on civilians (UN Press Release, ‘Security Council Press Statement on Libya’ (22 February 2011) <<http://www.un.org/press/en/2011/sc10180.doc.htm>> accessed 16 December 2014).

⁵⁰¹ ‘NTC declares ‘Liberation of Libya’’, *Al Jazeera* (24 October 2011) <<http://www.aljazeera.com/news/africa/2011/10/201110235316778897.html>> accessed 16 December 2014.

⁵⁰² UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

⁵⁰³ UNSC Res 2009 (16 September 2011) UN Doc S/RES/2009, ¶20 repealed the authorisation to use “all necessary measures” in UNSC Res 1973 (2011).

from the Council despite the use of chemical weapons in Syria, the standing total of over 3.2m refugees⁵⁰⁴ and an estimated 200,000 deaths.⁵⁰⁵

Despite this severe disparity in the length of time that was taken in dealing with each situation, the situation in Libya appears to have been afforded far more attention by the Security Council. In fact, in 2011 the subject of Libya was tabled as an individual subject for discussion twenty-three times⁵⁰⁶ and of the four Chapter VII resolutions on Libya in 2011⁵⁰⁷ it took a mere four days from the Under-Secretary-General's briefing on 22nd February 2011 to reach unanimous consensus for a Chapter VII resolution⁵⁰⁸ imposing an arms embargo on the country,⁵⁰⁹ travel ban on key figures of the Gaddafi regime⁵¹⁰ and asset freeze on the Gaddafi family,⁵¹¹ in addition to referring the situation to the Prosecutor of the International Criminal Court, a previously contentious issue.⁵¹² The situation in Syria has been discussed a mere seventeen times since the beginning of the conflict in 2011,⁵¹³ with only six resolutions being passed – three substantive⁵¹⁴ and three⁵¹⁵ relating to military observers and UNSMIS.⁵¹⁶

⁵⁰⁴ As of December, 2014, according to UNHCR figures <<http://data.unhcr.org/syrianrefugees/regional.php>> accessed 16 December 2014.

⁵⁰⁵ Although the UN has ceased updating its official figures, other sources point to this number. The exact number is extremely divisive. For an excellent analysis, see Adam Taylor, '200,000 dead? Why Syria's rising death toll is so divisive', Washington Post (3 December 2014) <<http://www.washingtonpost.com/blogs/worldviews/wp/2014/12/03/200000-dead-why-syrias-rising-death-toll-is-so-divisive>> accessed 16 December 2014.

⁵⁰⁶ UNSC Verbatim Record (22 February 2011) UN Doc S/PV.6486; UNSC Verbatim Record (25 February 2011) UN Doc S/PV.6490; UNSC Verbatim Record (26 February 2011) UN Doc S/PV.6491; UNSC Verbatim Record (17 March 2011) UN Doc S/PV.6498; UNSC Verbatim Record (24 March 2011) UN Doc S/PV.6505; UNSC Verbatim Record (28 March 2011) UN Doc S/PV.6507; UNSC Verbatim Record (4 April 2011) UN Doc S/PV.6509; UNSC Verbatim Record (3 May 2011) UN Doc S/PV.6527; UNSC Verbatim Record (4 May 2011) UN Doc S/PV.6528; UNSC Verbatim Record (9 May 2011) UN Doc S/PV.6530; UNSC Verbatim Record (31 May 2011) UN Doc S/PV.6541; UNSC Verbatim Record (15 June 2011) UN Doc S/PV.6555; UNSC Verbatim Record (27 June 2011) UN Doc S/PV.6566; UNSC Verbatim Record (28 July 2011) UN Doc S/PV.6595; UNSC Verbatim Record (30 August 2011) UN Doc S/PV.6606; UNSC Verbatim Record (16 September 2011) UN Doc S/PV.6620; UNSC Verbatim Record (26 September 2011) UN Doc S/PV.6622; UNSC Verbatim Record (26 October 2011) UN Doc S/PV.6639; UNSC Verbatim Record (27 October 2011) UN Doc S/PV.6640; UNSC Verbatim Record (31 October 2011) UN Doc S/PV.6644; UNSC Verbatim Record (2 November 2011) UN Doc S/PV.6647; UNSC Verbatim Record (2 December 2011) UN Doc S/PV.6673; UNSC Verbatim Record (22 December 2011) UN Doc S/PV.6698.

⁵⁰⁷ UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973; UNSC Res 2009 (16 September 2011) UN Doc S/RES/2009; UNSC Res 2016 (27 October 2011) UN Doc S/RES/2016.

⁵⁰⁸ UNSC Res 1970 (2011), passed with no abstentions.

⁵⁰⁹ *ibid* ¶9.

⁵¹⁰ *ibid* ¶15.

⁵¹¹ *ibid* ¶17.

⁵¹² This was the first referral to the ICC without abstentions; the only other, on March 31st 2005 in UNSC Res 1593 on Sudan featured abstentions by Algeria, Brazil and, more importantly, China and the US, both of which are P5 members and neither of which are signatories to the Rome Statute.

⁵¹³ UNSC Verbatim Record (27 April 2011) UN Doc S/PV.6524; UNSC Verbatim Record (3 August 2011) UN Doc S/PV.6598; UNSC Verbatim Record (31 January 2012) UN Doc S/PV.6710; UNSC Verbatim Record (4 February 2012) UN Doc S/PV.6711; UNSC Verbatim Record (12 March 2012) UN Doc S/PV.6734; UNSC Verbatim Record

This referral to the ICC in the case of Libya is remarkable for the identification by the Council that the “widespread and systematic attacks [that took] place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity;”⁵¹⁷ the far more moderately worded resolutions⁵¹⁸ than that of UNSC Res 1970 calling for a cessation of violence in Syria have been consistently vetoed⁵¹⁹ or watered down⁵²⁰ for the purposes of passing through the Council. This is despite protestations by members of the Security Council at the “especially horrific campaign . . . [of] indiscriminate violence . . . [and] abhorrent brutality”;⁵²¹ allegations of war crimes by the Office of the High Commissioner for Human Rights,⁵²² the Human Rights Council⁵²³ and various NGOs;⁵²⁴ the apparent breach of International Humanitarian Law;⁵²⁵ and an investigative UN Mission conclusion “that chemical weapons have

(21 March 2012) UN Doc S/PV.6736; UNSC Verbatim Record (14 April 2012) UN Doc S/PV.6751; UNSC Verbatim Record (21 April 2012) UN Doc S/PV.6756; UNSC Verbatim Record (30 August 2012) UN Doc S/PV.6826; UNSC Verbatim Record (26 September 2012) UN Doc S/PV.6841; UNSC Verbatim Record (18 April 2013) UN Doc S/PV.6949; UNSC Verbatim Record (16 July 2012) UN Doc S/PV.7000; UNSC Verbatim Record (20 August 2013) UN Doc S/PV.7020; UNSC Verbatim Record (25 October 2013) UN Doc S/PV.7049; UNSC Verbatim Record (22 February 2014) UN Doc S/PV.7116; UNSC Verbatim Record (22 May 2014) UN Doc S/PV.7180; UNSC Verbatim Record (14 July 2014) UN Doc S/PV.7216.

⁵¹⁴ UNSC Res 2118 (27 September 2013) UN Doc S/RES/2118; UNSC Res 2139 (22 February 2014) UN Doc S/RES/2139; UNSC Res 2165 (14 July 2014) UN Doc S/RES/2165.

⁵¹⁵ UNSC Res 2042 (14 April 2012) UN Doc S/RES/2042; UNSC Res 2043 (21 April 2012) UN Doc S/RES/2043; UNSC Res 2059 (20 July 2012) UN Doc S/RES/2059.

⁵¹⁶ United Nations Supervision Mission in Syria.

⁵¹⁷ UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970, preamble.

⁵¹⁸ See the statement by the UK on UNSC Draft Res S/2012/77 (2012) in UNSC Verbatim Record (4 February 2012) UN Doc S/PV.6711, 7; see also, statement by the US on UNSC Draft Res S/2012/77 (2012), *ibid* 5.

⁵¹⁹ Both China and Russia voted negatively on UNSC Draft Res S/2011/612 (2011), UNSC Draft Res S/2012/77 (2012) and UNSC Draft Res S/2012/538 (2012).

⁵²⁰ Both UNSC Res 2118 (2013) and UNSC Res 2139 (2014) condemn and demand, using terminology of Chapter VII, but fail to include the necessary criteria for Chapter VII as discussed previously and do not take action under Articles 41 or 42 of the Charter. They were also to results of several rounds of negotiations on the wording.

⁵²¹ US, UNSC Verbatim Record (4 February 2012) UN Doc S/PV.6711, 5. See also, the condemnation of the representatives of the UK, France and others, *ibid* 3 ff.

⁵²² ‘Mass executions in Syria may amount to war crimes, senior UN official warns’, *UN News Centre* (16 January 2014) <<http://www.un.org/apps/news/story.asp?NewsID=46939#.VJJDNCsa-mQ>> accessed 16 December 2014.

⁵²³ OHCHR, ‘Preliminary report of the High Commissioner on the situation of human rights in the Syrian Arab Republic’ (14 June 2011) UN Doc A/HRC/17/CRP.1, 3ff.

⁵²⁴ Amnesty International, ‘Deadly Reprisals: Deliberate Killings and Other Abuses by Syria’s Armed Forces’ (June 2012) <http://www.amnesty.org.uk/sites/default/files/deadly_reprisals.pdf> accessed 16 December 2014; Human Rights Watch, ‘In Cold Blood: Summary Executions by Syrian Security Forces and Pro-Government Militias’ (April 10 2012) <http://www.hrw.org/sites/default/files/reports/syria0412webwcover_0.pdf> accessed 16 December 2014.

⁵²⁵ “According to a cardinal IHL principle, a party to a conflict may direct attacks only against combatants and military objectives. Directing attacks against civilians who are not taking a direct part in hostilities, as well as indiscriminate and disproportionate attacks, are prohibited”, OHCHR, ‘Living Under Siege: The Syrian Arab Republic’ (19 February 2014) <<http://www.ohchr.org/documents/countries/sy/livingundersiege.pdf>> accessed 16 December 2014, referring to Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol 1* (CUP 2005) 3, 25, 37-40.

been used in the ongoing conflict between the parties in the Syrian Arab Republic.”⁵²⁶ Whereas concerted efforts were made to resolve the issue and stem the outbreak of a civil war in Libya on the scale now seen in Syria, where the UN itself has ceased updating⁵²⁷ its most recent figure in July 2013 of over 100,000 deaths⁵²⁸ due to the unfeasibility of UNHCR ground access in Syria,⁵²⁹ contrary to the flurry of Council activity on Libya⁵³⁰ even after the end of military operations in the country,⁵³¹ Syria has not enjoyed a great deal of discussion on the Council⁵³² or mission assistance.⁵³³ Since its initial stalemate over the subject, the Council has moved ever slowly and cautiously on the matter of the Syrian civil war, initially hesitant as a political body to make any bold statements apart from condemnation of attacks by terrorists or on diplomatic premises.⁵³⁴

VI.2.2 *Council action in analogous situations*

Efficacy and swiftness is, in general, typical of the behaviour of the Council, as one might expect from the powers to act it is granted unrestrained by the necessity of a framework of forward

⁵²⁶ UNGA, ‘United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic: Final report’ (December 12 2013) <<https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/12/report.pdf>> accessed 16 December 2014, ¶108.

⁵²⁷ John Heilprin, ‘UN Decides to Stop Updating Syria Death Toll’ *Associated Press* (Geneva, 7 January 2014) <<http://bigstory.ap.org/article/un-decides-stop-updating-syria-death-toll>> accessed 16 December 2014.

⁵²⁸ Edith M Lederer, ‘UN Chief says over 100,000 people killed in Syria’ *Associated Press* (United Nations, 25 July 2013) <<http://bigstory.ap.org/article/un-chief-says-over-100000-people-killed-syria>> accessed 16 December 2014.

⁵²⁹ Laura Stampler, ‘UN to Stop Updating Syria Death Toll’ *Time World* (7 January 2014) <<http://world.time.com/2014/01/07/un-to-stop-updating-syria-death-toll>> accessed 16 December 2014.

⁵³⁰ 23 meetings in 2011, Security Council Report, ‘Security Council Statistics in 2011’ (31 Jan 2012) <http://www.securitycouncilreport.org/monthly-forecast/2012-02/lookup_c_gIKWLeMTIsG_b_7966267.php> accessed 16 December 2014.

⁵³¹ The Council held ten meetings on Libya, adopting one decision (UNSC Res 2040 (2012)) in 2012, Security Council Report, ‘Security Council Statistics in 2012’ (31 January 2013) <http://www.securitycouncilreport.org/monthly-forecast/2013-02/security_council_statistics_in_2012.php> accessed 16 December 2014; it held another eight in 2013, adopting two decisions (UNSC Res 2095 (2013) and UNSC Presidential Statement 21 (2013)), Security Council Report, ‘Security Council Statistics in 2013’ (31 January 2014) <http://www.securitycouncilreport.org/monthly-forecast/2014-02/security_council_statistics_in_2013.php> accessed 16 December 2014.

⁵³² Four meetings in 2011 (not including meetings pertaining to the UNDOF), Security Council Report (n 530) and nine meetings in 2012 (not including meetings pertaining to the UNDOF), leading to five decisions (UNSC Res 2042 (2012); UNSC Res 2043; UNSC Res 2059; UNSC Presidential Statement 6 (2012); and UNSC Presidential Statement 10 (2012)), Security Council Report (2012), *ibid*.

⁵³³ The UN Supervision Mission in Syria (UNSMIS) was established under UNSC Res 2043 and renewed under UNSC Res 2059; its mandate was not renewed when it expired on 19th August 2012.

⁵³⁴ 2011 saw three unofficial documents emerge from the Council, all press statements: UN Press Release, ‘Security Council Press Statement on Embassy Attacks in Damascus’ (12 July 2011); UN Press Release, ‘Security Council Press Statement on Attacks against Diplomatic Premises in Syria’ (15 November 2011); UN Press Release, ‘Security Council Press Statement on Terrorist Attacks in Damascus, Syria’ (23 December 2011).

planning and its self-regulating rules of procedure. In the case of Kosovo, the process from the first Chapter VII resolution calling for steps to achieve a peaceful solution and imposing an arms embargo⁵³⁵ to authorisation for NATO intervention to secure the withdrawal of Yugoslav forces from Kosovo⁵³⁶ took barely over a year; similarly, despite being on the agenda of the Council for many years – with the first resolution issued in 1997⁵³⁷ – the Council’s response to the internal conflict in the Central African Republic⁵³⁸ intensified even before⁵³⁹ the assessment of the Under Secretary-General/Special Adviser on the Prevention of Genocide that “there [was] a risk of genocide in this country”⁵⁴⁰ when the violence was noted to have intensified. The conflict in the Democratic Republic of Congo is arguably the most deadly since World War II;⁵⁴¹ the Council dedicated the same number of meetings to the situation⁵⁴² and adopted twelve decisions between 2011-2014⁵⁴³ and has consistently addressed the threat through no less than forty-three Chapter VII⁵⁴⁴ resolutions since the Great War of Africa broke out in 1998 – more than two a year.

⁵³⁵ UNSC Res 1160 (31 March 1998) UN Doc S/RES/1160.

⁵³⁶ UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244.

⁵³⁷ UNSC Res 1125 (6 August 1997) UN Doc S/RES/1125.

⁵³⁸ Although external forces in the CAR play a role in the conflict, it is technically termed an intra-State dispute, in much the same way as there are allegations of neighbouring countries exerting pressure on the internal conflict in Syria.

⁵³⁹ UNSC Res 2088 (24 January 2013) UN Doc S/RES/2088 and UNSC Res 2121 (24 January 2013) UN Doc S/RES/2121 both refer to the extension or updating of the mandates of BINUCA; UNSC Res 2127 (5 December 2013) UN Doc S/RES/2127 is a Chapter VII resolution demanding swift implementation of transitional agreements (¶5), deploring the limited progress made (¶6) and authorising French military intervention in the country (¶50).

⁵⁴⁰ UNSC Verbatim Record (22 January 2014) UN Doc S/PV.7098, 5.

⁵⁴¹ Approximately 1.69 to 1.80 million women reported having been raped in their lifetime, with between 407,397 and 433,785 having reported being raped between 2006-7. See Amber Peterman, Tia Palermo and Caryn Bredenkamp, ‘Estimates and Determinants of Sexual Violence Against Women in the Democratic Republic of Congo’ (2011) 101 American Journal of Public Health 1060, 1060; an estimated 5.4 million people have died as a result of the conflict in the DRC since 1998, 50% of whom have been children, see International Rescue Committee, ‘Measuring Mortality in the Democratic Republic of Congo’ (2007), 7 <http://www.rescue.org/sites/default/files/resource-file/2006-7_congoMortalitySurvey.pdf > accessed 16 December 2014.

⁵⁴² Security Council Report (2013) (n 531): the Council discusses the DRC in 8 meetings each in 2011, 2012 and 2013.

⁵⁴³ UNSC Res 1991 (28 June 2011) UN Doc S/RES/1991; UNSC Res 2021 (29 November 2011) UN Doc S/RES/2021; UNSC Presidential Statement 11 (2011) UN Doc S/PRST/2011/11; UNSC Res 2053 (27 June 2012) UN Doc S/RES/2053; UNSC Res 2076 (20 November 2012) UN Doc S/RES/2076; UNSC Res 2078 (28 November 2012) UN Doc S/RES/2078; UNSC Presidential Statement 22 (2012) UN Doc S/PRST/2012/22; UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098; UNSC Presidential Statement 11 (2013) UN Doc S/PRST/2013/11; UNSC Presidential Statement 17 (2013) UN Doc S/PRST/2013/17; UNSC Res 2136 (30 January 2014) UN Doc S/RES/2136; UNSC Res 2147 (28 March 2014) UN Doc S/RES/2147; UNSC Presidential Statement 22 (2014) UN Doc S/PRST/2014/22.

⁵⁴⁴ UNSC Res 1291 (24 February 2000) UN Doc S/RES/1291; UNSC Res 1484 (30 May 2003) UN Doc S/RES/1484; UNSC Res 1493 (28 July 2003) UN Doc S/RES/1493; UNSC Res 1533 (12 March 2004) UN Doc S/RES/1533; UNSC Res 1565 (1 October 2004) UN Doc S/RES/1565; UNSC Res 1592 (30 March 2005) UN Doc S/RES/1592; UNSC Res 1596 (18 April 2005) UN Doc S/RES/1596; UNSC Res 1616 (29 July 2005) UN Doc

VI.3 Council double standards towards nuclear threats

One of the principal examples of Council double-standard with respect to equality before the law is its treatment of the military nuclear capacity of the Democratic People's Republic of Korea (DPRK). Of the eight known nuclear-weapon States⁵⁴⁵ and Israel, which maintains ambiguity over its possession or lack thereof,⁵⁴⁶ and the remaining 190 States Parties to the Non-Proliferation Treaty (NPT),⁵⁴⁷ it is the DPRK that has been singled out by the Council in rounds of sanctions.⁵⁴⁸ Moreover, of the eight nuclear-power States, only the P5 members have signed⁵⁴⁹ or ratified⁵⁵⁰ the treaty, leaving India and Pakistan not only as the sole two known nuclear

S/RES/1616; UNSC Res 1621 (6 September 2005) UN Doc S/RES/1621; UNSC Res 1635 (28 October 2005) UN Doc S/RES/1635; UNSC Res 1649 (21 December 2005) UN Doc S/RES/1649; UNSC Res 1650 (21 December 2005) UN Doc S/RES/1650; UNSC Res 1654 (31 January 2006) UN Doc S/RES/1654; UNSC Res 1669 (10 April 2006) UN Doc S/RES/1669; UNSC Res 1671 (25 April 2006) UN Doc S/RES/1671; UNSC Res 1693 (30 June 2006) UN Doc S/RES/1693; UNSC Res 1698 (31 July 2006) UN Doc S/RES/1698; UNSC Res 1711 (29 September 2006) UN Doc S/RES/1711; UNSC Res 1736 (22 December 2006) UN Doc S/RES/1736; UNSC Res 1742 (15 February 2007) UN Doc S/RES/1742; UNSC Res 1751 (13 April 2007) UN Doc S/RES/1751; UNSC Res 1756 (15 May 2007) UN Doc S/RES/1756; UNSC Res 1768 (31 July 2007) UN Doc S/RES/1768; UNSC Res 1771 (10 August 2007) UN Doc S/RES/1771; UNSC Res 1794 (21 December 2007) UN Doc S/RES/1794; UNSC Res 1797 (30 January 2008) UN Doc S/RES/1797; UNSC Res 1799 (15 February 2008) UN Doc S/RES/1799; UNSC Res 1807 (31 March 2008) UN Doc S/RES/1807; UNSC Res 1843 (20 November 2008) UN Doc S/RES/1843; UNSC Res 1856 (22 December 2008) UN Doc S/RES/1856; UNSC Res 1857 (22 December 2008) UN Doc S/RES/1857; UNSC Res 1896 (30 November 2009) UN Doc S/RES/1896; UNSC Res 1906 (23 December 2009) UN Doc S/RES/1906; UNSC Res 1925 (28 May 2010) UN Doc S/RES/1925; UNSC Res 1952 (29 November 2010) UN Doc S/RES/1952; UNSC Res 1991 (28 June 2011) UN Doc S/RES/1991; UNSC Res 2021 (29 November 2011) UN Doc S/RES/2021; UNSC Res 2053 (27 June 2012) UN Doc S/RES/2053; UNSC Res 2076 (20 November 2012) UN Doc S/RES/2076; UNSC Res 2078 (28 November 2012) UN Doc S/RES/2078; UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098; UNSC Res 2136 (30 January 2014) UN Doc S/RES/2136; UNSC Res 2147 (28 March 2014) UN Doc S/RES/2147.

⁵⁴⁵ All five P5 members – Russia, China, the US, UK and France – possess nuclear weaponry, in addition to Pakistan, India and the DPRK.

⁵⁴⁶ Israel was believed to have between 60-85 nuclear weapons with 65-85 predicted in 2020 according to the US Defense Intelligence Agency (DIA), 'A Primer on the Future Threat, The Decades Ahead: 1999-2020' (1999), 38, reproduced in Rowan Scarborough, *Rumsfeld's War: The Untold Story of America's Anti-Terrorist Commander* (Regnery 2013); the CIA believed as early as 1974 that "Israel already has produced nuclear weapons", Central Intelligence Agency, 'Prospects for Further Proliferation of Nuclear Weapons' (1974), 2 <<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB240/snle.pdf>> accessed 16 December 2014. See also, eg Leonard S Spector and Jacqueline R Smith, *Nuclear Ambitions: The Spread of Nuclear Weapons 1989-1990* (Westview Press 1990); Nuclear Non-Proliferation Project, 'Nuclear Proliferation Status Report July 1992' (1992); Hans M Kristensen and Robert S Norris, 'Global nuclear weapons inventories, 1945-2013' (2013) 69 *Bulletin of the Atomic Scientists* 75.

⁵⁴⁷ Treaty on the Non-Proliferation of Nuclear Weapons (1970).

⁵⁴⁸ UNSC Res 1695 (15 July 2006) UN Doc S/RES/1695; UNSC Res 1718 (14 October 2006) UN Doc S/RES/1718; UNSC Res 1874 (12 June 2009) UN Doc S/RES/1874; UNSC Res 2087 (22 January 2013) UN Doc S/RES/2087; UNSC Res 2094 (7 March 2013) UN Doc S/RES/2094.

⁵⁴⁹ France and China acceded in 1992.

⁵⁵⁰ Russia ratified the treaty in 1970; the UK ratified in 1968; the US ratified in 1970.

powers not to have acceded to or ratified the NPT⁵⁵¹ but also one of the few States not to have done so.⁵⁵²

IV.3.1 The case of the Democratic People's Republic of Korea

The DPRK signed the Non-Proliferation Treaty on September 12, 1985, before announcing it would withdraw on March 12, 1993 as a result of the resumption of joint US/South Korean “Team Spirit” exercises and IAEA demands to open military sites to inspection.⁵⁵³ Almost immediately, three P5 members issued a statement declaring that “[s]ince the NPT is an essential element of international peace and security, DPRK withdrawal from the NPT would constitute a serious threat to regional and international stability”⁵⁵⁴, prompting the Council to pass UNSC Res 825⁵⁵⁵ “reaffirming the crucial contribution which progress in non-proliferation can make to the maintenance of international peace and security”⁵⁵⁶ and calling upon the DPRK to reconsider its announcement. Despite suspending its decision to withdraw from the NPT, over the following year there was reluctance on the part of the DPRK to allow intervention in what it deemed sovereign affairs⁵⁵⁷ and it finally withdrew its membership from the IAEA in 1994 and, save for a deal brokered with the US,⁵⁵⁸ would have led to the withdrawal of the DPRK from the NPT⁵⁵⁹

⁵⁵¹ The DPRK acceded in 1985 before withdrawing in 2003.

⁵⁵² 93 States are signatories and 190 States have acceded; see <<http://disarmament.un.org/treaties/t/npt>> for a full list, accessed 16 December 2014

⁵⁵³ ‘Letter dated 12 March 1993 from the Minister for Foreign Affairs of the Democratic People’s Republic of Korea addressed to the President of the Security Council’ (12 March 1993) UN Doc S/25405, Annex.

⁵⁵⁴ ‘Letter dated 1 April 1993 from the Representatives of the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America addressed to the President of the Security Council’ (2 April 1993) UN Doc S/25515, Annex.

⁵⁵⁵ UNSC Res 825 (11 May 1993) UN Doc S/RES/825.

⁵⁵⁶ *ibid* preamble.

⁵⁵⁷ See eg numerous letters from the DPRK: ‘Letter dated 21 February 1994 from the Permanent Representative of the Democratic People’s Republic of Korea to the United Nations addressed to the Secretary-General’ (23 February 1994) UN Doc S/1994/204; ‘Letter dated 21 March 1994 from the Permanent Representative of the Democratic People’s Republic of Korea to the United Nations addressed to the Secretary-General’ (21 March 1994) UN Doc S/1994/319; ‘Letter dated 22 March 1994 from the Permanent Representative of the Democratic People’s Republic of Korea to the United Nations addressed to the Secretary-General’ (22 March 1994) UN Doc S/1994/327; ‘Letter dated 24 March 1994 from the Permanent Representative of the Democratic People’s Republic of Korea to the United Nations addressed to the Secretary-General’ (24 March 1994) UN Doc S/1994/337; ‘Letter dated 25 March 1994 from the Permanent Representative of the Democratic People’s Republic of Korea to the United Nations addressed to the Secretary-General’ (25 March 1994) UN Doc S/1994/344; ‘Letter dated 29 March 1994 from the Permanent Representative of the Democratic People’s Republic of Korea to the United Nations addressed to the Secretary-General’ (29 March 1994) UN Doc S/1994/358.

⁵⁵⁸ Agreed Framework between the United States of America and the Democratic People’s Republic of Korea (21 October 1994).

had it not been for the moratorium announced in the Agreed Framework. In 2003, however, the DPRK decided to withdraw from the NPT⁵⁶⁰ and has since not re-joined despite concerted efforts and significant pressure by the Council and its individual members.

After the first ballistic missile tests by the DPRK in 2006, although the Council stopped short of a Chapter VII resolution, it nonetheless condemned the launch of ballistic missiles and demanded that it suspend all activities related to its ballistic missile programme.⁵⁶¹ Three days after the DPRK launched its missiles into the Sea of Japan, India undertook its first test⁵⁶² of its Agni-III Intermediate-range ballistic missile with a more than 3,000km range and a payload weight of 1.5 tons;⁵⁶³ there was no Council condemnation, or even mention, of this launch at the Council meeting of July 15, 2006, despite direct reference during the discussion of UNSC Res 1540's prohibition of weapons and their delivery.⁵⁶⁴ The Council's first Chapter VII resolution on the DPRK⁵⁶⁵ was issued in response to its decision to carry out an underground nuclear test later that year and, in addition to condemning the nuclear test itself⁵⁶⁶ imposed an obligation on the DPRK to rejoin the NPT.⁵⁶⁷

UNSC Res 1874,⁵⁶⁸ following another DPRK nuclear test in 2009, reiterated much of the language and demands of its predecessor, again imposing the obligation on the DPRK to accede to a treaty it had decided to withdraw from;⁵⁶⁹ as Joyner has highlighted, “the Council's demand that the DPRK rejoin the NPT is the only example . . . of the Security Council demanding that a state re-accede to a treaty from which that state had duly withdrawn according to the treaty's terms.”⁵⁷⁰ Despite the irregularity of the measure, which has not been seen before or since the

⁵⁵⁹ UNSC Presidential Statement 64 (1994) UN Doc S/PRST/1994/64: “The Security Council takes note of the decision of the DPRK in the Agreed Framework to remain a party to the Treaty on the Non-Proliferation of Nuclear Weapons.”

⁵⁶⁰ For the full text of the withdrawal, see ‘The Statement of the Government of the Democratic People's Republic of Korea date 10 January 2003’ in ‘Letter dated 24 January 2003 from the Permanent Representative of the Democratic People's Republic of Korea to the United Nations addressed to the President of the Security Council’ (24 January 2003) UN Doc S/2003/91, Annex II.

⁵⁶¹ UNSC Res 1695 (15 July 2006) UN Doc S/RES/1695, ¶1-2.

⁵⁶² Indian Ministry of Defence Press Release, ‘Agni III take off successful’ (9 July 2006) *Press Information Bureau* <<http://pib.nic.in/newsite/erelease.aspx?relid=18775>> accessed 16 December 2014.

⁵⁶³ Indian Ministry of Defence Press Release, ‘Agni III launched successfully’ (12 April 2007) *Press Information Bureau* <<http://pib.nic.in/newsite/erelease.aspx?relid=26817>> accessed 16 December 2014.

⁵⁶⁴ US, UNSC Verbatim Record (15 July 2006) UN Doc S/PV.5490, 4.

⁵⁶⁵ UNSC Res 1718 (14 October 2006) UN Doc S/RES/1718.

⁵⁶⁶ *ibid* ¶1.

⁵⁶⁷ *ibid* ¶3.

⁵⁶⁸ UNSC Res 1874 (12 June 2009) UN Doc S/RES/1874.

⁵⁶⁹ *ibid* ¶5-6.

⁵⁷⁰ Joyner, ‘Legal Hegemon’ (n 51) 250.

DPRK example, this call for a return to the NPT has been reiterated against the DPRK as recently as 2013.⁵⁷¹

VI.3.2 *India and Pakistan*

Whilst the Council has been adamant for the DPRK to maintain its adherence to the NPT, there has been no such reaction to the nuclear statuses of India and Pakistan. Despite the apparent threat highlighted by the IAEA,⁵⁷² there has been no serious denouncement of India or Pakistan for their nuclear possession, attempts to construct a nuclear weapon or proliferation of delivery methods through missile and other technology. Notwithstanding the predictable protestations by both States,⁵⁷³ UNSC Res 1172,⁵⁷⁴ issued against India and Pakistan in the wake of their 1998 nuclear tests, is a relatively weak resolution by comparison to the forceful nature of the Council's reaction to the DPRK: it was not adopted under Chapter VII, it did not call for the dismantling of their existing weaponry, it did not impose any obligations or stipulations to join the NPT and condemned only the tests themselves, rather than the fact that either State had acquired nuclear weaponry. Far from condemning the test in 1974, which took place after the NPT came into force, "the United States in June 1974 proceeded to ship an instalment of previously approved uranium fuel to India's Tarapur reactor . . . [concluding] that the Indian test did not violate any agreement with the United States"⁵⁷⁵ and France "through its Atomic Energy Commission, sent a congratulatory message to the chairman of the Indian Atomic Energy Commission."⁵⁷⁶

UNSC Res 1540 was passed in response to the threat of illicit procurement of nuclear and nuclear delivery weaponry by non-State actors; however, despite a network of Pakistani agents⁵⁷⁷ selling clandestine nuclear information and components to numerous States including North

⁵⁷¹ UNSC Res 2094 (7 March 2013) UN Doc S/RES/2094, ¶3-4. This is particularly irrational when coupled with the fact that also in May 2009, India tested its nuclear-capable Agni-II ballistic missile, but once was left off the Council agenda despite discussions on the same topic – nuclear non-proliferation – in relation to the DPRK

⁵⁷² International Atomic Energy Agency, *Illicit Nuclear Trafficking: Collective Experience and the Way Forward* (IAEA 2008) 265: "The concealed nuclear arms programmes of Pakistan and India have pursued nuclear technology and materials abroad for decades through licit and illicit channels . . . [and t]he war-like situation between Pakistan and India contributes directly and indirectly to the flourishing of illicit nuclear trafficking in south and south-east Asia."

⁵⁷³ UNSC Verbatim Record (6 June 1998) UN Doc S/PV/3890, 28f.

⁵⁷⁴ UNSC Res 1172 (6 June 1998) UN Doc S/RES/1172.

⁵⁷⁵ George Perkovich, *India's Nuclear Bomb: The Impact on Global Proliferation* (California UP 2002) 184.

⁵⁷⁶ *ibid* 183.

⁵⁷⁷ See, eg IAEA (n 572) 103, where "[a]s far as the A.Q. Khan network is concerned, people from over 20 countries are involved."

Korea, Iran and Libya,⁵⁷⁸ allegedly with the complicity of Pakistani authorities,⁵⁷⁹ Pakistan has continued on its path to nuclear delivery proliferation with tests on nuclear-capable missile systems on a regular basis.⁵⁸⁰ Whilst Pakistan's two research reactors currently run on low-enriched uranium, which poses no weapons threat, highly Enriched Uranium does remain in Pakistan.⁵⁸¹ Civilian nuclear programs, too, have remained unaffected by the leak of information by the Khan network, with three currently operating nuclear reactors⁵⁸² in Pakistan and a further two due for completion in 2016, in addition to a recent \$6.5bn loan for the construction of twin nuclear power stations in Karachi.⁵⁸³ Such deals are in contradiction to the Guidelines⁵⁸⁴ of the Nuclear Suppliers Group,⁵⁸⁵ of which China is a member, which state that suppliers should not authorize the transfer of enrichment and reprocessing facilities if the recipient is not Party to the NPT⁵⁸⁶; Pakistan has never signed the NPT and therefore, although the Guidelines are not legally binding, China's defiance of the "fundamental principles"⁵⁸⁷ of an organisation created to

⁵⁷⁸ *ibid*: "the Pakistani scientist Abdul Qadeer Khan's network (known as the Khan Network) . . . [was] believed to have equipped the Islamic Republic of Iran, Libyan Arab Jamahiriya and the Democratic People's Republic of Korea with centrifuge equipment, as well as blueprints and the technical know-how needed to produce [Highly Enriched Uranium]."

⁵⁷⁹ Rob Crilly, 'AQ Khan claims Benazir Bhutto ordered nuclear sale' *The Telegraph* (London 17 September 2012) < <http://www.telegraph.co.uk/news/worldnews/asia/pakistan/9548300/AQ-Khan-claims-Benazir-Bhutto-ordered-nuclear-sale.html>> accessed 16 December 2014: in an interview with the Jang media group, Khan alleges "[t]he then Prime Minister Benazir Bhutto summoned me and names two countries which were to be assisted." James Astill, 'Musharraf knew I was selling secrets, says nuclear scientist' *The Guardian* (London 4 February 2004) <<http://www.theguardian.com/world/2004/feb/04/pakistan.jamesastill>> accessed 16 December 2014: Khan also stated to government investigators that General Pervez Musharraf had been "aware of everything."

⁵⁸⁰ Pakistan has tested its Babur nuclear capable cruise missile in 2005, 2007, 2009 and 2011. Babur (Hatf-VII), tested in 2012, is capable of carrying nuclear and conventional weaponry, in addition to possessing stealth technology. Hatf IX (Nasr) was last tested in late 2013: Pakistani Inter Services Public Relations Press Release, 'No. PR179/2013-ISPR' (5 November 2013) < https://www.ispr.gov.pk/front/t-press_release.asp?date=2013/11/5&print=1> accessed 16 December 2014.

⁵⁸¹ See, eg Matthew Bunn, 'Securing the Bomb 2010: Securing All Nuclear Materials in Four Years' (1 April 2010) 28 <http://www.nti.org/media/pdfs/Securing_The_Bomb_2010.pdf?_=1317159794> accessed 16 December 2014.

⁵⁸² The Karachi Nuclear Power Plant (live in 1971) and two at the Chasma Nuclear Power Plant (live in 2000 and 2011).

⁵⁸³ Farhan Bokhari and James Crabtree, 'China strengthens Pakistan ties with \$6.5bn loan for nuclear power' *Financial Times* (London 1 January 2014) <<http://www.ft.com/cms/s/0/4407fcee-72e9-11e3-b05b-00144feabdc0.html>> accessed 16 December 2014.

⁵⁸⁴ IAEA 'Guidelines for the Export of Nuclear Material, Equipment and Technology' Series, published under IAEA Doc INFCIRC/254/Rev.xxx, Part 1.

⁵⁸⁵ IAEA 'The Nuclear Suppliers Group: Its Origins, Role and Activities' (4 December 2012) INFCIRC/539/Rev.5, 1: "The Nuclear Suppliers Group (NSG) is a group of nuclear supplier countries that seeks to contribute to the non-proliferation of nuclear weapons through the implementation of two sets of Guidelines for nuclear exports and nuclear-related exports."

⁵⁸⁶ IAEA 'Communication Received from the Permanent Mission of the United States of America to the International Atomic Energy Agency regarding Certain Member States' Guidelines for the Export of Nuclear Material, Equipment and Technology' (12 November 2012) INFCIRC/254/Rev.11/Part 1a, ¶6(a)(i).

⁵⁸⁷ *ibid* ¶1.

counter the proliferation of nuclear weapons undermines its position when addressing nuclear proliferation elsewhere, notably on the Security Council.

Neighbouring India has similarly made no efforts to participate in the NPT⁵⁸⁸ and only gradually accepted opening its nuclear facilities to the International Atomic Energy Agency (IAEA).⁵⁸⁹ Despite over 20 instances of ballistic missile testing since 2006 alone⁵⁹⁰ there has been no equal pressure on India to dismantle its nuclear program, to desist from missile testing or to comply with legislative encroachment of the Council on the international legal field by signing the NPT.⁵⁹¹ Moreover, India has signed nuclear deals with numerous States, including most of the P5 members – France,⁵⁹² the US,⁵⁹³ Russia⁵⁹⁴ and the UK⁵⁹⁵, as well as ongoing negotiations on a bilateral Civil Nuclear Agreement with others.⁵⁹⁶ India's pursuit of increased nuclear technology cannot be argued to be purely for pacific reasons,⁵⁹⁷ not only did Russia deliver its

⁵⁸⁸ It remains a non-member of the NPT and continues to vote against relevant clauses in General Assembly resolutions that stress the need for nuclear States to accede, see eg voting against UNGA Res 67/59 (3 December 2012) UN Doc A/RES/67/59, ¶2 “calling upon all States not parties to the Treaty to accede as non-nuclear-weapon States to the Treaty promptly and without any conditions” (UNGA Verbatim Record (3 December 2012) UN Doc A/67/PV.48, 21.

⁵⁸⁹ Although six nuclear reactors were brought under safeguards of the IAEA between 1971 and 1994, the *Agreement Between the Government of India and the IAEA for the Application of Safeguards to Civilian Nuclear Facilities* was only approved in 2008 by the IAEA Board of Governors, a decade after the most recent nuclear weapons test, and aimed to gradually bring in a total of 14 reactors under Agency safeguards. See, Mohamed ElBaradei, ‘Introductory Statement to the Board of Governors’ (Vienna, 1 August 2008) <<http://www.iaea.org/newscenter/statements/introductory-statement-board-governors-28>> accessed 16 December 2014.

⁵⁹⁰ Agni I was tested October 2007, November 2010, December 2011, July 2012 and November 2013; Agni II was tested May 2009, November 2009, May 2010, September 2011, August 2012 and April 2013; Agni III was tested July 2006, April 2007, May 2008, February 2010, September 2012 and December 2013; Agni IV was tested November 2011, September 2012 and January 2014; Agni V was tested April 2012 and September 2013.

⁵⁹¹ In fact, somewhat contradictorily, the P5 members have furnished India with components, nuclear weaponry and even technical knowledge through cooperation on the construction of nuclear technology throughout the period that the P5 members have been reducing their nuclear cache.

⁵⁹² ‘Nicholas Sarkozy and Manmohan Singh in nuclear deal’ *BBC News* (London, 6 December 2010) <<http://www.bbc.co.uk/news/world-south-asia-11923836>> accessed 16 December 2014.

⁵⁹³ ‘US-India: Civil Nuclear Cooperation’, US Department of State <<http://www.state.gov/p/sca/c17361.htm>> accessed 16 December 2014.

⁵⁹⁴ Most recently, Russia announced it would build 16 nuclear reactors in India, in addition to the existing 2 in the process of construction in Tamil Nadu. See, ‘Russia signs India nuclear reactor deal’ *BBC News* (London, 12 March 2010) <<http://news.bbc.co.uk/1/hi/8561365.stm>> accessed 16 December 2014.

⁵⁹⁵ Nicholas Watt, ‘Britain to allow export of civil nuclear technology to India’ *The Guardian* (London, 28 July 2010) <<http://www.theguardian.com/world/2010/jul/28/britain-nuclear-technology-india>> accessed 16 December 2014.

⁵⁹⁶ Including South Korea in 2011, Canada in 2012 and Australia in 2012.

⁵⁹⁷ On land, India has test-launched at least two strategic missiles on numerous occasions since the start of the decade: the Agni IV was launched three times – in 2011, 2012 and 2013 – and is capable of achieving a range of 4,000km whilst carrying a nuclear warhead weighing one tonne; the Agni V missile was tested in 2012 and 2013 and, an intercontinental ballistic missile, is capable of carrying nuclear payloads to a range of more than 5,000km. Following the success of the Agni-V missile, the Indian Defence Ministry plans to soon test the more than 6,000km

second nuclear-powered submarine to India in 2012,⁵⁹⁸ the P5 member is alleged to have “continued to be the main supplier of technology and equipment to India’s . . . naval nuclear propulsion programs.”⁵⁹⁹ India leads even some P5 Council Members in terms of the breadth of their nuclear capabilities.⁶⁰⁰

India’s proliferation of weaponry is in direct and blatant conflagration of UNSC Res 1540⁶⁰¹ – a Chapter VII resolution – issued long before its most recent tests were carried out,

[a]ffirming that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery [defined for the purpose of this resolution only as missiles, rockets and other unmanned systems capable of delivering nuclear, chemical, or biological weapons, that are specially designed for such use] constitutes a threat to international peace and security . . .⁶⁰²

In addition to the Council members of US,⁶⁰³ Russian Federation⁶⁰⁴ and China⁶⁰⁵ continuing to flout this affirmation and concurrent Pakistani nuclear development, India has been repeatedly

range Agni-VI with the goal of eventually constructing a 10,000km range inter-continental Ballistic missile. These tests were and continue to be carried out against the backdrop of India’s air force – the fourth largest in the world – containing three nuclear-weapon capable fleets, one of which, designed jointly by France and Britain, was nuclear-capable when deployed by those countries.

⁵⁹⁸ Gardiner Harris, ‘World’s Biggest Arms Importer, India Wants to Buy Local’ *The New York Times* (New York, 6 March 2014) <http://www.nytimes.com/2014/03/07/business/international/worlds-biggest-arms-importer-india-wants-to-buy-local.html?hpw&rref=business&_r=0> accessed 16 December 2014.

⁵⁹⁹ Central Intelligence Agency, ‘Unclassified Report to Congress on the Acquisition of Technology Relating to Weapons of Mass Destruction and Advanced Conventional Munitions, 1 July Through 31 December 2003’ (2003), 9 <https://www.cia.gov/library/reports/archived-reports-1/july_dec2003.htm> accessed 16 December 2014.

⁶⁰⁰ India has successfully achieved a nuclear triad: air-based, land-based and sea-based nuclear weapon deployment capacities. The US, Russia and China are all accepted as current nuclear triad powers; France and the UK, however, have phased out certain nuclear capabilities since the end of the Cold War and do not have deployable nuclear weaponry on all three fronts.

⁶⁰¹ UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540.

⁶⁰² *ibid.*

⁶⁰³ The US maintained over 5,000 nuclear warheads in 2010, down from over 30,000 in 1967 and has made concerted efforts to increase transparency and reduce the number of weapons held in its stockpile. Nonetheless, it continues to proliferate its missile systems capable of delivering nuclear payloads- Lockheed Martin Press release, ‘Lockheed Martin-Built Trident II D5 Missile Achieves a Total of 148 Successful Test Flights Since 1989’ (24 September 2013) <<http://www.lockheedmartin.co.uk/us/news/press-releases/2013/september/924-ss-FBM.html>> accessed 16 December 2014.

⁶⁰⁴ Despite a US-Russian treaty limiting the numbers of intercontinental ballistic missiles in their respective fleets, it plans to increase its strategic nuclear forces by 100% by 2020. See, ‘Russia to fully renew nuclear forces by 2020’ *Russia Today* (Moscow, 22 September 2014) <rt.com/politics/189604-russia-nuclear-2020-mistral> accessed 16 December 2014. Moreover, in March 2014, Russia tested its nuclear-capable RS-12M Topol missile in Kazakhstan. The US response was simply that they had received proper notice, ‘Russia test-fires ICBM amid tension over Ukraine’ *Reuters* (Moscow, 4 March 2014) <<http://uk.reuters.com/article/2014/03/04/uk-russia-missile-idUKBREA2320520140304>> accessed 16 December 2014.

bolstered by Council Member State support for its pacific nuclear and defensive weapon delivery programs.

VI.4 Conclusions

The Council appears to treat States differently against the same independent standards both with respect to conflicts and other threats to the peace such as nuclear proliferation. In some situations, it would appear, the Council appears more forthcoming in its efforts to direct attention and quell incidents of violence or potential threats to the peace. However, such consensus is not immediately forthcoming in all situations and the example of Syria highlights these difficulties and those of political motivations that appear to be behind the decision-making process.⁶⁰⁶ Whilst there can be no definitive means of measuring equality of the Council's attention to perceived threats to the international peace, a clear indication is the amount of time expended, effort exerted and decisions taken in response to any given issue.

During a recent discussion on the rule of law at the Council level, emphasis was made on the necessity for the Council to hold itself to the same standards it imposes upon States. The Russian Federation identified that “in adhering to standards of international law in its activity, [the Council] sets an example by complying with the law.”⁶⁰⁷ However, not only have Council members failed to adhere to the same standards they impose on other States, there has been no explanation for the seemingly contradictory stances the Council has taken in, on one hand, the Indian and Pakistani situations and, on the other, the case of North Korea. It remains unclear in what way the aspirations of India and Pakistan to procure and expand both civilian and military capacities within the framework of nuclear powers and the very same of the DPRK might differ. Nonetheless, the two situations have been approached by the Council in wildly different

⁶⁰⁵ China has been elusive about its exact nuclear arsenal. However, it last publicly tested its nuclear-capable missile capabilities in January 2014 – the Dongfeng-31. See, Minnie Chan, ‘China’s nuclear missile drill seen as warning to US not to meddle in region’ *South China Morning Post* (23 January 2014) <<http://www.scmp.com/news/china/article/1411310/chinas-nuclear-missile-drill-seen-warning-us-not-meddle-region>> accessed 16 December 2014.

⁶⁰⁶ See eg UK representative’s assertion that Russia and China “have chosen to put their national interests ahead of the lives of millions of Syrians”, UNSC Verbatim Record (19 July 2012) UN Doc S/PV.6810, 3 and the counter-claim that the “Pharisees [of Western Powers] have been pushing their own geo-political intentions”, UNSC Verbatim Record (19 July 2012) UN Doc S/PV.6810, 8.

⁶⁰⁷ Russia, UNSC Verbatim Record (29 June 2010) UN Doc S/PV.6347, 22. See also Liechtenstein, UNSC Verbatim Record (29 June 2010) UN Doc S/PV.6347 (Resumption 1), 6, which remained “convinced that the best way for the Security Council to promote international law and the rule of law is to lead by example.”

manners. The insistence on continued sanctions against the DPRK,⁶⁰⁸ its vilification by the Council for actions that have been carried out with impunity by other States and the imposition of standards upon the DPRK that are not imposed on other States, including Council members themselves, surely points towards an unequal application of the law in the decisions taken by the Council.

⁶⁰⁸ First imposed under UNSC Res 1718 (14 October 2006) UN Doc S/RES/1718 and renewed or extended under UNSC Res 2087 (22 January 2013) UN Doc S/RES/2087 and UNSC Res 2094 (7 March 2013) UN Doc S/RES/2094.

CHAPTER VII

THE PREDICTABILITY PARADOX: THE AVOIDANCE OF ARBITRARINESS, SUPREMACY OF THE LAW, AND FAIRNESS IN THE APPLICATION OF THE LAW

I cannot believe that the Council, under any circumstances, would not assume its responsibility under the Charter of maintaining international peace and security. Nor can I believe that the Council would delay acting to put an end to a tragedy that endangers the lives of thousands of people and undermines the foundation of the edifice constructed by the world in order to avert the recurrence of violence and cruel wars.⁶⁰⁹

VII.1 Introduction

If it has been shown that equality is the identification and addressing of a threat to the international peace by the Council, the corresponding, subsequent component is predictability, which dictates that States should be capable of reasonably anticipating the Council's response to any of its given actions or lack thereof. It would logically follow that if there was a consistent practice on the part of the Security Council to respond to certain threats in a particular manner – for example, certain violations of international human right law – then States may have no basis upon which to claim ignorance or amnesty in the event that the Council took action against that violating State. Similarly, where certain actions have not historically been seized upon by the Council, a State may reasonable presume that such behaviour is acceptable. In short, a clear pattern of action should be evident to avoid allegation of arbitrariness⁶¹⁰ and the undermining of a legal order that equally applies to all Member States.

Whilst this is a difficult standard to uphold for the Council, it is not excessively so, and ties into the component of transparency, where the work of the Council should be clear and transparent to all interested parties. A bespoke approach may not immediately necessitate different approaches to similar threats; nonetheless, each threat must be taken on its merits. Accordingly, there should be an explanation as to why the Council has chosen to follow the same course charted previously, or an explanation as to why the situation at hand has dictated a

⁶⁰⁹ Egypt, UNSC Verbatim Record (26 March 2003) UN Doc S/PV.4726, 13.

⁶¹⁰ The absence of consistency and predictability.

departure from precedential norms. Moreover, a clear legal basis must be evident in every situation as to why the Council has chosen to take action – or not – and what, if anything, differentiates this potential threat from other State actions that have not been perceived as such.

VII.2 A clear pattern of action

Although in the vast majority of cases consensus is reached on the Council,⁶¹¹ this does not immediately equate to impartiality or a lack of bias on the Council; if the fact that P5 members “have mostly accompanied the consensus or the enabling majorities adopting the resolutions may be a product of their role as the pen holders on most Council agenda items”⁶¹² as gatekeepers of the Council, the accusation may be levelled that the predictability of Security Council resolutions can, at its most basic level, be said to correspond with the foreign policies of the voting States on the Council at any given time. States are more likely to vote in favour of resolutions that are compatible with their national interests and, conversely, more likely to vote against the passing of a resolution that is incompatible with such a trajectory; if only resolutions and discussions that conform to these policies are tabled, there is sure to be arbitrary behaviour. With this in mind, it is difficult to approach the Council as a monolithic entity that acts in unison on all counts and that shares all goals as one; frequently, it can be found that the principles that States defend through the use or threat of the veto shift dramatically and can even be interchanged between P5 members depending on the subject under discussion.

VII.2.1 Respect for national sovereignty

As far back as 1993, China voiced its opposition to interfering in the domestic affairs of a State deeming the measures entailed within Council UNSC Res 841⁶¹³ on Haiti “warranted only as a result of the unique and exceptional situation in Haiti, and therefore should not be regarded as constituting any precedent for the future.”⁶¹⁴ In fact, it was made quite clear that “[t]he Chinese delegation, as its consistent position, does not favour the Security Council’s handling matters which are essentially internal affairs of a Member State, nor does it approve of resorting lightly

⁶¹¹ 93.5% of resolutions adopted since 2000 have been adopted by consensus. See, Security Council Report, ‘In Hindsight: Consensus in the Security Council’ (2013) <http://www.securitycouncilreport.org/monthly-forecast/2014-01/in_hindsight_consensus_in_the_security_council.php> accessed 16 December 2014.

⁶¹² *ibid.*

⁶¹³ UNSC Res 841 (16 June 1993) UN Doc S/RES/841.

⁶¹⁴ China, UNSC Verbatim Record (16 June 1993) UN Doc S/PV.3238, 21 (on Resolution 841, *ibid.*)

to such mandatory measures as sanctions by the Council.”⁶¹⁵ This stance suggests that there are principles upheld by the Chinese delegation on a non-arbitrary basis and that, as a rule, interference in the domestic situations of States should not be the immediate responsibility of the Security Council. This stance certainly appears to be shared by Russia in some respects and both Russia and China have displayed strong support for the principle of national sovereignty. Such support often determines when each makes use of the veto power to block Security Council resolutions and therefore, implicitly, when they acquiesce or agree to intervention under Chapter VII of the Charter.

In the case of Zimbabwe, Russia’s took the view that a draft resolution attempting to impose targeted sanctions and an arms embargo on the Mugabe regime in the aftermath of his re-election in 2008 “represent[ed] nothing but an attempt by the Council to interfere in the internal affairs of States, contrary to the Charter.”⁶¹⁶ China took a similar tack, stating that it “has always believed that negotiation and dialogue are the best approach to solving problems on the international level.”⁶¹⁷ Similarly, during the debate on draft resolution S/2007/14⁶¹⁸ on the situation in Myanmar, China noted that the country was “faced with a series of grave challenges relating to refugees, child labour, HIV/AIDS, human rights and drugs.”⁶¹⁹ For this very reason, it found that the matter was one that did not meet its threshold of posing a threat to international peace; stating that no one would dispute that Myanmar was faced with a series of grave challenges, China found that similar problems existed in many other countries as well.⁶²⁰ It would seem, then – at least in the eyes of the Chinese delegate – that the issues faced by Myanmar did not meet the threshold of a threat to peace and security, after having been examined within the wider scope of domestic troubles faces by comparable countries across the globe. Russia also shared this opinion, finding that Myanmar was not suitable for consideration

⁶¹⁵ *ibid.*

⁶¹⁶ UNSC Verbatim Record (11 July 2008) UN Doc S/PV.5933, 9.

⁶¹⁷ *ibid* 13. Russia continued to state that “[I]ghtly using or threatening to use sanctions is not conducive to solving problems . . . [and that b]y adopting a resolution imposing sanctions on Zimbabwe now, the Security Council would unavoidably be interfering with the negotiating process. That would lead to a further deterioration of the situation.”

⁶¹⁸ UNSC Draft Res (12 January 2007) UN Doc S/2007/14.

⁶¹⁹ UNSC Verbatim Record (12 January 2007) UN Doc S/PV.5619, 3.

⁶²⁰ China, *ibid* 3: “If, because Myanmar is encountering this or that problem . . . it is to be arbitrarily labelled as a prominent or potential threat to regional security, . . . then the situations in all other 191 United Nations Member States may also need to be considered by the Security Council . . . [which] is obviously neither logical nor reasonable.”

by the Council.⁶²¹ This supports the assertion of non-arbitrary behaviour; both the Russian and Chinese delegations have examined the facts of the situation in Zimbabwe and Myanmar and reached the reasoned conclusion that the situation did not pose a threat to the region.

This stance was also the reasoning behind both Russia and China's decisions to veto three resolutions⁶²² relating to Syria. Russia, for its part, found that "proposals for wording on the non-acceptability of foreign military intervention were not taken into account"⁶²³ and emphasised that it "simply cannot accept a document, under Chapter VII of the Charter of the United Nations, that would open the way for the pressure of sanctions and later for external military involvement in Syrian domestic affairs."⁶²⁴ China maintained this posture, advocating that the international community "fully respect Syria's sovereignty, independence and territorial integrity"⁶²⁵ and highlighting that "sovereign equality and non-interference in the internal affairs of other countries are the basic norms governing inter-State relations enshrined in the Charter of the United Nations."⁶²⁶ Both Russia and China faulted these resolutions for material omissions or generalisations, their "unbalanced content [seeking] to put pressure on only one party"⁶²⁷ and ignoring "that the radical opposition no longer hides its extremist bent and is relying on terrorist tactics . . ."⁶²⁸; conversely, the US, UK and France advocated "changing the situation on the ground for better"⁶²⁹, invoking Chapter VII and threatening "the only party with heavy weapons, the Syrian regime, with sanctions if it continued to use those weapons brutally against its own cities and citizens."⁶³⁰

The views expressed by China and the Russian Federation on the subject of Syria – which "consistently maintained that the future and fate of Syria should be independently decided by the Syrian people, rather than imposed by outside forces"⁶³¹ – mirrors the stance held for decades that "the United States does not believe that the Security Council or the General

⁶²¹ Russia, *ibid* 6.

⁶²² UNSC Draft Res (4 October 2011) UN Doc S/2011/612; UNSC Draft Res (4 February 2012) UN Doc S/2012/77; UNSC Draft Res (19 July 2012) UN Doc S/2012/538.

⁶²³ Russia, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627, 5.

⁶²⁴ Russia, UNSC Verbatim Record (19 July 2012) UN Doc S/PV.6810, 8.

⁶²⁵ China, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627, 5; see also, China, UNSC Verbatim Record (4 February 2012) UN Doc S/PV.6711, 9.

⁶²⁶ China, UNSC Verbatim Record (19 July 2012) UN Doc S/PV.6810, 13.

⁶²⁷ *ibid*.

⁶²⁸ Russia, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627, 4.

⁶²⁹ UK, UNSC Verbatim Record (19 July 2012) UN Doc S/PV.6810, 2.

⁶³⁰ US, *ibid* 10.

⁶³¹ China, *ibid* 13.

Assembly should be in the business of inserting themselves into issues that the negotiating partners have decided will be addressed . . .”⁶³² This commitment to the sovereignty and right to self-defence is, the US claims, at the foundation of its decision to use its veto powers on fourteen separate occasions since 1990 alone, all on “The situation in the Middle East, including the Palestinian question” or “The situation in the occupied Arab territories”.⁶³³

The meandering support of the P5 for territorial integrity and sovereignty is thus undermined by certain exceptions to the supposedly unshakeable values at the heart not only of the UN Charter but of the Council’s self-proclaimed behaviour itself. The capacity of States to transpose their values so readily undermines the supremacy of the law and highlights the possibility of a double-standard on the Council. It would appear that all three P5 members of the US, China and Russia are willing to momentarily overlook the principles of sovereignty when the situation encroaches on their interests or the interests of allies, before reverting to an original stance of non-intervention. As the following sub-section will examine, humanitarian intervention has also been cited as a reason for the suspension of State sovereign rights.

VII.2.2 Humanitarian intervention

Whilst P5 States purport to be in favour of territorial integrity and sovereignty of States,⁶³⁴ the reality is at times starkly different, humanitarian intervention has been cited as a valid reason to suspend the associated rights of State sovereignty, as the example of NATO intervention in Kosovo clearly highlights. Operation Allied Force proceeded on 24th March 1999 without any

⁶³² US, UNSC Verbatim Record (21 March 1997) UN Doc S/PV.3756, 5. See also, US, UNSC Verbatim Record (5 October 2004) UN Doc S/PV.5051, 2, where “[t]he Council ha[d] before it yet another draft resolution regarding the Middle East situation, and once again the draft resolution is lopsided and unbalanced. It is dangerously disingenuous because of its many material omissions . . . Consider first what the draft resolution says and then what it fails to say . . . The draft resolution is totally lacking in balance.”

⁶³³ UNSC Draft Res (31 May 1990) UN Doc S/21326; UNSC Draft Res (17 May 1995) UN Doc S/1995/394; UNSC Draft Res (7 March 1997) UN Doc S/1997/199; UNSC Draft Res (21 March 1997) UN Doc S/1997/241; UNSC Draft Res (27-8 March 2001) UN Doc S/2001/270; UNSC Draft Res (14-5 December 2001) UN Doc S/2001/1199; UNSC Draft Res (20 December 2002) UN Doc S/2002/1385; UNSC Draft Res (16 September 2003) UN Doc S/2003/891; UNSC Draft Res (14 October 2003) UN Doc S/2003/980; UNSC Draft Res (25 March 2004) UN Doc S/2004/240; UNSC Draft Res (5 October 2004) UN Doc S/2004/783; UNSC Draft Res (13 July 2006) UN Doc S/2006/508; UNSC Draft Res (11 November 2006) UN Doc S/2006/878; UNSC Draft Res (18 February 2011) UN Doc S/2011/24.

⁶³⁴ See eg China, UNSC Verbatim Record (15 June 2009) UN Doc S/PV.6143, 5: “China has always maintained that all States should abide by the United Nations Charter and the norms of international law. Our position on the principle of national sovereignty and territorial integrity has been consistent and clear”; US, *ibid*: “The United States would like to reaffirm once again in this Chamber its commitment to the territorial integrity and sovereignty of Georgia within its internationally recognized borders.”

explicit, or implicit, Security Council authorisation, leading to condemnation by the Russian Federation of “aggression against a sovereign State . . . which was undertaken in violation of the United Nations Charter and in circumvention of the Security Council.”⁶³⁵ Two days later, a Council resolution co-sponsored by Belarus and the Russian Federation⁶³⁶ attempting to deem the “use of force by NATO against the Federal Republic of Yugoslavia . . . a threat to international peace and security”⁶³⁷ under Chapter VII failed to be adopted due to a failure to reach the required majority in accordance with the Charter;⁶³⁸ the bottom line – there was insufficient volition on the part of the Council members to condemn a breach of sovereignty. In fact, Council practice went even further; during discussions on the defeated resolution, NATO’s unilateral response was deemed to be “completely justified”⁶³⁹ “as an exceptional measure to prevent an overwhelming humanitarian catastrophe”⁶⁴⁰ and actions that “respond to Belgrade’s violation of its international obligations under the resolutions which the Security Council has adopted under Chapter VII.”⁶⁴¹ Moreover, the subsequent resolutions that emanated from the Council⁶⁴² urging parties to cease violence passed with no negative votes⁶⁴³ despite failing to mention the NATO transgression of the UN Charter.⁶⁴⁴ The Council had openly accepted the military intervention of a third party, in clear contravention of the UN Charter.

With the NATO intervention having successfully bypassed the Council, avenues to circumvention were open to Council members that could not find support within the Council to pursue their own motivations either as a separate alliance or unilaterally. On 20th March 2003,

⁶³⁵ Russia, UNSC Verbatim Record (10 June 1999) UN Doc S/PV.4011, 7; see, also China, *ibid* 8, reiterating the same sentiment.

⁶³⁶ UNSC Draft Res (26 March 1999) UN Doc S/1999/328.

⁶³⁷ *ibid* preamble.

⁶³⁸ UN Charter (1945), art 27(3) states the need for an affirmative vote of 9 members; UNSC Draft Res S/1999/328 gained 3 votes for and 12 abstentions.

⁶³⁹ US, UNSC Verbatim Record (26 March 1999) UN Doc S/PV.3989, 5.

⁶⁴⁰ UK, *ibid* 7.

⁶⁴¹ France, *ibid*. France’s argument was that since previous resolutions has been adopted under Chapter VII (UNSC Res 1160 (1998), UNSC Res 1199 (1998) and UNSC Res 1203 (1998)), NATO intervention was legitimate.

⁶⁴² UNSC Res 1239 (14 May 1999) UN Doc S/RES/1239; UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244.

⁶⁴³ China abstained on both.

⁶⁴⁴ There is much authorship on the legality of the NATO intervention in Kosovo that was eventually found by The Independent International Commission on Kosovo to be “illegal but legitimate”, Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000) 4. See also Bruno Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 EJIL 1; Noam Chomsky, *The New Military Humanism: Lessons from Kosovo* (Pluto 1999); Mary Ellen O’Connell, ‘The UN, NATO, and International Law after Kosovo’ (2000) 22(1) Hum Rts Q 57.

against strong opposition from the three non-contributing members of the P5⁶⁴⁵ and other UN members⁶⁴⁶, the US and allied countries, including the UK, intervened militarily in Iraq under the pretence of humanitarian reasons. Although an *ex post facto* Chapter VII resolution⁶⁴⁷ can be argued to have gone some way in legitimising the intervention – if only by acknowledgement and omission of its condemnation along the lines of the Kosovo example – and another later “recognising the specific authorities, responsibilities, and obligations under applicable international law of [the US and UK] as occupying powers under unified command”⁶⁴⁸, the intervention remains one of the most controversial moves in recent Council history, harking back to an era during the Cold War stalemate when direct inter-State negotiations overshadowed and undermined the Council.⁶⁴⁹

Most recently, with Syria, too, there were ruminations of unilateral action in the aftermath of the reports of use of chemical weapons by the Assad regime. The US has consistently maintained that the use of these weapons was a “red line” that Syria would not be permitted to cross without repercussions.⁶⁵⁰ As such, it was, by the US government’s own admission, “[i]n part because of

⁶⁴⁵ Russia called the intervention an “unprovoked military action . . . in violation of international law and in circumvention of the Charter” (UNSC Verbatim Record (26 March 2003) UN Doc S/PV.4726 (Resumption 1), 26); China saw the action as “a violation of the basic principles of the Charter of the United Nations and of international law” (ibid 28); France felt that the “conflict will be fraught with consequences for the future” (ibid).

⁶⁴⁶ A total of 67 non-Council member States (Albania, Algeria, Argentina, Australia, Belarus, Brazil, Canada, Colombia, Costa Rica, Czech Republic, Cuba, Dominican Republic, Egypt, El Salvador, Ethiopia, the Federated States of Micronesia, Georgia, Greece, Guatemala, Honduras, Iceland, India, Indonesia, the Islamic Republic of Iran, Iraq, Jamaica, Japan, Jordan, Kuwait, Kyrgyzstan, the Lao People’s Democratic Republic, Latvia, Lebanon, the Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Malaysia, Marshall Islands, Mauritius, Mongolia, Morocco, New Zealand, Nicaragua, Norway, Palestine, Poland, Republic of Korea, Saudi Arabia, Singapore, Slovakia, South Africa, Sri Lanka, Sudan, Switzerland, Thailand, The former Yugoslav Republic of Macedonia, Timor-Leste, Tunisia, Turkey, Uganda, the United Republic of Tanzania, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen and Zimbabwe) requested to be invited to participate in the first discussion of the Council after the invasion of Iraq; criticism of the unilateral action was clear from all speakers. See eg statements by the representatives of Malaysia (UNSC Verbatim Record (26 March 2003) UN Doc S/PV.4726, 8), Algeria (ibid 10), Indonesia (ibid 19), South Africa (ibid 20) and Brazil (ibid 28).

⁶⁴⁷ UNSC Res 1472 (28 March 2003) UN Doc S/RES/1472.

⁶⁴⁸ UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483, preamble. UNSC Res 1511 (16 October 2003) UN Doc S/RES/1511 further legitimised the occupying powers, reaffirming the temporary Coalition Provisional Authority, the interim administration and calling for a political timetable.

⁶⁴⁹ For example, the Cuban missile crisis of 1962 was averted due to an agreement between US President Kennedy and USSR leader Khrushchev with the assistance of UN Secretary-General U Thant, not the Council.

⁶⁵⁰ Barack Obama, ‘Remarks by the President to the White House Press Corps’ (Washington DC, 20 August 2012): “We have been very clear to the Assad regime, but also to other players on the ground, that a red line for us is we start seeing a whole bunch of chemical weapons moving around or being utilized. That would change my calculus. That would change my equation.” See also, ‘Remarks by President Obama and Prime Minister Reinfeldt of Sweden in Joint Press Conference’ (Rosenbad, 4 September 2013), where President Obama stated that “Congress set a red line when it indicated that -- in a piece of legislation titled the Syria Accountability Act -- that some of the horrendous things that are happening on the ground there need to be answered for.”

the credible threat of U.S. military action, as well as constructive talks that I had with President Putin . . . [that t]he Assad regime has now admitted that it has these weapons, and even said they'd join the Chemical Weapons Convention, which prohibits their use"⁶⁵¹ – a unilateral show of force by the US, in circumvention of the Security Council, in conjunction with inter-State diplomacy away from the UN, has lead the way to the most realistic prospects of solving the crisis in Syria. Such military action clearly had no basis in the UN Charter and the threat of its use by a P5 member of the Security Council, just as with Kosovo and Iraq before it, undermines not only the legitimacy of the Council but also its adherence to the international rule of law.

Three courses of action have been displayed in recent decades on the part of the Security Council with respect to humanitarian intervention. The first, exemplified by NATO intervention in Kosovo and US/UK-led intervention in Iraq, is unilateral intervention in the absence of explicit Chapter VII Council mandates, unequivocally contrary to the UN Charter; the second, exemplified by the authorised NATO interventions in the Former Yugoslavia and Libya, is intervention for humanitarian reasons with an explicit Chapter VII resolution from the Council, acting in accordance with the procedure of the Charter; and the third, typified by the situation in Syria, is that of the Council failing to reach any agreement on the course forwards beyond rhetoric on the Council⁶⁵² due to a lack of volition on the part of the Council members at the domestic level.⁶⁵³ There cannot be said to exist a pattern of behaviour in the humanitarian intervention record of the Council; nor can it be argued that the Council has evolved in its approach from one of impunity to one of adherence to the rule of law, or vice versa, since there

⁶⁵¹ Barack Obama, 'Remarks by the President in Address to the Nation on Syria' (Washington DC, 10 September 2013).

⁶⁵² As previously discussed, resolutions UNSCR Res 2118 (2013) and UNSCR Res 2139 (2014) were not adopted under Chapter VII, despite being strongly worded. There is no threat of action to be taken under Articles 40 and 41 of the UN Charter, which would be impossible without the acquiescence of Russia and China, both of which were the reason for the original omission of any Chapter VII language. In short, there seems not even the slightest chance of Chapter VII repercussions to the Syrian situation.

⁶⁵³ The UK Parliament voted down a motion to respond to the crisis in Syria that "may, if necessary, require military action that is legal, proportionate and focused on saving lives" by 285-272, House of Commons Votes and Proceedings (London, 29 August 2013) <<http://www.publications.parliament.uk/pa/cm201314/cmvote/130829v01.htm>> accessed 16 December 2014; although the Congressional vote was postponed by President Barack Obama, according to an NBC News/Wall Street Journal poll, 58% of Americans wanted the US Congress to vote against a resolution authorizing military action in Syria in late 2013. See NBC News/Wall Street Journal Survey (Hart Research Associates/Public Opinion Strategies Study #13340) (New York, 5-8 September 2013) <<http://online.wsj.com/public/resources/documents/WSJpoll09052013.pdf>> accessed 16 December 2014; 64% of the French population were against a military intervention against the Assad regime. See, 'Sondage. Syrie: 64% de Français sont contre une intervention française' *Le Parisien* (Paris, 30 Aug 2013) <<http://www.leparisien.fr/politique/syrie-64-des-francais-contre-une-intervention-francaise-30-08-2013-3093841.php>> accessed 16 December 2014.

is no chronological evidence to support this claim. The Council chose to intervene in Bosnia/Herzegovina conflict from 1991 onwards,⁶⁵⁴ then failed to do so in Rwanda prior to a genocide in 1994,⁶⁵⁵ before acquiescing to NATO intervention in Kosovo without authorisation in 1999, legitimising the Iraqi invasion by multinational forces after the fact, intervening in Libya in 2011, whilst failing to do so in Syria until today. The Council's record of intervention on humanitarian grounds is seemingly peppered with inconsistencies.

VII.3 Civilian nuclear programs: an arbitrary standard?

The case of Iran's nuclear program also highlights an arbitrary and unpredictable response by the Council. Iran has always maintained that its pursuit of nuclear technology is entirely for civilian purposes and non-militarily motivated due to both treaty and religious obligations.⁶⁵⁶ To date, there has been no conclusive IAEA evidence of any nuclear weapons constructed or possessed by Iran; the stance taken by the IAEA, despite credible information that "Iran has carried out activities that are relevant to the development of a nuclear explosive device"⁶⁵⁷ is one of ambiguity – there is no evidence one way or the other.⁶⁵⁸ Likewise, no intelligence points in that

⁶⁵⁴ Beginning with UNSC Res 713 (25 September 1991) UN Doc S/RES/713, numerous resolutions emerged from the Council authorising and extending NATO's mandates as well as imposing sanctions. See eg UNSC Res 743 (21 February 1991) UN Doc S/RES/743; UNSC Res 757 (30 May 1992) UN Doc S/RES/757; UNSC Res 781 (9 October 1992) UN Doc S/RES/781; UNSC Res 787 (16 November 1992) UN Doc S/RES/787; UNSC Res 816 (31 March 1993) UN Doc S/RES/816. This ran parallel to the establishment of an international tribunal for the Former Yugoslavia under UNSC Res 827 (25 May 1993) UN Doc S/RES/827, established to prosecute the perpetrators of breaches of the Geneva Conventions, violations of the laws of war, genocide and crimes against humanity.

⁶⁵⁵ The ICTR was established *after* the genocides. The UN Force Commander in Rwanda, Lt. Gen Roméo Dallaire, details how, based on an informant he was put in contact with in Rwanda, reliable explicit and detailed knowledge of planned genocides and attacks on Belgian-national UN Peacekeepers on the ground emerged, which he then immediately relayed to UN Headquarters to no avail, Roméo Dallaire, *Shake Hands with the Devil* (Arrow 2003) 142-147. See also, generally Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families* (Picador 2000). Following the massacre at a school on April 6th 1994, Chapter VII intervention was ruled out as "not feasible, considering that no such force can be raised immediately" (Nigeria, UNSC Verbatim Record (21 April 1994) UN Doc S/PV.3368, 2) and UNSC Res 912 additionally reduced the UN Assistance Mission in Rwanda to just 270 men (UNSC Resolution 912 (21 April 1994) UN Doc S/RES/912). Genocide is mentioned in all but name for the first time in UNSC Resolution 918 (17 May 1994) UN Doc S/RES/918, at which point the death toll was already an estimated 500,000.

⁶⁵⁶ See, eg Iran, UNGA Verbatim Record (17 September 2005) UN Doc A/60/PV.10, 8: 'Iran stopped nuclear weapons program as sinful – Rouhani' *Russia Today* (1 March 2014) <<http://rt.com/news/iran-banned-nuclear-weapons-347>> accessed 16 December 2014. See also, Iran, UNSC Verbatim Record (23 December 2006) UN Doc S/PV.5612, at 9, in response to the adoption of resolution 1737.

⁶⁵⁷ IAEA 'Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran' (20 February 2014) GOV/2014/10, ¶64.

⁶⁵⁸ *ibid* ¶74: "While the Agency continues to verify the non-diversion of declared nuclear material at the nuclear facilities and LOFs declared by Iran under its Safeguards Agreement, the Agency is not in a position to provide credible assurance about the absence of undeclared nuclear material and activities in Iran, and therefore to conclude that all nuclear material in Iran is in peaceful activities."

direction from US,⁶⁵⁹ Israeli⁶⁶⁰ and Russian⁶⁶¹ sources or factual evidence⁶⁶² that Iran is in pursuit of nuclear weaponry. Nonetheless, since 2006, Iran has been subject to no less than ten⁶⁶³ Security Council resolutions as a result of its nuclear activities and the US has made no effort to hide its conviction that it “would still be a profound national-security interest of the United States to prevent Iran from getting a nuclear weapon.”⁶⁶⁴ Iranian attempts to achieve civilian nuclear power are not newfound or recent ambitions at all⁶⁶⁵ and were initially supported by both China⁶⁶⁶ and Russia⁶⁶⁷ before Beijing’s⁶⁶⁸ and Washington’s⁶⁶⁹ suspicions that Iran sought nuclear weapons despite the fact that “it appears that the Natanz facility was designed to produce low-enriched uranium for nuclear power fuel, rather than weapons-grade uranium for a military

⁶⁵⁹ See eg ‘Remarks as delivered by James R. Clapper, Director of National Intelligence to the Senate Select Committee on Intelligence’ (Washington DC, 29 January 2014), 5 <http://www.dni.gov/files/documents/WWTA%20Opening%20Remarks%20as%20Delivered%20to%20SSCI_29_Jan_2014.pdf> accessed 16 December 2014, where the US did “not know if Iran will eventually decide to build nuclear weapons”.

⁶⁶⁰ See eg Amos Harel, ‘IDF chief to Haaretz: I do not believe Iran will decide to develop nuclear weapons’ *Haaretz*, (Tel Aviv, 25 April 2012) <<http://www.haaretz.com/news/diplomacy-defense/idf-chief-to-haaretz-i-do-not-believe-iran-will-decide-to-develop-nuclear-weapons-1.426389>> accessed 16 December 2014; Israeli Chief of Staff Lt. Gen. Benny Gantz believed that Iran “is going step by step to the place where it will be able to decide whether to manufacture a nuclear bomb. It hasn’t yet decided whether to go the extra mile.”

⁶⁶¹ Jonathan Lis, ‘Russia FM: Iran doesn’t intend to attack Israel with nuclear weapons’ *Haaretz* (Tel Aviv, 11 October 2012) <<http://www.haaretz.com/news/diplomacy-defense/russia-fm-iran-doesn-t-intend-to-attack-israel-with-nuclear-weapons-1.469408>> accessed 16 December: in a meeting with Israeli Knesset Speaker Rivlin, Russian Foreign minister Sergei Lavrov stated that “until now, it had not been clearly proven that Iran intends to develop nuclear weapons.”

⁶⁶² Iran announced that its “Bushehr nuclear power plant joined the national power grid” in September 2011. See, eg ‘Iran’s Bushehr plant joins national grid’ *Press TV* (Tehran, 4 September 2011) <<http://edition.presstv.ir/detail/197346.html>> accessed 16 December 2014.

⁶⁶³ UNSC Res 1696 (31 July 2006) UN Doc S/RES/1696; UNSC Res 1737 (27 December 2006) UN Doc S/RES/1737; UNSC Res 1747 (24 March 2007) UN Doc S/RES/1747; UNSC Res 1803 (3 March 2008) UN Doc S/RES/1803; UNSC Res 1835 (27 September 2008) UN Doc S/RES/1835; UNSC Res 1887 (24 September 2009) UN Doc S/RES/1887; UNSC Res 1929 (9 June 2010) UN Doc S/RES/1929; UNSC Res 1984 (9 June 2011) UN Doc S/RES/1984; UNSC Res 2049 (7 June 2012) UN Doc S/RES/2049; UNSC Res 2105 (5 June 2013) UN Doc S/RES/2105.

⁶⁶⁴ Jeffery Goldberg, ‘Obama to Iran and Israel: ‘As President of the United States, I Don’t Bluff’ *The Atlantic* (Washington DC, 2 March 2012) <<http://www.theatlantic.com/international/archive/2012/03/obama-to-iran-and-israel-as-president-of-the-united-states-i-dont-bluff/253875>> accessed 16 December 2014.

⁶⁶⁵ Beginning in the 1950s, the nuclear program was encouraged by US support through research reactors in 1967, cooperation with France in uranium enrichment in 1976 and renewed interest in nuclear power by Ayatollah Khomeini in 1984.

⁶⁶⁶ China was due to supply Iran with a miniature neutron source reactor and two power reactors. See, Joseph Cirincione, Jon Wolfsthal and Miriam Rajkumar, *Deadly Arsenal: Nuclear, Biological, and Chemical Threats* (Carnegie Endowment for International Peace 2005) 303.

⁶⁶⁷ Russia signed an “umbrella agreement for bilateral nuclear cooperation” with Iran in 1992. In 1995, further to agreeing completion of the Bushehr Nuclear Power Plant, “Russia also offered in principle to supply Iran with a large research reactor, fuel fabrication facilities and a centrifuge enrichment plant”. See, Gary Samore (ed), *Iran’s Strategic Weapon Programmes: A Net Assessment* (Routledge 2005) 13.

⁶⁶⁸ *ibid.*

⁶⁶⁹ *ibid* 14.

programme.”⁶⁷⁰ Even the 2002 announcement by the National Council of Resistance of Iran (NCRI) that Iran had hidden the existence of both the Natanz and Arak facilities⁶⁷¹ did not imply a violation of its safeguards agreement with the IAEA.⁶⁷²

Undeniably, there was no unequivocal evidence available to the Council itself that nuclear weaponry was the aim of the Iranian regime, even prior to the implementation of its first resolution on the matter, where “Iran’s nuclear activities and its history of concealment raise[d] pressing questions about whether Iran’s programme is, as it claims, solely for civil purposes.”⁶⁷³ It was this concealment that lay at the root of the adoption of UNSC Res 1696,⁶⁷⁴ based on “the view of the Security Council regarding the need for Iran to . . . clarify outstanding questions regarding its nuclear activities”⁶⁷⁵ and “the establishment of international confidence in the exclusively peaceful nature of Iran’s nuclear programme.”⁶⁷⁶ In a departure from the standard formula for the adoption of Chapter VII resolutions discussed previously in this thesis, UNSC Res 1696 – despite being adopted “under Article 40 of Chapter VII of the Charter of the United Nations in order to make mandatory the suspension required by the IAEA”⁶⁷⁷ – fails to identify the threat to international peace under article 39 and therefore “[c]alls upon Iran without delay to take the steps required by the IAEA Board of Governors . . . [and d]emands, in this context, that Iran suspend all enrichment-related and reprocessing activities”⁶⁷⁸ without legal basis or clarity. Even the IAEA indicated in its reports “in November 2004, and again in September 2005, all the nuclear material in Iran has been accounted for . . . [and] the Agency has not seen any diversion of nuclear material to nuclear weapons or other nuclear explosive devices”⁶⁷⁹; yet “the history of concealment of Iran’s nuclear activities . . . and resulting absence of confidence that Iran’s nuclear programme is exclusively for peaceful purposes have given rise to questions that are

⁶⁷⁰ *ibid* 14 ff.

⁶⁷¹ ‘Remarks by Alireza Jafarzadeh on New Information on Top Secret Projects of the Iranian Regime’s Nuclear Program’ (Washington DC, 14 August 2002) <<http://www.iranwatch.org/library/ncri-new-information-top-secret-nuclear-projects-8-14-02>> accessed 16 December 2014.

⁶⁷² Iran was not required to declare the facility until 180 days prior to introduction of any nuclear material to the facility under Code 3.1 of the Subsidiary Arrangements General Part of Iran’s Safeguards Agreement.

⁶⁷³ UK, UNSC Verbatim Record (31 July 2006) UN Doc S/PV.5500, 4.

⁶⁷⁴ UNSC Res 1696 (31 July 2006) UN Doc S/RES/1696.

⁶⁷⁵ Russia, UNSC Verbatim Record (31 July 2006) UN Doc S/PV.5500, 5.

⁶⁷⁶ China, *ibid* 6.

⁶⁷⁷ UNSC Res 1696 (31 July 2006) UN Doc S/RES/1696, preamble.

⁶⁷⁸ *ibid* ¶1.

⁶⁷⁹ IAEA ‘Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran’ (27 February 2006) GOV/2006/15, ¶53. See, also, IAEA ‘Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran’ (8 June 2006) GOV/2006/38, ¶18, where environmental samples previously taken from Iranian dual use materials were analysed and showed “no indication of the presence of particles of nuclear material.”

within the competence of the Security Council”⁶⁸⁰ and the alleged Iranian matter was referred to the Council in February 2006 for “Iran’s many failures and breaches of its obligations to comply with its NPT Safeguards Agreement.”⁶⁸¹

UNSC Res 1696 is also in many ways self-contradictory. The NPT stipulates that “[n]othing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty”⁶⁸², a standard that is referred to not only explicitly by the IAEA itself in its resolutions on Iran,⁶⁸³ but also by the Security Council in its own resolutions⁶⁸⁴ and discussions.⁶⁸⁵ Articles I and II relate solely to the transfer or receipt of nuclear weapons or information on their construction respectively; there is no indication of any IAEA safeguards or criteria to be met, which in turn fall under Article III of the NPT.⁶⁸⁶ Thus, on the one hand, by reaffirming this principle in the preamble of UNSC Res 1696, the Council is actively supporting the NPT and its underlying aims, goals and allowances; on the other hand, the Council then demands that Iran suspend “all enrichment-related and reprocessing activities, including research and development.”⁶⁸⁷ This demand is based solely on

⁶⁸⁰ IAEA ‘Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran’ (2 September 2005) GOV/2005/77, ¶2.

⁶⁸¹ IAEA ‘Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran’ (4 February 2006) GOV/2006/14, (g).

⁶⁸² Treaty on the Non-Proliferation of Nuclear Weapons (1970), art 4.

⁶⁸³ See eg IAEA ‘Implementation of the NPT safeguards agreement and relevant provisions of United Nations Security Council resolutions in the Islamic Republic of Iran’ (13 September 2012) GOV/2012/50, (f); IAEA ‘Implementation of the NPT safeguards agreement and relevant provisions of United Nations Security Council resolutions in the Islamic Republic of Iran’ (18 November 2011) GOV/2011/69, (e); IAEA ‘Implementation of the NPT safeguards agreement and relevant provisions of Security Council resolutions 1737 (2006), 1747 (2007), 1803 (2008) and 1835 (2008) in the Islamic Republic of Iran’ (27 November 2009) GOV/2009/82, (d); IAEA ‘Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran’ (4 February 2006) GOV/2006/14, (c); IAEA ‘Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran’ (2 September 2005) GOV/2005/77, (b); IAEA ‘Implementation of the NPT safeguards agreement in the Islamic Republic of Iran and related Board resolutions’ (11 August 2005) GOV/2005/64, (g); IAEA ‘Implementation of the NPT safeguards agreement in the Islamic Republic of Iran’ (29 November 2004) GOV/2004/90, (i); IAEA ‘Implementation of the NPT safeguards agreement and relevant provisions of United Nations Security Council resolutions in the Islamic Republic of Iran’ (18 September 2004) GOV/2004/79, (f).

⁶⁸⁴ UNSC Res 1673 (27 April 2006) UN Doc S/RES/1673, preamble; UNSC Res 1696 (31 July 2006) UN Doc S/RES/1696, preamble; UNSC Res 1737 (27 December 2006) UN Doc S/RES/1737, preamble; UNSC Res 1747 (24 March 2007) UN Doc S/RES/1747, preamble; UNSC Res 1803 (3 March 2008) UN Doc S/RES/1803, preamble; UNSC Res 1929 (9 June 2010) UN Doc S/RES/1929, preamble.

⁶⁸⁵ See, eg UNSC Presidential Statement 15 (2006) UN Doc S/PRST/2006/15; the UK representative offered “active support in the building of light-water power reactors in Iran . . . and legally binding assurances relating to the supply of nuclear material”, UNSC Verbatim Record (31 July 2006) UN Doc S/PV.5500, 4.

⁶⁸⁶ Moreover, Article IV of the NPT grants the right to participate in the “fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy.”

⁶⁸⁷ UNSC Res 1696 (31 July 2006) UN Doc S/RES/1696, ¶2.

the failure by Iran to comply with the IAEA safeguards – governed by Article III of the NPT – and the evaporation of confidence in Iranian sincerity in its declared pursuit of pacific nuclear technology – which is entirely subjective, speculative and contradictory to the intelligence of the international community; the Council undermines its own authority and interjects itself into the sovereign matters of a State as legally governed and permitted by an international treaty – the NPT – a matter over which it holds no jurisdiction.

One might argue that it is not the violation of the NPT itself that is the threat to the peace but rather the actions of Iran in allegedly attempting to build and maintain weapons of mass destruction and means of their delivery. However, this argument can easily be weakened by the allowances granted to both India and Pakistan – which have made no efforts to hide their animosity for one another⁶⁸⁸ and can be argued to pose a risk to the stability of the region, as explored in *Chapter IV.3.2* of this thesis – and which have had exceptions to international treaties made for them by P5 members.⁶⁸⁹ Therefore, if the pursuit of nuclear weapons and delivery systems is a threat to the peace separate from the NPT, which the adoption of the matter by the Council suggests, then these States should be held accountable; this has not happened. Another argument might be the threat of “break-out” capabilities – namely the capacity of a State teetering over the edge of sufficient enrichment to cross over from having only enough for civilian purposes to one with weapons-grade enriched uranium. This can also be dispelled based on the current status of Japan, one of the main advocates for Council action against the DPRK;⁶⁹⁰

⁶⁸⁸ There have been three wars between the two countries since 1947 and the disputed territory of Kashmir remains a source of great disharmony between the two; the issue of nuclear war between the two has also never truly been discounted and according to the chairman of India’s National Security Advisory Board, “the central tenet of [the Indian] nuclear doctrine . . . [is] that India will not be the first to use nuclear weapons, but that if it is attacked with such weapons, it would engage in nuclear retaliation which will be massive and designed to inflict unacceptable damage on the adversary”. See Shayam Saran, ‘Lecture at the India Habitat Centre’ (New Delhi, 24 April 2013) <<http://ris.org.in/publications/reportsbooks/654>> accessed 16 December 2014.

⁶⁸⁹ The Agreement for the Cooperation between the Government of the United States of America and the Government of India concerning Peaceful Uses of Nuclear Energy (2005) had support from France, UK and the Russia and was a step towards the landmark waiver of exemption for India in the Nuclear Supply Group, since it had signed neither the NPT nor the CTBT; China, as discussed previously, contravened the guidelines of the Nuclear Supplies Group in supplying Pakistan with nuclear energy in the absence of its acceptance of the NPT.

⁶⁹⁰ Japan called for several emergency meetings of the Council in its letters eg ‘Letter dated 4 July 2006 from the Permanent Representative of Japan to the United Nations addressed to the President of the Security Council’ (5 July 2006) UN Doc S/2006/481, that led to a meeting on 14 October 2006 resulting in the adoption of UNSC Res 1718 (2006); ‘Letter dated 5 April 2009 from the Permanent Representative of Japan to the United Nations addressed to the President of the Security Council’ (5 April 2009) UN Doc S/2009/176 leading to UNSC Presidential Statement S/PRST/2009/7 (2009); ‘Letter dated 25 May 2009 from the Permanent Representative of Japan to the United Nations addressed to the President of the Security Council’ (25 May 2009) UN Doc S/2009/271, leading to resolution 1874 (2009). Japan has also be extremely critical of the DPRK regime during discussion, eg UNSC

at the most recent declaration in 2013, Japan held over nine tonnes of unirradiated separated plutonium on its soil⁶⁹¹ and a further thirty-five tons in France and the UK,⁶⁹² in addition to going live with the Rokkasho reprocessing facility in late-2014.⁶⁹³ In total, Japan is estimated to have enough material to construct 5,000 nuclear bombs⁶⁹⁴ through weapons-grade plutonium, which is increasingly concerning given the fact that Japan's civilian nuclear program is based almost entirely on another source of nuclear power – enriched uranium.

VII.4 Conclusions

The principle of avoidance of arbitrariness, combined with individuality of State situations, requires not only that the Council address the situation but also that it explain the reason for any departure from previous behaviour based on factual evidence. There has been no such presentation of facts by the Council; Iran poses no apparent threat to the international community and yet it has been arbitrarily subjected to sanctions. Japan maintains that its nuclear program is for pacific purposes and the international community has shown no considerable doubt over this,⁶⁹⁵ Iran has claimed the same and has been subjected to numerous rounds of sanctions and has been the source of discussion at the Council and externally in diplomatic talks. Based upon the manner in which the Council has dealt with Japan, it would be realistic to expect that Iran may predict that it would be dealt with in the same fashion. There have been no repercussions against Japan; accordingly, the Iranian government – in tandem with the provisions of international treaties to which it is party – may note that there are no violations of international principles in its actions. Moreover, the Council – and constituent member States – have respected

Verbatim Record (15 July 2006) UN Doc S/PV.5490, 2f; it has also taken part in the discussions on the Iranian regime actions taken (eg UNSC Verbatim Record (23 December 2006) UN Doc S/PV.5612) and supported the passing of resolutions against Iran eg UNSC Res 1737 (2006) and UNSC Res 1874 (2009).

⁶⁹¹ IAEA 'Communication Received from Japan Concerning Its Policies Regarding the Management of Plutonium' (26 September 2013) INFCIRC/549/Add.1/16, Annex B.

⁶⁹² *ibid*; see also, eg Douglas Birch, R Jeffrey Smith and Jake Adelstein, 'Unarmed Guards, Bogus Terror Drills, and 96 Tons of Plutonium' *Foreign Policy* (Washington DC, 10 March 2014) <<http://foreignpolicy.com/2014/03/10/unarmed-guards-bogus-terror-drills-and-96-tons-of-plutonium>> accessed 16 December 2014.

⁶⁹³ This facility is estimated to be capable of nine metric tonnes of plutonium annually, equivalent to 2,000 nuclear weapons. See, Jay Solomon and Miho Inada, 'Japan's Nuclear Plan Unsettles US' *The Wall Street Journal* (New York, 1 May 2013) <<http://www.wsj.com/articles/SB10001424127887324582004578456943867189804>> accessed 16 December 2014.

⁶⁹⁴ Robert Windrem, 'Japan Has Nuclear 'Bomb in the Basement,' and China Isn't Happy' *NBC News* (New York, 11 March 2014) <<http://www.nbcnews.com/storyline/fukushima-anniversary/japan-has-nuclear-bomb-basement-china-isnt-happy-n48976>> accessed 16 December 2014.

⁶⁹⁵ There have been mild protestations by States such as the US and China, which have nonetheless failed to reach the Council.

the sovereignty and rights of Japan to peaceful nuclear progress, whereas in the case of Iran, unclear foundation for jurisdiction have given rise to the usurping of powers belonging to the ICJ and the trespassing on the rights of States under international law to extend its powers beyond the functions and authority granted in the UN Charter. Based upon this research and the notable disparity in response to threats around the world, it is seemingly evident that there is arbitrary behaviour and unpredictability in the Council's decision-making process.

CHAPTER VIII

CONSISTENCY WITH INTERNATIONAL HUMAN RIGHTS NORMS AND STANDARDS

“[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law . . .”⁶⁹⁶

VIII.1 Introduction

The issue of human rights at the Security Council can be interpreted as comprising two elements—firstly, there is the consideration of human rights implications as substantive issues that affect the maintenance of international peace and security; that is to say that there are threats to the international peace and security that arise from human rights violations and concerns perpetrated against civilians either by their own governments or another,⁶⁹⁷ such as ethnic cleansing⁶⁹⁸ or protection of civilians,⁶⁹⁹ to which the Council must not turn a blind eye and which therefore instigate Council action. As UN Secretary General Annan declared in 2000, “no legal principle – not even sovereignty – can ever shield crimes against humanity. Where such crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community.”⁷⁰⁰ These fall under a straightforward assessment of the threat to international peace and may potential instigate Council action under Chapter VII. This thesis has discussed intervention for humanitarian reasons in section VII.2.2 and as a result I will not enter into a lengthy discussion of Council intervention on humanitarian and human rights grounds.

The second intersection of human rights with the rule of law at the Council level is more internalised and comes in the form of the Council’s awareness and efforts to accommodate international human rights principles and standards in its own actions – actions that do not focus

⁶⁹⁶ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 (A)(III) (UDHR) preamble.

⁶⁹⁷ Such as the right to life, freedom of expression, self-determination of peoples and other commonly acknowledged civil, political, cultural and economic rights, many of which have been enshrined in international conventions such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

⁶⁹⁸ eg UNSC Res 819 (16 April 1993) UN Doc S/RES/819 and UNSC Res 836 (4 June 1993) UN Doc S/RES/836 on the humanitarian concerns of the Council in the Former Republic of Yugoslavia.

⁶⁹⁹ See, UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894 on compliance with international humanitarian, human rights and refugee law.

⁷⁰⁰ Report of the Secretary-General, ‘We the peoples: the role of the United Nations in the twenty-first century’ (2000) UN Doc A/54/2000, ¶219.

primarily on responding to a human rights abuse *per se*. This component of the rule of law – compliance with international human rights norms – addresses whether the Security Council firstly, should be and, secondly, feels itself bound by the principles of international human rights law in its decision-making process; this Chapter attempts to identify what measures, if any, the Council takes to accommodate human rights concerns when taking a decision. Although it might be argued that many threats to the international peace touch on human rights issues – such as the proliferation of nuclear weapons,⁷⁰¹ international terrorism⁷⁰² or piracy⁷⁰³ – this component of the rule of law examines whether the Council’s response to such threats itself incorporates an alertness to human rights concerns. Such “non-substantive” human rights issues may come about, for example, in situations where the Council imposes country-wide economic or targeted sanctions and where it decides to authorise military intervention or peacekeeping missions are established.⁷⁰⁴

In contrast to a response to a human rights violation by the Council – which requires a pro-active response using legal and political machinery at its disposal under the Charter to violations of human rights perpetrated by governments and non-State actors – consistency with international human rights norms and standards is an intrinsic obligation that the Council must comply with international human rights norms in the passing of resolutions. Human rights are therefore useful as a component of the international rule of law as both a catalyst for action and as parameters to the actions of the Security Council; consequently, it is important to examine to what extent the Council allows itself to be limited by human rights as a consideration prior to or during its decision-making process and I intend to examine whether the Council shows compulsion to abide by international human rights law in its Chapter VII resolutions, evidenced by explicit statements either by States themselves in verbatim records or by the text of resolutions that are passed by the Council. Moreover, this component questions whether there is

⁷⁰¹ eg UNSC Res 984 (11 April 1995) UN Doc S/RES/984, adopting the stance that everything must be done to avoid nuclear war and prevent the proliferation of nuclear weaponry.

⁷⁰² See, eg UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267 establishing the Al-Qaida and Taliban Committee.

⁷⁰³ See eg S/RES/1816 (2008) authorising action against piracy in Somalia.

⁷⁰⁴ For a general introduction and discussion of the difference between Human Rights as substantive and incidental concerns of the Council, see eg Bardo Fassbender, ‘The Role for Human Rights in the Decision-making Process’, in Bardo Fassbender (ed), *Securing Human Rights?: Achievements and Challenges of the UN Security Council* (OUP 2010) 88, where there are five tentative types of Council action that intersect with human rights. See also, Sidney D Bailey, *The UN Security Council and Human Rights* (Macmillan 1994); Jared Genser and Bruno Stagno Ugarte (eds), *The United Nations Security Council in the Age of Human Rights* (CUP 2014).

a pattern of compliance, or, in the event that human rights have not historically been considered by the Council in its decision-making process, a movement towards reform in its attitude and the gradual inclusion of human rights considerations when reaching a decision.

This component also links somewhat to that of the predictability paradox in *Chapter VII* of this thesis insofar as the risk of a double-standard emerging; the Council has been vociferous in advocating the promotion of human rights both in the peacekeeping and observer missions that it has mandated⁷⁰⁵ and in the course of other resolutions adopted⁷⁰⁶ since the 1990s and it would undoubtedly attract allegations that the Council sees itself as superior to the law should it not comply internally with the same principles that it advocates externally.

VIII.2 The case for applicability of human rights and humanitarian law to the Council

Although it would instinctively appear to exemplify a double standard should the Council fail to incorporate the very same standards to its own decision-making process that it advocates on a global basis through its Chapter VII powers in situations and areas where human rights concerns are deemed to exist, there are also compelling legal arguments that support the implementation of human rights considerations upon the Council's behaviour. In general, since its establishment in 1945, the UN has dedicated a large part of its work to human rights issues, not least with the Universal Declaration on Human Rights in 1948 and various international treaties and covenants,⁷⁰⁷ the enshrined principles of which have since passed into customary international law. It would therefore be remiss to argue that there is no basis upon which to argue that the Council should be held to maintain a standard of human rights in both its substantive and non-substantive human rights decisions.⁷⁰⁸

⁷⁰⁵ See eg UNSC Res 925 (8 June 1994) UN Doc S/RES/925 on Rwanda; UNSC Res 976 (8 February 1995) UN Doc S/RES/976 on Angola; UNSC Res 993 (12 May 1995) UN Doc S/RES/993 on Georgia; UNSC Res 1001 (10 June 1995) UN Doc S/RES/1001 on Liberia.

⁷⁰⁶ See eg UNSC Res 1034 (21 December 1995) UN Doc S/RES/1034 on Yugoslavia; UNSC Res 1076 (22 October 1996) UN Doc S/RES/1076 on Afghanistan; UNSC Res 1199 (23 September 1998) UN Doc S/RES/1199 on Kosovo; UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265 on the protection of civilians in armed conflicts.

⁷⁰⁷ eg Convention on the Rights of the Child, The Convention on the Elimination of Discrimination Against Women, The Convention against Torture, The International Covenant on Civil and Political Rights, The International Covenant on Economic, Social and Cultural Rights.

⁷⁰⁸ See Mariano J Aznar-Gomez 'A Decade of Human Rights Protection by the UN Security Council: A Sketch of Deregulation?' (2002) 13(1) EJIL 221.

Orakhelashvili sets the standard for testing the Council's actions against those of *jus cogens* norms,⁷⁰⁹ in contrast to this research which will expand this standard to include wider human rights issues. *Jus cogens* norms relate to the most heinous of crimes that can be committed and are norms upon which all States are able to agree upon, having the widest base of support but an inverse-proportionately narrow scope; that is to say, to gain the widest acceptance from States, it is only the highest-ranking, and least number of, crimes that can be outlawed. Furthermore, these are agreed upon by States in a customary manner – insofar as they are not enshrined in any text – and thus *jus cogens* is an insufficient code of conduct for two reasons: firstly, there is no concrete definition of what constitutes a *jus cogens* norm and, secondly, even those touted as being peremptory norms are a handful at best, continuing to grant the Council all but free-reign in its actions and defeating the purpose of this research. As such, there are myriad violations of human rights law that can be perpetrated outside of the narrow scope of *jus cogens*.

However, the absence of extensive human rights protections in the Charter is a result of the lack of consideration they were granted in the mid-20th Century; for as valuable and integral as human rights are widely accepted to be both nationally and internationally today, “when the UN Charter was drafted, human rights were at the international level still moral postulates and political principles only.”⁷¹⁰ This stance is supported by the non-binding nature of the UDHR and the fact that it would be a further twenty years before legally binding treaties – the ICCPR and ICESCR – would be adopted by States and thirty years before they would come into force, in 1976. Moreover, the UN is excluded from both the ICCPR and ICESCR, which focus on the actions and obligations of States rather than international organisations⁷¹¹ and the UN is not party to the 1949 Geneva Conventions, the 1977 Additional Protocols or any other human rights treaties due, officially, to the fact that the UN is not “substantively in a position to become party to the 1949 Conventions, which contain many obligations that can only be discharged by the exercise of juridical and administrative powers which the Organization does not possess . . .”⁷¹² A differentiation must also be made between the accession of States to treaties relating to international human rights law or the imposition of customary international norms upon States

⁷⁰⁹ Orakhelashvili (n 53) 178

⁷¹⁰ Fassbender (n 704) 79.

⁷¹¹ Art 48 of the ICCPR allows only States to accede to the treaty and even the language used in the texts, referring to ‘State Parties’, excludes entities that do not fit such a description.

⁷¹² ‘Legal Opinion of the Secretariat of the United Nations, Question of the Possible Accession of Intergovernmental Organizations to the Geneva Conventions for the Protection of War Victims’ [1972] UN Jurid Ybk 153, ¶3.

and the exercise of power by those very same States through the Council as a UN organ; it may be argued that States have obligations both domestically and internationally under international law that do not exist as an organ when deliberating or passing resolutions in their respective Council seats.⁷¹³

This does not immediately preclude the Council from an obligation to respect human rights law in its decision-making process. The applicability of rule of law components generally, which include the respect for human rights, has explicitly been highlighted by Secretaries-General not only in Annan's original 2004 enumeration of rule of law components,⁷¹⁴ but again in 2008, by Ban Ki-Moon, who reiterated that "rules of international law apply *mutatis mutandis* to the Organization as they do to States."⁷¹⁵ As is the case with other components of the rule of law, the first point of reference when examining the duties and responsibilities of the Council itself should be the Charter; "[t]he United Nations is a creation of international law, established by treaty, and its activities are governed by the rules set out in its Charter."⁷¹⁶ The Council is bound under the Charter to act "in accordance with the Purposes and Principles of the United Nations,"⁷¹⁷ of which both "promoting and encouraging respect for human rights and for fundamental freedoms"⁷¹⁸ and the maintenance of peace and security "in conformity with the principles of justice *and international law*"⁷¹⁹ both feature. Overarching both these principles, and the Charter itself, are the goals of the United Nations as an organisation, one of which is "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."⁷²⁰ It would be illogical and undermine the core principles of the UN as an organisation if the Council were to ignore international law in the decision-making process. It has even been postulated that, according to principles of *venire*

⁷¹³ For a more lengthy discussion of this issue, see eg Fassbender (n 704) 80-2.

⁷¹⁴ Report of the Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies' (2004) UN Doc S/2004/616, ¶6.

⁷¹⁵ Report of the Secretary-General, 'Strengthening and Coordinating United Nations rule of law activities' (6 August 2008) UN Doc A/63/226, ¶27.

⁷¹⁶ *ibid.*

⁷¹⁷ UN Charter (1945) art 24(2)

⁷¹⁸ *ibid* art 1(3).

⁷¹⁹ *ibid* art 1(1).

⁷²⁰ *ibid* preamble.

*contra factum proprium*⁷²¹ the Council is bound by estoppel to abide by the same human rights standards that it advocates.⁷²²

In Council-mandated operations too, there have been developments in the applicability of human rights and humanitarian law; where individuals have been affected directly by Council-mandated action, there have been standards imposed upon UN personnel on the ground. In 1999, the Secretary-General emphasised the need for “fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control.”⁷²³ In the post-conflict environment of East Timor, the UN Transitional Administration in East Timor (UNTAET) – “endowed [under Council resolution 1272 (1999)] with overall responsibility for the administration of East Timor empowered to exercise all legislative and executive authority, including the administration of justice”⁷²⁴ – imposed upon “all persons undertaking public duties or holding public office in East Timor . . . internationally recognized human rights standards”⁷²⁵ of a wide variety, from the non-derogable to the non-legally binding;⁷²⁶ in Kosovo, too, the UN Interim Administration in Kosovo (UNMIK) was under obligation to observe the same “internationally recognized human rights standards.”⁷²⁷ These standards are wide-ranging, comprehensive and based on legally binding

⁷²¹ “No one may set himself in contradiction to his own previous conduct”. See, Bryan A Garner (ed), *Black’s Law Dictionary* (10th edn, Thomson West 1990) 1039. Fassbender has argued that this maxim “is a general principle of law as defined by Art 38(1)(c) ICJ Statute . . . [and i]n accordance with that concept, it may be said that the development of international human rights law since 1945, to which the work of the United Nations has decisively contributed, has given grounds for legitimate expectations that the United Nations itself, when its action has a direct impact on the rights and freedoms of an individual, strictly observes human rights and fundamental freedoms”, see Bardo Fassbender, ‘Human Rights Obligations and the UN Security Council’ in Pieter H F Bekker, Rudolf Dolzer & Michael Waibel (eds), *Making Transitional Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (CUP 2010) 82.

⁷²² See Malcolm N Shaw, *International Law* (CUP 2003) 439. See also, Reinisch (n 49).

⁷²³ ‘Secretary-General’s Bulletin on the Observance by United Nations Forces of International Humanitarian Law’ (6 August 1999) ST/SGB/1999/13.

⁷²⁴ UNTAET ‘Regulation No 1999/1 on the Authority of the Transitional Administration in East Timor’ (27 November 1999) UNTAET/REG/1991/1, preamble.

⁷²⁵ *ibid* s 8.

⁷²⁶ *ibid*: “The Universal Declaration on Human Rights of 10 December 1948; The International Covenant on Civil and Political Rights of 16 December 1966 and its Protocols; The International Covenant on Economic, Social and Cultural Rights of 16 December 1966; The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965; The Convention on the Elimination of All Forms of Discrimination Against Women of 17 December 1979; The Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984; The International Convention on the Rights of the Child of 20 November 1989.”

⁷²⁷ UNMIK ‘Regulation No 2000/59 Amending UNMIK Regulation No 1999/24 on the Law Applicable in Kosovo’ (27 October 2000) UNMIK/REG/2000/59, ¶1.3. These standards were: “The Universal Declaration on Human Rights of 10 December 1948; The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto; The International Covenant on Civil and Political Rights of 16 December 1966 and the Protocols thereto; The International Covenant on Economic, Social and Cultural

international treaties; it would seem contradictory for peacekeeping operations to be required to comply with human rights law and principles when the organ that legitimises and authorises them itself fails to do so.

Extending, therefore, the thesis that the Council must be bound by the rule of law, UN organs must be held to the same standards that they attempt to promote, of which human rights is surely one. Indeed, the increased preponderance of international human rights law works in favour of the assertion that the Council should be held to the same standards as States; as human rights instruments have increased in number and scope – to which, of course, the UN itself has contributed in no small part – so too the expectation that where the Council’s decisions impact upon the rights and freedoms protected by those instruments, for example through the imposition of sanction regimes or military intervention, has grown more acute. As early as 1950, this argument was being promoted by Lauterpacht.⁷²⁸ The Council, then, as an organ of the United Nations, has certain legal obligations to ensure that human rights are respected when making decisions. In a departure from the early 20th Century where human rights were an afterthought or optional consideration in the decision-making process for the Council, there has been growing support for the non-derogability of human rights in the Council procedure where individuals are concerned. Brownlie goes even further to suggest that human rights are as integral a consideration as any other element:

Even if the political organs have a wide margin of appreciation in determining that they have competence by virtue of Chapter VI or Chapter VII, and further, in making dispositions to maintain or restore international peace and security, it does not follow that the selection of the modalities of implementation is unconstrained by legality. Indeed when the rights of individuals are involved, *the application of human rights standards is a legal necessity*. Human rights now form *part of the concept of the international public order*.⁷²⁹

Rights of 16 December 1966; The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965.”

⁷²⁸ Hersch Lauterpacht, *International Law and Human Rights* (Stephens & Sons 1950) 159: “[t]he provisions of the Charter on the subject [of human rights] impose legal obligations not only upon the Members of the United Nations . . . [but also] a comprehensive legal obligation upon the United Nations as a whole.”

⁷²⁹ Ian Brownlie, ‘The Decisions of Political Organs of the United Nations and the Rule of Law’ in Ronald St John Macdonald (ed), *Essays in Honour of Wang Tieya* (Nijhoff 1993) 102 [emphasis added].

Moreover, it would appear there is a longstanding acceptance amongst scholars that international organisations are bound by customary international law;⁷³⁰ thus, the UDHR and treaties governed by the Charter-based and Treaty-based organs of the UN should also be incorporated into the human rights standards of the Council. These binding and non-binding documents, some of which – such as the ICCPR – have passed into customary international law, reflect the purposes, intentions, goals and objectives of the UN Charter and, by extension, the organs of the UN itself, including the Council. Therefore, by extension, a wide array of standards should be applicable to the Council in its decision-making process, including not only *jus cogens* norms such as the prohibition on torture, but also the full ambit of treaty and customary international human rights law that has evolved over the years from the non-binding UDHR.⁷³¹ It would seem conclusive that the Council *should* be obliged to act with respect and due attention to human rights considerations; however, it remains to be established whether the Council sees this itself and whether it has taken step to ensure that it complies with this element of the rule of law.

VIII.3 Human rights violations as a threat to the international peace

The Council itself has conceded that the rule of law should apply internally to the United Nations in a Council presidential statement from 2010, where it “expressed its commitment to ensure that all UN efforts to restore peace and security themselves respect and promote the rule of law.”⁷³² Respect for human rights, as examined in Chapter II, has generally been accepted to form part of the rule of law both domestically and internationally; it would, therefore, appear that a more explicit commitment and admission of the applicability of the rule of law to the Council, by extension from the UN, in its responsibility to maintain and restore the international peace cannot be made. However, the Council has not always granted such accord to the principles of human rights either as an issue that falls within its jurisdiction or as a concept that applies to it internally.

⁷³⁰ Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity Within Diversity* (Nijhoff 2011) 824; Derek W Bowett, *The Law of International Institutions* (Stevens & Sons 1982) 366; Pierre-Marie Dupuy and Yann Kerbat, *Droit International Public* 143 (Daloz 2014).

⁷³¹ For further discussion, see eg Christian Tomuschat, *Human Rights: Between Idealism and Realism* (OUP 2008) 37-8.

⁷³² UNSC Presidential Statement 11 (2010) UN Doc S/PRST/2010/11, 2.

Although discussions at the Council level about human rights as an issue have undoubtedly grown in number and scope since the end of the Cold War, prior to 1990 it would appear that human rights was a topic seldom broached as a result of the deadlock between the superpowers.⁷³³ UNSC Res 161 on the situation in the Congo appears to be the first instance of the explicit mention of human rights as a consideration of the Council; in it, the Council noted “with deep regret and concern the systematic violations of human rights and fundamental freedoms and the general absence of the rule of law in the Congo.”⁷³⁴ However, despite the early acknowledgement of the concept and the potential threat that it might pose, tackling human rights issues was not seen as the primary concern of the Council in the mid-twentieth century and the permanent Council members were split over how to react to human rights concerns; in 1961 – the same year as the seminal Congo resolution – when discussing the situation in Angola, some P5 members appeared to turn away from elevating human rights to the level of importance it holds today. France warned against expanding the definition of peace and security for fear of “attributing to any dispute or incident which occurs in a country, however regrettable and distressing it may be, a meaning and significance which it does not have”⁷³⁵, whereas the UK argued outright against the inclusion of human rights within the definition of peace and security:

[A]cting as we must in accordance with Article 24 of the Charter, it is not, in the first place, to deal with a crisis or to prevent abuses of human rights that the Security Council has primary responsibility, but to maintain international peace and security. *All the rest may flow from this. But, without a situation likely to endanger the maintenance of international peace and security, this Council has no power, whatever other features any supposed crisis may have or whatever may be the extent of any abuse of human rights.*⁷³⁶

In the early years of the Council, there was a strong sentiment by some States that human rights and the welfare of individuals was a matter that was “essentially within the domestic

⁷³³ As discussed previously, the effect of the end of the Cold War on the work and potential of the Council was a monumental shift from sluggish progress to a flurry of movement and activity. There do exist some resolutions that may have links to human rights issues, such as those relating to terrorism eg UNSC Res 286 (9 September 1970) UN Doc S/RES/286 appealing for an end to the hijacking of commercial aircraft and UNSC Res 579 (18 December 1985) UN Doc S/RES/579 condemning acts of hostage-taking and abduction – but these are wholly overwhelmed by the sheer volume and scope of resolutions and statements adopted by the Council from 1992 onwards.

⁷³⁴ UNSC Res 161 (21 February 1961) UN Doc S/RES/161, B preamble.

⁷³⁵ UNSC Verbatim Record (10 March 1961) UN Doc S/PV.944, 4.

⁷³⁶ *ibid* 3 [emphasis added].

jurisdiction of any State”⁷³⁷ and that Article 2(7) of the Charter cast “serious doubts regarding the legal merits of [human rights cases] submitted to the Council . . . and regarding the competence of the Council to deal with [questions of human rights].”⁷³⁸ As the representative from Chile noted, “there are other United Nations organs with specific competence in the promotion of human rights and they are clearly the ones to deal with this matter.”⁷³⁹ However, not all States agreed with an interpretation of article 2(7) that excluded the intervention of the Council in human rights affairs; whilst France and the UK were hesitant to intervene in the racial discrimination policies of South Africa and analogous situations, other P5 members such as the then-USSR⁷⁴⁰ and the US held the belief that “when a question such as [apartheid in South Africa] is involved, Article 2, paragraph 7, must be read in the light of Articles 55 and 56.”⁷⁴¹ Indeed, twenty-eight UN Member States – over a third of its membership at the time – petitioned the Council for “an urgent meeting . . . to consider the situation arising out of the large-scale killings of unarmed and peaceful demonstrators against racial discrimination and segregation in the Union of South Africa”⁷⁴², highlighting the importance of human rights to a large section of the UN’s membership and the need for the Council to consider human rights issues to fall within its remit. Many States took the view that “the Charter insistently proclaims respect for human rights, so that an absolute and rigid interpretation of Article 2, paragraph 7, of the Charter, resulting in the defence of a situation which flagrantly violates that respect for human rights proclaimed. . . would be illogical.”⁷⁴³ China, though silent on the question of Angola in 1961,⁷⁴⁴ soon afterwards adopted a general stance that “there can be no genuine peace and security if

⁷³⁷ UK, UNSC Verbatim Record (30 March 1960) UN Doc S/PV.851, 2.

⁷³⁸ *ibid* 3. See also, eg the Italian stance, *ibid*: “Obviously, there appears to exist some internal contradiction within the Charter itself between the need to give practical expression to the provisions of the Charter concerning human rights and fundamental freedoms and those provisions aimed at protecting States from interference in their internal affairs. Both provisions are of fundamental importance in the present structure of the United Nations”;

⁷³⁹ UNSC Verbatim Record (10 March 1961) UN Doc S/PV.944, 2.

⁷⁴⁰ *ibid* 4: “[T]he discriminatory policy of the Union authorities not only results in a gross violation of fundamental human rights but also endangers the maintenance of peace in the African continent. Thus it is the duty of the Security Council, which bears the main responsibility for maintaining the peace, to . . . thoroughly examine the newly arisen situation in Africa.

⁷⁴¹ *ibid* 5.

⁷⁴² ‘Letter dated 25 March 1960 from the representatives of Afghanistan. Burma, Cambodia, Ceylon. Ethiopia, Federation of Malaya, Ghana. Guinea, India, Indonesia, Iran, Iraq, Japan, Jordan. Laos. Lebanon. Liberia, Libya. Morocco. Nepal, Pakistan. Philippines, Saudi Arabia, Sudan, Thailand, Tunisia, Turkey, United Arab Republic and Yemen addressed to the President of the Security Council’ (25 March 1960) UN Doc S/4279.

⁷⁴³ Venezuela, UNSC Verbatim Record (5 August 1963) UN Doc S/PV.1053(OR), 16.

⁷⁴⁴ UNSC Verbatim Record (10 March 1961) UN Doc S/PV.944, 1: “Frankly, my delegation knows very little about conditions in Angola as my country has not had direct relations with that region. We are, therefore, not in a position to pass judgement on the nature of the problem presented or on the proper forum to have a discussion.”

human rights and the fundamental freedoms are not respected”⁷⁴⁵ and accordingly, that “on questions involving human rights and fundamental freedoms, the competence of the United Nations is overriding . . . [and] has long since been settled by an impressive number of precedents”⁷⁴⁶ Despite this, explicit acknowledgement of human rights issues mainly remained embedded within the subtext of Council resolutions and decisions⁷⁴⁷ until the later 20th Century, although this was more of a gradual recognition of human rights issues than a sharp and sudden awakening of the Council to human rights concerns in the immediate aftermath of the seismic political shift of the fall of the USSR.⁷⁴⁸ Nonetheless, until the 1990s, although human rights were referenced as subsidiary issues of concern to situations posing a threat to the international peace, heinous human rights violations such as the Khmer Rouge massacres in the 1970s were not only ignored but indirectly actively rewarded.⁷⁴⁹

The increased attention paid to human rights reached new heights in the early 1990s; in 1992 alone there are three instances of the Council inviting Special Rapporteurs on human rights situations – in Iraq⁷⁵⁰ and the former Yugoslavia⁷⁵¹ – which were the first examples of the Council inviting such rapporteurs. Since then, the focus of the Council on human rights issues has expanded to include a plethora of resolutions on issues such as the protection of civilians,⁷⁵²

⁷⁴⁵ UNSC Verbatim Record (5 August 1963) UN Doc S/PV.1053(OR), 13.

⁷⁴⁶ *ibid.*

⁷⁴⁷ See eg references to “grave events” in the Dominican Republic in UNSC Res 203 (14 May 1965) UN Doc S/RES/203 and UNSC Res 205 (22 May 1965) UN Doc S/RES/205.

⁷⁴⁸ The Council first acknowledged the existence of the UN Commission of Human Rights in 1971 (UNSC Res 294 (15 July 1971) UN Doc S/RES/294) and mentioned human rights concerns even in the 1960s in such resolutions as UNSC Res 237 (14 June 1967) UN Doc S/RES/237 following the Six Day War, UNSC Res 253 (29 May 1968) UN Doc S/RES/253 in Southern Rhodesia, UNSC Res 245 (25 January 1968) UN Doc S/RES/245, and UNSC Res 256 (16 August 1968) UN Doc S/RES/256 against the actions of South Africa.

⁷⁴⁹ Despite killing thousands of soldiers, military officers, civil servants and civilians, as well as operating detention camps, perpetrating torture and executing innocent citizens of the Khmer Republic, the Council did not discuss the actions of the Khmer Rouge for decades afterwards. Moreover, the UN voted to recognise Democratic Kampuchea – an exiled resistance movement in Cambodia which included the Khmer Rouge – as the only legitimate representative of Cambodia from 1979 to 1990 at the General Assembly. In UNGA Res 34/2 (21 September 1979) UN Doc A/RES/34/2, the Assembly voted to approve the reports of the Credentials Committee, which “[h]aving examined the credentials of the delegation of Democratic Kampuchea to the thirty-fourth session of the General Assembly [a]ccept[ed] the credentials of the delegation of Democratic Kampuchea” by 6 votes to 3 in UNGA ‘First report of the Credentials Committee’ (20 September 1979) UN Doc A/34/500, ¶23.

⁷⁵⁰ See, UNSC Verbatim Record (11 August 1992) UN Doc S/PV.3105 and UNSC Verbatim Record (23 November 1992) UN Doc S/PV.3139, where Special Rapporteur on the human rights situation in Iraq Max Van der Stoep addressed the Council on the situation between Iraq and Kuwait.

⁷⁵¹ See, UNSC Verbatim Record (13 November 1992) UN Doc S/PV.3134, where Special Rapporteur of the Commission on Human Rights on the former Yugoslavia Tadeusz Mazowiecki addressed the Council on the situation in Bosnia and Herzegovina.

⁷⁵² See UNSC Res 918 (17 May 1994) UN Doc S/RES/918; UNSC Res 1019 (9 November 1995) UN Doc S/RES/1019; UNSC Res 1034 (21 December 1995) UN Doc S/RES/1034; UNSC Res 1080 (15 November 1996)

women, peace and security⁷⁵³ and children in armed conflict.⁷⁵⁴ The establishment of international criminal tribunals for the former Yugoslavia⁷⁵⁵ and Rwanda,⁷⁵⁶ the Special Court for Sierra Leone⁷⁵⁷ and the insertion of a “backdoor” clause in the Rome Statute allowing the Council to refer situations to the International Criminal Court⁷⁵⁸ all highlight the Council’s intensifying focus on human rights issues; through these mechanisms, the Council has empowered itself to tackle human rights violations such as crimes against humanity, war crimes and genocide.

Notwithstanding, despite some advances in the Council’s recognition of human rights as central to the maintenance of peace and security and the correlation between international peace and human rights, there are numerous occasions where their responses have been delayed or lacking entirely. Throughout the late 20th century and even more recently, progress made in bringing human rights concerns to the fore have been undermined by lack of action. In addition

UN Doc S/RES/1080; UNSC Res 1208 (19 November 1998) UN Doc S/RES/1208; UNSC Res 1261 (30 August 1999) UN Doc S/RES/1261; UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265; UNSC Res 1289 (7 February 2000) UN Doc S/RES/1289; UNSC Res 1296 (19 April 2000) UN Doc S/RES/1296; UNSC Res 1422 (12 July 2002) UN Doc S/RES/1422; UNSC Res 1494 (30 July 2003) UN Doc S/RES/1494; UNSC Res 1502 (26 August 2003) UN Doc S/RES/1502; UNSC Res 1547 (11 June 2004) UN Doc S/RES/1547; UNSC Res 1554 (29 July 2004) UN Doc S/RES/1554; UNSC Res 1573 (16 November 2004) UN Doc S/RES/1573; UNSC Res 1577 (1 December 2004) UN Doc S/RES/1577; UNSC Res 1582 (28 January 2005) UN Doc S/RES/1582; UNSC Res 1592 (30 March 2005) UN Doc S/RES/1592; UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674; UNSC Res 1738 (23 December 2006) UN Doc S/RES/1738; UNSC Res 1833 (22 September 2008) UN Doc S/RES/1833; UNSC Res 1836 (29 September 2008) UN Doc S/RES/1836; UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894; UNSC Res 1998 (12 July 2011) UN Doc S/RES/1998; UNSC Res 2016 (27 October 2011) UN Doc S/RES/2016.

⁷⁵³ See UNSC Res 1325 (31 October 2000) UN Doc S/RES/1325; UNSC Res 1327 (13 November 2000) UN Doc S/RES/1327; UNSC Res 1366 (30 August 2011) UN Doc S/RES/1366; UNSC Res 1408 (6 May 2002) UN Doc S/RES/1408; UNSC Res 1820 (19 June 2008) UN Doc S/RES/1820; UNSC Res 1888 (30 September 2009) UN Doc S/RES/1888; UNSC Res 1889 (5 October 2009) UN Doc S/RES/1889; UNSC Res 1960 (16 December 2010) UN Doc S/RES/1960; UNSC Res 2106 (24 June 2013) UN Doc S/RES/2106; UNSC Res 2122 (18 October 2013) UN Doc S/RES/2122.

⁷⁵⁴ See UNSC Res 1261 (30 August 1999) UN Doc S/RES/1261; UNSC Res 1314 (11 August 2000) UN Doc S/RES/1314; UNSC Res 1379 (20 November 2001) UN Doc S/RES/1379; UNSC Res 1460 (30 January 2003) UN Doc S/RES/1460; UNSC Res 1493 (28 July 2003) UN Doc S/RES/1493; UNSC Res 1539 (22 April 2004) UN Doc S/RES/1539; UNSC Res 1542 (30 April 2004) UN Doc S/RES/1542; UNSC Res 1612 (26 July 2005) UN Doc S/RES/1612; UNSC Res 1649 (21 December 2005) UN Doc S/RES/1649; UNSC Res 1698 (31 July 2006) UN Doc S/RES/1698; UNSC Res 1704 (25 August 2006) UN Doc S/RES/1704; UNSC Res 1706 (31 August 2006) UN Doc S/RES/1706; UNSC Res 1719 (25 October 2006) UN Doc S/RES/1719; UNSC Res 1756 (15 May 2007) UN Doc S/RES/1756; UNSC Res 1768 (31 July 2007) UN Doc S/RES/1768; UNSC Res 1769 (31 July 2007) UN Doc S/RES/1769; UNSC Res 1771 (10 August 2007) UN Doc S/RES/1771; UNSC Res 1780 (15 October 2007) UN Doc S/RES/1780; UNSC Res 1794 (21 December 2007) UN Doc S/RES/1794; UNSC Res 1820 (19 June 2008) UN Doc S/RES/1820; UNSC Res 1882 (4 August 2009) UN Doc S/RES/1882; UNSC Res 1998 (12 July 2011) UN Doc S/RES/1998; UNSC Res 2143 (7 March 2014) UN Doc S/RES/2143.

⁷⁵⁵ Established directly through UNSC Res 827 (1993).

⁷⁵⁶ Established directly through UNSC Res 955 (1994).

⁷⁵⁷ Established in part through a request by the Council to the Secretary-General in UNSC Res 1315 (14 August 2000) UN Doc S/RES/1315.

⁷⁵⁸ Rome Statute (n 72) art 16.

to the massacres perpetrated by the Khmer Rouge in Kampuchea⁷⁵⁹ between 1975 - 1979, the Council also neglected human rights violations in Congo in 1960, Burundi in 1972 and 1993, Bosnia Herzegovina in 1992, Rwanda in 1994, Kosovo in 1999, Sudan in 2004 – 2007, Sri Lanka in 2009, Syria from 2011 onwards and, most recently, both the situation in Ukraine and the renewed sectarian violence in Iraq in 2014. Most damningly, perhaps, is the explanation of this absence; as two scholars phrased it, “the lack of political will, not lack of information, is at the core of the failures of the Security Council to address these and other abhorrent situations both timely and appropriately, or even to consider them at all.”⁷⁶⁰

This is not to say that the Council has not made grand efforts to promote different elements and facets of human rights both on its agenda and beyond. Numerous thematic agenda items have been added to its work that centres around human rights concerns;⁷⁶¹ opposition to *coup d'états* in Liberia,⁷⁶² Burundi,⁷⁶³ Sierra Leone,⁷⁶⁴ Guinea Bissau⁷⁶⁵ and Mauritania⁷⁶⁶ and highlight the support for democratically elected leadership through elections;⁷⁶⁷ other than the tribunals on the FRY and Rwanda, the Council has condemned or otherwise reacted to a plethora of human rights violations since the early 1990s, including Georgia,⁷⁶⁸ Armenia,⁷⁶⁹ Afghanistan,⁷⁷⁰ Angola,⁷⁷¹ Liberia,⁷⁷² Burundi,⁷⁷³ Cote d'Ivoire,⁷⁷⁴ Sudan⁷⁷⁵ and the DRC.⁷⁷⁶

⁷⁵⁹ Now Cambodia.

⁷⁶⁰ Bruno Stagno Ugarte and Jared Genser, ‘Evolution of the Security Council’ in Genser and Stagno Ugarte (n 704) 27.

⁷⁶¹ eg Children and Armed Conflict, Protection of Civilians in Armed Conflict, Women and Peace and Security.

⁷⁶² UNSC Res 788 (19 November 1992) UN Doc S/RES/788; UNSC Res 1497 (1 August 2003) UN Doc S/RES/1497.

⁷⁶³ UNSC Presidential Statement 32 (1996) UN Doc S/PRST/1996/32; UNSC Res 1072 (30 August 1996) UN Doc S/RES/1072.

⁷⁶⁴ UNSC Presidential Statement 29 (1997) UN Doc S/PRST/1997/29; UNSC Presidential Statement 36 (1997) UN Doc S/PRST/1997/36; UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132.

⁷⁶⁵ UNSC Presidential Statement 2 (2009) UN Doc S/PRST/2009/2; UNSC Res 1876 (26 June 2009) UN Doc S/RES/1876.

⁷⁶⁶ UNSC Presidential Statement 30 (2009) UN Doc S/PRST/2009/30.

⁷⁶⁷ This is a right under human rights instruments such as the UDHR, art 21 and the ICCPR, art 2. See, generally, Thomas M Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 AJIL 46.

⁷⁶⁸ UNSC Res 1036 (12 January 1996) UN Doc S/RES/1036.

⁷⁶⁹ UNSC Res 822 (30 April 1993) UN Doc S/RES/822.

⁷⁷⁰ UNSC Res 1333 (19 December 2000) UN Doc S/RES/1333; UNSC Presidential Statement 2 (2000) UN Doc S/PRST/2000/2.

⁷⁷¹ UNSC Res 834 (1 June 1993) UN Doc S/RES/834; UNSC Presidential Statement 26 (1999) UN Doc S/PRST/1999/26.

⁷⁷² UNSC Res 1509 (19 September 2003) UN Doc S/RES/1509; UNSC Presidential Statement 34 (1997) UN Doc S/PRST/1997/34; UNSC Presidential Statement 38 (1997) UN Doc S/PRST/1997/38.

⁷⁷³ UNSC Res 1791 (19 December 2007) UN Doc S/RES/1791; UNSC Res 1902 (17 December 2009) UN Doc S/RES/1902; UNSC Presidential Statement 31 (1996) UN Doc S/PRST/1996/31.

⁷⁷⁴ UNSC Res 1933 (30 June 2010) UN Doc S/RES/1933.

Nonetheless, the Council’s human rights record has been selective and there remain instances, as discussed earlier, where glaring omissions in practice and pattern can be distinguished.

VIII.4 Applying human rights to Council decisions

Consequently, the protection of human rights externally by the Council cannot be said to have been exhaustive but the Council does acknowledge the need for consideration of the human rights effects of its decisions. In the post-Cold War landscape, there has been an increased applicability of human rights law to the actions of peacekeepers, missions and other entities mandated by the Council to operate on the ground;⁷⁷⁷ yet the Council has never acknowledged that human rights should guide its response to a threat to the international peace. That is to say, whilst the Council has shown that human rights – at least in certain cases – warrant a response by the Council,⁷⁷⁸ and the groups and entities that direct these responses are bound by human rights

⁷⁷⁵ UNSC Res 1547 (11 June 2004) UN Doc S/RES/1547; UNSC Res 1769 (31 July 2007) UN Doc S/RES/1769.

⁷⁷⁶ UNSC Res 1341 (22 February 2001) UN Doc S/RES/1341; UNSC Res 1355 (15 June 2001) UN Doc S/RES/1355; UNSC Res 1468 (20 March 2003) UN Doc S/RES/1468; UNSC Res 1794 (21 December 2007) UN Doc S/RES/1794; UNSC Res 1856 (22 December 2008) UN Doc S/RES/1856; UNSC Res 1906 (23 December 2009) UN Doc S/RES/1906; UNSC Res 1925 (28 May 2010) UN Doc S/RES/1925; UNSC Presidential Statement 26 (1998) UN Doc S/PRST/1998/26.

⁷⁷⁷ The human rights component of the UN Observer Mission in El Salvador (ONUSAL), established under UNSC Res 693 (1991) was first of its kind to be deployed; the UN Transitional Authority in Cambodia (UNTAC), established under UNSC Res 745 (1992) also featured a human rights component; Memorandums of Understanding (MoUs) such as that between the Department of Peacekeeping Operations (DPKO) and the Office of the High Commissioner for Human Rights (OHCHR) in November 1999 can enumerate how human rights elements within peacekeeping operations operate; human rights components of peacekeeping missions are viewed on a par with all other components, including internal policy-making; the integration of human rights experts in an Integrated Mission Task Force (IMTF), established at the UN Headquarters in New York, is a prerequisite; there are usually express mandates by the Council requesting all parties, including peacekeepers, to protect and promote human rights; and the human rights obligations of a contributing State Party to a mission apply to their citizens and staff extraterritorially.

⁷⁷⁸ UNSC Res 827 (25 May 1993) UN Doc S/RES/827 established the ICTY “for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law”, at ¶2; UNSC Res 955 (8 November 1994) UN Doc S/RES/955 established the ICTR “for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law”, at ¶1; UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 authorised military intervention in Libya “to protect civilians and civilian populated areas under threat of attack”, at ¶4; UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975 on the Cote d’Ivoire included a decision by the Council to “adopt targeted sanctions against those individuals . . . [who] commit serious violations of human rights and international humanitarian law”, at ¶12; UNSC Res 2127 (5 December 2013) UN Doc S/RES/2127 on the Central African Republic condemned “widespread human rights violations and abuses”, at ¶17, and requested the establishment of “an international commission of inquiry . . . to investigate reports of violations of international humanitarian law, international human rights law and abuses of human rights in CAR”, at ¶24.

law, there has been no explicit statement that such a response itself must be guided by principles of human rights.⁷⁷⁹

This section focuses primarily on instances of the imposition of sanctions or embargoes⁷⁸⁰ and the authorisation or delegation of authority by the Council under Chapter VII to intervene militarily⁷⁸¹ in response to perceived threats to the peace. As such, the examination of integration of human rights standards into Council decisions will be examined within the framework of these two elements. Indeed, prior to 1990 there is no evidence that the Council considered human rights within the framework of its decision-making process, which is unsurprising giving the debate discussed in the preceding pages that raged over whether human rights even fell within the scope of the Council's mandate at all. There is no mention of human rights in the Council's *Rules of Procedure* and, notwithstanding Article 24(2) of the Charter, nor is there an obligation inherent in the text of any Chapter VII article that implies the Council must ensure that the effects of action taken under Articles 41 and 42 of the Charter adheres to human rights norms. As with the rise of the importance of human rights generally in the minds of UN Members and on the agendas of the Council and other UN organs, human rights appear to have been introduced by informal and organic means.

VIII.4.1 Article 41: coercive measures not amounting to the use of force

As human rights began to take centre stage on the agenda of the Council after 1990, many commentators both inside the UN⁷⁸² and externally⁷⁸³ criticised what appeared to be a 'human rights paradox' – namely that the reasons for imposition of sanctions have increasingly been the

⁷⁷⁹ The Council has expressed its “commitment to ensure that all UN efforts to restore peace and security themselves respect and promote the rule of law” (UNSC Presidential Statement 11 (2010) UN Doc S/PRST/2010/11, ¶9) and the Representative of Lichtenstein has argued that the Council “is legally bound by the applicable rules of the Charter and of international law” (UNSC Verbatim Record (29 June 2010) UN Doc S/PV.6347 (Resumption 1), 6) but the applicability of human rights to the Council decision-making process itself has never been put forward.

⁷⁸⁰ UN Charter (1945) art 41.

⁷⁸¹ UN Charter (1945) art 42.

⁷⁸² UNGA ‘Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations’ (25 January 1995) UN Doc A/50/60 – S/1995/1, ¶70: “Sanctions, as is generally recognized, are a blunt instrument. They raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behaviour is unlikely to be affected by the plight of their subjects. Sanctions also always have unintended or unwanted effects.” See also, Secretary-General’s Report (n 700) 50.

⁷⁸³ See eg Joy K Fausey, ‘Does the United Nations’ Use of Collective Sanctions to Protect Human Rights Violate Its Own Human Rights Standards?’ (1994) 10 Conn J Intl L 193; Nico Schrijver, ‘The Use of Economic Sanctions by the UN Security Council: An International Law Perspective’ in Harry HG Post (ed), *International Economic Law and Armed Conflict* (Martinus Nijhoff 1994) 156.

protection of human rights, when the imposition of sanctions themselves often have a detrimental effect:

Sanctions can complicate the work of humanitarian agencies by denying them certain categories of supplies and by obliging them to go through arduous procedures to obtain the necessary exemptions. They can conflict with the development objectives of the Organization and do long-term damage to the productive capacity of the target country. They can have a severe effect on other countries that are neighbours or major economic partners of the target country. They can also defeat their own purpose by provoking a patriotic response against the international community, symbolized by the United Nations, and by rallying the population behind the leaders whose behaviour the sanctions are intended to modify.⁷⁸⁴

The perils of hastily adopted and ill-planned sanction regimes were exemplified in 1990 with the imposition of economic sanctions on Iraq⁷⁸⁵ as a result of its failure to comply with resolution 660 (1990),⁷⁸⁶ ordering it to withdraw from the territory of Kuwait. These comprehensive sanctions resulted in a spike in infant mortality and morbidity,⁷⁸⁷ child malnutrition and a deterioration in the standard of living, nutrition and health for the Iraqi people, especially with respect to access to drinking water, agriculture and the supply of electricity;⁷⁸⁸ one Council member estimated that in 1995, “[s]even per cent of Iraq’s population – about 1,300,000 people – [was] at risk, being hardest hit by the consequences of the sanctions regime.”⁷⁸⁹ In fact, far from exerting pressure “to secure compliance of Iraq with paragraph 2 of resolution 660 (1990)”⁷⁹⁰, the sanction policy inhibited “the importation of spare parts, chemicals, reagents, and the means of transportation required to provide water and sanitation services to the civilian population of Iraq”⁷⁹¹, thereby consolidating the Iraqi regime’s power through its capacity to

⁷⁸⁴ ‘Agenda for Peace Supplement’ (n 782) ¶70.

⁷⁸⁵ UNSC Res 661 (6 August 1990) UN Doc S/RES/661.

⁷⁸⁶ UNSC Res 660 (2 August 1990) UN Doc S/RES/660.

⁷⁸⁷ See, UNSC ‘Report of the Second Panel established pursuant to the note by the President of the Security Council of 30 January 1999 (S/1999/100) concerning the current humanitarian situation in Iraq’ (30 March 1999) UN Doc S/1999/356, Annex II; UNICEF ‘Iraq Child and Maternal Mortality Surveys’ (July 1999) <<http://fas.org/news/iraq/1999/08/irqscont.pdf>> accessed 16 December 2014.

⁷⁸⁸ See eg UNCHR Subcommission on the Promotion and Protection of Human Rights ‘Humanitarian Situation of the Iraqi Population, Sub-Commission on Human Rights Decision 2000/112’ (18 August 2000) E/N.4/2000/L.11/Add.2.

⁷⁸⁹ Honduras, UNSC Verbatim Record (14 April 1995) UN Doc S/PV.3519, 4.

⁷⁹⁰ UNSC Res 661 (6 August 1990) UN Doc S/RES/661, ¶2.

⁷⁹¹ UNICEF ‘The Status of Children and Women in Iraq: A Situation Report’ (September 1995), 4.

control distribution of bare necessities through a rationing system, granting the authorities further control over anti-government insurgence and expanding the existing corruption in the country.⁷⁹²

The impact of sanctions was a divisive issue amongst the Council members throughout the 1990s. Some, including Russia, China and France, argued that the humanitarian concerns raised by sanctions demanded they be reviewed,⁷⁹³ whilst others, such as the UK and US, maintained that “Iraq will remain subject to a regime of sanctions imposed under Chapter VII of the United Nations Charter until it complies fully with all the Security Council’s relevant resolutions”⁷⁹⁴ and that sanctions should even be augmented so long as the Iraqi authorities continued to refuse compliance with the numerous Council resolutions passed on the subject.⁷⁹⁵ In fact, due to the open-ended nature of resolutions such as 660 (1990), 661 (1990), and 678 (1990) and the fact that they were not rescinded subsequently, permanent members of the Council benefited from what has been referred to as a “reverse veto”⁷⁹⁶ over the termination of sanctions⁷⁹⁷ – the capacity to use or threaten the use of the veto on any resolution that would put

⁷⁹² See, UNGA ‘Situation of human rights in Iraq- note by the Secretary-General’ (14 October 1999) UN Doc A/54/466, ¶33: “While the Government of Iraq has failed to use its existing resources well or to cooperate fully to take advantage of other available resources, the Government of Iraq has used some resources to enrich itself.”

⁷⁹³ Although UNSC Res 986 (1995) temporarily lifting the embargo on Iraqi oil exports passed unanimously, several States took the opportunity to make their views on the sanctions regime known, including China, the representative of which believed that “the Council should proceed to discuss, at an early date, the lifting of the oil embargo against Iraq, on the basis of humanitarian considerations and in the light of Iraq’s implementation of the resolutions, so as to truly and effectively ease the humanitarian situation in Iraq and alleviate the suffering inflicted on the Iraqi people by sanctions”, China, UNSC Verbatim Record (14 April 1995) UN Doc S/PV.3519, 3. Later, in 1997, it was only through negotiations at the Council that China agreed to vote for UNSC Res 1115 (1997): “[the Council] should consider gradually lifting sanctions against Iraq in order to alleviate its humanitarian difficulties. However, the resolution before us decides to suspend the review of sanctions against Iraq by the Council . . . and threatens to impose further sanctions. This is not fair . . . We have noted that considerable changes have been incorporated in the current resolution, with the deletion of new sanctions . . . For these reasons, the Chinese delegation voted in favour of the resolution before us”, UNSC Verbatim Record (21 June 1997) UN Doc S/PV.3792, 6. See also, the explanation of vote by the Russia on UNSC Res 1129 (1997) in UNSC Verbatim Record (12 September 1997) UN Doc S/PV.3817, 4: “while noting that both sides bear responsibility for the ongoing situation, we believe that it is exceedingly important to remedy the situation in the Committee on sanctions as regards the delivery of humanitarian goods to Iraq. Unfortunately . . . this aspect is not reflected in the draft resolution, and for this reason we shall abstain in the voting.” China, France, Egypt, Kenya and Russia all abstained from voting on UNSC Res 1134 (1997), which set the stage for further sanctions.

⁷⁹⁴ UNSC Verbatim Record (14 April 1995) UN Doc S/PV.3519, 11.

⁷⁹⁵ UNSC Verbatim Record (23 October 1997) UN Doc S/PV.3826, 12: The US representative wished in UNSC Res 1129 (1997) to “start the process [of further sanctions] by beginning the compilation of names, so if sanctions are imposed there will be no administrative delay . . . [and make] very clear to the Iraqi authorities that the next time they try to block UNSCOM’s work the Council will impose sanctions against those individuals responsible for Iraqi failure to cooperate with UNSCOM.”

⁷⁹⁶ David D Caron, ‘The Legitimacy of the Collective Authority of the Security Council’ (1993) 87 AJIL 552.

⁷⁹⁷ This open-endedness also formed the US legal basis, at least for a short period of time, behind the invasion of Iraq in 2003: “Whereas United Nations Security Council Resolution 678 (1990) authorizes the use of all necessary means to enforce United Nations Security Council Resolution 660 (1990) and subsequent relevant resolutions and to

an end to existing sanctions. By 1994, deep into the sanctions regime that had been imposed on Iraq, it was clear that sanctions were not operating as intended: “Iraqi authorities [had] enough money to maintain one of the largest armies and enough money to pay for military operations, whether to suppress the Marsh Arabs or to threaten Kuwait.”⁷⁹⁸

The Council members themselves had already recognised by the mid-1990s that sanctions could not be imposed in isolation of consideration for human rights and humanitarian concerns; ⁷⁹⁹ references to ensuring that humanitarian concerns were addressed prior to the imposition of sanctions were already emerging during discussions. The Russian Federation appears to have been the first to make mention, as early as 1994, that

thought must be given to the question *how sanctions may be aimed at political elites*, thereby reducing to a minimum the sufferings of broad strata of the population, including its most vulnerable categories . . . In other words, thought should be given to the fact that sanctions should not punish the most those who are perhaps least of all capable of righting the situation . . . and to *laying down clear humanitarian limits* in determining sanctions. ⁸⁰⁰

Concrete efforts were made to assess and mitigate the humanitarian repercussions of the Council’s sanctions regimes in 1995, with the commissioning of a report on the effect of sanctions on humanitarian conditions by the UN Department of Humanitarian Affairs (DHA)⁸⁰¹

compel Iraq to cease certain activities that threaten international peace and security, including the development of weapons of mass destruction and refusal or obstruction of United Nations weapons inspections in violation of United Nations Security Council Resolution 687 (1991), repression of its civilian population in violation of United Nations Security Council Resolution 688 (1991), and threatening its neighbors or United Nations operations in Iraq in violation of United Nations Security Council Resolution 949 (1994) . . . The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . enforce all relevant United Nations Security Council resolutions regarding Iraq”, ‘Authorization for Use of Military Force Against Iraq Resolution of 2002’ 107th Congress (2001-2002) H.J.RES.114.ENR.

⁷⁹⁸ US, UNSC Verbatim Record (15 October 1994) UN Doc S/PV.3438, at 5; the UK voted in favour of both UNSC Res 1115 (1997) and UNSC Res 1134 (1997).

⁷⁹⁹ Although the 1990s saw the imposition of sanctions against Haiti and Yugoslavia, both of these were unique in their own way and pre-dated the review of sanctions regimes that began in the mid-1990s; for instance, sanctions on Haiti under UNSC Res 841 (16 June 1993) UN Doc S/RES/841 were imposed as a result of a coup, in the absence of existing post-conflict damage in the same vein as that of Iraq and rapidly followed by a military intervention in a year later.

⁸⁰⁰ Russia, UNSC Verbatim Record (17 October 1994) UN Doc S/PV.3439, 5 [emphasis added].

⁸⁰¹ Claudia von Braunmühl and Manfred Kulesa, ‘The Impact of UN Sanctions on Humanitarian Assistance Activities: Report on a Study Commissioned by the United Nations Department of Humanitarian Affairs’ (Berlin: Gesellschaft für Communication Management Interkultur Training, December 1995).

and a study⁸⁰² conducted for the DHA with the objective of developing methods and indicators for assessment of humanitarian impact of sanctions. Nonetheless, it was not until the end of the decade that the Council abandoned paying lip service to the humanitarian situation in Iraq⁸⁰³ and truly took stock of the failures resulting from its sanctions regime there.⁸⁰⁴ A panel on humanitarian issues was established to “assess the current humanitarian situation in Iraq and make recommendations to the Security Council regarding measures to improve the humanitarian situation in Iraq.”⁸⁰⁵ The subsequent findings confirmed the protestations of agencies, States, NGOs and humanitarian groups which the Council already knew four years earlier⁸⁰⁶ and arguably even as early as 1991:⁸⁰⁷ “[e]ven if not all suffering in Iraq can be imputed to external factors, especially sanctions, the Iraqi people would not be undergoing such deprivations in the

⁸⁰² Larry Minear and others, ‘Towards More Humane and Effective Sanctions Management: Enhancing the Capacity of the United Nations System’ (1998) Thomas J Watson Jr Institute for International Studies Occasional Paper No 31 <https://sanctionsandsecurity.nd.edu/assets/110294/toward_more_humane_pdf > accessed on 16 December 2014.

⁸⁰³ Discussions throughout the 1990s focused on the need for increased awareness and deference to humanitarian priorities; Italy voted in favour of UNSC Res 986 (1995), but made it clear that while “sanctions are, and remain, one of the most effective tools provided by the Charter of the United Nations to enforce compliance with international law, they should not lead to the extreme consequence of inflicting untold misery and starvation on an entire civilian population”, UNSC Verbatim Record (14 April 1995) UN Doc S/PV.3519, 2; the US “shared the concern expressed by so many here that sanctions not strike an unintended target” and the UK “Government has been concerned about the humanitarian situation in Iraq since 1991,” *ibid* 11. Identification of a worsening humanitarian situation in Iraq was made clearly; see eg Russia, UNSC Verbatim Record (12 September 1997) UN Doc S/PV.3817, 3: “The situation has in fact become very serious. By the end of August, the medicine and other medical supplies being delivered to Iraq amounted only to 9.5 per cent of the target amount. In the areas of agricultural products, water supplies, electrical energy and education, when the Secretary-General’s report was submitted, no supplies at all had reached the country. All of this is causing a worsening deterioration of the humanitarian situation in Iraq.”

⁸⁰⁴ Yet no definitive action was taken and even temporary measures were insufficient. See, eg UNSC Verbatim Record (4 December 1997) UN Doc S/PV.3840, 2, where “despite the implementation of [S/RES986 (1995) and S/RES/1111 (1997)], the humanitarian situation in Iraq is continuing to worsen . . . The quantity of oil sales stipulated in resolution 1111 (1997) is far from being able to satisfy Iraq’s basic humanitarian needs.”

⁸⁰⁵ UNSC ‘Note by the President of the Security Council’ (30 January 1999) UN Doc S/1999/100, ¶5.

⁸⁰⁶ France, UNSC Verbatim Record (14 April 1995) UN Doc S/PV.3519, 12: “We are all aware that the humanitarian situation in Iraq has worsened over the past few years. Nevertheless, we do not possess an exhaustive analysis enabling us to determine precisely the extent of the needs. *There is no doubt, however, that they are great.* The testimony of non-governmental organizations and the reports of the United Nations institutions that are now working in that country have amply shown this” [emphasis added].

⁸⁰⁷ Under the auspices of the UN Secretary-General, a team to assess the humanitarian situation was sent to Iraq. See ‘Report to the Secretary-General on humanitarian needs in Kuwait and Iraq in the immediate post-crisis environment by a mission to the area led by Mr. Martti Ahtisaari, Under-Secretary-General for Administration and Management, dated 20 March 1991’ in UNSC ‘Letter dated 20 March 1991 from the Secretary-General addressed to the President of the Security Council’ (20 March 1991) UN Doc S/22366, Annex: “Iraq [had], for some time to come, been relegated to a pre-industrial age, but with all the disabilities of post-industrial dependency on an intensive use of energy and technology” (¶8) and recommended that “in these circumstances of present severe hardship and in view of the bleak prognosis, sanctions in respect of food supplies should be immediately removed as should those relating to the import of agricultural equipment and supplies” (¶18).

absence of prolonged measures imposed by the Security Council and the effects of the war.”⁸⁰⁸ The Council was found, by its own established panel no less, to have verged on complicity with the regime in intensifying the horrific humanitarian situations in Iraq during the 1990s.

By 1995, the realisation was more widespread that the absence of human rights considerations can result in the detrimental outcome or by-product of a Council response such as sanctions, particularly in relation to vulnerable sections of society. In a letter to the President of the Security Council, the P5 members grouped together to support the proposal that “further collective actions in the Security Council within the context of any future sanctions regimes should be directed to minimize unintended adverse side-effects of sanctions on the most vulnerable segments of targeted countries.”⁸⁰⁹ Nonetheless, it took several years for the Council to implement this concept into practice. It was not until 1997, when debating the means of dealing with the situation in Sudan, that a note from the DHA⁸¹⁰ warning against the implementation of air sanctions under UNSC Res 1054⁸¹¹ was heeded and the 90 day grace period given in the resolution elapsed without consequence. Both China and the Russian Federation were extremely hesitant to resort to the use of sanctions again in light of the concerns raised in Iraq and Haiti, with the latter noting that “[t]he rash use of the sanctions instrument is not only destructive for the people of Sudan and the countries of the region, but creates a precedent which could do real damage to the Security Council’s authority by giving the impression that the Council is not able to draw conclusions from past lessons.”⁸¹² A report by the

⁸⁰⁸ UNSC ‘Report of the Second Panel established pursuant to the note by the President of the Security Council of 30 January 1999 (S/1999/100) concerning the current humanitarian situation in Iraq’ (30 March 1999) UN Doc S/1999/356, Annex II, ¶45.

⁸⁰⁹ ‘Letter dated 13 April 1995 from the Permanent Representatives of China, France, Russia, The United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council’ (13 April 1995) UN Doc S/1995/300, 2.

⁸¹⁰ UN Department of Humanitarian Affairs ‘Note from the Department of Humanitarian Affairs Concerning the Possible Humanitarian Impact of the International Flight Ban Decided in Security Council Resolution 1070 (1996)’ (20 February 1997).

⁸¹¹ UNSC Res 1054 (26 April 1996) UN Doc S/RES/1054.

⁸¹² UNSC Verbatim Record (16 August 1996) UN Doc S/PV.3690, 10. See also, China, *ibid* 12: “China’s position of principle on sanctions is a consistent one. We do not consider sanctions a panacea because sanctions, or the tightening of sanctions, cannot solve a problem; they may, on the contrary, further aggravate the problem. Restrictions on Sudan Airways constitute an escalation in the sanctions regime on the Sudan. Although the draft resolution before us does not determine the date of entry into force of its provisions, it represents a clear decision on imposing such sanctions. This question concerning the Sudan is already quite complicated. We are concerned that tightening sanctions against the Sudan might further compound the problem.” Although France voted in favour of suspended sanctions under UNSC Res 1070 (1996), it highlighted at 16 that “the Council must think about how they should be applied, and in particular about their duration. In our view, these measures should not penalize the people of Sudan by making them suffer additional restrictions that could have serious humanitarian consequences.”

Secretary-General two months later highlighted “the likely negative humanitarian effects of the possible ban envisaged in UNSC Res 1070 (1996) and . . . the potential negative impact on the health situation.”⁸¹³ Whether as a result of humanitarian concerns or – more cynically – the threat of the use of a veto by the Russian Federation due to economic concerns,⁸¹⁴ the flight ban on Sudan Airlines was not enforced. Similar investigations took place prior to the implementation of sanctions in Afghanistan,⁸¹⁵ Liberia⁸¹⁶ and Sierra Leone.⁸¹⁷

The balance between human rights concerns and effective sanctions regimes was not perfected overnight and, despite the humanitarian crises that were risked as a result of the sanctions regime imposed by the Council, the frustration and disappointment that followed the failure of the Council to soften its stance even in the late 1990s was highlighted by the representative of France, which

had hoped also that the Council, in the future exercise of its prerogatives, would continue to use very precise wording in its work in order to avoid situations in which people who are not directly responsible for the problems encountered

⁸¹³ UNSC ‘Report of the Secretary-General pursuant to Security Council Resolution 1070 (1996)’ (14 November 1996) UN Doc S/1996/940, ¶18.

⁸¹⁴ ‘Letter dated 19 December 1996 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General’ (29 January 1996) UN Doc A/51/60, Annex, 2: the Russian Federation State Duma recommended that Russia should “take measures precluding the possibility of the use by the Security Council of sanctions causing serious damage to the economic interests of the Russian Federation, unless at the same time an effective international mechanism is set up to compensate for economic losses incurred by the Russian side as a result of participation in the sanctions.”

⁸¹⁵ Office of the UN Coordinator for Afghanistan ‘Vulnerability and Humanitarian Implications of UN Security Council Sanctions in Afghanistan’ (December 2000), s 5, 36: the study found that “the direct impact of sanctions on the humanitarian situation are limited, but the indirect impacts are potentially more serious.”

⁸¹⁶ UNSC Res 1343 (7 March 2001) UN Doc S/RES/1343 imposed limited and targeted sanctions upon specific individuals; prior to expanding the sanctions, the Secretary-General was asked to draft a report into the humanitarian impact, which found that “[a] tightening of the existing sanctions regime [was likely] to have further negative effects on the financial environment, with worsening exchange rates, increasing prices for essential commodities, decreased savings and more capital flight. These additional aggravating factors and their implications would particularly affect the most vulnerable of Liberia’s population given that their resilience and coping capacities are next to exhausted”, UNSC ‘Report of the Secretary-General in pursuance of paragraph 13 (a) of resolution 1343 (2001) concerning Liberia’ (5 October 2001) UN Doc S/2001/939, ¶47.

⁸¹⁷ UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132 was passed only after the “ECOWAS Committee of Five [had] given the United Nations Department of Humanitarian Affairs assurances that in implementing the current ECOWAS regional sanctions regime it does not intend to constrain humanitarian relief operations in Sierra Leone”, UNSC Verbatim Record (8 October 1997) UN Doc S/PV.3822, 8. Once introduced, an inter-agency mission comprising UN OCHA, UNICEF, UNHCR, WO, WFP and OSESG were tasked with the assessment of “the humanitarian situation in Sierra Leone and measuring to what extent this situation has deteriorated under the UN sanctions and ECOWAS embargo, particularly in terms of the delivery of humanitarian assistance”, Office of the Coordination of Humanitarian Affairs ‘Inter-Agency Assessment Mission to Sierra Leone: Interim Report’ (17 February 1998), ¶1.

might find themselves facing sanctions . . . but deem[ed] it unfortunate that this suggestion was not taken into account.⁸¹⁸

Indeed, criticism continued even to the turn of the century and the Council has been accused of adopting a policy where “getting sanctions right has [often] been a less compelling goal than getting sanctions adopted.”⁸¹⁹ Such criticism of the human rights impact of comprehensive sanctions regimes and a drive to incorporate new techniques to make sanctions more effective at their goals to ensure compliance with its resolutions through non-military means led to several rounds of sanction reform reviews: in the years 1998-1999, the Interlaken Process focused on targeting financial sanctions;⁸²⁰ in 1999-2000, the Bonn/Berlin Process tackled sanctions related to arms embargoes, travel and aviation;⁸²¹ in 2001-2003, the Stockholm Process⁸²² discussed UN Policy Options; and in 2007, Greece sponsored a symposium on ‘Enhancing the Implementation of UN Security Council Sanctions’.⁸²³

VIII.4.1.1 A lesson learnt?

In addition to these four rounds of sanctions review, the Council has also implemented its own reform efforts in the form of The Informal Working Group on General Issues of Sanctions – a temporary body established in 2000⁸²⁴ – which was created to explore the sanctions process and propose amendments to the Council in how best to impose sanctions. When, in 2006, it submitted its recommendations, amendments to the design,⁸²⁵ implementation,⁸²⁶ monitoring,⁸²⁷ and working methods,⁸²⁸ the Council significantly amended its approach to and content of

⁸¹⁸ UNSC Verbatim Record (23 October 1997) UN Doc S/PV.3826, 10.

⁸¹⁹ Canadian Foreign Minister Lloyd Axworthy. See David Cortright and George A Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Lynne Rienner 2000) 7.

⁸²⁰ See, the Thomas J Watson Jr Institute for International Studies, ‘Targeted Financial Sanctions: A Manual for Design and Implementation. Contributions from the Interlaken Process’ (2001).

⁸²¹ Michael Brzoska (ed), ‘Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions: Results of the ‘Bonn-Berlin Process’ (BICC 2001)

⁸²² Peter Wallensteen, Carina Staibano and Mikael Eriksson (eds), ‘Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options. Results from the Stockholm Process on the Implementation of Targeted Sanctions’ (Uppsala U 2003).

⁸²³ ‘Letter dated 12 December 2007 from the Permanent Representative of Greece to the United Nations addressed to the President of the Security Council’ (13 December 2007) UN Doc S/2007/734, Annex.

⁸²⁴ UNSC ‘Note by the President of the Security Council’ (17 April 2000) UN Doc S/2000/319, later extended by UNSC ‘Note by the President of the Security Council’ (29 December 2005) S/2005/841.

⁸²⁵ UNSC ‘Note by the President of the Security Council’ (22 December 2006) UN Doc S/2006/997, Annex, 4.

⁸²⁶ *ibid* 5, 7.

⁸²⁷ *ibid* 6.

⁸²⁸ *ibid* 7, 9.

sanctions, introducing targeted and smart sanctions to replace the blanket comprehensive sanctions employed in Haiti, Yugoslavia and Iraq. These newer forms of sanctions were also more bespoke to the countries upon which they were imposed; this new approach reflects positively on another component of the rule of law: the *Predictability Paradox*.

Rather than adopting a *one size fits all* model of sanction regime, as the Council had previously been inclined to do, newer sanctions regimes integrated almost pinpoint-accurate measures such as commodity-specific sanctions pertinent to the country of sanction,⁸²⁹ sanctions targeted to individuals⁸³⁰ and segmented sanction elements⁸³¹ that could be selected individually and tailored more accurately to ensure lower negative humanitarian and human rights impact upon civilians and increased pressure on the powerful elite that were the true targets of Council action. The ability of the Council to *mix and match* different components of sanctions allowed it to focus its sanctions regime on the sources of income for those in power or for those individuals that it wished to isolate, rather than effecting collateral damage on the scale of the Iraqi sanctions regime. Moreover, in various sanction regimes, assets that were deemed to be “necessary for basic expenses, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges”⁸³² were exempt in a clear lesson learnt from the Iraq sanctions experience, which itself was overhauled⁸³³ to account for

⁸²⁹ In addition to traditional oil embargos in Iraq and Haiti, for example, a charcoal embargo was imposed on Eritrea and Somalia in UNSC Res 2036 (22 February 2012) UN Doc S/RES/2036 and UNSC Res 2093 (6 March 2013) UN Doc S/RES/2093; timber embargoes were imposed on Liberia in UNSC Res 1521 (22 December 2003) UN Doc S/RES/1521 and UNSC Res 1532 (12 March 2004) UN Doc S/RES/1532; and diamond embargoes were introduced against UNITA in Angola (UNSC Res 1173 (12 June 1998) UN Doc S/RES/1173, the Revolutionary United Front in Angola (UNSC Res 1306 (5 July 2000) UN Doc S/RES/1306) and Liberia (UNSC Res 1343 (7 March 2001) UN Doc S/RES/1343).

⁸³⁰ In contrast to the sanctions against Iraq and Yugoslavia, where financial sanctions were imposed upon government assets, the Council began to focus in on individuals and entities.

⁸³¹ There are four central categories of sanctions: Travel bans, Asset Freezes, Arms Embargos and Commodity Interdictions. Sanctions regimes may incorporate between one and all of the categories, as well as other measures such as judicial referral and diplomatic sanctions. The first three categories are almost invariably part of a sanction regime; of the 15 current sanctions regimes, arms embargoes are included in 13, travel bans in 14 and asset freezes in 14.

⁸³² UNSC Res 1591 (29 March 2005) UN Doc S/RES/1591, ¶3(g). The same principle is repeated in numerous resolutions relating to sanctions regimes, see eg UNSC Res 1718 (14 October 2006) UN Doc S/RES/1718, ¶9(a), UNSC Res 1737 (27 December 2006) UN Doc S/RES/1737, ¶13(a) and UNSC Res 1844 (20 November 2008) UN Doc S/RES/1844, ¶4(a). Sanctions in Sierra Leone, for example, did not limit shipments of food or medicines or other basic goods, contained regular review of implementation and were “designed to have maximum impact against the illegal junta of Sierra Leone, while imposing a minimum burden on the civilian population”, UNSC Verbatim Record (8 October 1997) UN Doc S/PV.3822, 16.

⁸³³ UNSC Res 1472 (28 March 2003) UN Doc S/RES/1472.

the humanitarian situation following the second Gulf War and finally replaced⁸³⁴ in 2003 with a committee-led sanctions regime.

This practice of creating committees, panels or groups of experts and monitoring groups for all sanctions imposed is also a step towards increased transparency, fairness and institutional strength on the part of the Council. Eritrea and Somalia were subject to a simple sanction regime under UNSC Res 733⁸³⁵ before the adoption of UNSC Res 751⁸³⁶ created a committee to monitor the situation; the DRC's sanctions were also amended in 2003 from a simple arms embargo⁸³⁷ to one under the supervision of both a committee and a group of experts;⁸³⁸ Sudan's simple arms embargo⁸³⁹ transitioned to sanctions under the watch of a committee and panel of experts;⁸⁴⁰ and UNSC Res 1695⁸⁴¹ imposing non-proliferation sanctions on the DPRK was swiftly augmented to an arms embargo, asset freeze, non-proliferation and travel ban under the auspices of a committee in 2006.⁸⁴² In fact, since 2006 the Council has not imposed a sanctions regime without a corresponding committee at the very least.⁸⁴³ Although these committees are established to monitor compliance with the sanctions regimes, their existence provides a much needed link between the situation on the ground and the Council through country reports that are filed.

Notwithstanding the implementation of this measure, which may have added a degree of transparency and independence to the listing of individuals to be targeted, there remained human rights concerns with respect to the lists of individuals compiled. Due process rights are jeopardised by the procedure of the Council and the inability of individuals to contest their insertion on asset freeze and financial sanctions lists; under article 25 of the Charter, States "agree to accept and carry out the decisions of the Security Council"⁸⁴⁴ and, in contrast to domestic jurisdictions where legal recourse may be available through domestic judicial channels

⁸³⁴ UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483.

⁸³⁵ UNSC Res 733 (23 January 1992) UN Doc S/RES/733.

⁸³⁶ UNSC Res 751 (24 April 1992) UN Doc S/RES/751.

⁸³⁷ UNSC Res 1493 (28 July 2003) UN Doc S/RES/1493.

⁸³⁸ UNSC Res 1533 (12 March 2004) UN Doc S/RES/1533

⁸³⁹ UNSC Res 1556 (30 July 2004) UN Doc S/RES/1556.

⁸⁴⁰ UNSC Res 1591 (29 March 2005) UN Doc S/RES/1591.

⁸⁴¹ UNSC Res 1695 (15 July 2006) UN Doc S/RES/1695.

⁸⁴² UNSC Res 1718 (14 October 2006) UN Doc S/RES/1718.

⁸⁴³ Of the fifteen current sanctions regimes, all have a committee established to oversee the stipulations of the relevant resolutions and sanction elements. These function to ensure that sanctions are carried out adequately and appropriately.

⁸⁴⁴ UN Charter (1945) art 25.

in the event of an alleged breach of justice, there was initially no means of arguing one's innocence to the Council. In essence, once placed on the list, it was impossible to be removed without the express consent of the Council or the overseeing Committee, a request for which had to come through the State of nationality or residency of the petitioner.

It was this “resolve to ensure that sanctions are carefully targeted in support of clear objectives. . . [and that] fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions”⁸⁴⁵ that led to the establishment of a Focal Point for Delisting requests, which is undoubtedly a step forward for the due process rights that may have been initially overlooked by the Council in their sanction regimes. Although the grandiose title belies the fact that this role is essentially a single UN staff member, the mechanism allows direct access to the individual in question,⁸⁴⁶ rather than the arduous path of applying through the State. The Council also created the Office of the Ombudsperson – an independent and impartial review mechanism for de-listing from the Al-Qaida sanctions list – in an effort to welcome “improvements to the Committee’s procedures and the quality of the Consolidated List and *expressing* its intent to continue efforts to ensure that procedures are fair and clear.”⁸⁴⁷ The Ombudsman should “perform [their] tasks in an independent and impartial manner and . . . neither seek nor receive instructions from any government.”⁸⁴⁸ The sanctions regime was first established in 1999⁸⁴⁹ and has been subsequently amended numerous times since⁸⁵⁰ but it was the concern over due rights process of individuals placed on the sanctions list that spurred the Council into action. Individuals who found themselves on the list were not subject to any judicial standards of trial prior to their inclusion⁸⁵¹

⁸⁴⁵ UNSC Presidential Statement 28 (2006) UN Doc S/PRST/2006/28, 2. UNSC Res 1730 (19 December 2006) UN Doc S/RES/1730, preamble.

⁸⁴⁶ The basic procedures for the operation of the delisting request are publically available UNSC Res 1370 (18 September 2001) UN Doc S/RES/1370, Annex.

⁸⁴⁷ UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904, preamble [emphasis in original].

⁸⁴⁸ *ibid* ¶20.

⁸⁴⁹ UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267.

⁸⁵⁰ eg UNSC Res 1333 (19 December 2000) UN Doc S/RES/1333; UNSC Res 1390 (16 January 2002) UN Doc S/RES/1390; UNSC Res 1455 (17 January 2003) UN Doc S/RES/1455; UNSC Res 1526 (30 January 2004) UN Doc S/RES/1526; UNSC Res 1617 (29 July 2005) UN Doc S/RES/1617; UNSC Res 1735 (22 December 2006) UN Doc S/RES/1735; UNSC Res 1822 (30 June 2008) UN Doc S/RES/1822; UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904; UNSC Res 1989 (17 June 2011) UN Doc S/RES/1989; UNSC Res 2082 (17 December 2012) UN Doc S/RES/2082; UNSC Res 2083 (17 December 2012) UN Doc S/RES/2083.

⁸⁵¹ The Committee of the Security Council dealing with sanctions against the Taliban established by UNSC Res 1267 was authorised to freeze funds and other financial resources in accordance with UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267, ¶4(b) without oversight and “to designate the aircraft and funds or other financial resources referred to in paragraph 4”, *ibid* ¶6(e).

and there was no justification offered by the Council or other body for listing these individuals on the sanctions list, contrary to principles of *habeas corpus*, transparency and avoidance of arbitrariness.

Thus, there is still work to be done to ensure that the Council complies with human rights fully in the process of establishing its sanctions regimes; in an apparent conflict of interest, the same committee entrusted with compiling and monitoring the sanctions list was the only body empowered to “consider requests for exemptions from the measure imposed”⁸⁵² with no oversight. The inability of individuals to appeal their inclusion to the committee is what, in part, led to the landmark – and controversial – *Kadi II*,⁸⁵³ *Kadi III*⁸⁵⁴ and *Nada*⁸⁵⁵ judgments at the EU courts. The fundamental rights of Kadi – specifically the “right to be heard, the right to respect for property and the principle of proportionality, and also the right to effective judicial review”⁸⁵⁶ were found to have been violated by his inclusion on the sanctions list.⁸⁵⁷ As recently as 2013 it was found by the ECJ that despite the establishment of the Office of the Ombudsperson, “the procedure for delisting and *ex-officio* re-examination at UN level . . . do not provide to the person whose name is listed on the Sanctions Committee Consolidated List . . . the guarantee of effective judicial protection.”⁸⁵⁸ Although the European Court of Human Rights has previously held that “in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights”⁸⁵⁹, in the *Nada* case it soon after made it quite clear that “Resolution 1390 (2002) . . . [imposed] an obligation to take measures capable of breaching human rights.”⁸⁶⁰ The legal interpretation, then, is that the Council does not *deliberately* breach human rights, but that it is capable of doing so nonetheless.

This interpretation is befitting to summarise the Council’s approach to human rights; the Council’s intentions and results are at times mismatched. Whilst there may have been varying objectives of efforts towards reform, including strengthening capacities to administer the

⁸⁵² *ibid.*

⁸⁵³ Case T-85/09, *Yassin Abdullah Kadi v European Commission and Others* [2010] ECR I-06351 (*Kadi II*).

⁸⁵⁴ Joined cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others v Yassin Abdullah Kadi* [2013] (CFI, 23 July 2013) (*Kadi III*).

⁸⁵⁵ *Nada v Switzerland* App no 10593/08 (ECtHR, 12 September 2012).

⁸⁵⁶ *Kadi III* (n 854) ¶18.

⁸⁵⁷ This was later overturned in the *Kadi II* case.

⁸⁵⁸ *Kadi III* (n 854) ¶133.

⁸⁵⁹, *Al-Jedda v The United Kingdom* App no 27021/08 (ECtHR 7 July 2011) ¶102.

⁸⁶⁰ *Nada* (n 855) ¶172.

sanctions, increasing compliance and streamlining the design and implementation of embargoes and sanctions, the human rights impact of sanctions was undoubtedly one of the core elements for reflection; however, as respect for human rights increased in Council resolutions on sanctions, new challenges have arisen that have taken time for the Council to come to terms with. Moreover, efficacy appears at times have declined. The subsequent shift in the Council's response – as a result of the implementation of some of the many recommendations and the increased concern for human rights and humanitarian issues in sanctioned countries – may have resulted in tamer results on the ground; it is not clear that sanctions have succeeded alone in altering the trajectory of troubled countries. In the Sudan,⁸⁶¹ Ivory Coast⁸⁶² and Libya,⁸⁶³ for example, sanctions were always coupled with the mobilisation of troops either in a protection or monitoring force⁸⁶⁴ or military intervention capacity.⁸⁶⁵ However, this may be a necessary forfeit on the part of the Council. It is worth noting that sanctions are one of a number of tools at the disposition of the Council and, just as there are various types of sanctions that can be applied to a situation threatening the peace, so too the Council is not barred in any form from implementing sanctions in tandem with one or more other tools at its disposal either under Chapter VII, as was the case in Libya recently, or through international diplomacy, as is the case with Iran currently. Ultimately, the Council has correctly identified the necessity of ensuring that sanction measures take stock of human rights and humanitarian concerns; however, this does not mean that they are limited as to what course of action outside of a sanctions regime they may pursue.

⁸⁶¹ UNSC Res 1556 (30 July 2004) UN Doc S/RES/1556; UNSC Res 1591 (29 March 2005) UN Doc S/RES/1591; UNSC Res 1593 (7 April 2005) UN Doc S/RES/1593; UNSC Res 1945 (14 October 2010) UN Doc S/RES/1945.

⁸⁶² UNSC Res 1572 (5 November 2004) UN Doc S/RES/1572; UNSC Res 1584 (1 February 2005) UN Doc S/RES/1584; UNSC Res 1643 (15 December 2005) UN Doc S/RES/1643; UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975; UNSC Res 2153 (29 April 2014) UN Doc S/RES/2153.

⁸⁶³ UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970; UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973; UNSC Res 2009 (16 September 2011) UN Doc S/RES/2009; UNSC Res 2146 (19 March 2014) UN Doc S/RES/2146.

⁸⁶⁴ The UN Mission in Sudan (UNMIS) was established by UNSC Res 1590 and was mandated to “contribute towards international efforts to protect and promote human rights in Sudan”, ¶4(d); the UN Operation in Côte d’Ivoire (UNOCI) was mandated by UNSC Res 1584 (2005) to “monitor the implementation of the [sanctions] measures imposed by paragraph 7 of resolution 1572 (2004)”, UNSC Res 1590 (24 March 2005) UN Doc S/RES/1590, ¶2(a).

⁸⁶⁵ UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973, whilst authorising all necessary measures to protect civilians – thereby authorising military intervention – also strengthened the sanctions regime, imposed a no-fly zone and extended the arms embargo.

VIII.4.2 Article 42

Indeed, sanctions regimes are quite frequently supported with troops on the ground, either in the form of military intervention or a peacekeeping force. The authorisation of the use of military force is troublesome for the Council from a human rights perspective – the extent to which the Council is able to control the actions of authorised military forces is low and, should violations of human rights occur during a military operation or even the administration of a country post-conflict by an authorised force, the reach of the Council is limited.⁸⁶⁶ In the wake of scandals of human rights abuses perpetrated by UN staff themselves in locations where they were dispatched to assist in rebuilding nations,⁸⁶⁷ the conduct of peacekeepers has increasingly been regulated through various internal guidelines, rules and policy;⁸⁶⁸ the conduct of military troops contributed to UN-mandated interventions is governed not only by international humanitarian law instruments,⁸⁶⁹ but also the domestic jurisdictions of the contributing States themselves, which have an obligation to pursue prosecution for violations of human rights and humanitarian law.⁸⁷⁰ Accordingly, the Council itself has a responsibility to ensure that human rights protection

⁸⁶⁶ Various human rights groups expressed concern over the treatment of detainees in Iraq by the Multi-National Force-Iraq (MNF-I), who were deprived of liberty and without judicial review processes under an expansive reading of the Fourth Geneva Convention. See eg Human Rights Watch, ‘Letter to the Security Council on MNF Detention Practices in Iraq’ (25 April 2008) <<http://www.hrw.org/news/2008/04/24/letter-security-council-mnf-detention-practices-iraq>> accessed 16 December 2014; Amnesty International, ‘Beyond Abu Ghraib: detention and torture in Iraq’ (6 March 2006) Amnesty International <<http://www.amnesty.org/en/library/asset/MDE14/001/2006/en/a2b9a7ed-d46e-11dd-8743-d305bea2b2c7/mde140012006en.pdf>> accessed 16 December 2014.

⁸⁶⁷ UNGA ‘Report of the Office of Internal Oversight Services on the investigation into sexual exploitation of refugees by aid workers in West Africa’ (11 October 2002) UN Doc A/57/465 details numerous allegations against UN staff; despite concluding in ¶42 that “the impression given in the consultants’ report that sexual exploitation by aid workers, in particular sex for services, was widespread is misleading and untrue” the damage to the image of the UN was grave and resulted in numerous reforms.

⁸⁶⁸ See, principally, UN Department of Peacekeeping Operations ‘United Nations Peacekeeping Operations Principles and Guidelines’ (March 2008) (‘Capstone Doctrine’) See, also UNGA ‘Overview of the financing of the United Nations peacekeeping operations: budget performance for the period from 1 July 2004 to 30 June 2005 and budget for the period from 1 July 2006 to 30 June 2007’ (24 February 2006) UN Doc A/60/696, ¶6-21 (‘Peace Operations 2010’ reform Strategy); UNGA ‘Report of the Panel on United Nations Peace Operations’ (21 August 2000) UN Doc A/55/305-S/2000/809 [hereinafter ‘The Brahimi report’].

⁸⁶⁹ *Legality of Use of Force (Yugoslavia v United States of America)* (Provisional Measures) [1999] ICJ Rep 1999 916, ¶31: The ICJ established the principle that “whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law.”

⁸⁷⁰ This principle has been echoed in the criminal and military trials against soldiers perpetrating crimes against civilians in Kosovo (see *US v Frank J Ronghi*, 60 MJ 83 (ACMR, 2004), where US Staff Sergeant Frank Ronghi was sentenced to life imprisonment for the rape and murder of an 11 year old ethnic Albanian in Kosovo in 2000), Afghanistan (see *R v Alexander Wayne Blackman and Secretary of State for Defence* [2014] EWCA Crim 1029, where Blackman (formerly ‘Marine A’ was jailed for a minimum of 10 years in 2013 for murdering a wounded Afghan detainee); conversely, in the wake of serious violations of prisoner rights by US soldiers at Abu Ghraib

is enshrined in its own resolutions and decisions authorising troops to act; the fact that the degree of effective control over events on the ground by the Council is so little serves to underline the importance of clear mandates for action by the Council that incorporate both non-derogable human rights protections and derogable human rights protections, as well as the limitation of their derogability, into resolutions. A delegation or authority by the Council imparts with it not only permission or encouragement to act, but also the Council's obligation to respect human rights throughout. Moreover, if as discussed in relation to sanctions the Council has grown increasingly aware of the need to include human rights and humanitarian protections in the imposition and monitoring processes of sanctions, it should surely incorporate similar safeguards in decisions to authorise intervention of troops both as peacekeepers and in military interventions.

VIII.4.2.1 Military interventions

Historically, the authorisation to military intervene under Chapter VII did not make note of any human rights implications: UNSC Res 83 in 1950 was the model of succinctness and “[r]ecommends that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area”;⁸⁷¹ the limited authority given to the United Kingdom to bring to an end the rebellion in Southern Rhodesia under UNSC Res 253 in 1968, though emerging from the need to “enable the people to secure the enjoyment of their rights as set forth in the Charter of the United Nations”⁸⁷² placed no explicit human rights safeguards or parameters upon the troops; and in 1990, the authority given to Member States to “use all necessary means to uphold and implement resolution 660 (1990)”⁸⁷³ in Iraq featured no mention of the scope of applicability of international human rights or humanitarian law. Even as recently as 2011, the authorisation in UNSC Res 1973 to Member States “to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya”⁸⁷⁴ did so without a human rights framework; the only mention of humanitarian considerations is the exemption of

prison, minor sentences were handed down to the perpetrators in Court martials, see ‘Iraq Prison Abuse Scandal Fast Facts’ *CNN Library* (7 November 2014) <<http://edition.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts>> accessed 16 December 2014.

⁸⁷¹ UNSC Res 83 (27 June 1950) UN Doc S/RES/83.

⁸⁷² UNSC Res 253 (29 May 1968) UN Doc S/RES/253, ¶2.

⁸⁷³ UNSC Res 678 (29 November 1990) UN Doc S/RES/678, ¶2.

⁸⁷⁴ UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973, ¶4.

the No Fly Zone to “flights whose sole purpose is humanitarian, such as delivering or facilitating the delivery of assistance, including medical supplies, food, humanitarian workers and related assistance, or evacuating foreign nationals from the Libyan Arab Jamahiriya.”⁸⁷⁵

It could easily be argued that there is no need for explicit reference to the obligations of States and their troops to comply with international human rights and humanitarian law when taking part in military interventions authorised by the Council; many international human rights and humanitarian treaties govern the practices of troop-contributing nations,⁸⁷⁶ so as to ensure they are bound to abide by international norms when carrying out their duties under the authorisation of the Council. Although unlikely, such obligations would be suspended in the event of conflict with a Council resolution under Article 103 of the Charter; this principle has been established in numerous legal precedents. Even were such an unlikely situation to occur, both customary international and *jus cogens* norms would govern the actions of troops, including distinctions between civilians and combatants, treatment of civilians, protected persons and permitted weaponry to be used⁸⁷⁷ as well as the prohibition of torture, genocide, war crimes, crimes against humanity and other peremptory norms. France recently highlighted the point that “Security Council mandates for the protection of civilians do not take the place of sovereign responsibilities. The protection of civilians is, and will continue to be, primarily the responsibility of the host Government.”⁸⁷⁸ As recently as August 2014, the Council has emphasised that “that the primary responsibility under international law for the security and protection of humanitarian personnel and United Nations and associated personnel lies with the Government hosting a United Nations operation.”⁸⁷⁹ Nonetheless, the Council has also taken

⁸⁷⁵ *ibid* ¶7.

⁸⁷⁶ eg there are 168 parties to the ICCPR, 162 parties to the ICESCR, 146 signatories to the Convention on the Prevention and Punishment of the Crime of Genocide (1949), 188 parties to the Convention on the Elimination of All Forms of Discrimination against Women (1979), 155 parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 194 parties to the Convention on the Rights of the Child (1989).

⁸⁷⁷ See, eg Henckaerts and Doswald-Beck (n 525).

⁸⁷⁸ France, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531, 5. See also, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531, 14 (2011) “Colombia concurs with other Council members that the primary responsibility for the protection of civilians belongs to each State.”

⁸⁷⁹ UNSC Res 2175 (29 August 2014) UN Doc S/RES/2175, preamble.

active steps to bolster the Protection of Civilians where necessary by mandating an increase in peacekeepers.⁸⁸⁰

However, this does not entirely negate the need for a specific and precise mandate issued by the Council. The military intervention into Libya underscores this reality and emphasised the need for a tighter and clearer framework to be created by the Council as well as increased involvement in the management and oversight of operations by the Council for two principle reasons: firstly, the authorisation granted by UNSC Res 1973 was vague to the point of permitting the regional organisation that responded to the call – NATO – the liberty of interpreting it as it saw fit and leading to the violation of sovereignty through regime change; secondly, allegations of international human rights and humanitarian law contraventions perpetrated by NATO forces, as well as the reluctance of its officials to investigate these allegations, emerged in an alarmingly reliable manner soon after. In the aftermath of the military intervention of Libya by NATO forces, Brazil was quick to bring perspective to the role of the Council:

When the Council does authorize the use of force, such as in the case of Libya, we must hold ourselves to a high standard. *The Council has a responsibility to ensure the appropriate implementation of its resolutions.* Force must be used carefully, with due regard for the principle of proportionality and in strict accordance with the terms of the authorization. *The use of force to protect civilians does not abrogate international law, but underlines the need for strict adherence to it.*⁸⁸¹

UNSC Res 1973 barely passed in the Council with five abstentions, two of which were from P5 Members China and Russia; Council Members noted that “the text of resolution 1973 (2011) contemplates measures that go far beyond [the call of the League of Arab States for strong measures to stop the violence through a no-fly zone]”.⁸⁸² There were protestations that the Council did “not have clarity about details of enforcement measures, including who will participate and with what assets, and how these measures will exactly be carried out”⁸⁸³ as well

⁸⁸⁰ See, eg South Sudan, where in UNSC Res 2132 (24 December 2013) UN Doc S/RES/2132, ¶3, the Council endorsed “the recommendation made by the Secretary-General to temporarily increase the overall force levels of UNMISS to support its protection of civilians and provision of humanitarian assistance.”

⁸⁸¹ UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531, 11.

⁸⁸² Brazil, UNSC Verbatim Record (17 March 2011) UN Doc S/PV.6498, 6.

⁸⁸³ India, *ibid.*

as both Russian and Chinese disappointment that their queries had been left unanswered.⁸⁸⁴ This disappointment soon turned into condemnation and accusations that NATO had ventured further than the two mandates issued in UNSC Res 1973, namely the use of force to protect civilians and to enforce the No Fly Zone.⁸⁸⁵ Moreover, just as Russia, China and others had feared at the time of its passing, as a result of UNSC Res 1973's broad authorisation, some commentators have remarked that NATO "had effectively become the air force of the opposition"⁸⁸⁶ risking the goal of the Council that "all efforts to protect civilians be strictly in keeping with the Charter and based on a rigorous and non-selective application of international humanitarian law."⁸⁸⁷ In response to the widening scope of NATO intervention, the Russian Federation underlined that "[t]he noble goal of protecting civilians should not be compromised by attempts to resolve in parallel any unrelated issues."⁸⁸⁸ Against this backdrop, any intended regime change, though denied at national level by nations advocating intervention in Libya such as the UK,⁸⁸⁹ was stringently avoided by both the Council⁸⁹⁰ and the Secretariat, which reiterated the necessity that "[i]n addition to complying scrupulously with international humanitarian law, the

⁸⁸⁴ Russia, *ibid* 8: "In essence, a whole range of questions raised by Russia and other members of the Council remained unanswered. Those questions were concrete and legitimate and touched on how the no-fly zone would be enforced, what the rules of engagement would be and what limits on the use of force there would be." See also, *ibid* 10, where the Chinese representative "asked specific questions. However, regrettably, many of those questions failed to be clarified or answered. China has serious difficulty with parts of the resolution."

⁸⁸⁵ See, Russia, UNSC Verbatim Record (4 May 2011) UN Doc S/PV.6528, 9: "We emphasize once again that any use of force by the coalition in Libya should be carried out in strict compliance with resolution 1973 (2011).

Any act going beyond the mandate established by that resolution in any way or any disproportionate use of force is unacceptable"; *ibid* 10, "China calls for the complete and strict implementation of the relevant resolutions of the Security Council. The international community must respect the sovereignty, independence, unity and territorial integrity of Libya. The internal affairs and fate of Libya must be left up to the Libyan people to decide. We are not in favour of any arbitrary interpretation of the Council's resolutions or of any actions going beyond those mandated by the Council."

⁸⁸⁶ Thomas G Weiss and others, *The United Nations and Changing World Politics* (Westview Press 2012) 118; see, also Alex J Bellamy and Paul D Williams, 'The New Politics of Protection?' (2011) 87 *International Affairs* 4, who note that "NATO and several key allies, including Qatar and Jordan, interpreted the mandate as providing the basis for a wide range of military activities including the suppression of Libya's air defences, air force and other aviation capacities, as well as the use of force against Libya's fielded forces, its capacity to sustain fielded forces, and its command and control capacities, on the basis that Libya's armed forces constituted a threat to civilians."

⁸⁸⁷ Brazil, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531, 11.

⁸⁸⁸ Russia, *ibid* 9.

⁸⁸⁹ 'Libya: Removing Gaddafi not allowed, says David Cameron', *BBC News* (London, 21 March 2011) <<http://www.bbc.co.uk/news/uk-politics-12802749>> accessed 16 December 2014.

⁸⁹⁰ UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531, 20: China stated that "[t]here must be no attempt at regime change or involvement in civil war by any party under the guise of protecting civilians"; India noted that "Any decision to intervene that is associated with political motives detracts from that noble principle [to protect civilians] and needs to be avoided", *ibid* 10; Brazil reiterated this sentiment, *ibid* 11, "We must avoid excessively broad interpretations of the protection of civilians, which could link it to the exacerbation of conflict, compromise the impartiality of the United Nations or create the perception that it is being used as a smokescreen for intervention or regime change."

implementation of the Council's decision must be exclusively limited to promoting and ensuring the protection of civilians.”⁸⁹¹

Nonetheless, despite assertions by Council Members that “the future of Libya should be decided by the people of Libya”⁸⁹², it would appear that Council-authorized intervention was central to the removal of Gaddafi, displaying a clear bias for one side of the conflict and undermining the protection of *all* civilians in Libya; an inclusion of specific humanitarian and human rights standards as well as limitations on the scope of actions permitted by a Council mandate would contribute to ensuring that future military interventions are not misinterpreted and do not lead to a similarly biased approach.

Increased details on the scope of authorized action and binding inclusions of human rights and humanitarian principles in the text of a resolution would also go far in minimizing the damage to civilian populations in conflict zones as it would impose the precise parameters upon which the Council Members decide upon the forces carrying out military intervention. Although military intervention is explicitly provided for under Chapter VII of the Charter,⁸⁹³ the Council has increasingly opted for the authorization of the use of force by Member States⁸⁹⁴ rather than the centralized Military Staff Committee planned for by the drafters of the UN Charter in article 46. The safeguards and regulations that are enshrined in articles 43 to 50 of the Charter, including the existence of a Military Staff Committee consisting of “the Chiefs of Staff of the permanent members of the Security Council . . . [and] responsible under the Security Council for the strategic direction of any armed forces”⁸⁹⁵ are replaced by the strategic command of organization of States, predominantly NATO in recent years.⁸⁹⁶ Hesitation and consternation by Member States over this lack of direct Council control highlights the split that exist on the Council over

⁸⁹¹ Under-Secretary-General for Humanitarian Affairs, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531, 4.

⁸⁹² US, UNSC Verbatim Record (17 March 2011) UN Doc S/PV.6498, 5; see also, UK, *ibid* 4, “The central purpose of the resolution is clear: to end the violence, to protect civilians and to allow the people of Libya to determine their own future, free from the tyranny of the Al-Qadhafi regime.”

⁸⁹³ UN Charter (1945) art 46-7.

⁸⁹⁴ There is debate over the legality of this in the light of art 2(4) of the UN Charter. See eg Sarooshi (n 11); Niels M Blokker, ‘Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by ‘Coalitions of the Able and Willing’ (2000) 11 EJIL 541.

⁸⁹⁵ UN Charter (1945) art 47(2)-(3).

⁸⁹⁶ NATO intervened in Yugoslavia following the adoption of UNSC Res 1199 (1998), Afghanistan even prior to the creation of the International Security Assistance Force in 2001 and Libya following UNSC Res 1973 (2011).

the use of force by a third party with the consent of the Council; India,⁸⁹⁷ China,⁸⁹⁸ Zimbabwe,⁸⁹⁹ Brazil,⁹⁰⁰ Mexico,⁹⁰¹ New Zealand,⁹⁰² Pakistan,⁹⁰³ India,⁹⁰⁴ Nigeria⁹⁰⁵ and Belgium⁹⁰⁶ are but some of the nations having expressed discontent over the lack of “a purely United Nations operation.”⁹⁰⁷ Due to allegations of human rights violations by troops of Member State armed forces, it is not difficult to perceive the reasoning behind this.

⁸⁹⁷ UNSC Verbatim Record (13 August 1992) UN Doc S/PV.3106, 12: “in the present instance, it would be highly advisable – indeed imperative – that the operation, which could involve the use of force, should be and should always remain under the command and control of the United Nations.”

⁸⁹⁸ *ibid* 51: “the broad authorization given to all States by the resolution to take all necessary measures is tantamount to issuing a blank check. It may lead to the loss of control of the situation, with serious consequences for which the United Nations and the Security Council will be held responsible, and the reputation of the United Nations may suffer as a result.”; UNSC Verbatim Record (31 July 1994) UN Doc S/PV.3413, 10: The practice of the Council’s authorizing certain Member States to use force is even more disconcerting because this would obviously create a dangerous precedent.”; UNSC Verbatim Record (3 December 1992) UN Doc S/PV.3145, 17: “we wish to point out that, in spite of the fact that the Secretary-General has been given some authorization, the draft resolution has taken the form of authorizing certain countries to take military action, which may adversely affect the collective role of the United Nations. We hereby express our reservations on this.”

⁸⁹⁹ UNSC Verbatim Record (13 August 1992) UN Doc S/PV.3106, 16: “Zimbabwe is of the view that any necessary measures taken or arrangements made to deal with this crisis have to be undertaken as a collective enforcement measure under the full control of and with full accountability to the United Nations through the Security Council, as provided for by the Charter of the United Nations.”; Zimbabwe also voted in favour of S/RES/794 (1992) specifically because the resolution placed “the Secretary-General of the United Nations at the controlling centre of the operation.”, UNSC Verbatim Record (3 December 1992) UN Doc S/PV.3145, 7.

⁹⁰⁰ UNSC Verbatim Record (31 July 1994) UN Doc S/PV.3413, 9-10: “the issue of the immediate establishment of a multinational force with the purpose of intervening in Haiti . . . constitute[s] a worrisome departure from the principles and customary practices adopted by the United Nations as regards peace-keeping.”

⁹⁰¹ *ibid* 5: “a kind of *carte blanche* has been awarded to an undefined multinational force to act when it deems it to be appropriate. This seems to us an extremely dangerous practice in the field of international relations.”

⁹⁰² *ibid* 21: “New Zealand’s preference has always been and will always be for collective security to be undertaken by the United Nations itself. That provides the reassurance that small countries seek from the United Nations when Chapter VII is being invoked.”

⁹⁰³ *ibid* 25: “We regret that, for well-understood reasons, the Secretary-General could not recommend the option one contained in his report in document S/1994/828 of 15 July 1994. Had it been possible to implement that option, it would have been a preferred course of action, in my delegation’s view”; UNSC ‘Report of the Secretary-General on the United Nations Mission in Haiti’ (15 July 1994) UN Doc S/1994/828, ¶16: “The first option would be for the Security Council to expand the existing force (UNMIH) and give it a revised mandate covering the additional tasks envisaged in resolution 933 (1994).”

⁹⁰⁴ UNSC Verbatim Record (31 July 1994) UN Doc S/PV.3413, 50: “Consistent with the position that the Indian delegation has had the opportunity to express on several occasions in the Council, my delegation favoured . . . a country-wide enforcement operation in Somalia with the aim of creating conditions in which relief supplied can be effectively delivered to those in need, an operation carried out under United Nations command and control.”

⁹⁰⁵ UNSC Verbatim Record (22 June 1994) UN Doc S/PV.3392, 10: “The current situation in Rwanda constitutes a threat to international peace and security. Under these circumstances, the United Nations, through the Security Council, retains a primary responsibility. Therefore, any effort - be it unilateral, bilateral or multilateral - is best subsumed within it.”

⁹⁰⁶ UNSC Verbatim Record (3 December 1992) UN Doc S/PV.3145, 24: “The operation in Somalia will be under the political control of the United Nations. The coordinating machinery to be set up between the States participating in the operation and the Secretary-General, and the decision-making powers granted to the Council concerning the duration of the operation, are, in my delegation’s opinion, key elements in this draft resolution.”

⁹⁰⁷ *ibid*.

Such a purely UN operation has not materialised, or perhaps such an opportunity has not arisen due in unison to the gravity of negative experiences during NATO intervention and the recent nature of such intervention in Libya – “the UN itself can no more conduct military operations on a large scale on its own than a trade association of hospitals can conduct surgery.”⁹⁰⁸ The detrimental impact of intervention was foreseen by several States during debates on UNSC Res 1973, if only due to the loose terminology used; Russia – abstaining in the vote – argued that “[r]esponsibility for the inevitable humanitarian consequences of the excessive use of outside force in Libya will fall fair and square on the shoulders of those who might undertake such action”⁹⁰⁹ and later indirectly accused the Council of complicity through its statement that “actions by the NATO-led coalition forces are also resulting in civilian casualties.”⁹¹⁰ In the wake of these casualties, reports surfaced of NATO’s reluctance to investigate civilian deaths,⁹¹¹ simply stating that although it “did everything possible to minimize the risk to civilians, in a complex military operation that risk cannot be reduced to zero.”⁹¹² There is no access to justice for survivors; in contrast to the Council’s efforts to deal with human rights violations by establishing the ad hoc courts of the ICTY and ICTR and referrals twice to the ICC⁹¹³ of situations involving breaches of human rights, no tribunals have been set up by the Council nor have efforts been made to investigate alleged contraventions of international human rights and humanitarian law by NATO forces under the authority of the Council. Indeed, although the situation in Libya has been referred to the International Criminal Court,⁹¹⁴ the jurisdiction of the Court over military and civilian staff from outside Libya was limited,⁹¹⁵ which might be

⁹⁰⁸ Michael Mandelbaum, ‘The Reluctance to Intervene’ (1994) 95 Foreign Policy 3, 11.

⁹⁰⁹ UNSC Verbatim Record (17 March 2011) UN Doc S/PV.6498, 7.

⁹¹⁰ Russia, UNSC Verbatim Record (4 May 2011) UN Doc S/PV.6528. China more mutedly simply stated its official position – that it “is always against the use of force in international relations”, *ibid* 10.

⁹¹¹ Amnesty International, ‘Libya: The forgotten victims of NATO strikes’ (March 2012), 18 <<http://www.amnesty.org/en/library/asset/MDE19/003/2012/en/8982a094-60ff-4783-8aa8-8c80a4fd0b14/mde190032012en.pdf>>

accessed 16 December 2014: “NATO appeared to suggest that it had limited means and responsibility to conduct investigations into reports of civilian casualties caused in NATO strikes . . . [and] did not take any steps to conduct on site investigations into reports of death and injury of civilians resulting from its strikes in areas which had come under the control of the new Libyan authorities (the NTC) prior to 31 October 2011 and which were thus safely accessible. All the survivors and relatives of those killed in NATO strikes interviewed by Amnesty International said that they had never been contacted either by NATO or by the Libyan NTC.”

⁹¹² *ibid*.

⁹¹³ First for alleged breaches in Sudan (UNSC Res 1593 (7 April 2005) UN Doc S/RES/1593) then again in Libya (UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970).

⁹¹⁴ UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970, ¶4.

⁹¹⁵ *ibid* ¶5: “nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the S/RES/1970

interpreted as suggesting that the ends justify the means and that potential breaches of human rights by military and civilian staff working under authorisation by the Council were above the law.⁹¹⁶ The immunity of nationals and officials from non-Rome Statute Party Members was certainly alluded to in the discussions of UNSC Res 1970,⁹¹⁷ and would have figured heavily in the minds of Council members such as the United States, who had vehemently advocated the immunity – albeit temporary⁹¹⁸ and more diplomatically worded⁹¹⁹ – of its peacekeepers from ICC jurisdiction almost a decade earlier⁹²⁰ and indeed vetoed drafted resolution S/2002/712.⁹²¹ From this perspective too, the Council does not appear to feel obliged to incorporate human rights protections into its resolutions, nor to provide affected citizens with access to justice thereafter; to the contrary, it holds to account the actions of the parties it targets in its resolutions whilst refusing to hold its own delegated forces to the same standard – “an unacceptable double standard in international law.”⁹²²

There have also been no efforts by the Council to learn lessons from the experience in Libya and other conflicts, much less incorporate them into future resolutions. Save for the reluctance of Russia and China to intervene similarly in Syria, the Council may have repeated the same model and once again authorised NATO intervention under the pretence of humanitarian intervention, couched in a loosely termed mandate that evolved into regime change of leadership

(2011) Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State.”

⁹¹⁶ See Canada’s objections to immunity for peacekeepers from prosecution by the ICC in UNSC Verbatim Record (10 July 2002) UN Doc S/PV.4568, 3.

⁹¹⁷ India, UNSC Verbatim Record (26 February 2011) UN Doc S/PV.6491, 2-3: India is not a member of the International Criminal Court. Of the 192 Members of the United Nations, only 114 are members of the International Criminal Court. Five of the 15 members of the Council, including three permanent members, are not parties to the Rome Statute . . . In this context, we draw attention to paragraph 6f of the resolution, concerning national [sic] from countries not parties to the Rome Statute.; however, Brazil argued against such exemption at *ibid* 7, “initiatives aimed at establishing exemptions of certain categories of individuals from the jurisdiction of the International Criminal Court are not helpful to advancing the cause of justice and accountability and will not contribute to strengthening the role of the Court.”

⁹¹⁸ UNSC Res 1422 (12 July 2002) UN Doc S/RES/1422, ¶1 requests that the ICC defer any investigations or prosecutions of “current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation,” for a period of 12 months from 1 July 2002. The phrasing of the immunity in resolution 1970 echoes the terminology of resolution 1422.

⁹¹⁹ Canada, UNSC Verbatim Record (10 July 2002) UN Doc S/PV.4568, 4: “The proposed draft resolutions circulating avoid the word ‘immunity’ but in fact have precisely the same effect as the proposal that the Security Council would not entertain on 30 June.”

⁹²⁰ United States, UNSC Verbatim Record (30 June 2002) UN Doc S/PV.4563, 2-3.

⁹²¹ *ibid* 3.

⁹²² Canada, UNSC Verbatim Record (10 July 2002) UN Doc S/PV.4568, 4.

in Syria.⁹²³ From this perspective, the Council as a body does appear to have gained an increased awareness of the need for specificity and respect for human rights in its military interventions, albeit that the same cannot be claimed for all its constituent Members. In voting against a draft resolution⁹²⁴ that was itself watered down to remove even references to suspended sanctions,⁹²⁵ much less military intervention, both China and the Russian Federation attempted to transform what it saw as a negative experience into a didactic opportunity for Council course correction.⁹²⁶

This divide between the two camps of France, US and UK on one side and Russia and China on the other remains the norm to this day,⁹²⁷ reflecting the fact that human rights are still seen by the latter two P5 members as falling within the domestic jurisdiction. Indeed, one might go so far as to point to the situation in Libya as being a principal reason for Council inaction on Syria; indirectly, through the inefficient management of the intervention in Libya, the human rights situation in Syria appears to have been negatively impacted. Criticism from both Russia and China on the deviation from the initial mandate given to NATO in Libya has scarred the Council's unity in the face of human rights abuses thereafter. The Russian Federation has not hesitated to make mention of the Libyan experience when voting against draft resolutions on the Syrian conflict⁹²⁸ and China has stood firm in its stance that "the Council should continue

⁹²³ See, UNSC Draft Res (19 July 2012) UN Doc S/2012/538; UNSC Draft Res (4 February 2012) UN Doc S/2012/77; UNSC Draft Res (4 October 2011) UN Doc S/2011/612.

⁹²⁴ UNSC Draft Res (4 October 2011) UN Doc S/2011/612.

⁹²⁵ UK, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627, 7: "We removed the sanctions. Still, it was unacceptable to the minority. We called on all sides to reject violence and extremism. Still it was unacceptable. We removed any sense that sanctions would automatically follow in 30 days if the regime failed to comply, and still it was unacceptable. By including reference to Article 41 of the United Nations Charter we made it clear that any further steps would be non-military in nature. Still it was unacceptable."

⁹²⁶ Russia, *ibid* 4: "For us, Members of the United Nations, including in terms of a precedent, it is very important to know how the resolution was implemented and how a Security Council resolution turned into its opposite. The demand for a quick ceasefire turned into a full-fledged civil war, the humanitarian, social, economic and military consequences of which transcend Libyan borders. The situation in connection with the no-fly zone has morphed into the bombing of oil refineries, television stations and other civilian sites. The arms embargo has morphed into a naval blockade in western Libya, including a blockade of humanitarian goods . . . *These types of models should be excluded from global practices once and for all*" [emphasis added]. See also, *ibid* 5, where "China believes that, under the current circumstances, sanctions or the threat thereof does not help to resolve the question of Syria and, instead, may further complicate the situation."

⁹²⁷ Further to UNSC Draft Res S/2011/612 (2012), UNSC Draft Res S/2012/77 (2012), UNSC Draft Res S/2012/538 (2012) and UNSC Draft Res S/2014/348 (2014) were all vetoed by Russia and China.

⁹²⁸ Russia, UNSC Verbatim Record (22 May 2014) UN Doc S/PV.7180, 13, discussing UNSC Draft Res S/2014/348 (2014): "One cannot ignore the fact that the last time the Security Council referred a case to the International Criminal Court (ICC) — the Libyan dossier, through resolution 1970 (2011) — it did not help resolve the crisis, but instead added fuel to the flames of conflict . . . The deaths of civilians as a result of NATO bombardments was somehow left outside its scope. Our colleagues from NATO countries arrogantly refused to address that issue altogether. They even refuse to apologize, even as they waxed eloquent about shame. They advocate fighting impunity but are themselves practicing a policy of all-permissiveness."

holding consultations, rather than forcing a vote on the draft resolution, in order to avoid undermining Council unity or obstructing coordination and cooperation.”⁹²⁹

The lack of intervention in Syria also raises questions about the responsibility to protect doctrine (R2P)⁹³⁰ that can trump established principles of international law such as State sovereignty and was arguably at the heart of the decision to intervene in Libya.⁹³¹

In its abstract, R2P clearly suggests that state sovereignty is not absolute but contingent on responsible governmental behavior. If a government egregiously violates international law, and in particular if it allows atrocities or is the perpetrator of abuse, its claims to sovereignty will be reviewed and maybe restricted or even overturned by the Security Council.⁹³²

In light of the atrocities that have taken place in Syria and the absence of an imperative to intervene under the R2P doctrine, it appears that the Sino-Russia stance has halted the full emergence of this principle.⁹³³ The controversial nature of overriding such an integral foundation of the international legal order where heinous crimes have been committed by the State or their actors may also contribute to the reticence shown in its acceptance and highlights the difficulty of such a reconceptualisation of the principle.⁹³⁴ Weiss and others argue that the R2P doctrine will garner an inconsistent approach: “In terms applying the emerging norm, Syria is not Libya, and Sri Lanka is not Cote d’Ivoire. Political interest and will vary from case to case.”⁹³⁵ R2P,

⁹²⁹ UNSC Verbatim Record (22 May 2014) UN Doc S/PV.7180, 14.

⁹³⁰ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (IDRC 2001). This principle was later endorsed by both UNGA ‘Note by the Secretary-General: Report of the High Level Panel on Threats, Challenges and Changes, A More Secure World: Our Shared Responsibility’ (2 December 2004) UN Doc A/59/565 and UNGA ‘Report of the Secretary-General: In Larger Freedom: Towards Development, Security and Human Rights for All’ (21 March 2005) UN Doc A/59/2005.

⁹³¹ See, Daphna Shrager, ‘The Security Council and Human Rights – from discretion to Promote to Obligation to Protect’, in Fassbender (ed) (n 704): “Security Council resolution 1973 (2011) was the Council’s first ‘R2P reaction’ to an ‘R2P situation’. It reiterated the responsibility of the Libyan authorities to protect the Libyan population, and qualified the wide-spread and systematic attacks against civilians as crimes against humanity – one of the three ‘R2P crimes’.”

⁹³² Weiss and others (n 886) 122.

⁹³³ Thomas G Weiss, ‘Reinserting ‘Never’ into ‘Never Again’: Political Innovations and the Responsibility to Protect’ in David Hollenbach (ed), *Driven from Home: Protecting the Rights of Forced Migrants* (Geo UP 2010) 207-228; see also, eg Rama Mani and Thomas G Weiss (eds), *The Responsibility to Protect: Cultural Perspectives from the Global South* (Routledge 2011).

⁹³⁴ Edward C Luck, ‘The United Nations and the Responsibility to Protect’ (The Stanley Foundation Policy Analysis Brief, August 2008) 8: “Like most infants, R2P will need to walk before it can run.”

⁹³⁵ Weiss and others (n 886) 122. See, also Martha Hall Findlay, *Can R2P Survive Libya and Syria* (Strategic Studies Working Group Papers, 2011).

then, is yet another tool at the discretion of the Council that is open to arbitrary implementation and national interests of the authorising States, even at the expense of the human rights of individuals affected by the atrocities on the ground.

This lack of authorization for military intervention in Syria by the Council, rather than suggesting an absence of care towards human rights and the humanitarian situation, may be indicative of a renewed attention to the impact of its resolutions on the individuals affected;⁹³⁶ certainly in eyes of Russia and China it would appear that peace and security, as well as an improved human rights situation on the ground, is no longer synonymous with military intervention, or even a sanctions regime.⁹³⁷ The Council was, however, unanimous in its adoption of UNSC Res 2043, establishing a team of 300 unarmed military observers⁹³⁸ and calling for “the urgent, comprehensive, and immediate implementation of all elements of the Envoy’s six-point proposal.”⁹³⁹ Increasingly diplomatic methods are being explored as the Council moves away from military intervention, in part at least due to the human rights and humanitarian implications of such broad mandates as have been given in the past; in much the same way as sanctions have been deconstructed to focus on specific issues, individuals and bespoke areas of a nation’s key industry or trade, piecemeal approaches are also being explored with numerous resolutions targeting individual aspects of a conflict rather than the more blunt instrument of military intervention being paraded as a panacea to cure all facets and causes of conflict.⁹⁴⁰ Whilst the value of this approach towards an improvement of human rights on the ground has been debated,⁹⁴¹ what is certain is that human rights and humanitarian concerns, at

⁹³⁶ See Caitlin Alyce Buckley, ‘Learning from Libya, Acting in Syria’ (2012) 5(2) J Strategic Security 81 for a discussion of alternative means of reaching a solution to the situation in Syria.

⁹³⁷ See eg UNSC Verbatim Record (19 July 2012) UN Doc S/PV.6810, 8, where in voting against UNSC Draft Res S/2012/538 (2012), the “Russian delegation had very clearly and consistently explained that we simply cannot accept a document, under Chapter VII of the Charter of the United Nations, that would open the way for the pressure of sanctions and later for external military involvement in Syrian domestic affairs.”

⁹³⁸ UNSC Res 2043 (21 April 2012) UN Doc S/RES/2043, ¶5.

⁹³⁹ *ibid* ¶1.

⁹⁴⁰ eg UNSC Res 2118 (27 September 2013) UN Doc S/RES/2118 tackled the issue of the Syrian chemical stockpile; UNSC Res 2139 (22 February 2014) UN Doc S/RES/2139 dealt with the humanitarian situation.

⁹⁴¹ United Kingdom, UNSC Verbatim Record (22 May 2014) UN Doc S/PV.7180, 7: “It is to Russia and China’s shame that they have chosen to block efforts to achieve justice for the Syrian people. It is disgraceful that they have yet again vetoed the Security Council’s efforts to take action in response to the appalling human rights violations being committed every day in Syria”; US, *ibid* 5: “Those who would behead civilians and attack religious minorities will not be soon held accountable at the ICC either, for today’s vetoes by Russia and China protect not only Al-Assad and his henchmen but also the radical Islamic terrorists who continue a fundamentalist assault on the Syrian people that knows no decency or humanity. Such vetoes have aided impunity not just for Al-Assad but for terrorist groups, as well”; France, UNSC Verbatim Record (19 July 2012) UN Doc S/PV.6810, 3: “I had hoped not to have to go through this ghastly list. By 4 October 2011, repression in Syria had already claimed 3,000 lives and Russia and

least on the surface, are at the centre of the decision not to mire Syria in a *Libya-esque* military intervention and aftermath.⁹⁴²

VIII.4.2.2 *Peacekeeping Operations*

A similar quagmire is found in the case of peacekeeping, although Council efforts with respect to the integration of human rights elements into these mandates have been clearer and, moreover, concretely supported by other organs and agencies in recent years. Certainly, in comparison with peacekeeping efforts in the Congo where the impartiality of the United Nations Operation in the Congo (ONUC) failed to maintain its mandate to “not be a party to or in any way intervene in or be used to influence the outcome of any internal conflict, constitutional or otherwise”,⁹⁴³ peacekeeping is vastly different from its original incarnation. This is not surprising given its origins; peacekeeping “can rightly be called the invention of the United Nations.”⁹⁴⁴ Indeed, peacekeeping was not originally envisioned by the Charter drafters at San Francisco and one would not find any explicit reference to it in the Charter; ironically, however, it has grown to become the central tool in the Council’s fulfilment of maintaining and restoring international peace⁹⁴⁵ and “the United Nations has continued to serve as the universal forum for advancing consensus and as a coordinating mechanism among the many organizations active in the

China vetoed the Council’s action for the first time (see S/PV.6627). By 4 February, 6,000 Syrians had been cut down by the regime, and Russia and China exercised their second veto on the Council’s action (see S/PV.6711). Today, 19 July, we now count 17,000 men, women and children dead. We mourn their memory alongside the Syrian people, and Russia and China have just exercised their veto of the Council’s action for the third time.”

⁹⁴² China, UNSC Verbatim Record (30 August 2012) UN Doc S/PV.6826, 33: “The politicization of humanitarian issues must be avoided. Humanitarian relief efforts should never be militarized. We should especially guard against and oppose any act of interference in Syria’s internal affairs or military intervention under the pretext of humanitarianism.”

⁹⁴³ UNSC Res 146 (9 August 1960) UN Doc S/RES/146, ¶4. For a discussion of the partisanship of UN forces in favour of the Congolese central government, see Weiss and others (n 886) 51-53.

⁹⁴⁴ UNGA ‘An Agenda for Peace, Preventive diplomacy, peacemaking and peace-keeping: Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992’ (17 June 1992) UN Doc A/47/277 – S/24111, ¶46.

⁹⁴⁵ Thirteen peacekeeping missions were established between 1948 and 1988 – UNTSO, UNMOGIP, UNEF I, UNOGIL, ONUC, UNSF, UNYOM, UNFICYP, UNIPOM, DOMREP, UNEFII, UNDOF, UNIFIL, UNGOMAP, UNIIMOG, UNTAG, UNAVEM I and ONUCA – some of which remain to this day; between 1998-2000, a total of thirty-six missions were established or follow-up missions to previous situations – UNGOMAP, UNIIMOG, UNTAG, UNAVEMI, ONUCA, UNAMIC, ONUSAL, UNAVEM II, UNIKOM, MINURSO, UNTAC, UNOSOM I, UNOMOZ, UNPROFOR, UNOMUR, UNOSOM II, UNMIH, UNAMIR, UNOMIL, UNOMIG, UNASOG, UNMOT, UNCRO, UNAVEM III, UNPREDEP, UNMIBH, UNSMIH, UNTAES, UNMOP, MUNGUA, UNTMIH, MONUA, MIPONUH, UNCPSG, UNOMSIL and MINURCA; and since 2000, nineteen missions have been created – UNTAET, UNAMSIL, MONUC, UNMIK, UNMEE, UNMISSET, UNMIL, UNOCI, MINUSTAH, ONUB, UNMIS, UNMIT, UNIFIL, MINURCAT, UNAMID, UNIPSIL, MONUSCO, UNMISS and UNISFA. In total, sixty-eight missions have been created, an average of one per year that the UN has existed. See Siobhan Wills, *Protecting Civilians: The Obligations of Peacekeepers* (OUP 2009).

field.”⁹⁴⁶ Coupled with the increased recognition of human rights concerns on the Council over the decades since its creation, it is little surprise that in 1996 the Secretary-General noted that the “United Nations . . . has moved to integrate, to the extent possible, its human rights and humanitarian efforts with its peace efforts.”⁹⁴⁷

However, as with other responses to threats to the peace historically, human rights concerns and protection of civilians were not always included in the primary objectives of peacekeeping missions. This situation changed in 1999, when the Council authorised the UN Assistance Mission in Sierra Leone (UNAMSIL) to “take the necessary action to ensure the security and freedom of movement of its personnel and . . . to afford protection to civilians under imminent threat of physical violence”;⁹⁴⁸ alongside this mandate the Council “[u]nderline[d] the importance of including in UNAMSIL personnel with appropriate training in international humanitarian, human rights and refugee law, including child and gender-related provisions, negotiation and communication skills, cultural awareness and civilian-military coordination.”⁹⁴⁹ Even more specific than this was the Council’s recognition of country-specific human rights violations in Sierra Leone, emphasising that “that the plight of children is among the most pressing challenges facing Sierra Leone.”⁹⁵⁰ The Council has also begun integrating specific human rights standards into the mandates of its peacekeeping authorisations: in the wake of the allegation of sexual abuse by peacekeeping troops on civilians, a zero-tolerance policy on sexual exploitation towards UN personnel was incorporated into mandates authorised by the Council in Haiti⁹⁵¹ and Sudan,⁹⁵² although the same paragraphs are missing in later mission mandates;

⁹⁴⁶ UNGA ‘Report of the Secretary-General on the work of the Organization: August 1996’ (20 August 1996) UN Doc A/51/1, ¶1132.

⁹⁴⁷ *ibid.*

⁹⁴⁸ UNSC Res 1270 (22 October 1999) UN Doc S/RES/1270, ¶14.

⁹⁴⁹ *ibid* ¶15.

⁹⁵⁰ *ibid* ¶18.

⁹⁵¹ In UNSC Res 1608 (22 June 2005) UN Doc S/RES/1608, ¶17, the Council “[w]elcomes efforts undertaken by MINUSTAH to implement the Secretary-General’s zero-tolerance policy on sexual exploitation and abuse, and to ensure full compliance of its personnel with the United Nations code of conduct, requests the Secretary-General to continue to take all necessary action in this regard and to keep the Council informed, and urges troop-contributing countries to take appropriate preventive and disciplinary action to ensure that such acts are properly investigated and punished in cases involving their personnel.”

⁹⁵² In UNSC Res 1590 (24 March 2005) UN Doc S/RES/1590, ¶14, the Council “[r]equests the Secretary-General to take the necessary measures to achieve actual compliance in UNMIS with the United Nations zero-tolerance policy on sexual exploitation and abuse, including the development of strategies and appropriate mechanisms to prevent, identify and respond to all forms of misconduct, including sexual exploitation and abuse, and the enhancement of training for personnel to prevent misconduct and ensure full compliance with the United Nations code of conduct, requests the Secretary-General to take all necessary action in accordance with the Secretary-General’s Bulletin on special measures for protection from sexual exploitation and sexual abuse (ST/SGB/2003/13) and to keep the

resolutions authorising missions began including specific reference to human rights issues such as gender in peacekeeping⁹⁵³ and vulnerable groups;⁹⁵⁴ and increased coordination with human rights and humanitarian agencies are explicitly included in the work of the missions authorised.⁹⁵⁵

Furthermore, many multi-dimensional peace operations have a human rights team to assist in the implementation of human rights-related steps directly derived from the Council: the UNJHRO⁹⁵⁶ comprises the MONUSCO⁹⁵⁷ Human Rights Division – the mandate for which branched from UNSC Res 1291⁹⁵⁸ – and the former OHCHR/DRC;⁹⁵⁹ the UNMIL⁹⁶⁰ Human Rights and Protection Section’s mandate is derived from UNSC Res 1509;⁹⁶¹ UNOCI’s Human Rights Division derives its mandate from UNSC Res 1528⁹⁶² and UNSC Res 1609.⁹⁶³ This creates a nexus between the allegations of war crimes and other criminal activities perpetrated by UN field personnel in Council-mandated missions and the Council itself; accordingly, the Council has attempted to take a strong stance against them.⁹⁶⁴

Council informed, and *urges* troop-contributing countries to take appropriate preventive action including the conduct of pre-deployment awareness training, and to take disciplinary action and other action to ensure full accountability in cases of such conduct involving their personnel.”

⁹⁵³ UNSC Res 1590 (24 March 2005) UN Doc S/RES/1590, at ¶15; UNOCI is mandated to “contribute to the promotion and protection of human rights in Côte d’Ivoire, with special attention to grave violations and abuses committed against children and women, notably sexual-and gender-based violence”; UNSC Res 2162 (25 June 2014) UN Doc S/RES/2162, ¶19(g).

⁹⁵⁴ In UNSC Res 1545 (21 May 2004) UN Doc S/RES/1545, ¶6, the United Nations in Burundi (ONUB) was mandated to “provide advice and assistance . . . to the transitional Government and authorities to contribute to their efforts . . . to ensure, in close liaison with the Office of the High Commissioner for Human Rights, the promotion and protection of human rights, with particular attention to women, children and vulnerable persons, and investigate human rights violations to put an end to impunity”; MONUC was mandated “to facilitate humanitarian assistance and human rights monitoring, with particular attention to vulnerable groups including women, children and demobilized child soldiers” in UNSC Res 1291 (24 February 2000) UN Doc S/RES/1291, ¶7; part of the mandate of UNMIS was to “coordinate international efforts towards the protection of civilians with particular attention to vulnerable groups including internally displaced persons, returning refugees, and women and children”, UNSC Res 1590 (24 March 2005) UN Doc S/RES/1590, ¶4(d).

⁹⁵⁵ UNOCI’s mandate included working “closely with humanitarian agencies, particularly in relation to areas of tensions and with respect to the return of displaced persons, to collect information on and identify potential threats against the civilian population, and bring them to the attention of the Ivorian authorities as appropriate”, UNSC Res 2162 (25 June 2014) UN Doc S/RES/2162, ¶19(a).

⁹⁵⁶ United Nations Joint Human Rights Office.

⁹⁵⁷ The United Nations Organization Stabilization Mission in the Democratic Republic of the Congo

⁹⁵⁸ UNSC Res 1291 (24 February 2000) UN Doc S/RES/1291, ¶4.

⁹⁵⁹ Office of the UN High Commissioner for Human Rights in the DRC

⁹⁶⁰ UN Mission in Liberia.

⁹⁶¹ UNSC Res 1509 (19 September 2003) UN Doc S/RES/1509, ¶3 (l)-(m).

⁹⁶² UNSC Res 1528 (27 February 2004) UN Doc S/RES/1528, ¶4 (n).

⁹⁶³ UNSC Res 1609 (24 June 2005) UN Doc S/RES/1609, ¶2 (t).

⁹⁶⁴ UNSC ‘Report of the Secretary-General on Women and Peace and Security’ (13 October 2004) UN Doc S/2004/814, ¶99: “Sexual exploitation and abuse are forms of gender-based violence that can be perpetrated by

These efforts have been bolstered by reform efforts of other agencies: the *Brahimi report*⁹⁶⁵ highlighted the “pivotal importance of clear, credible and adequately resourced Security Council mandates”⁹⁶⁶ and emboldened peacekeepers to stop any “violence against civilians . . . in support of basic United Nations principles”;⁹⁶⁷ the Capstone Doctrine⁹⁶⁸ is a lengthy document outlining the role and responsibilities of peacekeepers and framing peacekeeping operations within human rights parameters; the Zeid report⁹⁶⁹ focused on rules of conduct of peacekeepers, their management control and individual accountability for sexual exploitation and abuse by peacekeeping personnel; and the New Partnership Agenda,⁹⁷⁰ as well as its two progress reports,⁹⁷¹ seeks to contribute to the dialogue of strengthening peacekeeping and ensuring that human rights standards are maintained by its personnel, as well as driven by mandates from the Council.

Nevertheless, the Council at times takes strong measures that clearly stand in stark contrast to measures of ensuring human rights are maintained by its representative personnel, such as the insistence of their immunity from prosecution under international law. The passing of UNSC Res 1422, as well as the discussions that led to its adoption, cannot instill human rights advocates with a great deal of confidence; nor is this an area that the Council has been able to resolve or ameliorate since 2002 – in fact, the temporary immunity from prosecution at the ICC in UNSC Res 1422⁹⁷² was repeated permanently in 2011 in UNSC Res 1970 on Libya⁹⁷³ and would have been once more in a failed draft resolution of May 2014,⁹⁷⁴ had it not been for the

anyone in a position of power or trust. The involvement of United Nations personnel, whether civilian or uniformed, in sexual exploitation and sexual abuse of local populations is particularly abhorrent and unacceptable and a serious impediment to the achievement of the goals of resolution 1325 (2000) on the protection of women and girls. In May 2004, the United Nations Mission in the Democratic Republic of the Congo (MONUC) uncovered allegations of sexual exploitation and abuse, including of minors, by civilian and military personnel in Bunia. Such abuses must be prevented and the perpetrators must be held accountable.” See also, UNSC Presidential Statement 21 (2005) UN Doc S/PRST/2005/21 and UNSC Presidential Statement 52 (2005) UN Doc S/PRST/2005/52.

⁹⁶⁵ The Brahimi Report (n 868).

⁹⁶⁶ *ibid* ¶6(b).

⁹⁶⁷ *ibid* x.

⁹⁶⁸ The Capstone Doctrine (n 868).

⁹⁶⁹ ‘A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations’ in UNGA ‘Letter dated 24 March 2005 from the Secretary-General to the President of the General Assembly’ (24 March 2005) UN Doc A/59/710.

⁹⁷⁰ DPKO ‘A New Partnership Agenda: Charting a New Horizon for UN Peacekeeping’ (New York, July 2009).

⁹⁷¹ DPKO ‘The New Horizon Initiative: Progress Report No.1- October 2010’ (New York, October 2010); DPKO ‘The New Horizon Initiative: Progress Report No.2- December 2011’ (New York, December 2011).

⁹⁷² UNSC Res 1422 (12 July 2002) UN Doc S/RES/1422, ¶1.

⁹⁷³ UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970, ¶6.

⁹⁷⁴ UNSC Draft Res (22 May 2014) UN Doc S/2014/348, ¶7. The resolution was proposed by a large host of countries: Albania, Andorra, Australia, Austria, Belgium, Botswana, Bulgaria, Canada, Central African Republic, Chile, Côte d’Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Estonia,

negative votes of Russia and China. The double standards alluded to in 2002 by Canada⁹⁷⁵ were reiterated in discussions on S/2014/34:

In today's [sic] draft resolution, the United States insisted on an exemption for itself and its citizens. Great Britain is a party to the ICC, but for some reason is unenthusiastic about the exploration in the Court of crimes committed by British nationals during the Iraq war. If the United States and the United Kingdom were to together refer the Iraqi dossier to the ICC, the world would see that they are truly against impunity.⁹⁷⁶

Nonetheless, despite both the numerous options⁹⁷⁷ short of ending the mandate of the United Nations Mission in Bosnia and Herzegovina that would have eliminated the risk of US peacekeepers being brought before the ICC and the assurances by other Council members,⁹⁷⁸ the Secretary-General⁹⁷⁹ and under the Vienna Convention on the Law of Treaties,⁹⁸⁰ the US decided to vote against the resolution and prohibit *any* peacekeepers from continuing under Council authorisation. Accordingly, as lamented by the Secretary-General, “the mandate of the United Nations Mission in Bosnia and Herzegovina (UNMIBH) [came] to an abrupt end for reasons that are unrelated to the vitally important work that it is performing to implement the Dayton Peace

Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Jordan, Latvia, Libya, Liechtenstein, Lithuania, Luxembourg, Malta, Marshall Islands, Mexico, Monaco, Montenegro, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Samoa, San Marino, Saudi Arabia, Senegal, Serbia, Seychelles, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America.

⁹⁷⁵ UNSC Verbatim Record (10 July 2002) UN Doc S/PV.4568, 3-4.

⁹⁷⁶ Russia, UNSC Verbatim Record (22 May 2014) UN Doc S/PV.7180, 13.

⁹⁷⁷ France suggested that the US withdraw its troops or use the article 16 provisions of the Rome Statute to postpone prosecution (which it soon did), UNSC Verbatim Record (30 June 2002) UN Doc S/PV.4563, 5; Canada also highlighted that the US could withdraw its forces, but added that they had the option of declining participation in future missions or negotiating bilateral agreements consistent with article 98 of the Rome Statute, UNSC Verbatim Record (10 July 2002) UN Doc S/PV.4568, 4.

⁹⁷⁸ United Kingdom, UNSC Verbatim Record (30 June 2002) UN Doc S/PV.4563, 5: “the risk of peacekeeping personnel appearing before the Court is extremely small. Under the so-called complementarity principle, the ICC will take over only if States are unwilling or unable to investigate. Allegations of crimes will thus, in most cases, continue to be investigated by the authorities of the State with jurisdiction.”

⁹⁷⁹ Letter from the Secretary-General of the United Nations to US Secretary of State Colin Powell (3 July 2002): “I think that I can state confidently that in the history of the United Nations, and certainly during the period that I have worked for the Organization, no peacekeeper or any other mission personnel have been anywhere near the kind of crimes that fall under the jurisdiction of the ICC. The issue that the United States is raising in the Council is therefore highly improbable with respect to United Nations peacekeeping operations. At the same time, the whole system of United Nations peacekeeping operations is being put at risk.”

⁹⁸⁰ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331, art 34: “A treaty does not create either obligations or rights for a third State without its consent.” Since the Rome Statute is a treaty and the ICC is a treaty body, it does not have jurisdiction over non-State Parties.

Agreement.”⁹⁸¹ Soon afterwards, in an effort to appease the US, which threatened not only to veto resolutions on peacekeeping missions in Bosnia and Herzegovina over the issue of ICC jurisdiction but also future peacekeeping missions, UNSC Res 1422 was passed unanimously but begrudgingly,⁹⁸² granting a renewable suspension of any potential prosecution against non-States Party to the Rome Statute; in the words ironically spoken by Syria many years before discussion of the referral of its own situation was tabled and rejected at the Council, “[p]eacekeeping forces and their mandates should not be held hostage to arguments that do not concern them directly.”⁹⁸³ The reluctance by Russia and China, who were silent in 2002 in the face of what some States claimed was abuse of Council authority under article 16 of the Rome Statute,⁹⁸⁴ to follow the same course of action in 2014 may suggest that the Council as an organ is acknowledging that human rights and peacekeeping cannot be held separate from each other.

Finally, the role and responsibility of the Council does not end at the point that it delegates the role of intervention to third parties; a frequent, regular re-evaluation of the situation, with detailed updates and seizure of the matters on the ground is necessary to ensure not only that the Council maintains overall control over the threat to the peace – such as the revocation of authority to intervene – but also to ensure that it can reassess the needs of the

⁹⁸¹ UNSC Verbatim Record (30 June 2002) UN Doc S/PV.4563, 3.

⁹⁸² In the run-up to the proposition and subsequent adoption of resolution 1422, numerous States expressed their discontent at the US’s stance and attempts to manipulate article 16 of the Rome Statute for its own benefit: New Zealand, UNSC Verbatim Record (10 July 2002) UN Doc S/PV.4568, 5-6: “To purport to provide a blanket immunity in advance in this way would in fact amount to an attempt to amend the Rome Statute without the approval of its States parties. It would represent an attempt by the Council to change the negotiated terms of a treaty in a way unrecognized in international law or in international treaty-making processes”; France, *ibid* 11, “made a specific proposal regarding article 16 and is ready to discuss that within the limits authorized by law — I repeat, within the limits authorized by law. However, it cannot accept modification, by means of a Security Council resolution, of a provision of the Treaty”; Costa Rica, *ibid* 14, “We are therefore concerned at any initiative attempting to substantially modify the provisions of the Statute by means of a Council resolution. To adopt this kind of proposal would exceed the competence of the Security Council and would have a serious impact on the Council’s credibility and legitimacy.” Strikingly, the use of article 16 was, in fact, a suggestion put forward by some these States themselves during the discussions on UNSC Draft Res S/2002/712, extending the mandate of UNMIBH: France, *ibid* 5, “The second solution would be, as France and the United Kingdom proposed, to use article 16 of the Rome Statute in order to enable the Security Council to request the International Criminal Court on a case-by-case basis, through a resolution, to not be seized for a one-year renewable period, in the case of an ongoing investigation on a member of a force who is a citizen of a State that is not a party to the Rome Statute”; United States, *ibid* 10, “Our latest proposal uses article 16 of the Rome Statute — as we were urged to do by other Council members — to address our concerns about the implications of the Rome Statute for nations that are not parties to it, but which want to continue to contribute peacekeepers to United Nations missions.”

⁹⁸³ Syria, UNSC Verbatim Record (10 July 2002) UN Doc S/PV.4568 (Resumption 1), 10.

⁹⁸⁴ See eg. Samoa, *ibid* 7: “There is clearly no ground for a determination in advance, and then in perpetuity. Our contention, therefore, is that the purported use of article 16 would be plainly *ultra vires*.”

troops on the ground in the pursuit of successful achievement of the legally certain goals of the resolution.

It is vitally important that negotiators, the Security Council, Secretariat mission planners, and mission participants alike understand which of these political-military environments they are entering, how the environment may change under their feet once they arrive, and what they realistically plan to do if and when it does change. Each of these must be factored into an operation's entry strategy and, indeed, into the basic decision about whether an operation is feasible and should even be attempted.⁹⁸⁵

Moreover, if circumstances change on the ground, the Council should be well-placed to re-evaluate the scope of the mandate given to ensure that intervention does not negatively contribute to the situation; a need for increased troops to complete the goals of intervention once the military have engaged, for example, cannot be denied if this would result in a deterioration in the human rights or humanitarian situation. Failing this, the Council could be accused of intervening in a situation with the intention of reinstating peace and security, but with the outcome of having contributed to its further absence.

VIII.5 Conclusions

What emerges from this study is that, at least over the past two decades, the Council appears to have actively searched to improve the human rights considerations in its decision-making process. The Council's record on sanctions appears to have improved more than that of military intervention and peacekeeping mandates; it is clear that the Council and its constituent members see an obligation to ensure that sanctions do not adversely affect the innocent individuals of a State subject to sanctions or embargoes. From refusing the assertion that human rights fell within under the responsibilities of the Council to maintain peace and security to a realisation and admission, not simply verbally in the course of resolutions debates, but through actions of the Council in establishing safeguards, committees and bodies to monitor and implement sanctions, the Council has moved a considerable distance in the space of several decades. UNSC Res 2083⁹⁸⁶ introduced the necessity for increased transparency as to how sanction lists are compiled; the Al-Qaida list now includes a narrative summary of reasons for the listing of individuals,

⁹⁸⁵ The Brahimi Report (n 868) ¶26.

⁹⁸⁶ UNSC Res 2083 (17 December 2012) UN Doc S/RES/2083, ¶17.

groups, undertakings and entities included in the Al-Qaida Sanctions List.⁹⁸⁷ The Office of the Ombudsman must also adhere to a strict timeframe for dealing with all de-listing requests⁹⁸⁸ and the Committee is obliged to decide within a sixty day window whether to de-list the individual or entity.⁹⁸⁹ Similarly, the use of committees, panels of experts and other subsidiary bodies of the Council not only allow the Council members to receive more accurate and reliable information, but also display an increased willingness to achieve transparency and avoid arbitrariness in their actions. Whilst the Council has perhaps not yet fully achieved this component of incorporating human rights fully into its decision-making process, in charting the course that it has taken over the past decades, it is clear that significant steps are being taken in the appropriate direction.

However, there is still a great deal of headway to be made before total compliance with human rights by the Council can be claimed in its process. The Council's human rights and humanitarian intervention record is selective, as seen in *Chapter VII.2.2* of this thesis, and with respect to its efforts to tackle the peripheral issues of human rights in post-conflict States it also lacks full engagement. Military and peacekeeping operations require additional Security Council integration; this can take place through a number of means. Vague references to "all necessary measures" that are found in Council resolutions should be tightened to specify exact parameters for action, time-frames and exit strategies in addition to the creation of a bespoke supervisory committee to report to the Council about progress in implementing its mandates and the methods to which peacekeeping and military forces can be answerable; this oversight would go some way in addressing both inconsistencies in approaches and potential violations of human rights and humanitarian law by State and non-State parties authorised under Chapter VII resolutions.

Moreover, as a result of inconsistencies between the official stances promulgated during meetings and the resulting action taken under its authority or delegation of powers, the Council risks losing moral authority and integrity. For instance, the Chinese stance for decades has been that "the promotion of human rights and fundamental freedoms is a paramount purpose of the United Nations, no less important than the maintenance of international peace and security";⁹⁹⁰ nonetheless, this did not prevent its recent vetoes, along with Russia, on issues that dealt with

⁹⁸⁷ <<http://www.un.org/sc/committees/1267/pdf/AQList.pdf>> accessed 16 December 2014.

⁹⁸⁸ The mandate of the Ombudsman is outlined in UNSC Res 2083 (17 December 2012) UN Doc S/RES/2083, Annex II: information gathering (four months), dialogue (two months) and committee discussion (forty five days).

⁹⁸⁹ *ibid* ¶13.

⁹⁹⁰ UNSC Verbatim Record (5 August 1963) UN Doc S/PV.1053(OR), 13.

human rights in Zimbabwe,⁹⁹¹ Myanmar⁹⁹² or Syria.⁹⁹³ Nor indeed did the respect for human rights shown by the US in pursuit of referrals to the ICC of the situations in Libya and Syria hinder its veto of resolutions condemning Israel for human rights issues⁹⁹⁴ or Russian advocacy for human rights hinder its veto on the extension of an investigative mission to Georgia⁹⁹⁵ and matters concerning minority rights in Ukraine.⁹⁹⁶ Even amidst calls by France⁹⁹⁷ and Canada⁹⁹⁸ to abolish the use of the veto when dealing with human rights issues, the Council continues to proceed on a selective basis with respect to both intervening in situations that involve violations of human rights and ensuring that human rights safeguards are enshrined in the documents resulting from its deliberations. Overall, the Council must seek to balance more effectively its duties as a UN organ in protecting and promoting human rights with the national political interests of the Members of which it is comprised, for the human rights of the peoples who rely on the Council for assistance and rescue should supersede all other concerns.

⁹⁹¹ UNSC Draft Res (11 July 2008) UN Doc S/2008/447.

⁹⁹² UNSC Draft Res (12 January 2007) UN Doc S/2007/14.

⁹⁹³ UNSC Draft Res (4 October 2011) UN Doc S/2011/612; UNSC Draft Res (4 February 2012) UN Doc S/2012/77; UNSC Draft Res (19 July 2012) UN Doc S/2012/538; UNSC ‘Letter dated 16 January 2013 from the Permanent Representative of Guatemala to the United Nations addressed to the President of the Security Council’ (21 January 2013) UN Doc S/2013/38.

⁹⁹⁴ UNSC Draft Res (13 July 2006) UN Doc S/2006/508; UNSC Draft Res (11 November 2006) UN Doc S/2006/878; UNSC Draft Res (18 February 2011) UN Doc S/2011/24.

⁹⁹⁵ UNSC Draft Res (14 June 2009) UN Doc S/2009/310.

⁹⁹⁶ UNSC Draft Res (15 March 2014) UN Doc S/2014/189.

⁹⁹⁷ France, UNGA Verbatim Record (7 November 2013) UN Doc A/68/PV.46, 28: “The limitation of the exercise of the veto would involve the five permanent members of the Security Council voluntarily and collectively suspending their right to exercise the veto when mass atrocities are under consideration. It would thus be a voluntary process – a code of conduct – which would therefore not require a revision of the Charter. It would not in fact be a reform of the Security Council.”

⁹⁹⁸ Canada, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 10: “We also strongly believe that the veto has no place in deliberations on situations of genocide, crimes against humanity and war crimes.”

CHAPTER IX

THE SEPARATION OF POWERS AND ACTING *ULTRA VIRES*

The Council should stop encroaching on subjects falling squarely within the core competence of the Organization's other main organs, particularly the General Assembly and the Economic and Social Council, under the pretext of dealing with the security aspects of those subjects or by attempting to give a false impression that the subject matter under consideration gives rise to a threat to international peace and security. This issue stresses the importance of revisiting the relationship between the Security Council and the other principal organs of the Organization for the purposes of restoring the institutional balance between them that is clearly outlined in the Charter. In this regard, the International Court of Justice has a major role to play in settling any dispute that might arise between organs with respect to their mandates.⁹⁹⁹

IX.1 Introduction

The separation of powers between branches of domestic governments – principally the executive, legislature and judiciary – cannot be directly transposed from constitutions the world over to the United Nations system; as discussed in Chapter II of this thesis, the United Nations Charter, whilst bearing many similarities to a constitution, does not function as one *par excellence*. Although there are critics of imposing a separation of powers to the UN system,¹⁰⁰⁰ it is clear from the Charter itself in the mandates given to each of the constituent organs of the UN that each serves a distinct and deliberate purpose. The functions and powers of each of the UN organs are explicitly delineated in respective Chapters of the UN Charter; whilst each of the General Assembly,¹⁰⁰¹ Security Council¹⁰⁰² and Economic and Social Council¹⁰⁰³ has the competence to adopt its own rules of procedure, there is a delicate balance of responsibilities that are distributed amongst the organs that form the United Nations: the ICJ is “the principal judicial organ of the United Nations”¹⁰⁰⁴, the General Assembly “may discuss any questions or any

⁹⁹⁹ Egypt, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 3.

¹⁰⁰⁰ See, eg de Wet (n 34) 112.

¹⁰⁰¹ UN Charter (1945) art 21.

¹⁰⁰² *ibid* art 30.

¹⁰⁰³ *ibid* art 72(1).

¹⁰⁰⁴ *ibid* art 92.

matters within the scope of [the Charter]”,¹⁰⁰⁵ and the Council, as already established, has “primary responsibility for the maintenance of international peace and security”.¹⁰⁰⁶

IX.2 Sources of support for the separation of powers

The Charter also expressly works towards avoiding the duplication of efforts and discussions by separate organs: Charter article 12, for example, states that “[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”¹⁰⁰⁷ The different mandates of the organs are reflected also in the extent to which they interact; although the Charter recognises five organs,¹⁰⁰⁸ only the “General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question”¹⁰⁰⁹, reflecting the added value that coordination between the Assembly or the Council and the ICJ would impart. Juxtaposed with this, the Secretary-General, as the “chief administrative officer of the Organisation”¹⁰¹⁰ may “bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security”¹⁰¹¹ but has no such direct power to refer to the ICJ for advisory opinions.¹⁰¹²

Similarly, there is division of labour even within the field of peaceful settlement of disputes between States; both the Council and the ICJ are authorised to deal with issues relating to inter-State disputes under the respective mandates of the Charter. However, whereas the Council is a political organ and deals with peaceful settlement of inter-State disputes within the

¹⁰⁰⁵ *ibid* art 11.

¹⁰⁰⁶ *ibid* art 24.

¹⁰⁰⁷ *ibid* art 12.

¹⁰⁰⁸ *ibid* art 7(1): “There are established as principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice and a Secretariat”

¹⁰⁰⁹ *ibid* art 96.

¹⁰¹⁰ *ibid* art 97.

¹⁰¹¹ *ibid* art 99.

¹⁰¹² Some have argued that reform of the ICJ should incorporate this element to extend the advisory jurisdiction of the ICJ; see, eg Stephen M Schwebel, ‘Preliminary Rulings by the International Court of Justice at the Instance of National Courts’ (1988) 28 *Va J Intl L* 495; Shabtai Rosenne, ‘Preliminary Rulings by the ICJ at the Instance of National Court: A reply’ (1989) 29 *Va J Intl L* 401. However, the Statute of the ICJ remains restrictive of requests for Advisory Opinions solely from “whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request” (Statute of the International Court of Justice (1945) art 65), namely the Assembly and the Council under art 96 of the Charter.

framework of peace and security under Chapter VI,¹⁰¹³ the ICJ is “the principal judicial organ of the United Nations”¹⁰¹⁴ and has jurisdiction over both advisory opinions and contentious cases – “all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.”¹⁰¹⁵ The dissection of inter-State disputes into political and judicial matters is highlighted not only implicitly by these pithy mandates of each organ, but also explicitly in the Charter, which cautions the Council to “take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.”¹⁰¹⁶ Any deviation from this general norm would require compelling reasoning on the part of the Council.

The separation of powers within the United Nations has also been explicitly referred to by the ICJ itself in numerous cases including *Nicaragua*,¹⁰¹⁷ *Hostages*,¹⁰¹⁸ *Aegean Continental Shelf*,¹⁰¹⁹ *Armed Activities in the Congo*¹⁰²⁰ and *Application of Genocide Convention*.¹⁰²¹ In these

¹⁰¹³ See eg UN Charter (1945) art 33(2) where the Council shall “call upon the parties to settle their dispute [by negotiation, enquiry, mediation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice]” or *ibid* art 34, where “The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.”

¹⁰¹⁴ UN Charter (1945) art 92.

¹⁰¹⁵ Statute of the International Court of Justice (1945) art 36(1).

¹⁰¹⁶ UN Charter (1945) art 36(3).

¹⁰¹⁷ “[T]he Court is of the view that the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued *pari passu*”, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Jurisdiction and Admissibility) ICJ Rep 392, 433 [emphasis in original].

¹⁰¹⁸ *United States Diplomatic and Consular Staff in Tehran*, (Judgment) [1980] ICJ Rep 3, ¶40: “[T]he Security Council expressly took into account the Court’s Order of 15 December 1979 indicating provisional measures ; and it does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council. Nor is there in this any cause for surprise.”

¹⁰¹⁹ *Aegean Sea Continental Shelf (Greece v Turkey)*(Request for the Indication of Interim Measures of Protection, Order of 11 September 1976) [1976] ICJ Rep 3, ¶37: “[t]he Court has cognizance of the fact that, simultaneously with the proceedings before it in respect of the request for interim measures of protection, the United Nations Security Council also has been seized of the dispute between Greece and Turkey regarding the Aegean Sea continental shelf . . . [and] adopted by consensus a resolution (resolution 395 (1976)).”

¹⁰²⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (Request for the Indication of Provisional Measures, Order of 1 July 2000) [2000] ICJ Rep 111 , at ¶36 “Security Council resolution 1304 (2000) and the measures taken in its implementation, do not preclude the Court from acting in accordance with its Statute and with the Rules of Court . . . [and] in the present case the Security Council has taken no decision which would *prima facie* preclude the rights claimed by the Congo from ‘be[ing] regarded as appropriate for protection by the indication of provisional measures’ (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, *Provisional Measures, Order of 14 April 1992*, p. 15, para. 40).”

cases it was shown that the seizure of a matter by the Council does not preclude its discussion within the court of the ICJ ; indeed, “[t]he Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.”¹⁰²² The ICJ took the same view when assessing whether to exercise jurisdiction in the Advisory Opinion sought by the General Assembly on the independence of Kosovo.¹⁰²³ Each organ of the UN is bestowed with limited functions, as well as specific powers and it would be as absurd and illegitimate for the ICJ to enter into political discussions of a situation as it would for the Council to enter into judgments of legality of actions by States. The ICJ’s *Namibia* Advisory Opinion clearly affirmed the principle that the Security Council powers are bound by the standards of the Charter,¹⁰²⁴ a stance later reiterated by the ICTY.¹⁰²⁵ The ICJ detailed even further its special relationship with the Council in the *Hostages* case, emphasising the distinct fields in which each must operate.¹⁰²⁶

Restrictions and explicit mandates such as these on the work of UN organs demonstrate the intentions of the drafters of the UN Charter to ring-fence powers and responsibilities to ensure not only an effective and efficient path towards achieving the goals, principles and

¹⁰²¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Provisional Measures [1993] ICJ Rep 3, ¶33: “Yugoslavia contend[ed] that so long as the Security Council is acting in accordance with Article 25 and under [Chapter VII], ‘it would be premature and inappropriate for the Court to indicate provisional measures, and certainly provisional measures of the type which have been requested’.”

¹⁰²² *Nicaragua* (n 1017) ¶95.

¹⁰²³ *Kosovo Advisory Opinion* (n 174) ¶40: “While the request put to the Court concerns one aspect of a situation which the Security Council has characterized as a threat to international peace and security and which continues to feature on the agenda of the Council in that capacity, that does not mean that the General Assembly has no legitimate interest in the question. Articles 10 and 11 of the Charter . . . confer upon the General Assembly a very broad power to discuss matters within the scope of the activities of the United Nations, including questions relating to international peace and security. That power is not limited by the responsibility for the maintenance of international peace and security which is conferred upon the Security Council by Article 24, paragraph 1.”

¹⁰²⁴ *Namibia* (n 102).

¹⁰²⁵ *Tadic case* (Decision by Appeals Chamber) IT-94-1-AR72 (2 October 2000), ¶28: “The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).” For further discussion, see Orakhelashvili (n 53).

¹⁰²⁶ *US v Iran* (n 1018) ¶40: “Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to the dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute.”

purposes of the Charter, but also to avoid contradictory findings by UN organs that would undermine the integrity and authority of one of more of the organs; this inherent *lis alibi pendens*¹⁰²⁷ element of the mandates given to organs under the UN Charter avoids the duplication of inconsistent decisions. Moreover, there is evidence from the statements of UN Member States themselves during discussions on Council reform that there exists strong support for imposing boundaries to Council action both internally to the UN system and with respect to the extent of the existing powers it is mandated to exercise under the Charter.¹⁰²⁸

Bedjaoui proposes that the San Francisco conference resulted in the creation of a UN system that is governed by four overarching principles,¹⁰²⁹ each of which supports the assertion that the separation of powers at the UN was fully intended from its earliest days: the *specialisation principle*, where each organ is endowed with a particular mission or set of tasks; a *non-subordination principle*, “insomuch as each organ’s special mission calls for an autonomy of conduct incompatible with dependence on another organ specializing in a different area”¹⁰³⁰; *Kompetenz-Kompetenz*, reflecting the autonomy and self-proclaimed interpretation of Charter provisions; and a *coordination principle* that binds the work of the organs together. Accordingly, this principle of the separation of powers within the UN, can be easily extended to form the root of this component of the rule of law at the Council level. However, the Charter is deliberately broad in the discretion permitted to UN organs in the interpretation of its provisions; whilst there is a clear separation of both powers and responsibilities in the Charter, there is little in the way of ensuring their continued separation and avoiding the activities of one bleeding into the mandate of another. Proposals made by the Belgian delegation for UN organs to submit any interpretative disagreements to the ICJ¹⁰³¹ or the General Assembly¹⁰³² for analysis were rejected in 1945 and the UN was created with no specific mechanism for interpreting the provisions of the Charter¹⁰³³ and the recognition that UN organs would interpret the respective applicable Charter provisions themselves.¹⁰³⁴ Notwithstanding the ruling of the ICJ in the *Nuclear Weapons*

¹⁰²⁷ “Dispute elsewhere pending”.

¹⁰²⁸ See eg Iran, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 12 (2008); Russia, UNSC Verbatim Record (12 January 2007) UN Doc S/PV.5619, 6.

¹⁰²⁹ Bedjaoui (n 229).

¹⁰³⁰ *ibid* 13.

¹⁰³¹ United Nations Conference on International Organization (UNCIO), Vol 13 (1945), 657.

¹⁰³² United Nations Conference on International Organization (UNCIO), Vol 8 (1945), 394.

¹⁰³³ United Nations Conference on International Organization (UNCIO), Vol 3 (1945), 709-710.

¹⁰³⁴ *ibid*.

in Armed Conflict case, this “absence of [any specific legality-test clause] not only fails to offer protection against any excess of Charter powers but is conducive to it.”¹⁰³⁵

IX.3 The Council’s norm-setting

At the outset, it is key to establish the stark division between the capacity of the Council to create legal obligations upon UN Member States through UN Charter article 25¹⁰³⁶ and its foray into commenting upon or even ruling on the legality of actions by States unrelated to the Charter. Whereas the former grants the Council the unrivalled power to immediately and spontaneously alter the landscape of international law both by forcing States to abide by its resolutions and by establishing a precedent for future action, the latter would place the Security Council – a political organ – squarely in the judicial role of weighing the actions of States against the international legal standard. Whilst the first is not only acceptable but forms part of the role of the Council, the latter would be a drastic change in the role of the Council for which it neither was designed nor is competent to carry out; the Council may create and measure the actions of States against its own legal norms through its binding resolutions, but only incidental to its role in maintaining international peace and security – the “progressive development of international law and its codification”¹⁰³⁷ is a task for the General Assembly. Moreover, it may not rule on the legality or compliance of States with existing norms or principles of international law – this is the role of the ICJ.¹⁰³⁸ This differentiation is exemplified by the fact that the both the Council and the ICJ may address the same matters simultaneously – as with the dispute between the US and Nicaragua – but divergently within their respective frameworks of responsibilities. The Council, however, has gradually begun encroaching on the territory of both the Assembly and the ICJ.

¹⁰³⁵ Bedjaoui (n 229) 9.

¹⁰³⁶ “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

¹⁰³⁷ UN Charter (1945) art 13.

¹⁰³⁸ See eg *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Application instituting Proceedings) General List No 155 [2013], 22, where Nicaragua alleges that Colombia is in breach of UN Charter art 2(4), Nicaragua’s sovereign rights and jurisdiction and rights under the UN Convention on the Law of the Sea; *Case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden)*, (Judgment) [1958] ICJ Rep 55, 67, where the Court was “asked to say whether the measure taken and impugned is or is not compatible with the obligations binding upon Sweden by virtue of the 1902 Convention.”

It cannot be disputed that the Council is empowered to make legislative decisions in response to threats to the international peace through the adoption of legally binding resolutions; Joyner proposes that

the Council is empowered not only to act as an *executive body*, but rather also to act as a *legislative body* crafting proactive and permanent legal edicts covering important areas of international relations including terrorism (UNSC Resolution 1373) and weapons of mass destruction proliferation (UNSC Resolution 1540), and even further to act as a *judicial body* determining the legal rights and obligations of UN members.¹⁰³⁹

Indeed, the imposition of sanction regimes, authority for military intervention and the establishment of ad hoc international criminal tribunals are all examples of legislative powers at the disposal of the Council in response to specific threats. However, these are not examples of *normative* legislation but rather must be specific, as highlighted earlier with regard to the need for legal certainty and the determination of the threat to the peace under article 39 of the Charter, and in support of this specificity, they must have timeframes for action. As a result, legislative action can only legitimately emerge from the Council once, firstly, a specific to the threat to the peace has been determined by the Council and, secondly, the resolution is temporally limited to encompass exclusively the period of time required for addressing this threat. Laws of a general nature with indefinite durations are decidedly outside of the remit of the Council; the separation of powers, then, with respect to the Security Council, concerns not its capacity to legislate *per se*, but rather its adherence to the parameters of legislative power it has been granted by the Charter and ensuring that responding to threats of the international peace is not used as a gateway to effect permanent change in the norms of international law or domestic legislation.

IX.3.1 The advancement of international law by proxy

The Council has always made full use of its *kompetenz kompetenz*, but has grown considerably bolder after 1990: for example, as mentioned in *Chapter VIII* of this thesis the Council initially saw human rights as falling outside of its mandate; today it is central to its activities in peace and security; the use of Chapter VII in the creation of the ICTY and ICTR, as well as the referral to the ICC of situations in the Sudan and Libya are further examples. However, there still exists the

¹⁰³⁹ Joyner, 'Legal Hegemon' (n 51) 226.

risk that this self-interpretative mandate of the UN Charter may encroach on the mandates of sibling UN organs and that it has also shirked its responsibilities in some cases. This potential for a blurring in the separation of powers and excess of the Council's mandate under the Charter was hinted at early on the history of the United Nations; in 1947, the General Assembly was already recommending that "organs of the United Nations . . . should, from time to time, review the difficult and important points of law within the jurisdiction of the International Court of Justice . . . including points of law relating to the interpretation of the Charter of the United Nations".¹⁰⁴⁰ Nonetheless, the Council has not chosen to refer to the ICJ in interpreting its mandate or in deciding whether a matter falls within its remit, despite both the designated mandate of the ICJ to tackle issues of a judicial and legal nature and practical instances where the Court has over the course of the years exercised its right upon request of authorised UN organs to interpret the Charter on specific articles¹⁰⁴¹ and in general questions of law.¹⁰⁴² The lack of referral to the ICJ of questions relating to clarification of the limits of the Council cannot, then, be due to a lack of jurisdiction or experience, but due to other factors.¹⁰⁴³ In defence of the Council, it can be evidenced that in the earliest stages of the UN's history, the Council had no need to seek clarification from the ICJ on the limits of its jurisdiction, as it originally abided by the demarcated Charter boundaries, recommending where appropriate that States "immediately refer the dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court."¹⁰⁴⁴ However, over the decades, the Council has increasingly deviated from this formula.

Since the mid-1960s the Council has grown increasingly bolder in its pronouncements on international legal matters, declaring governments and occupations illegal¹⁰⁴⁵ and assigning legal

¹⁰⁴⁰ UNGA Res 171 (II) (1947) UN Doc A/RES/2/171, preamble.

¹⁰⁴¹ eg *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151; *Admission of a State to the United Nations (Charter, Art 4)* (Advisory Opinion) [1948] ICJ Rep 57.

¹⁰⁴² eg *Namibia* (n 102); *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1942] ICJ Rep 174.

¹⁰⁴³ Bedjaoui excellently highlights some of the concerns of States at the initial stages of drafting the Council's mandate in the Charter at San Francisco in 1945. See, Bedjaoui (n 229) 15-21 for discussion. Further discussion of the ICJ and its capacity to review the Council can be found in *Chapter XI* of this thesis.

¹⁰⁴⁴ UN Doc S/RES/22 (1947) referred to the UK-Albanian dispute over damage to UK shops in the Straits of Corfu, which was settled at the ICJ in the *Corfu Channel case* (Judgment) [1949] ICJ Rep 4.

¹⁰⁴⁵ UNSC Res 216 (12 November 1965) UN Doc S/RES/216, ¶2 called on States "not to recognize this *illegal* racist minority regime in Southern Rhodesia" [emphasis added]; UNSC Res 276 (30 January 1970) UN Doc S/RES/276, ¶2 declared "the continued presence of the South African authorities in Namibia . . . *illegal* and . . . consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are *illegal and invalid*" [emphasis added].

liability to Parties¹⁰⁴⁶ in some situations. Indeed, in a precursor the ICTY, the ICTR and the Rome Statute, the Council advocated for the individual responsibility for war crimes in UNSC Res 794¹⁰⁴⁷ affirming, in relation to Somalia, that “those who commit or order the commission of such acts will be held individually responsible in respect of such acts.”¹⁰⁴⁸ In so doing, the Council established a legal principle that had otherwise never been formally recognised and which later formed one of the bases for the Prosecutor of the ICTY to present evidence of *opinio juris* in the *Tadic* case¹⁰⁴⁹ – individual responsibility for breaches of humanitarian law. The Council here clearly stumbles into the territory of other organs in developing international law, which has been of concern to States.¹⁰⁵⁰

More than advancing the development of international law and creating international legal principles, which may well be argued as a by-product of the Council’s work in promoting the international peace, the Council has in recent years stepped up its work as legislator. Concerns over the quasi-legislative resolutions of the Council risk undermining the legitimacy of the decisions of the Council.¹⁰⁵¹ Whereas the Council throughout the years has continued to encourage States to enact legislation and enforcement mechanisms themselves as means to counter certain threats, such as the illicit flow of arms in Africa,¹⁰⁵² the creation of the ICTY and ICTR as subsidiary bodies under Chapter VII may have marked the start of a new era in which

¹⁰⁴⁶ UNSC Res 687 (3 April 1991) UN Doc S/RES/687.

¹⁰⁴⁷ UNSC Res 794 (3 December 1992) UN Doc S/RES/794.

¹⁰⁴⁸ *ibid* 5.

¹⁰⁴⁹ *Tadic Appeal* (n 1025) ¶133: “Of great relevance to the formation of *opinio juris* to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations are certain resolutions unanimously adopted by the Security Council. Thus, for instance, in two resolutions on Somalia, where a civil strife was under way, the Security Council unanimously condemned breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held “individually responsible” for them. (See S.C. Res. 794 (3 December 1992); S.C. Res. 814 (26 March 1993).)” [emphasis in original].

¹⁰⁵⁰ Iran, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 12: “The Security Council’s norm-setting and law-making are also part of another increasing trend that runs counter to the letter and the spirit of the Charter of the United Nations. In accordance with the Charter, the General Assembly, as the chief deliberative, policy-making and representative organ of the United Nations, is primarily entrusted with the task of the progressive development and codification of international law. As stated by the representative of Cuba in her statement on behalf of the Non-Aligned Movement, to which we subscribe, the Security Council’s increasing encroachment on the prerogatives of other main organs of the United Nations — in particular those of the General Assembly and the Economic and Social Council and their subsidiary bodies . . . — is also of particular concern to Member States.” See also Ecuador, *ibid* 13, which felt that some Council “decisions go beyond discussions on the political or security issues, and lead us to reflect on the legal implications, within the context of international law”.

¹⁰⁵¹ See, eg Austria, *ibid* 17.

¹⁰⁵² UNSC Res 1209 (19 November 1998) UN Doc S/RES/1209, ¶2 encouraged “African States to enact legislation on the domestic possession and use of arms, including the establishment of national legal and judicial mechanisms for the effective implementation of such laws.”

the Council consolidated its role in norm-setting. The establishment itself of the tribunals may have been legally sound, but the Council's cavalier attitude towards its mandate and the knock-on effect this has had on principles of international law cannot be underestimated.

Orakhelashvili, relying on a statement of the ICTY itself,¹⁰⁵³ argues that in creating

the *ad hoc* criminal tribunals, the Council did not derogate from customary law, and the fact that the concept of crimes against humanity was linked to an armed conflict in *Tadić* and to a discriminatory intent in *Akayesu* was due not to the intention of the Council to change or otherwise affect the composition of these crimes as recognized under general international law, but just to provide the ICTY and ICTR with the jurisdiction limited accordingly.¹⁰⁵⁴

Certainly, the ICTY was not intended to be “empowered with – nor would the Council be assuming – the ability to set down norms of international law or legislate with respect to those rights”;¹⁰⁵⁵ the codification of customary law was therefore illegitimate. Nonetheless, the international humanitarian law that was thought to be “impressively codified, well understood, agreed upon and enforceable”¹⁰⁵⁶ was in fact significantly augmented by sources of law outside of the Geneva Conventions of 1949,¹⁰⁵⁷ including “international customary law which is not laid down in conventions”.¹⁰⁵⁸ the principle of *individual criminal responsibility* is included in part due to the self-referential, circular reasoning that “the Security Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law . . . are individually responsible for such violations”;¹⁰⁵⁹ crimes against humanity had no written legal basis prior to the ICTY and were included due to its recognition almost 50 years previously “in the Charter and Judgment of the Nuremberg Tribunal, as well as in Law No. 10 of

¹⁰⁵³ *Tadić Appeal* (n 1025) ¶ 296: “It is open to the Security Council – subject to peremptory norms of international law (*jus cogens*) – to adopt definitions of crimes in the Statute which deviate from customary international law. Nevertheless, as a general principle, provisions of the Statute defining the crimes within the jurisdiction of the Tribunal should always be interpreted as reflecting customary international law, unless an intention to depart from customary international law is expressed in the Statute, or from other authoritative sources.”

¹⁰⁵⁴ Alexander Orakhelashvili, ‘The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions’ 16(1) EJIL 59-88, 80.

¹⁰⁵⁵ Venezuela, UNSC Verbatim Record (25 May 1993) UN Doc S/PV.3217, 7.

¹⁰⁵⁶ US, UNSC Verbatim Record (22 February 1993) UN Doc S/PV.3175, 11.

¹⁰⁵⁷ This is explicitly mentioned as the basis for article 2 of the ICTY Statute, but no other codified international law is referred to in the Statute.

¹⁰⁵⁸ UNSC ‘Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)’ (3 May 1993) UN Doc S/25704, ¶33. Such sources of law include the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

¹⁰⁵⁹ *ibid* ¶53.

the Control Council for Germany”;¹⁰⁶⁰ and immunity from prosecution was removed from alleged perpetrators of crimes falling within the jurisdiction of the court based on “comments received by the Secretary-General . . . [and] suggestions draw[ing] upon the precedents following the Second World War.”¹⁰⁶¹ The creation or codification of hitherto unwritten law by the Council through its subsidiary organ of the ad hoc court was a rapid endeavour¹⁰⁶² that led some to reflect on whether “[p]erhaps more extensive legal studies could have been undertaken on various aspects of the Statute, such as the question of the principle of *nullum crimen sine lege* . . .”¹⁰⁶³ This was reiterated by Schabas, who noted “an absence of any real guidance on the subject [of *mens rea*] in the applicable law of the [ICTY].”¹⁰⁶⁴

The establishment of the ICTY was also groundbreaking in numerous respects. Primarily, it appears to be the first time that the expediency of action was explicitly acknowledged to trump the many benefits of a more inclusive process for the creation of an international criminal court. The Secretary-General highlighted at the outset of his report that

[t]he approach which, in the normal course of events, would be followed in establishing an international tribunal would be the conclusion of a treaty by which the States parties would establish a tribunal and approve its statute . . . [which] would have the advantage of allowing a detailed examination and elaboration of all issues pertaining to the establishment of the international tribunal. It also would allow the States participating in the negotiation and conclusion of the treaty fully to exercise their sovereign will . . .¹⁰⁶⁵

¹⁰⁶⁰ *ibid* ¶47.

¹⁰⁶¹ *ibid* ¶55. See also, Ivan Simonvic, ‘The Role of the ICTY in the Development of International Criminal Adjudication’ (1999-2000) 23 *Fordham Intl L J* 440, 457-8, where “[t]he practice of the Tribunal already is, and will continue to be, very important for the interpretation of international humanitarian law . . . Systematic rape has been added to the list of war crimes through the practice of the Tribunal. The recognition of a new gender related crime – that of rape and the incitement to rape that has been used to achieve political goals, such as ethnic cleansing – is new and important.” Whilst these are excellent advances in the field of international humanitarian law it is arguable whether the role of the Council to create such norms is legitimate.

¹⁰⁶² France, UNSC Verbatim Record (25 May 1993) UN Doc S/PV.3217, 11: “The Statute was worked out at the request of the Security Council . . . in a very short period of time.”

¹⁰⁶³ Japan, UNSC Verbatim Record (25 May 1993) UN Doc S/PV.3217, 24. See also, Brazil, UNSC Verbatim Record (22 February 1993) UN Doc S/PV.3175, 6-7, where “[t]he Security Council can and should play a strong and positive role in promoting the implementation of the various elements that would contribute to the peace efforts developed by the Conference on the Former Yugoslavia, That role, however, can and should remain within the scope of the powers expressly granted to the Security Council in accordance with the United Nations Charter.”

¹⁰⁶⁴ William Schabas, ‘*Mens Rea* and the International Criminal Tribunal for the Former Yugoslavia’ (2002-3) 37 *New Eng L Rev* 1015, 1017.

¹⁰⁶⁵ UNSC ‘Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)’ (3 May 1993) UN Doc S/25704, ¶19.

The establishment of the ICTY was, then, a departure from the traditional method of establishing a legal entity that held States accountable for their behaviour; with the exception of the ICJ, to which all UN Member States are automatically party, there had never been a legal body established to preside over the behaviour of States without an accorded treaty to which accession is voluntary.¹⁰⁶⁶ The Secretary-General also made reference to fact that the General Assembly “as the most representative organ of the United Nations, should have a role in the establishment of the international tribunal.”¹⁰⁶⁷ However, due to the fact that some States may choose not to ratify any treaty establishing the ICTY, thereby circumventing its jurisdiction – as indeed, has happened with the ICC – and the considerable time that a treaty or Assembly deliberation would take – which “would not be reconcilable with the urgency expressed by the Security Council in resolution 808 (1993)”¹⁰⁶⁸ – a Chapter VII resolution was recommended: “[t]his approach would have the advantage of being expeditious and of being immediately effective as all States would be under a binding obligation to take whatsoever action is required to carry out a decision taken as an enforcement measure under Chapter VII.”¹⁰⁶⁹ Kirgis also notes the legislative element of the ICTY Statute, referring to them as “directives to national governments.”¹⁰⁷⁰

The *Tadic* trial highlighted the impossibility of the ICTY reviewing its own establishment; at both the Trial¹⁰⁷¹ and Appellate¹⁰⁷² stages, the Court was found to have “no authority to

¹⁰⁶⁶ eg The Human Rights Committee (CCPR) monitors implementation of the International Covenant on Civil and Political Rights (1966) and its optional protocols; the Committee on Economic, Social and Cultural Rights (CESCR) monitors implementation of the International Covenant on Economic, Social and Cultural Rights (1966); the Committee on the Elimination of Racial Discrimination (CERD) monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the Committee on the Elimination of Discrimination against Women (CEDAW) monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women (1979) and its optional protocol (1999); the Committee against Torture (CAT) monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984); the Committee on the Rights of the Child (CRC) monitors implementation of the Convention on the Rights of the Child (1989) and its optional protocols (2000); Committee on Migrant Workers (CMW) monitors implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).

¹⁰⁶⁷ UNSC ‘Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)’ (3 May 1993) UN Doc S/25704, ¶21.

¹⁰⁶⁸ *ibid.*

¹⁰⁶⁹ *ibid* ¶23. See also, Ralph Zacklin, ‘Some Major Problems in the Drafting of the ICTY Statute’ (2004) 2 JICJ 361: “even if the negotiation and signature stages [of the treaty-making process] could be compressed into a relatively short span of time - say, 12 months - ratification to bring the treaty into force could take many years.”

¹⁰⁷⁰ Kirgis (n 58) 524.

¹⁰⁷¹ *Tadic Trial* (Decision on the Defence Motion on Jurisdiction) IT-94-I-T (10 August 1995).

¹⁰⁷² *Tadic Appeal* (n 1025) ¶20: “There is no question, of course, of the International Tribunal acting as a constitutional tribunal, reviewing the acts of the other organs of the United Nations, particularly those of the Security Council, its own “creator.” It was not established for that purpose, as is clear from the definition of the ambit of its “primary” or “substantive” jurisdiction in Articles 1 to 5 of its Statute.”

investigate the legality of its creation by the Security Council.”¹⁰⁷³ Therefore, rather than referring to the ICJ to rule on the legality of the establishment of the ICTY, as originally suggested by the General Assembly in 1947 in relation to the interpretation of Charter provisions, it was left to the Secretary-General to declare that the “establishment of the International Tribunal by means of a Chapter VII decision would be legally justified.”¹⁰⁷⁴ Despite the Secretary-General’s correct assertion that a Council “determination of the existence of a threat to the peace, breach of the peace or act of aggression”¹⁰⁷⁵ would be required for the establishment of the ICTY, it is the Secretary-General who contradictorily declares in his report that “[s]uch a decision would constitute a measure to maintain or restore international peace and security”¹⁰⁷⁶ – a task clearly within the remit of the Council as primary maintainer of peace and security. Whilst the Council may delegate the “*action* required to carry out the decisions of the Security Council for the maintenance of international peace and security”¹⁰⁷⁷, it is for the Council alone to “decide what measures not involving the use of armed force are to be employed to give effect to its decisions.”¹⁰⁷⁸ To delegate this task to the Secretary-General, who is ill-equipped to decipher the legal intricacies of Charter interpretation¹⁰⁷⁹ – particularly in relation to the ICJ – is a gross blurring of the lines between organs and an *ultra vires* delegation of powers by the Council.

Furthermore, despite assurances from the Secretary-General that “in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of the international humanitarian law, the Security Council would not be creating or purporting to ‘legislate’ that law”¹⁰⁸⁰, this was not borne out in reality. The principles created for the ICTY were replicated in the ICTR and the ICC statutes; Sadat notes that it “is probably fair to say that the Court would not have existed *but for* the successful creation and operation of the ICTY and

¹⁰⁷³ *Tadic Trial* (n 11711071) ¶5.

¹⁰⁷⁴ UNSC ‘Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)’ (3 May 1993) UN Doc S/25704, ¶24.

¹⁰⁷⁵ *ibid* ¶22.

¹⁰⁷⁶ *ibid*.

¹⁰⁷⁷ UN Charter (1945) art 48 [emphasis added].

¹⁰⁷⁸ *ibid* art 41.

¹⁰⁷⁹ Whilst the legal analysis may have come from the Office of Legal Counsel, the most appropriate forum for the discussion of the legality of the establishment of international tribunals is the ICJ.

¹⁰⁸⁰ UNSC ‘Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)’ (3 May 1993) UN Doc S/25704, ¶29.

ICTR.”¹⁰⁸¹ The Assistant-Secretary-General for Legal Affairs has also noted that “[t]he contribution of the ICTY to the development of international criminal law has been significant”¹⁰⁸², a fact that is highlighted by ICTY decisions even forming part of the jurisprudence relied upon by the ICJ in the 2000 *Congo v. Belgium* case.¹⁰⁸³ The Council has set precedents of international law under the guise of addressing threats to the international peace; as a result, the Council has created legal principles, which have been adopted by international courts as reliable evidence of *opinio juris*, and accordingly are now relied upon in international legal establishments such as the ICTY, ICTR and ICC. As Weiss et al have noted, “in a narrow sense [the ICTY and ICTR] have been successful not only in convicting and incarcerating a number of criminal defendants but also in engaging in a major rewriting of modern international criminal law.”¹⁰⁸⁴

IX.3.2 *The Council as direct legislator*

The international criminal tribunals may have been the Council’s introduction to legislating by proxy, but emboldened by this new-found power to legislate, it began towards the turn of the century to impose obligations of a generally applicable legal nature on States directly through Chapter VII resolutions, without the existence or determination of a specific threat to the international peace and with no temporal parameters. This direct legislation by the Council falls under what many commentators have termed “*ultra vires* action”¹⁰⁸⁵; however, I have chosen to approach this differently bringing it under the umbrella of the separation of powers. The role of the Council as legislator runs contrary to the Charter for two principal reasons: firstly, as mentioned previously, the role of advancing international law falls within the remit of the Assembly. In addition to UNGA Res 67/1 on the rule of law, numerous Assembly resolutions

¹⁰⁸¹ Leila Nadya Sadat, ‘The Legacy of the ICTY: The International Criminal Court’ (2002-3) 37 *New Eng L Rev* 1073, 1074 [emphasis in original].

¹⁰⁸² Ralph Zacklin, ‘The Failings of Ad Hoc International Tribunals’ (2004) 2 *JICJ* 541, 542.

¹⁰⁸³ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3, ¶58: “The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts” [emphasis added].

¹⁰⁸⁴ Weiss and others (n 886) 198.

¹⁰⁸⁵ See Rosand (n 48); Elberling (n 3).

developing international law have been adopted without vote, such as the 1970 Declaration on Friendly Relations¹⁰⁸⁶ and the 1974 Definition of Aggression.¹⁰⁸⁷ Secondly, it undermines the purposes and foundations of the Charter itself. When taken in isolation, legislative action by the Council may indeed be deemed *ultra vires* of its powers under the Charter; however, within the framework of the international rule of law and the international legal order against which the Council operates the Council encroaches upon other elements of the Charter, which flout the traditions and customs of international law – namely, the sovereign rights of States. Operating within the sphere of international law, States have obligations and rights outside of those imposed by their adherence to the UN Charter;¹⁰⁸⁸ that is to say that membership to the United Nations by States is itself an exercise in the sovereignty that underscores international law¹⁰⁸⁹ and the sole jurisdiction over their domestic affairs.¹⁰⁹⁰ One may traditionally approach the separation of powers within the Charter, in much the same way as that of the domestic sphere, as comprising the core organs of the UN: functionally relevantly to this thesis the ICJ, the Assembly and the Council, which are loose transpositions of judiciary, legislative and executive branches. However, this omits an additional branch of power in the Charter that is uniquely idiosyncratic to the Charter: that of the sovereign State. Naturally, due to the differences between domestic and international law – the vertical versus the horizontal– one would not find this additional branch of powers in national constitutions. Nonetheless, it lies at the foundation of the Charter.

This branch of *sovereign States*, the powers of which are sanctified on a par with the powers of the Council, the Assembly and the ICJ, is explicitly referred to in the Charter as being inviolable; with the exception of the application of *enforcement measures* under Chapter VII, “[n]othing contained in the [UN] Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the

¹⁰⁸⁶ UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/25/2625.

¹⁰⁸⁷ Definition of Aggression, UNGA Res 3314 (14 December 1974).

¹⁰⁸⁸ For example, States’ obligations under international customary law, treaties entered into, and *jus cogens* are outside of the scope of the UN Charter. Similarly, the principle of State sovereignty, whilst mentioned in the Charter, predates the United Nations significantly.

¹⁰⁸⁹ UN Charter (1945) art 2(1): “The Organization is based on the principle of the sovereign equality of all its Members.” States exercise their sovereign rights by *choosing* to join the United Nations, as opposed to customary international law which is imposed upon States without their active ratification or signature.

¹⁰⁹⁰ *ibid* art 2(7): “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

Members to submit such matters to settlement under the present Charter.”¹⁰⁹¹ The only legitimate means for the Council to legislate, therefore, by virtue of a Chapter VII resolution authorising such enforcement mechanisms, which in turn as discussed in *Chapter V* of this thesis must comply with the principles of legal certainty. Consequently, an illegitimate use of power by the Council in legislating outside of this narrow window¹⁰⁹² would be a violation not only of its powers under the Charter but of the rule of law itself.

Against this backdrop, for the Council to adopt the role of international legislator outside of the enforcement mechanisms of Chapter VII is, therefore, to encroach upon the sphere of international law itself – well outside of the UN Charter altogether – for not even the Assembly that is tasked with the advancement of international law under the Charter may obligate States to abide by non-customary norms of international law in the absence of general consent. This would be a disregard in the separation of powers outlined in the Charter, imposing legal obligations upon States that either regulate the domestic sphere of nations or binding their hands against action under their domestic constitutions.

IX.3.2.1 International terrorism

Following the bombing of US embassies in Kenya and Tanzania in 1998 – claimed to have been perpetrated by operatives of Osama Bin Laden – the US began its crackdown against the Taliban in Afghanistan, who continued to “provide bin Laden with safe haven and security, allowing him the necessary freedom to operate, despite repeated efforts by the United States to persuade the Taliban to turn over or expel him.”¹⁰⁹³ Whilst condemnation of international terrorism by the Council prior to 1999 was not unheard of, the Council had hitherto taken a piecemeal approach that was fairly rare;¹⁰⁹⁴ in fact, Weiss and others note that until “the 1990s terrorism was dealt with almost entirely by the General Assembly, which approached the issue as a general problem of international law.”¹⁰⁹⁵ In the aftermath of the attacks on the World Trade Centre in 2001, the

¹⁰⁹¹ *ibid.*

¹⁰⁹² See also, *ibid* art 25, where “Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

¹⁰⁹³ US, UNSC Verbatim Record (15 October 1999) UN Doc S/PV.4051, 3.

¹⁰⁹⁴ Few instances of Council discussion on terrorism prior to 1999 could be found eg UNSC Res 286 (9 September 1970) UN Doc S/RES/286 appealed for an end to hijacking of commercial aircraft and release of passengers held; UNSC Res 457 (4 December 1979) UN Doc S/RES/457 condemned Iranian taking of US hostages in Tehran; UNSC Res 579 (18 December 1985) UN Doc S/RES/579 condemned acts of hostage-taking and abduction; UNSC Presidential Statement 3 (1995) UN Doc S/PRST/1995/3 condemned a terrorist attack in Israel.

¹⁰⁹⁵ Weiss and others (n 886) 130.

Council paid far more acute attention to the threat of international terrorism which was deemed to “constitute one of the most serious threats to international peace and security in the twenty-first century.”¹⁰⁹⁶ With indirect legislation on the front of human rights and humanitarian law having succeeded at the international tribunals, a further leap was taken in 2001 in imposing on States specifically outlined, but abstractly supported, legal obligations. Beginning with a general condemnation the day after the attacks, the Council called “on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions.”¹⁰⁹⁷

However, less than a month later, the Council emerged with detailed, legally binding, wide-reaching stipulations that, under Chapter VII, States were bound to comply with. In contrast to the resolutions that established the ICTY and ICTR and other resolutions targeting the specific threats,¹⁰⁹⁸ UNSC Res 1373¹⁰⁹⁹ was extremely general in its scope, a hallmark of international treaties rather than the specific determination of a threat to the peace one might expect under Article 39 of the Charter:¹¹⁰⁰ the resolution lacked temporal limitation on the validity of the impositions, neglected to specify the exact situation that it aimed to address in an effort to reinstate peace and security¹¹⁰¹ and failed to identify any subjects who were causing the threat to the international peace.¹¹⁰² Indeed, despite numerous discussions prior to and in the

¹⁰⁹⁶ UNSC Res 1377 (12 November 2001) UN Doc S/RES/1377, Annex.

¹⁰⁹⁷ UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368, ¶4.

¹⁰⁹⁸ eg UNSC Res 1390 (16 January 2002) UN Doc S/RES/1390, ¶2(a), which imposed the obligation that “all States shall . . . [f]reeze without delay the funds and other financial assets or economic resources” of Osama bin Laden, members of Al Qaeda, and the Taliban, and other individuals, groups, undertakings, and entities associated with them”. See also, eg UNSC Res 1333 (19 December 2000) UN Doc S/RES/1333, ¶8(c); UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267, ¶4(b).

¹⁰⁹⁹ UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

¹¹⁰⁰ See, eg Simon Chesterman, Thomas M Franck and David M Malone, *Law and Practice of the United Nations* (OUP 2008) 110, where resolutions in which the Council legislates are characterised by “obligations [that] are phrased in neutral language, apply to an indefinite number of cases, and are not usually limited in time”; Stefan A. Talmon, ‘The Security Council as World Legislature’ (2005) 99 AJIL 175.

¹¹⁰¹ UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373, preamble: “Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts.”

¹¹⁰² The resolution is phrased extremely vaguely and in the passive eg *ibid* 1, where “States shall prevent and suppress the financing of terrorist acts . . . [and] prohibit their nationals or any persons and entities within their territories from making any funds . . . available for the benefit of persons who commit . . . the commission of terrorist acts . . .”

wake of UNSC Res 1373¹¹⁰³ and one Assembly definition¹¹⁰⁴ there was no strictly agreed definition of terrorism, which was later to lead to some frustration on the part of several representatives.¹¹⁰⁵ UNSC Res 1373 made no mention of the Assembly definition of terrorism and it was not until 2004 that the Council made any attempt to define the act¹¹⁰⁶ despite the existence of twelve international conventions on the subject of terrorism at the time.¹¹⁰⁷

Drawing heavily on the language and definition of the Assembly almost a decade earlier, no nexus is made between the two and the Council appears to ignore the seizure of the matter by the Assembly. Moreover, despite the lack of definition by the ICJ¹¹⁰⁸ or the Assembly,¹¹⁰⁹ either

¹¹⁰³ eg The International Convention for the Suppression of Terrorist Bombings (1997); the International Convention for the Suppression of the Financing of Terrorism (1999); the International Convention for the Suppression of Acts of Nuclear Terrorism (2005); High Level Panel on Threats, Challenges and Change (2004).

¹¹⁰⁴ UNGA Res 51/210 (16 January 1997) UN Doc A/RES/51/210, ¶2: “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.”

¹¹⁰⁵ See, eg Syria, UNSC Verbatim Record (15 April 2002) UN Doc S/PV.4512, 10: “We believe that the international community is today more duty-bound than ever to put an end to the deliberate confusion and ambiguity regarding the definition of terrorism, with which we are all struggling”; Malaysia, *ibid* (Resumption), 10: “[Foreign Ministers of the Organization of the Islamic Conference] underlined the urgent need for an internationally agreed definition of terrorism that differentiates such legitimate struggles from acts of terrorism”; Pakistan, UNSC Verbatim Record (18 January 2002) UN Doc S/PV.4453, 30: “A crisis has been provoked in our region, for the sake of political opportunism, by confusing and obfuscating the issue and by fudging the very definition of terrorism . . . It is driven only by political ambitions for regional hegemony, not by the fight against terrorism.”

¹¹⁰⁶ UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566, ¶3: “criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.”

¹¹⁰⁷ 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft (“Tokyo Convention”); 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (“Hague Convention”); 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (“Montreal Convention”); 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons; 1979 International Convention against the Taking of Hostages (“Hostages Convention”); 1980 Convention on the Physical Protection of Nuclear Material (“Nuclear Materials Convention”); 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation; 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf; 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection; 1997 International Convention for the Suppression of Terrorist Bombings; 1999 International Convention for the Suppression of the Financing of Terrorism.

¹¹⁰⁸ The ICJ has not defined terrorism. See, eg Rosalyn Higgins, ‘The General International Law of Terrorism’ in Rosalyn Higgins and Maurice Flory (eds), *Terrorism and International Law* (Routledge 1997) 28: Former President Rosalyn Higgins has stated that “[t]errorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals widely disapproved of and in which wither the methods used are unlawful, or the targets protected or both.”

¹¹⁰⁹ UK, UNGA Verbatim Record (1 October 2001) UN Doc A/56/PV.12, 18-19: At the discussion on Measures to eliminate international terrorism, defining terrorism was “one controversial area where this Assembly has a job to do

of which would arguably be better suited to the establishment of international legal definitions, UNSC Res 1373 was adopted without a definition of the act that it criminalised.¹¹¹⁰ Accordingly, a blanket imposition of broad obligations¹¹¹¹ upon States and the requirement to report the steps taken¹¹¹² by States in compliance with these obligations were outlined in a manner reminiscent of the expansive sanctions regimes of the early 1990s.

Remarkably, not only did the resolution pass unanimously,¹¹¹³ despite anticipation of opposition¹¹¹⁴ to the far-reaching and overtly legislative nature of the content, but there was great praise for what was seen as “one of the most important resolutions of [the Council’s] history.”¹¹¹⁵ Indeed, the “unprecedented step of bringing into force legislation binding all States on the issue of combatting terrorism”¹¹¹⁶ was seen in a positive light and, as a result, “[a]ll States now [had] the legal, as well as political and moral, obligation to act against it”¹¹¹⁷ despite the fact that, firstly, there was no unanimously agreed definition of terrorism and, secondly, there was otherwise no legally binding obligation upon States to do so. On the one hand, the fact that the CTC did not intend to “trespass onto the areas of competence of other parts of the United

. . . In following up the implementation of Friday’s Security Council resolution, the 1373 Committee must focus on what we all agree is terrorism without subjective interpretation, and filter out prejudice and unilateralism.”

¹¹¹⁰ *ibid* 18: The loose definition of the term in 2001 did not appear to phase the head of the Counter-Terrorism Committee (CTC), who acknowledged that it “is a highly controversial and subjective area, on which, because of the legitimate spectrum of viewpoints within the United Nations membership, we will never reach full consensus. See also, *ibid* for the hazy definition of terrorism: “Increasingly, questions are being raised about the problem of the definition of a terrorist. Let us be wise and focused about this. Terrorism is terrorism. It uses violence to kill and damage indiscriminately to make a political or cultural point and to influence legitimate Governments or public opinion unfairly and amorally. There is common ground among all of us on what constitutes terrorism. What looks, smells and kills like terrorism is terrorism.”

¹¹¹¹ *ibid*. See also, *ibid* 2 ff: “States shall refrain from providing any form of support active or passive to entities or persons involved in terrorist acts . . . Take the necessary steps to prevent the commission of terrorist acts . . . Deny safe haven . . . [and] Prevent the movement of terrorists.”

¹¹¹² *ibid* ¶6.

¹¹¹³ President, UNSC Verbatim Record (12 November 2001) UN Doc S/PV.4413, 19: “There were 15 votes in favour”.

¹¹¹⁴ UK, UNSC Verbatim Record (30 November 2001) UN Doc S/PV.4432, 5: Member States “have come to the meetings that we have had on [counter-terrorism] items, not with complaints about the Security Council — which they might well have had, given the unique nature, I think, of resolution 1373 (2001) — but in order to bring out the questions they have in their minds about the substance of what we are doing.”

¹¹¹⁵ France, UNSC Verbatim Record (18 January 2002) UN Doc S/PV.4453, 7. See also, eg UK, UNSC Verbatim Record (12 November 2001) UN Doc S/PV.4413, 15; Singapore, UNSC Verbatim Record (15 October 2001) UN Doc A/56/PV.25, 10; Turkey, UNSC Verbatim Record (12 November 2001) UN Doc A/56/PV.48, 9; UNGA ‘Letter dated 20 December 2001 from the Representatives of Belgium and India to the United Nations addressed to the Secretary-General’ (26 December 2001) UN Doc A/56/757, 4 and UNSC Verbatim Record (18 January 2002) UN Doc S/PV.4453, 21; Kazakhstan, UNSC Verbatim Record (19 November 2001) UN Doc A/56/PV.59, 34; Guatemala, UNSC Verbatim Record (31 October 2001) UN Doc A/56/PV.34, 13.

¹¹¹⁶ Angola, UNSC Verbatim Record (22 April 2004) UN Doc S/PV.4950, 9-10.

¹¹¹⁷ US, UNSC Verbatim Record (18 January 2002) UN Doc S/PV.4453, 6.

Nations system . . . [or] define terrorism in a legal sense”¹¹¹⁸ was no more than mere lip service; in fact its imposition of legally binding obligations without a clear framework of action of definition meant a distinct lack of legal clarity. On the other hand, the resolution imposed the obligation that “[n]ational efforts must . . . be welded into a global framework.”¹¹¹⁹ Moreover, although “[r]esolution 1373 (2001) drew on the language negotiated by all United Nations Members in the 12 conventions against terrorism”,¹¹²⁰ the elimination of terrorism had not yet approached any level of legal obligation outside the Council: there were still calls after the passing of UNSC Res 1373 that “every State should ratify the existing 12 United Nations and international conventions against terrorism”¹¹²¹; there were varying interpretations as to how exactly to tackle the issue of terrorism;¹¹²² and accusations were levelled that “fudging the definition of terrorism . . . is driven only by political ambitions for regional hegemony.”¹¹²³ At the time of the adoption of UNSC Res 1373, there was little agreement even on the definition of terrorism, much less any legal obligations on States to act in response to it; yet the Council maintained its right to press ahead with the Chapter VII resolution nonetheless, setting a dangerous precedent that was only later opposed by States. UNSC Res 1566 continued the legacy of legislating both in attempting to define terrorist acts¹¹²⁴ and in attempting to bind States under a Chapter VII resolution to general international law without temporal limitation.¹¹²⁵

Most recently, in response to the threat posed by the Islamic State in Iraq and Syria, the Council has passed another legislative decision on terrorism under Chapter VII – UNSC Res 2178¹¹²⁶ – recalling UNSC Res 1373¹¹²⁷ and once more imposing legally binding obligations on States of a general nature and with indefinite duration. Perhaps most concerning about this resolution is reaffirmation “that terrorism *in all forms and manifestations* constitutes one of the most serious threats to international peace and security”¹¹²⁸; whereas UNSC Res 1373’s focus

¹¹¹⁸ UK, *ibid* 5.

¹¹¹⁹ UK, UNGA Verbatim Record (1 October 2001) UN Doc A/56/PV.12, 18.

¹¹²⁰ UK, UNSC Verbatim Record (18 January 2002) UN Doc S/PV.4453, 4.

¹¹²¹ UK, UNGA Verbatim Record (1 October 2001) UN Doc A/56/PV.12, 18.

¹¹²² See, eg Syria, UNSC Verbatim Record (18 January 2002) UN Doc S/PV.4453, 9: “Since the resolution did not define terrorism, Syria has based its report on its obligations under the 1998 Arab Convention on the Suppression of Terrorism, which clearly distinguished between terrorism and legitimate struggle against foreign occupation.”

¹¹²³ Pakistan, *ibid* 31.

¹¹²⁴ UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566, ¶3.

¹¹²⁵ *ibid* ¶2.

¹¹²⁶ UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178.

¹¹²⁷ *ibid* ¶6.

¹¹²⁸ *ibid* preamble [emphasis added].

was confined to *international* terrorism, UNSC Res 2178 expands an already poorly-defined term even further, including the abstract notion of “violent extremism.”¹¹²⁹ The Council’s failure to define these terms, coupled with the obligation upon States to implement national legislation against their own citizens and individuals transiting through their territory, opens the door to an indefinite and arbitrary violation of individuals’ rights. The omission of the international element also potentially allows for State crackdowns on internal dissidents and opposition to the government under the pretence of abidance by Council decisions to enforce the maintenance of international peace.

IX.3.2.2 Nuclear Non-proliferation

UNSC Res 1540 unequivocally built upon the legacy of UNSC Res 1373; the latter is recognised as paving the way for the 2004 resolution “binding Security Council resolution on weapons of mass destruction, addressing non-State actors and terrorists”¹¹³⁰ and even “to be part of what began with resolution 1373 (2001).”¹¹³¹ Although this resolution also passed unanimously, there was far more opposition by UN Member States. On the most basic level, there was rejection of the “justification for the adoption of this resolution under Chapter VII of the Charter”¹¹³² and discussion over the duplication of work – that is to say that some States took the view that “existing treaties . . . already prescribe most of the legislation that would cover proliferation by both State and non-State actors . . . [and] can be improved, if and where necessary, through negotiations among sovereign and equal States.”¹¹³³ Indeed, it could be argued that UNSC Res 1540 was superfluous in many respects, imposing “obligations on United Nations Member States and attempts to legislate on behalf of States . . . [even] where States have already accepted non-proliferation obligations under international treaties and other legal instruments.”¹¹³⁴

Joyner is deeply critical of the Council for such actions, finding that “the Security Council appears now to consider itself to possess ultimate and essentially unlimited legal

¹¹²⁹ *ibid* ¶1.

¹¹³⁰ Chile, UNSC Verbatim Record (22 April 2004) UN Doc S/PV.4950, 10. Resolution 1373 is referred to numerous times in the discussions on UNSC Res 1540 (2004). See eg, France, *ibid* 9; Russia, *ibid* 16 (2004); Germany, *ibid* 19; India, *ibid* 23.

¹¹³¹ Spain, *ibid* 7. See also, Angola, *ibid* 10, where UNSC Res 1540 (2004) was “in accord with the objectives stated in resolution 1373 (2001).”

¹¹³² Pakistan, UNSC Verbatim Record (22 April 2004) UN Doc S/PV.4950, 15.

¹¹³³ *ibid*.

¹¹³⁴ South Africa, *ibid* 22.

authority – i.e. to represent something of a legal hegemon – by virtue of its UN Charter mandate to maintain and restore international peace and security.”¹¹³⁵ Particularly with respect to UNSC Res 1540, he argues that

the Security Council has confused the proper scope of its enforcement powers under Chapter VII, with the proper scope of its long unused, limited lawmaking powers under Article 26, and has taken to itself by unilateral exercise of its Chapter VII powers a role which, under the Charter system, it is to share both with the General Assembly in the exercise of its Article 11(1) powers, as well as with the general membership of the United Nations¹¹³⁶

His assertion that the Council “is simply not an international legislator, nor can it be . . . [and] is ill-equipped institutionally, in terms of its membership structure and tenuous claim to any principle of representation of U.N. members, to assume such a role of law-giver to the international community”¹¹³⁷ is one that has already been shown to be supported by UN Member States. Indeed, he finds that resolutions 1373 and 1540 were “calculated, proactive forward-looking normative creations. In both cases the Security Council simply determined that an entire class of actions, which have been and which may be in the future committed potentially by any state, constitute a threat to international peace and security.”¹¹³⁸ This is the act of legislation that has been argued to exceed the mandate of the Council: general, temporally unlimited, legally binding rules for States. Joyner finds that “[i]n short, it acted as a legal hegemon, unbound by the fundamental rules and principles of international law, and the limited nature of its own authority under the Charter”¹¹³⁹ and that “by trampling upon a right of states recognized in a broadly subscribed treaty to be an ‘inalienable right’, the Security Council in UNSC Res 1737 and subsequent related resolutions on Iran overstepped the bounds of its Chapter VII authority.”¹¹⁴⁰

Of particular concern to States was the use of UNSC Res 1540 to fill in gaps of international law and “remedy lacunae existing in the existing apparatus of multilateral legal instruments on disarmament and nonproliferation of weapons of mass destruction (WMD).”¹¹⁴¹

¹¹³⁵ Joyner, ‘Legal Hegemon’ (n 51) 227.

¹¹³⁶ Joyner, *International Law* (n 51) 189.

¹¹³⁷ *ibid* 192.

¹¹³⁸ Joyner, ‘Legal Hegemon’ (n 51) 231.

¹¹³⁹ *ibid* 237.

¹¹⁴⁰ *ibid* 246.

¹¹⁴¹ Mexico, UNSC Verbatim Record (22 April 2004) UN Doc S/PV.4950 (Resumption 1), 4. See, also Chile, UNSC Verbatim Record (28 April 2004) UN Doc S/PV.4956, 6: “a vacuum exists in the international system with

This “increasing tendency of the Council . . . to assume new and wider powers of legislation on behalf of the international community, with its resolutions binding on all States”¹¹⁴² was interpreted by many States to be unequivocally outside of the scope of the Council and led to concerns that “the exercise of legislative functions by the Council, combined with recourse to Chapter VII mandates, could disrupt the balance of power between the General Assembly and the Security Council, as enshrined in the Charter.”¹¹⁴³ Further than this, States questioned “whether the Security Council has the right to assume the role of prescribing legislative action by Member States”¹¹⁴⁴ at all. Perhaps too late given the adoption of UNSC Res 1373 three years earlier, these questions of international law and the “far-reaching legal and practical implications”¹¹⁴⁵ of UNSC Res 1540 on the international legal landscape caused consternation to the Mexican delegation:

[The] delegation is concerned about the precedent that this draft resolution could set for the handling of other new issues on the world agenda. We are not only concerned about the *proliferation of parallel regimes to those already established*, using channels outside the norms of existing treaties, but also about *the growing trend that the Security Council seeks to legislate*, particularly with regard to issues that have their own regime of rights and obligations, even if incomplete when it comes to non-State actors.¹¹⁴⁶

Undeterred, despite a “general view expressed in the Council’s open debate that the Security Council cannot legislate for the world”¹¹⁴⁷ the Council – and its members – ignored accusations of excess of its Charter powers that were raised previously and any contravention of the Charter-assigned separation of powers. The Council is not tasked under the Charter with addressing gaps in international law- this is the role of the Assembly and, on a wider scale, the role of customary international law; nor indeed is it the role of the Council to bolster existing international treaties

respect to the proliferation and control of weapons of mass destruction in relation to their possible terrorist use by non-State actors. It therefore devolves to the Security Council to act in a prompt and timely manner by taking appropriate steps within the framework of the powers entrusted to it by the Charter for the maintenance of international peace and security, as this initiative is, indeed, doing”; Pakistan, *ibid* 3: “The sponsors have assured the Council that this resolution is designed to address a gap in international law to address the risk of terrorists and non-State actors acquiring or developing weapons of mass destruction.”

¹¹⁴² India, UNSC Verbatim Record (22 April 2004) UN Doc S/PV.4950, 23.

¹¹⁴³ *ibid*.

¹¹⁴⁴ Pakistan, *ibid* 15.

¹¹⁴⁵ South Africa, *ibid* 22.

¹¹⁴⁶ Mexico, *ibid* (Resumption 1), 5 [emphasis added].

¹¹⁴⁷ Pakistan, UNSC Verbatim Record (28 April 2004) UN Doc S/PV.4956, 2.

and conventions;¹¹⁴⁸ and the Council's use of Chapter VII simply to "make [a resolution] legally binding in an unequivocal way and to send a strong political message"¹¹⁴⁹ is in clear contravention of its intended purpose under the Charter.¹¹⁵⁰ Nonetheless, as a result of UNSC Res 1540 each Member State would "need to review its laws and to determine what laws or regulations will be necessary to meet the resolution's requirements."¹¹⁵¹ National legislation of measures bringing States into compliance with the Council's resolution were obligatory, yet the Council members "believe[d] that the resolution is not intrusive because it enables States to translate the obligations conferred by it into domestic law as they wish."¹¹⁵²

Moreover, despite the fact that UNSC Res 1540 was recognised as "contain[ing] provisions whose implementation would not include enforcement action"¹¹⁵³, it was nonetheless deemed "appropriate to act under Chapter VII of the Charter"¹¹⁵⁴; this, of course, is entirely opposed to the Council's powers under the Charter, which permit the imposition of legislation upon the domestic sphere of States only in "the application of enforcement measures under Chapter VII."¹¹⁵⁵ These landmark resolutions imposed a new legal order with respect to international terrorism, which – for better or worse and aside from any moral arguments that might have neutralised the adoption of UNSC Res 1540 from a political standpoint – imposed obligations upon States illegitimately and outside of the Charter's delineation of powers to the appropriate parties. It is this type of resolution "not in response to a particular fact situation, and on an ongoing basis"¹¹⁵⁶ that caused consternation during debates in the run-up to resolutions

¹¹⁴⁸ See, Brazil, *ibid* 8: "We sought to safeguard the integrity of the existing international treaties and conventions – including the Non-Proliferation Treaty – and the balance of rights and duties contained therein."

¹¹⁴⁹ Spain, *ibid* 8.

¹¹⁵⁰ Under art 39 of the Charter, Chapter VII must include the determination of a threat to the peace. The US attempted this in the discussions on resolution 1540: *ibid* 5 "The Security Council today is responding unanimously to a threat to international peace and security: the uncontrolled spread of nuclear, chemical and biological weapons, their means of delivery and related materials by non-State actors, including terrorists seeking to exploit weak export-control laws and security measures in a variety of countries." Nonetheless, the general nature of the threat undermines the authority of the resolution and is precisely what Pakistan alluded to as "fudging" definition of terrorism for hegemonic political interests. Moreover, the Council does not clearly state what gaps exist in existing international treaties and conventions that spurred it into action for the purposes of a threat to the international peace.

¹¹⁵¹ US, *ibid* 5.

¹¹⁵² Spain, *ibid* 8.

¹¹⁵³ Chile, UNSC Verbatim Record (22 April 2004) UN Doc S/PV.4950, 11.

¹¹⁵⁴ *ibid*.

¹¹⁵⁵ UN Charter (1945) art 2(7).

¹¹⁵⁶ New Zealand, UNSC Verbatim Record (10 July 2002) UN Doc S/PV.4568, 5.

1422 and 1487 on the “very questionable legal foundations”¹¹⁵⁷ of temporary immunity of peacekeepers from ICC prosecution.¹¹⁵⁸

Both Elberling and de Wet reach similar conclusions in their respective works.¹¹⁵⁹ Elberling, like Joyner, takes the stance that “[t]he discharge of legislative powers by the Security Council violates the UN Charter . . . [and] marks an important step on the way to fully realised legalised hegemony . . .”¹¹⁶⁰ Elberling’s principal arguments that the Great Powers¹¹⁶¹ have “achieved an impressive broadening of the powers granted to them in San Francisco”¹¹⁶² and that they are using the Council to establish a legalised hegemony¹¹⁶³ is both a reflection of previous UN Member States resentment and predictive of its continuation after his writing, particularly in light of views expressed by UN Member States themselves. De Wet proposes that “Security Council practice that consistently remains within the norms of *ius cogens* and the purposes and principles of the Charter is long and arduous . . . [but] the only way by means of which the

¹¹⁵⁷ Uruguay, UNSC Verbatim Record (12 June 2003) UN Doc S/PV.4772, 11.

¹¹⁵⁸ See eg Canada, UNSC Verbatim Record (10 July 2002) UN Doc S/PV.4568, 3 (2002): “the proposed draft resolutions currently circulating would set a negative precedent under which the Security Council could change the negotiated terms of any treaty it wished — for example, the nuclear Non-Proliferation Treaty — through a Security Council resolution. The proposed draft resolution would thereby undermine the treaty-making process”; Samoa, *ibid* (Resumption 1), 7: “So, too, in the absence of a situation threatening or breaching international peace and security, would we question the vires in the purported use of Chapter VII of the Charter. In our view, it seems very doubtful that the requisite circumstances exist in this case to bring into play Article 39 of the Charter and Chapter VII”; Germany, UNSC Verbatim Record (10 July 2002) UN Doc S/PV.4568, 9, “Chapter VII of the United Nations Charter requires the existence of a threat to the peace, a breach of the peace or an act of aggression – none of which, in our view, is present in this case. The Security Council would thus be running the risk of undermining its own authority and credibility”; Canada, UNSC Verbatim Record (12 June 2003) UN Doc S/PV.4772, 5-6: UNSC Res 1422 (2002) “touched directly on the obligations assumed by States parties under the Rome Statute, without their consent. Such an approach, to say the very least, stretched the legitimate limits of the role and responsibility entrusted to the Council under the Charter”; Liechtenstein, *ibid* 7-8: “Resolution 1422 (2002) invokes Chapter VII of the Charter of the United Nations without making a determination of a threat to international peace and security . . . [and] leads to the broader question of the undermining of the international treaty-making system. The Security Council does not have the competence to adopt and interpret international treaties, and by attempting to do so, it weakens the system established by the Charter”; Trinidad and Tobago, *ibid* 15: “we consider [resolution 1422’s] initial adoption — as we do its proposed renewal at this time — to be contrary to the United Nations Charter in that the Security Council did not make then — nor has it made now — a determination regarding the existence of a threat to the peace, a breach of the peace or an act of aggression, which would constitute the basis for invoking Chapter VII of the Charter.”

¹¹⁵⁹ Elberling (n 3) 337; de Wet (n 34).

¹¹⁶⁰ Elberling (n 3) 337.

¹¹⁶¹ Elberling uses this phrase to refer to the five permanent members of the Council, as they were the Great Powers in the wake of WWII.

¹¹⁶² Elberling (n 3) 356-357.

¹¹⁶³ *ibid* 359.

Security Council can achieve the legitimacy necessary for the efficient restoration and maintenance of international peace and security in the long term . . .”¹¹⁶⁴

Resolution 1696 is also *ultra vires* in its imposition. When taken in isolation as a right under the NPT, there is a convincing argument that the Council is within its powers to declare a threat to the international peace and force abidance by a Chapter VII resolution. The UN Charter outlines two articles that unambiguously place States in a position to follow the decrees of the Council: Article 25 delineates the obligation upon States to “accept and carry out the decisions of the Security Council”¹¹⁶⁵; Article 103 imposes the hierarchical structure that Council resolutions ‘trump’ any State obligations under an international treaty.¹¹⁶⁶ However, in this particular case, it can be argued that the enshrined rights of the NPT of enrichment of nuclear material for peaceful means is a fundamental right of States separate to its codification in the NPT, having been successfully recognised by 190 nations.¹¹⁶⁷ Once this position is established, Article 103 of the Charter no longer remains relevant, since it relates exclusively to *obligations* upon States, rather than *rights* of States and the pursuit of a peaceful nuclear program is distinctly the latter. The Council has, therefore, set a precedent for the violation of international law, placing itself above the inalienable right of Iran to pursue nuclear power peacefully.

However, the hegemony of which the Council is accused by both scholars and UN Member States are resultant from the composition of the Council itself; in an example of the interconnectivity of rule of law components, the lack of equitable participation allows for a violation of the separation of powers and a Council acting *legibus solitus*. A hegemony of the P5 is, as *Chapter X* will examine, in theory proportionally representative of a third of all UN Members, when in reality as this section has examined there is great opposition to the decisions of the Council from the States Parties purportedly represented. Such skewed representations of the will of the wider UN membership are perhaps the central flaw ripe for exploitation by the P5 and allow for the continuation of the criticised hegemony, encroachment upon the roles of other organs and ever-extension of Council power into the domestic sphere.

¹¹⁶⁴ de Wet (n 34) 386.

¹¹⁶⁵ UN Charter (1945) art 25.

¹¹⁶⁶ *ibid* art 103: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

¹¹⁶⁷ For further discussion of this argument, see generally, Daniel Joyner, *Interpreting the Nuclear Nonproliferation Treaty* (OUP 2011).

IX.4 Conclusions

Throughout the course of its existence, there have been numerous voices criticising and warning the Council for its transgression beyond its Charter powers and “dangerous tendency to undermine international law and erode [its] credibility.”¹¹⁶⁸ Nonetheless, the Council has persevered in its trajectory, despite internal criticism from Council Members and criticism from other UN Member States. Sibling organs of the UN have been silent on the subject of encroachment and there has been no condemnation by the Assembly or the ICJ for Council actions conceivably within their jurisdiction. Legislation by the Council would have been inconceivable in the 1990’s¹¹⁶⁹ yet was accepted almost without question in the aftermath of the highly emotional terrorist attacks in 2001 in response to the “plague of the twenty-first century.”¹¹⁷⁰ The unanimous adoption of both resolutions 1373 and 1540 may be seen to constitute State practice with respect to the interpretation of the Charter and the Council’s powers thereunder;¹¹⁷¹ however, it is key to note that notwithstanding the representative nature of the Council – which itself is to be discussed in *Chapter X* of this thesis and can be argued to fail the test of being truly representative – the Council is formed of a mere 15 States out of almost 200 and that initial widespread State acceptance or acquiescence of the Council’s legislative resolution in 2001 gradually shifted to stark warnings over the limits of Council powers with respect to the separation of powers: States were “convinced that the starting point in reforming the Council’s working methods is for the Council to refrain from exceeding the mandates entrusted to it under the Charter of the United Nations.”¹¹⁷²

Nonetheless, with the exception perhaps of the renewal of UNSC Res 1422, these warnings have not borne fruit and the Council appears to have made little effort to move towards a less legislative role; rather, it has built upon its precedent by adopting resolutions such as 1737¹¹⁷³ and 1929,¹¹⁷⁴ both on the nuclear programs in Iran and imposing legal obligations upon Iran to cooperate with the IAEA. The Council has also taken it upon itself to bind a States to a treaty

¹¹⁶⁸ Iran, UNSC Verbatim Record (12 June 2003) UN Doc S/PV.4772.

¹¹⁶⁹ eg *Tadic Appeal* (n 1025) ¶43, where “there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.” See also, Wood (n 36); Derek W Bowett, ‘Judicial and Political Functions of the Security Council and the International Court of Justice’ in Fox (n 56) 79-80.

¹¹⁷⁰ Russia, UNSC Verbatim Record (12 September 2001) UN Doc S/PV.4370, 5.

¹¹⁷¹ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331, art 31(3.b).

¹¹⁷² Egypt, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 3.

¹¹⁷³ UNSC Res 1737 (27 December 2006) UN Doc S/RES/1737.

¹¹⁷⁴ UNSC Res 1929 (9 June 2010) UN Doc S/RES/1929.

under the guise of a threat to the international peace,¹¹⁷⁵ contrary to the principles of State sovereignty and the stipulations of the Vienna Convention on the obligations of third party States.¹¹⁷⁶ Bedjaoui opines that “[t]he fact that there is no mechanism for sanctioning the Security Council if it breaches the Charter . . . in no way weakens the principle that the Council is subjected to the Charter”¹¹⁷⁷, a sentiment that appears to be shared by numerous Member States of the UN.

The theory, however, belies the reality of affairs on the Council, which as an organ of the UN has not made any coherent efforts to move towards the symbiosis of powers within its parent system that the San Francisco drafters undoubtedly intended in the Charter; rather, it has chosen to itself increasingly fill gaps in international law rather than turn to the Assembly, create legal principles and precedent in the stead of the ICJ and encroach dramatically on the powers of UN Member States, in direct confrontation with the underlying principles not only of the United Nations but of international law itself – State sovereignty. The Council does not believe that it acts *ultra vires* in legislating general international norms, which have no temporal boundaries. Indeed, in a similar political environment to that over a decade ago in 2001, where foreign terrorist organisations today pose a threat to the citizens and interests of Western States, the Council has not hesitated to pass a legacy of UNSC Res 1373 in UNSC Res 2178, placing legally binding obligations upon States that are general, poorly-defined and temporally indefinite. Moreover, in an even more concerning expansion of the powers seized under UNSC Res 1373, the Council has unequivocally crossed the boundaries set by article 2(7) of the Charter in interfering in the domestic realm of sovereign States, namely terrorism on a domestic level.

¹¹⁷⁵ UNSC Res 1718 (14 October 2006) UN Doc S/RES/1718, ¶3 “[d]emands that the DPRK immediately retract its announcement of withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons”.

¹¹⁷⁶ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331, art 34 “A treaty does not create either obligations or rights for a third State without its consent.” At the core of the Convention, in its preamble, is “free consent” and the Convention also provides for the “withdrawal of a party . . . in conformity with the provisions of the treaty”, as the DPRK did. Moreover, the use of coercion or threat of force in resolution 1718 may have invalidated any subsequent accession by the DPRK under article 52 of the Vienna Convention.

¹¹⁷⁷ Bedjaoui (n 229) 28.

CHAPTER X

THE EQUITABLE PARTICIPATION IN DECISION-MAKING PROCESSES

“The Council remains a closed club. Informal consultations apart, the Council’s real work and decision-making transpires often in smaller and more secretive conclaves, which in some cases exclude even some members of the Council.”¹¹⁷⁸

X.1 Introduction

Equitable participation in the decision-making process of the Council is one of the central reasons for the validity of imposing a rule of law framework upon the Council; as discussed in *Chapter III.7* of this thesis, the Council’s composition of fifteen State Members, as well as the existence of permanent seats on the Council, underline the need for an equitable and fair decision-making process. However, perhaps the most common criticism of the Council in relation to equitable participation in decision-making processes is that the Council operates within a framework wherein five permanent Member States are capable of overruling the decisions of the entire Council on non-procedural matters by use of the *veto* power.¹¹⁷⁹ Whilst the veto is undoubtedly a contentious issue and will be addressed in *Chapter X.3* of this thesis, there are other examples within the Charter where the equitable participation of Member States should take place. As a primarily political organ, the composition of the Council should arguably effectively reflect the modern political landscape as opposed to that of post-World War II at the time of its creation; moreover, elements of the UN Charter relating to how the Council exercises its function to “act on [UN Member States’] behalf”¹¹⁸⁰ should be carried out to the letter.

X.2 Voting, composition and consultation

Aside from the existence and use of the veto, three central themes exhibit the extent to which the Council allows for the equitable participation of Member States in the decision-making process. As the UN organ vested with the responsibility to act on behalf of UN Member States¹¹⁸¹ and power to command Member States to comply with its resolutions,¹¹⁸² it is not necessary for all Member States to contribute to the decision-making process in the same manner as that of the

¹¹⁷⁸ Pakistan, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 24.

¹¹⁷⁹ UN Charter (1945) art 27(3).

¹¹⁸⁰ *ibid* art 24(1).

¹¹⁸¹ *ibid*.

¹¹⁸² *ibid* art 25.

General Assembly; with one vote to each Council Member State as opposed to one vote to each UN Member State, “prompt and effective action by the United Nations”¹¹⁸³ is more likely to take place. However, it is nonetheless inherent in the voting structure of the Council – which requires an affirmative vote of nine members¹¹⁸⁴ – that matters are discussed openly, fully and extensively on the Council itself and not purely between a sub-section of the fifteen Member States. This matter has already been discussed, and established, in *Chapter IV* of this thesis under Transparency of Council Procedure; as concluded, the Council has yet to reform itself to adequately include all Member States in so far as the openness of its meetings is concerned.

Equitability of participation extends further than simply the transparency of meetings and the inclusion of all relevant parties to a discussion; the composition of the Council should also reflect an effort to establish equitable participation. The ten non-permanent State Members of the Council should also be representative of the wider UN community, as evidenced by the necessity for “equitable geographical distribution” in article 23(1) of the Charter; this must be balanced with their contribution “to the maintenance of international peace and security and to the other purposes of the Organization”¹¹⁸⁵ but the composition and number of Council members should reflect the wider community of the UN that the Council was designed to represent. Moreover, State Members affected by matters¹¹⁸⁶ or party to a dispute¹¹⁸⁷ under consideration by the Council should be included in any relevant discussions, not only in the interests of equality but also those of transparency; similarly, there is the implicit expectation that such inclusion in discussions would not simply be formality but rather that the Council would accommodate any issues, concerns or comments raised during the course of debate.

X.2.1 Arguing the expansion of the Council

The only reform of the Security Council in history has been the expansion of the number of Members from eleven to fifteen, under UNGA Res 1991 (1963),¹¹⁸⁸ later ratified by the Council in 1965. The same document assigned to the now ten non-permanent seats five members from African and Asian States, one from Eastern European States, two from Latin American States

¹¹⁸³ *ibid* art 24(1).

¹¹⁸⁴ *ibid* art 27 (2).

¹¹⁸⁵ *ibid* art 23(1).

¹¹⁸⁶ *ibid* art 31.

¹¹⁸⁷ *ibid* art 32.

¹¹⁸⁸ UNGA Res 1991A (1963) UN Doc A/RES/17/1991A, ¶1(a)-(d).

and two from Western European and other States.¹¹⁸⁹ This decision was taken as a result of the increase in the membership of the United Nations, which swelled from the original fifty-one nations in 1945 to one hundred and thirteen in 1963.¹¹⁹⁰ With over half the UN membership consisting of recently decolonised African and Asian countries, the Council was amended to reflect not only numbers but also issues and priorities represented within the UN system.

Both the reasoning behind the decision to expand the Council and the subsequent action itself are worth examining within the context of today's geo-political landscape. One way to look at the ballooning of UN membership in the first two decades of its existence would be that numbers more than doubled; another would be that membership increased by sixty-two States. Since 1965 – when the Council ratified the GA resolution – membership of the UN has expanded by a further eighty nations, most recently with South Sudan in 2011. In fact, in the decade of 1990-2000, thirty States¹¹⁹¹ declared independence or sought to be recognised by the UN, many of which was due to the end of the Cold War; the independence of so many former USSR territories and declared independence of smaller island States are analogous to the decolonisation of nations in the mid-20th Century.

However, over a decade later, reform of the Council through expanding its number of seats has not materialised; the current assignment of non-permanent seats on the Council has remained the same for almost half a century whilst the geographical groups have expanded in number – in comparison to 1965, there are now five seats to be divided between an African group of fifty-four States and Asia-Pacific group of fifty-five, totalling one hundred and nine States. This figure equates to over 56% of the total UN membership;¹¹⁹² including the permanent seat of China, this equates to six seats out of fifteen, a total of 40% of Council seats¹¹⁹³ or one seat per eighteen States. The Latin American and Caribbean Group (GRULAC) has no permanent seats assigned to it and thirty-two States – or 17% of UN Member States – to be represented by only two non-permanent seats; this is one seat per fifteen States, of which neither has the power to block

¹¹⁸⁹ *ibid.*

¹¹⁹⁰ 'Growth in United Nations membership, 1945-present' <<http://www.un.org/en/members/growth.shtml>> accessed 16 December 2014.

¹¹⁹¹ Lichtenstein, Namibia, the DPRK, Estonia, Latvia, Lithuania, Marshall Islands, Micronesia, Republic of Korea, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Georgia, Kazakhstan, Kyrgyzstan, Republic of Moldova, San Marino, Slovenia, Tajikistan, Turkmenistan, Uzbekistan, Andorra, Czech Republic, Eritrea, Monaco, Slovakia, The former Yugoslav Republic of Macedonia, Palau, Kiribati, Nauru, Tonga, Federal Republic of Yugoslavia, Tuvalu.

¹¹⁹² 109 States from 193 is 56.5%.

¹¹⁹³ 6 out of 15 seats on the Council.

Council resolutions in the interests of the region, as most other groups do.¹¹⁹⁴ Conversely, the Western European and Other Group consists of twenty-nine States and is assigned three permanent seats¹¹⁹⁵ in addition to two non-permanent seats – a total of five seats or one third of all Council seats – for a mere 15% of UN membership: one seat per six States. In between these two poles lies the smallest of the groups – the Eastern European Group – with one seat per twelve States: Russia’s permanent seat in addition to another non-permanent rotating seat to represent twenty-three UN Members, or 12% of the UN membership. There is clearly an extreme disparity in the composition of the Council that does not reflect equitable participation by or representation of UN Member States and calls for reform to expand it appear entirely warranted.¹¹⁹⁶

This position is further amplified by two elements: firstly, the difficulty with which States Member of a large groups, such as Africa or the Asia-Pacific, will have to actually achieve the goal of sitting on the Council due to the wider pool and therefore smaller chance of succeeding; and, secondly, the discriminate nature of the selection of States to fill these limited non-permanent seats, which at times appear to be given to the same candidates on repeat occasions – sixty-nine States¹¹⁹⁷ – over a third of UN members – have never served on the UN Security Council in its history, whereas other nations have served up to ten times.¹¹⁹⁸ Although many of these States are newly-declared independent and perhaps understandably have not had the opportunity to sit on the Council, other States like the Dominican Republic and Haiti joined in the UN in 1945 – the same time as Argentina¹¹⁹⁹ and Colombia¹²⁰⁰ - but neither have represented

¹¹⁹⁴ The WEOG has France, UK and US; the Eastern European Group has Russia; and the Asia-Pacific group (and arguably the African Group) has China.

¹¹⁹⁵ France, UK, US.

¹¹⁹⁶ Iran, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 11: “[i]n accordance with Article 24 of the Charter of the United Nations, the Security Council should act on behalf of all Member States; but in reality, if there is one thing missing in the exercise of many of the Council’s functions and the taking of its decisions, it is that very principle.”

¹¹⁹⁷ Afghanistan, Albania, Andorra, Antigua and Barbuda, Armenia, Bahamas, Barbados, Belize, Bhutan, Brunei, Cambodia, Central African Republic, Comoros Islands, Cyprus, DPRK, Dominica, Dominican Republic, El Salvador, Equatorial Guinea, Eritrea, Estonia, Fiji, Georgia, Grenada, Haiti, Iceland, Israel, Kazakhstan, Kiribati, Kyrgyzstan, Laos, Latvia, Lesotho, Liechtenstein, Macedonia, Malawi, Maldives, Marshall Islands, Federated States of Micronesia, Moldova, Monaco, Mongolia, Montenegro, Mozambique, Myanmar, Nauru, Palau, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, São Tomé and Príncipe, Saudi Arabia, Serbia, Seychelles, Solomon Islands, South Sudan, Suriname, Swaziland, Switzerland, Tajikistan, East Timor, Tonga, Turkmenistan, Tuvalu, Uzbekistan and Vanuatu.

¹¹⁹⁸ Brazil represented the GRULAC on a non-permanent seat in 1946/7, 1951/2, 1954/5, 1963/4, 1967/8, 1988/9, 1993/4, 1998/9, 2004/5 and 2010/11; Japan represented Asia-Pacific in a non-permanent seat in 1958/9, 1966/7, 1971/2, 1975/6, 1981/2, 1987/88, 1992/3, 1997/8, 2005/6 and 2009/10.

¹¹⁹⁹ Which finishes its ninth rotation on the Council in December 2014.

the Latin American and Caribbean States (GRULAC) at the Council; even the comparable nations of Panama¹²⁰¹ and Cuba¹²⁰² have fared better. In Asia, while Pakistan has sat in the Asia-Pacific seat seven times, Afghanistan been overlooked entirely, despite having joined a year before; in Africa, South Africa – a frontrunner for a permanent seat within the African Group plan – has sat only twice, both within the last decade, despite joining in 1945, whereas Egypt was one of the first to represent the African Group and has done so five times. This disparity affects not only the perspectives of the issues discussed at the Council level, but also the nature of issues brought to light to the Council. A stark example of this is climate change, which affects more than any other group that of the Alliance of Small Island States (AOSIS) – a coalition of forty-four States that is at greatest risk of rising sea levels; as the Prime Minister of Tuvalu noted during his address to the General Assembly in 2008, climate change is “without doubt, the most serious threat to the global security and survival of mankind . . . [and] an issue of enormous concern to a highly vulnerable small island State like Tuvalu.”¹²⁰³ Yet of the forty-four members of the AOSIS, only eight States¹²⁰⁴ have had the opportunity to sit on the Council where they might highlight such issues.

The stagnation of reform flies in the face not only of all States’ resolution in the UN Millennium Declaration to intensify efforts “to achieve a comprehensive reform of the Security Council *in all its aspects*”¹²⁰⁵ but also of many States’ support for an enlarged Security Council, including the P5 members themselves,¹²⁰⁶ who recognise the need for “a Security Council that better represents twenty-first-century realities and is maximally capable of carrying out its mandate and effectively meeting the global challenges of this century.”¹²⁰⁷

¹²⁰⁰ Which has sat eight times on the Council.

¹²⁰¹ Which has sat five times.

¹²⁰² Which as has three times.

¹²⁰³ ‘Statement delivered by Honourable Apisai Ielemia, Prime Minister and Minister of Foreign Affairs of Tuvalu, at the 63rd Session of the United Nations General Assembly Open Debate’ (26 September 2008).

¹²⁰⁴ Cape Verde, Cuba, Guinea Bissau, Guyana, Jamaica, Mauritius, Singapore and Trinidad and Tobago. In total, they have sat thirteen times.

¹²⁰⁵ UNGA Res 55/2 (18 September 2000) UN Doc A/RES/55/2, ¶30.

¹²⁰⁶ There is broad support from the P5 for Council reform on the question of enlargement: France calls for the inclusion of the so-called ‘G4’ of “Germany, Brazil, India and Japan as permanent members of the Security Council and an increased presence of African countries”, France, UNGA Verbatim Record (7 November 2013) UN Doc A/68/PV.46, 28; the UK (ibid 20) and China (ibid 26) support this proposal; Russia is “in favour of keeping the Council as it is, namely, compact. Its optimal number should not exceed 20 members” (ibid 18); and the US “is open to modest expansion of the Council in both the permanent and non-permanent categories”(ibid 22).

¹²⁰⁷ US, UNGA Verbatim Record (7 November 2013) UN Doc A/68/PV.46.

From the wider community, too, there is heavy support for Council reform through enlargement; at least three major initiatives external to the P5 members have been put forward. In 2005, former Secretary-General Annan proposed his *In Larger Freedom* report¹²⁰⁸ with an aim to “make it more broadly representative of the international community as a whole, as well as of the geopolitical realities of today, and thereby more legitimate in the eyes of the world”¹²⁰⁹; in this he advocated¹²¹⁰ an enlarged council of twenty-four members under one of two plans,¹²¹¹ either of which he believed would allow the Council to become more “broadly representative of the realities of power in today’s world.”¹²¹² The Secretary-General urged a vote prior to the summit in September 2005¹²¹³ – none took place. Also in 2005, the G4 – comprising Brazil, Germany, India and Japan – proposed¹²¹⁴ ten new members to the Council, of which six seats would be permanent and held by them in addition to two African States. Perhaps unsurprisingly there is opposition from numerous angles to each of these bids,¹²¹⁵ most notably the larger *Uniting for Consensus* group – containing Argentina, Italy, Canada, Colombia and Pakistan – which opposed this proposal and countered with a plan to bolster the existing fifteen seats with an additional ten *non-permanent* seats and granting all members the right to re-election.¹²¹⁶ Finally, African States have not stayed silent; they also submitted a draft plan expanding the Council.¹²¹⁷ The common denominator in all proposals was, ironically, the lack of coherency from Member States in finding a suitable compromise. Nonetheless, in 2008, efforts were redoubled by the UN and multiple rounds¹²¹⁸ of negotiations on a suitable text were conducted during which caucuses such as the African Group¹²¹⁹ and L69¹²²⁰ emerged and the Uniting for

¹²⁰⁸ UNGA ‘Report of the Secretary-General: In Larger Freedom: Towards Development, Security and Human Rights for All’ (21 March 2005) UN Doc A/59/2005.

¹²⁰⁹ *ibid* 60.

¹²¹⁰ *ibid* ¶170.

¹²¹¹ *ibid* 43 (Box 5): “Model A provides for six new permanent seats, with no veto being created, and three new two-year term non-permanent seats, divided among the major regional areas . . . [whilst] Model B provides for no new permanent seats but creates a new category of eight four-year renewable-term seats and one new two-year non-permanent (and non-renewable) seat, divided among the major regional areas.”

¹²¹² *ibid* ¶169.

¹²¹³ *ibid* ¶170.

¹²¹⁴ UNGA Draft Res (6 July 2005) UN Doc A/59/L.64.

¹²¹⁵ eg Argentina, Colombia and Mexico oppose Brazil’s bid; China and South Korea oppose the appointment of Japan; Pakistan opposes giving a seat to India.

¹²¹⁶ UNGA Draft Res (21 July 2005), UN Doc A/59/L.68.

¹²¹⁷ UNGA Draft Res (14 December 2005), UN Doc A/60/L.41.

¹²¹⁸ March/April 2009; May 2009; September 2009; November 2009; June – November 2010; December 2010; March 2011; January – May 2012.

¹²¹⁹ 54 Member States from Africa, coordinated by the C10 – Algeria, DRC, Equatorial Guinea, Kenya, Libya, Namibia, Senegal, Sierra Leone, Uganda, and Zambia.

Consensus group gained momentum;¹²²¹ however, even at the 10th round of Intergovernmental Negotiations on Security Council reform (IGN) talks in March 2014, “[t]he positions of the various groups remained unchanged, pointing to the manifest deadlock in terms of what should be the specific way ahead.”¹²²²

Notwithstanding the efforts and official stances of States to expand the Council as part of wider reform, it is key also to examine the real impact of enlargement and whether it will achieve the purported goals of ensuring a more equitable participation experience for those included. Whilst there appears to be a general consensus over the notion that the Council should expand to reflect more accurately the landscape of the modern political world, there are two major flaws to the implementation. Primarily, since the Council is a political organ, is the issue of whether expansion would actually reflect not only the number of countries in the world and how mathematically well represented they are but also the distribution of power. It can be argued that France certainly, and potentially the UK along with it, are no longer the powerhouses that they were in 1945 with a sprawling colonial empire at their discretion; others would point at the economic rise of countries such as Brazil, India and South Africa. Secondly, the logistics of expansion should be measured against the potential impact on the efficiency and potency of the Council; it would be counterproductive if an expansion were to have a negative impact on the work of the Council.

On the first point, it is unclear that any Group’s reform proposals attempt to address the *de facto* imbalance between seats granted on the Council and the military, economic and political potency outside of it; it is perhaps unsurprising that all P5 members are among the top eight countries in terms of GDP,¹²²³ top six countries in terms of both military firepower¹²²⁴ and

¹²²⁰ A group of developing countries active from 2007 onwards, including Brazil, India and approximately another 40 States.

¹²²¹ With Italy as a focal point and core members of Argentina, Canada, Colombia, Costa Rica, Italy, Malta, Mexico, Pakistan, Republic of Korea, San Marino, Spain, and Turkey. China and Indonesia, support for the group likely totals around 40 UN Members.

¹²²² UNGA ‘Remarks at the Informal General Assembly Meeting of the Intergovernmental Negotiations on Security Council Reform’ (New York, 27 June 2013) <http://www.un.org/en/ga/president/67/statements/statements/June/sc_reform27062013.shtml> accessed 16 December 2014.

¹²²³ ‘GDP and its breakdown at current prices in US Dollars’, UN Statistics Division (2013) <<http://unstats.un.org/unsd/snaama/dnllist.asp>> accessed 16 December 2014.

¹²²⁴ ‘Countries Ranked by Military Strength’ (3 April 2014) *Global Firepower* <<http://www.globalfirepower.com/countries-listing.asp>> accessed 16 December 2014.

expenditure¹²²⁵ and all possess nuclear weaponry. To extend these trends, however, is difficult; India, Brazil, Japan and Germany are nations that are often touted as likely potential candidates for permanent seats on the Council, but it is up for debate whether any bring a rounded package in the same form as the existing P5 members.¹²²⁶

With respect to the logistics of Council expansion, as has been shown, there is general consensus that the Council should be expanded. However, whilst much of the focus has been directed towards suitable candidates for permanent or non-permanent seats,¹²²⁷ precisely how many seats the Council should be expanded by¹²²⁸ or what rights any new seats would confer on Council Members that occupied them – especially the veto – little prudent debate has been had over the wisdom of actually expanding the Council and what impact this will have on the decision-making process. The Secretary-General emphasised in his report *In Larger Freedom* that reforms of the Council “should not impair the effectiveness of the Security Council;”¹²²⁹ to ignore this advice simply to achieve adherence to standards of the rule of law might be considered short-sighted since, if by expanding the number of Council members one also undermines the work of the principal organ entrusted with maintenance of the international peace, a great blow would be struck to the UN as a whole and the wider community that relies on the actions of the Council.

An expanded Council of twenty-four States might more easily contribute towards the highlighting of a wider range of issues that are prioritised by the newer members; however, it may also serve to dilute the efficacy and potency of the Council. The resources at the disposal of

¹²²⁵ Sam Perlo-Freeman and Carina Solmirano, ‘Trends in world military expenditure, 2013’ (April 2013) *Stockholm International Peace Research Institute*, Table 1 <<http://books.sipri.org/files/FS/SIPRIFS1404.pdf>> accessed 16 December 2014; International Institute of Strategic Studies, ‘The Military Balance: 2014’ (Routledge 2014), 3.

¹²²⁶ For instance, India has the tenth largest nominal GDP in the world (‘GDP and its breakdown at current prices in US Dollars’ (n 1223)), is ahead of both the UK and France in terms of global firepower (‘Countries Ranked by Military Strength’(n 1224)); nonetheless, India has a Human Development Index (HDI) score of only 0.554, (UNDP ‘Statistical Tables from the 2013 Human Development Report’, Table 1) placing it 136th from a potential 186 nations, and a GDP per capita of \$4077 (World Bank ‘World Economic Outlook Database, July 2014: Report for Selected Countries and Subjects’ (2014)) placing it 133rd from 187 nations according to the World Bank. Similarly, Brazil has failed to gain the recognition at the Council it covets, despite leading the UN stabilisation mission in Haiti for a decade and intervening in neighbouring Colombia to assist in rescue missions against the Fuerzas Armadas Revolucionarias de Colombia (FARC) – both clear indicators of its willingness to reinstate regional stability within the framework of “peace and security”.

¹²²⁷ In addition to Japan, Germany, India and Brazil vying for permanent seats, Egypt, Nigeria and South Africa all feel they have strong reasons to sit on an “African seat”.

¹²²⁸ The smallest expansion remains that of the Secretary-General, advocating an expansion to 24 seats in both plans.

¹²²⁹ UNGA ‘Report of the Secretary-General: In Larger Freedom: Towards Development, Security and Human Rights for All’ (21 March 2005) UN Doc A/59/2005.¶169(c).

the Council would need to be spread wider; consequently, larger States may well be more reluctant to contribute towards causes that are not high on their agenda and therefore at least one of the purposes of enlarging the Council – widening the horizons of Council action – would have failed. Moreover, in expanding the Council, the voting system would need to be changed, requiring a greater majority of votes in order to pass a resolution; given the lengthy closed door and informal discussions referred to in *Chapter IV* of this work on Clarity of Action and accounting for divergent views based on regional affiliation, the discussions at the Council would not only be more lengthy but may also inevitably result in an increase in stalemates or failures of resolution to be adopted. Finally, it would still be debateable whether an increased Council would represent the Council as a whole; whilst at first glance the Council would move towards the democratic representation of the General Assembly, the fact remains that enlarging the group too much – even if the number of seats proportionally reflected the number of States in each group – would hinder serious negotiations whilst still leaving the veto within the hands of at least five Member States. Moreover, issues of which States would fill the seats and the selection process would open an entirely new avenue of debate.

A question emerges, then, whether expanding the Council to include these States would weaken the image of the Council, which is primarily tasked with maintaining peace and security worldwide. The P5 members have *global* reach not only in terms of sheer numbers on paper – such as military expenditure, armed forces strength or GDP – or their geographical location, distributed around the world almost evenly, but also in terms of political influence. The answer to this question would extend tangentially from the thesis of this work, which focuses on the compatibility of Council action with the established rule of law principles. If expanding the Council would cripple its work, such moves towards equality under the rule of law would be self-defeating for the rule of law can only operate within a robust system that works efficiently.

It is . . . imperative to find a balance between the need for swift and effective decision-making and the need to give all Member States concerned the opportunity to make themselves heard at an appropriate time, thus ensuring that their opinions are taken into account by the Security Council when decisions are formulated and taken.¹²³⁰

¹²³⁰ Austria, UNSC Verbatim Record (16 December 2014) UN Doc S/PV.3483, 19.

As such, strictly from a legal perspective, the lack of Council expansion contravenes the principle of the equitable participation; however, in reality, this may be a necessary departure from the letter of the law in an effort to maintain the power of the Council to act quickly, efficiently and decisively in the event of a threat to the international peace. As contrasting as it may appear to advocate practicality over equality and fairness, it may be that the Council – as a political organ that must be necessarily rapid in its responses – requires such a compromise.

X.2.2 Consultation of relevant parties to a situation or matter of discussion

In accordance with its Rules of Procedure,¹²³¹ the Council should meet in public; however, as already established, it has become common practice for the Council to meet in private where a great deal of the discussion and decisions themselves take place, away from the eye not only of the general public and wider UN community, but also from other Council Members. Any opacity of decision-making on the Council is even more acutely felt when the discussions are around a topic to which an affected or involved party is not privy; where article 31 of the Charter grants the Council discretion over inviting a UN Member to the discussion, article 32 imposes an obligation on the Council to include relevant Parties in the discussion.¹²³² However, in practice, the liberty granted to the Council in article 31 is relied upon more heavily than that of article 32; the Council may be more inclined to deem a situation to “specially affect” a Member State than it may be to consider that State a party to a dispute in order to avoid the necessity of including that State in discussions. This appears to have been the case with South Africa during discussions over the question in Namibia; in this case the ICJ found that South Africa was not entitled to demand inclusion in discussions due to the classification of the Namibia question as a situation rather than a dispute,¹²³³ meaning that the Council was permitted discretion over which States could be invited under article 31, rather than the more restrictive language of article 32. Moreover, there is little room for States to object to such classification.¹²³⁴

¹²³¹ UNSC Rules of Procedure (n 287) r 48.

¹²³² UN Charter (1945) arts 31-2: “Any Member of the United Nations which is not a member of the Security Council *may* participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected. Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, *shall* be invited to participate, without vote, in the discussion relating to the dispute” [emphasis added].

¹²³³ *Namibia* (n 102) ¶22.

¹²³⁴ Under article 25 of the Charter, States are bound to comply with the decisions of the Council. There is no mechanism for review of Council decision; in the case of *Namibia* *ibid*, South Africa was found to have been

Council practice shows that States that should logically be party to a discussion are often sidelined in a variety of ways. Firstly, there is the possibility that articles 31 and 32 will be overlooked altogether and States that are clearly relevant and even central to the discussion are left out of the Council when it broaches topics. In 1998, when both Pakistan¹²³⁵ and India¹²³⁶ conducted nuclear tests in their respective territories, the Council met to discuss their action in the absence of both parties. Presidential statements condemning the actions of both nations¹²³⁷ – emerging from meetings¹²³⁸ that neither India nor Pakistan were invited to attend – were followed by UNSC Res 1172,¹²³⁹ to which in addition to the fifteen Council members of the time, the nations of Argentina, Australia, Canada, Egypt, Iran, Mexico, New Zealand, Norway, Pakistan, the Republic of Korea, Ukraine and the United Arab Emirates were invited to participate in the discussion.¹²⁴⁰ India was not invited to participate in the discussion, nor did any State remark on its absence in the discussions of UNSC Res 1172, despite a letter circulated by the Permanent Representative of India to the Council two days prior to the Council meeting on the resolution¹²⁴¹ regretting “that the Council has disregarded this Charter provision [of article 31] by not giving India an opportunity to participate in the discussions on this draft.”¹²⁴² India raises a valid and awkward point for the Council, raising questions of bias that the Council would find difficult to respond to, given that the other party to the dispute – Pakistan – was granted the opportunity to publicly respond to both Council members and non-Council members alike during discussion in a lengthy and defensive speech.¹²⁴³ A decade later, the matter was still the subject of criticism at the Council.¹²⁴⁴ This is precisely the scenario that India objected to in

required to object to the classification of the question at the beginning and the matter could not be reclassified on the fly.

¹²³⁵ 28 May 1998.

¹²³⁶ 11 and 13 May 1998.

¹²³⁷ UNSC Presidential Statement 12 (1998) UN Doc S/PRST/1998/12 condemned India; UNSC Presidential Statement 17 (1998) UN Doc S/PRST/1998/17 condemned Pakistan.

¹²³⁸ UNSC Verbatim Record (14 May 1998) UN Doc S/PV.3881 and UNSC Verbatim Record (29 May 1998) UN Doc S/PV.3888 note no additional attendees beyond the 15 Council members.

¹²³⁹ UNSC Res 1172 (6 June 1998) UN Doc S/RES/1172.

¹²⁴⁰ UNSC Verbatim Record (6 June 1998) UN Doc S/PV/3890, 2.

¹²⁴¹ UNSC ‘Letter dated 4 June 1998 from the Permanent Representative of India to the United Nations addressed to the President of the Security Council’ (4 June 1998) UN Doc S/1998/464 was sent 2 days prior to the Council’s 3890th meeting on 6th June 1998, discussing the recent nuclear tests by India and Pakistan.

¹²⁴² *ibid* ¶2.

¹²⁴³ UNSC Verbatim Record (6 June 1998) UN Doc S/PV/3890, 28-32.

¹²⁴⁴ Philippines, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 9: “[D]ue process and the rule of law demand that Member States that are not members of the Security Council but are the subjects of the Council’s scrutiny should have the right to appear before the Council at all stages of the proceedings concerning them to state or defend their positions on the issues that are the subjects of or are related to that scrutiny. At present,

the aftermath of its nuclear testing, having not been given the opportunity to represent or defend itself publically to the Council prior to its condemnation by the organ.

Secondly, even when States are invited to take part in proceedings, there are no safeguards in place to ensure that their contributions take place prior to the decision being taken;¹²⁴⁵ for example, in the discussion on UNSC Res 1172, Canada took the opportunity to “express [its] regret that the views of Member States not members of the Security Council are being heard only after consideration and after adoption of such a resolution, dealing as it does with matters of such vital concern to all Member States”¹²⁴⁶; a view reiterated almost a decade later by Iran.¹²⁴⁷ The denial of representation prior to a vote undermines the concept of transparency and openness on the Council; in the same way as private meetings can be construed as eliciting a “clique” mentality between certain members of the Council – most notably the P5 members – so too giving the floor to representatives to speak only *after* a vote has taken place gives the impression that their contributions are neither valued nor have impact on the Council members. To relegate speeches in such a way devalues the input of these States, suggests that their arguments are mere afterthoughts to a process that includes neither their perspective nor their, often, political stances. The components of transparency, fairness and equitable participation are all challenged when the Council adopts “a presidential statement and a resolution without even allowing the views of the concerned party to be heard.”¹²⁴⁸

There is also the possibility that States may be overruled in the discussions by more powerful members, even when matters primarily affect their own sovereignty, with no clear

such participation is unfairly limited by rules 37 and 38 of the provisional rules of procedure. Under rule 37, a State Member of the United Nations that is not a member of the Security Council may be invited to participate only as a result of a decision of the Council and only when the Council considers that the interests of that non-member are specially affected or when that non-member brings a matter to the attention of the Council in accordance with Article 35(1) of the Charter. That is a denial of due process, which is a violation of the basic principle of the rule of law. Due process and the rule of law require that a party must be heard before it is condemned.”

¹²⁴⁵ The representative of Belarus succinctly and accurately stated the crux of the matter in 2008: “When working out and adopting decisions, it is important that they be genuine and not just words, and that they take into account the views and concerns of all Member States, be they rank-and-file members of the General Assembly or permanent members of the Council, and particularly Members whose interests are directly affected”, Belarus, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 5.

¹²⁴⁶ UNSC Verbatim Record (6 June 1998) UN Doc S/PV/3890, 18.

¹²⁴⁷ Iran, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 12: “[A]lthough paragraph 29 of [UNSC ‘Note by the President of the Council’ (19 July) 2006 UN Doc S/2006/507] stipulates that ‘when non-members are invited to speak to the Council, those who have a direct interest in the outcome of the matter under consideration may speak prior to Council members’, on many occasions the Council has denied an opportunity to countries concerned to speak before a vote is taken, instead allowing them to speak only after the Council had taken a decision and its members had made their statements.”

¹²⁴⁸ Iran, UNSC Verbatim Record (31 July 2006) UN Doc S/PV.5500, 7.

explanation for the decision; this can be argued to have been the case with Iran and the DPRK in resolutions relating to the proliferation of nuclear activities, particularly in light of the double standards established in Chapters VII.3 and IX.3.2 of this thesis. This was also the case for Rwanda, which initially approached the Council for assistance after the Rwandan genocide in 1994 and requested the Council to set up “as soon as possible an international tribunal to try the criminals”¹²⁴⁹ for four principal reasons.¹²⁵⁰ However, less than two months later, they voted against UNSC Res 955¹²⁵¹ establishing the ICTR; Rwanda was the only State to have voted against the tribunal, with China abstaining. Put simply, Rwanda was excluded from input into redressing “genocide and other systematic, widespread and flagrant violations of international humanitarian law”¹²⁵² that had taken place on its own territory, not only – as flippantly claimed by New Zealand¹²⁵³ – due to the avoidance of the death penalty, but as a result of seven serious concerns¹²⁵⁴ that Rwanda found unacceptable. Rwanda is a prime example of a nation that has

¹²⁴⁹ ‘Letter dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council’ (29 September 1994) UN Doc S/1994/1115.

¹²⁵⁰ UNSC Verbatim Record (8 November 1994) UN Doc S/PV. 3453, 14: “First, by asking for the establishment of such a tribunal, the Rwandese Government wanted to involve the international community, which was also harmed by the genocide and by the grave and massive violations of international humanitarian law, and it wanted to enhance the exemplary nature of a justice that would be seen to be completely neutral and fair. Secondly, the Government appealed for an international presence in order to avoid any suspicion of its wanting to organize speedy, vengeful justice. Thirdly, the Rwandese Government requested and firmly supports the establishment of an international tribunal to make it easier to get at those criminals who have found refuge in foreign countries. Fourthly, the genocide committed in Rwanda is a crime against humankind and should be suppressed by the international community as a whole.”

¹²⁵¹ UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

¹²⁵² *ibid* preamble.

¹²⁵³ UNSC Verbatim Record (8 November 1994) UN Doc S/PV. 3453, 5: “We recall that the Government of Rwanda requested the Tribunal. That is a fact. We are disappointed that it has not supported this resolution. We understand that this is principally because of its desire that those convicted of genocide should be executed.”

¹²⁵⁴ *ibid* 14 ff: “First, my delegation regards the dates set for the *ratione temporis* competence of the International Tribunal for Rwanda from 1 January 1994 to 31 December 1994 as inadequate . . . Secondly, my delegation finds that the composition and structure of the International Tribunal for Rwanda inappropriate and ineffective . . . Thirdly, in view of all this, my delegation was surprised to see in the draft statute that the International Tribunal, instead of devoting its meagre human resources, and probably equally meagre financial ones, to trying the crime of crimes, genocide, intends to disperse its energy by prosecuting crimes that come under the jurisdiction of internal tribunals . . . Fourthly, certain countries, which need not be named here, took a very active part in the civil war in Rwanda. My Government hopes that everyone will understand its concern at seeing those countries propose candidates for judges and participate in their election. The fifth reason is that my delegation finds it hard to accept that the draft statute of the International Tribunal proposes that those condemned be imprisoned outside Rwanda and that those countries be given the authority to reach decisions about the detainees . . . The sixth reason is that the International Tribunal as designed in the resolution, establishes a disparity in sentences since it rules out capital punishment, which is nevertheless provided for in the Rwandese penal code . . . The seventh reason is that my Government called for the establishment of an international tribunal to prosecute those guilty of genocide because the international community is deeply concerned in this respect, but also and above all we requested the establishment of this Tribunal to teach the Rwandese people a lesson . . . It therefore seems clear that the seat of the

suffered grave, catastrophic conflict that has stemmed from and caused even further ethnic division amongst its peoples, which it attempted to highlight in the first of its objections to the Council on *ratione temporis*.¹²⁵⁵ Even after the vote, the Rwandan representative believed that “[t]he changes proposed by the Rwandese Government, with all good will, could very well have been accommodated by international law and do not run counter to the idea of international jurisdiction . . . [and] that an international tribunal for Rwanda, taking into account Rwandese realities, [was] possible and feasible”¹²⁵⁶; nonetheless, all seven of its objections- including the inclusion of candidates and judges for the ICTR from States with nationals alleged to have perpetrated the very crimes they intended to try – were ignored by the Council, which is unsurprising given that Rwanda was permitted to give its speech only after the vote had been taken in a manner that suited more an explanation of its vote than a coherent attempt by the Council to expand its base of information upon which to take a balanced decision.

These omissions and acts are coupled with miscellaneous errors in the procedure and implementation of Council rules that also have the result of undermining equitable participation in the decision-making process for States – invitations to participate are sometimes late¹²⁵⁷ and the draft resolutions and statements that are circulated to Council members

are often trimmed and edited before reaching informal consultations. Such a practice makes it hard for non-members to be readily informed of the work of the Council. It also makes it difficult for non-members to provide meaningful input into the process, even in rare opportunities such as open debates.¹²⁵⁸

Overall, the Council appears to have undermined the equitable participation of States in the decision-making process, not only overall by failing to expand appropriately or redress the geopolitical imbalance of its composition, but also through various methods of exclusion of States from debates, discussions and decisions. Insofar as Council practice in the field of equitable representation, it has not shown a willingness for meaningful reform, nor has it displayed any

International Tribunal should be set in Rwanda; it will have to deal with Rwandese suspects, responsible for crimes committed in Rwanda against the Rwandese.”

¹²⁵⁵ *ibid* 14.

¹²⁵⁶ *ibid* 16.

¹²⁵⁷ Libya, UNSC Verbatim Record (16 September 2013) UN Doc S/PV.7031, 6.

¹²⁵⁸ Tonga, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 21.

pattern or comprehensive future plan of action for ameliorating the shortfalls in which its behaviour hitherto has resulted.

X.3 The Veto

The most contentious issue on the Council when any discussion on reform or equitable participation in the decision-making process is broached is undoubtedly the existence, and use of, the veto by the P5 members. The veto, however, is enshrined¹²⁵⁹ in the foundations of the Charter:

The veto had been meticulously inserted into every nook and cranny of the Charter. No important decision could be taken by the Organization without their approval. Any Great Power, if it chose, could block the admission of new members. It could prevent the expulsion of a member or the suspension of membership rights. It could hold up the appointment of the Secretary-General. It could block the admission of a state to the International Court of Justice. More important still, it could prevent the adoption of an amendment to the Charter. Thus the veto power was imbedded with what seemed to be eternal finality in the fundamental law of the United Nations.¹²⁶⁰

To suggest that any debate on the value of the existence, or indeed abolition, of the veto or its usage is anything but strictly academic would be asinine; the UN Charter requires the consent of the very same P5 members¹²⁶¹ that would not even consider relinquishing the control it grants them and it is likely that a moratorium or informal agreement to prohibit its use by the P5 would fail for the same reasons. Accordingly, this thesis examines the Council's behaviour within the existing framework of the UN Charter, which clearly allows for the use of the veto in its article 27(3).

X.3.1 The intended purpose of the veto

[D]ecisions of the Council on procedural matters require an affirmative vote of any seven members of the Council. Other decisions, which we might call decisions on matters of substance, require not merely a majority of seven

¹²⁵⁹ UN Charter (1945) art 27(3): "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members."

¹²⁶⁰ Francis O Wilcox, 'The Rule of Unanimity in the Security Council' (1946) 40 ASIL Proc 51, 54.

¹²⁶¹ UN Charter (1945) art 109(2).

members, but the concurring votes of all the permanent members of the Council. That means, of course, that each of the five permanent members of the Council possesses the right to prevent any decision of the Council being reached. And that is why the right implied in this formula has been called the “veto”. *Some objection was taken to using the name “veto”, but the name is quite an accurate description of the right itself.*¹²⁶²

The veto was “the most controversial, perhaps, of all the problems with which the Conference [was] faced”¹²⁶³ at San Francisco in 1945; strong opposition to the notion of permanent seats on the Council coupled with the power to unilaterally block the adoption of non-procedural resolutions was rife amongst delegates.¹²⁶⁴ Indeed, so irregular, perhaps, was the notion of the veto that confusion as to its applicability led to the first veto, exercised by Russia, being discounted in 1946.¹²⁶⁵ Nonetheless, the veto was a non-negotiable element of the Council for the major powers of the time – the UK, Russia, US and China.¹²⁶⁶ Nonetheless, the veto was initially due to be afforded to every Council Member under the principle of unanimity, but was removed from all but the P5 – a decision that, to the UK delegate, “may be considered to be unequal treatment . . . [and] undesirable, but . . . not entirely unreasonable.”¹²⁶⁷

From the perspective of the Member States, the veto represented the utmost confidence and trust instilled in the Great Powers to use the veto not only selflessly, but invariably sparingly, and only due to the debt owed to them in the aftermath of World War II:

We believe that it is necessary that on every occasion when the veto power be applied by any one of the great powers *it should be recalled that the great majority of this Conference has granted them such a tremendous amount of confidence in the certainty that the veto shall not be applied except in exceptional*

¹²⁶² Australia, United Nations Conference on International Organization (UNCIO), Vol 11 (1945), 19-20 [emphasis added].

¹²⁶³ Egypt, *ibid* 5.

¹²⁶⁴ See eg, *ibid* 20, where the Australian view, “supported by many other delegations, has been that the scope of the veto power should be as restricted as possible so that no one great power could by its individual action block Council decisions”; Norway, United Nations Conference on International Organization (UNCIO), Vol 12 (1945), 2: “in our opinion, the right of veto of the permanent members of the Security Council has been given far too wide a scope”

¹²⁶⁵ UNSC Verbatim Record (16 February 1946) UN Doc S/PV.23, 367.

¹²⁶⁶ UK, United Nations Conference on International Organization (UNCIO), Vol 11 (1945), 5: “The unanimity of the Great Powers was a hard fact but an inescapable one. The veto power was a means of preserving that unanimity, and far from being a menace to the small Powers, it was their essential safeguard. Without that unanimity, all countries, large and small, would fall victims to the establishment of gigantic rival blocs which might clash in some future Armageddon.”

¹²⁶⁷ UK, *ibid* 1.

*cases** and then only when the exercise of that faculty may contribute to consolidate the peace and to maintain security in the world--in other words that the Conference *being as it is opposed to the proposed system* has given its approval to it only because it believes that the great powers which have carried this war to a victorious culmination deserve such *an exorbitant proof of confidence from the other countries associated in the United Nations Organization.*¹²⁶⁸

Following a great deal of compromise, the right of a veto for the Great Powers was semantically altered to reflect a “categoric imperative of unanimity”¹²⁶⁹ – a shift took place from the *right* of the P5 members to a permanent seat and veto power, to the *necessity* for unanimity on the Council. In short, the veto was designed to ensure that the P5 Members acted in perpetual unison with respect to any non-procedural action taken under the aegis of the Council. As a result, the veto was seen “not as a question of privileges, but of using the present distribution of military and industrial power in the world for the maintenance of peace”¹²⁷⁰ without which “the [United Nations] would break down in the event that enforcement action were undertaken against a Permanent Member.”¹²⁷¹ It was seen as imperative that the P5 Members with their sheer strength of military and populations, moved in a coordinated effort at every step; moreover, the P5 at the time represented “probably more than half the population of the world, and account has to be taken of that fact.”¹²⁷² Ultimately, the acceptance of the existence of the veto was not smooth, but pragmatically accepted;¹²⁷³ the reality of the situation was that “if the veto . . . was removed the Powers responsible for Dumbarton Oaks Proposals would say they couldn't accept the decision and the inevitable alternative would be to drop the Proposals altogether”¹²⁷⁴ meaning that the United Nations would never have come into existence. In the words of one commentator, “[t]he veto was the price we had to pay for the Charter. It was the price we had to pay for the cooperation of the Great Powers.”¹²⁷⁵

¹²⁶⁸ Colombia, United Nations Conference on International Organization (UNCIO), Vol 12 (1945), 3 [emphasis added].

¹²⁶⁹ Peru, *ibid* 5.

¹²⁷⁰ US Secretary of State, quoted in Kanhaya R Gupta, *Reform of the United Nations, Vol. 1* (Atlantic Publishers 2007) 26.

¹²⁷¹ P-5 statement, *ibid*.

¹²⁷² UK, United Nations Conference on International Organization (UNCIO), Vol 11 (1945), 4

¹²⁷³ New Zealand, *ibid* 2, where discussions “start from the basis of the inevitability of the veto . . . We have to accept the veto in some form or there will be no international organisations, I regret that . . . We have to accept the decisions that have been made and which have clearly indicated time and time again the inevitability of the veto”

¹²⁷⁴ New Zealand, *ibid* 1.

¹²⁷⁵ Wilcox (n 1260) 55.

The veto was unabashedly part of a flawed system¹²⁷⁶ and remains thus to this day. However, it is clear that the reason for the creation of the veto for the Council was not to ensure that the Great Powers were exalted or given a position further up a hierarchy or seen as *senior board members*, but to reflect the political, military and demographic realities of the world at the time of the establishment of the UN. Clearly, the geo-political landscape has changed drastically in the decades that have passed;¹²⁷⁷ nonetheless, the reasoning and purpose behind the veto remains the same: to ensure that the P5 Members moved in unison towards the goal of maintaining international peace and security. Certainly, the veto was never intended to be “used capriciously and . . . the Soviet Delegate had told the press that the five great powers would rarely exercise the veto.”¹²⁷⁸

X.3.2 The veto record of the Council

History, however, recounts a different story and since the creation of the United Nations, 191 draft Council resolutions have been subject to veto;¹²⁷⁹ of these, the vast preponderance overall have been cast by the USSR/Russian Federation¹²⁸⁰, the very same P5 member that granted the above assurances. With the exception of two vetoes used by France and the UK in 1956,¹²⁸¹ no other State used its veto until 1970.¹²⁸² In fact, throughout the Cold War, the veto was frequently resorted to, almost exclusively by the USSR and the US in “a story of the pursuit of national

¹²⁷⁶ UK, *ibid* 6: “If we tried to draft, in pure theory, a perfect Charter, perfectly logical, perfectly complete there is no doubt that many Delegates here would draft a better one than the one you are now asked to consider. The question is, what do we want to do? Do we want to draft here something which, at the end of our labors, I hope will be taken solemnly for signature to the plenary session- do we want them to sign something which is on paper theoretically satisfying, about the operation of which we must have some doubt - or do we want to sign something which we honestly believe will work within its limitations?”

¹²⁷⁷ eg the P5 members no longer represent half the world’s population; UN membership has grown from the original 51 States to 193; the P5 no longer represent the world’s largest economies or militaries.

¹²⁷⁸ United Nations Conference on International Organization (UNCIO), Vol 11 (1945), 5.

¹²⁷⁹ ‘Security Council Veto List, prepared and maintained by the Dag Hammarskjold Library’ <http://www.un.org/depts/dhl/resguide/scact_veto_en.shtml> accessed 16 December 2014.

¹²⁸⁰ 90 vetoes cast as USSR, 11 as Russian Federation.

¹²⁸¹ UNSC ‘Letter dated 29 October 1956 from the Representative of the United States of America, addressed to the President of the Security Council, concerning: ‘The Palestine Question: Steps for the Immediate Cessation of the Military Action of Israel in Egypt’ (30 October 1956) UN Doc S/3710; Letter dated 29 October 1956 from the Representative of the United States of America, addressed to the President of the Security Council, concerning: ‘The Palestine Question: Steps for the Immediate Cessation of the Military Action of Israel in Egypt’ (30 October 1956) UN Doc S/3713/Rev.1.

¹²⁸² UNSC Draft Res (11 March 1970) UN Doc S/9696.

interests - even in the face of contrary world opinion and reasoned judicial decisions”¹²⁸³ In the years 1945-1989, a total of 646 resolutions were adopted whilst the veto was exercised a total of 162 times – therefore, almost one in five resolutions debated at the Council failed. This surely falls short of the standard expected by the delegates at San Francisco, who believed that

the great powers can perform, a great service to the world if they demonstrate in practice that the special power of veto given to each and every one of them individually under this Charter will be used with restraint and in the interest of the United Nations as a whole. It might be put in a phrase with which most of us are familiar, “It is excellent to have a giant’s strength but it is tyrannous to use it as a giant.”¹²⁸⁴

Deeper inspection of the use of veto relates unequivocally to interests unaffiliated with international peace and security, and in many cases central to the national interests of States : both the USA¹²⁸⁵ and USSR¹²⁸⁶ alike exercised their veto in the admission of numerous States to the UN “for no better reason than that . . . [a P5 Member] sees them as pawns in the cold war”,¹²⁸⁷ the USSR used its veto to avoid action over its invasion of Afghanistan¹²⁸⁸ and Czechoslovakia;¹²⁸⁹ the US blocked resolutions against its own actions in Grenada¹²⁹⁰ and Nicaragua;¹²⁹¹ and the UK blocked numerous resolutions criticising or threatening sanctions on South Africa.¹²⁹² Although the UN “was not meant to be a club in which [veto-holders] competed to admit [their] friends and to blackball candidates supported by [their] opponents,”¹²⁹³

¹²⁸³ Emma McClean, ‘Hard Evidence: who uses veto in the UN Security Council most often – and for what?’ *The Conversation* (31 July 2014) <<http://theconversation.com/hard-evidence-who-uses-veto-in-the-un-security-council-most-often-and-for-what-29907>> accessed 16 December 2014.

¹²⁸⁴ Australia, United Nations Conference on International Organization (UNCIO), Vol 11 (1945), 19-20

¹²⁸⁵ Vietnam (1975 and 1976), Angola (1976).

¹²⁸⁶ Italy (1952 and 1955), Libya (1952), Japan (1952 and 1955), Vietnam (1952, 1957 and 1958), Laos (1952), Cambodia (1952), Portugal (1955), Ireland (1955), Jordan (1955), Guatemala (1954) and Korea (1957 and 1958) amongst others.

¹²⁸⁷ UK, UNSC Verbatim Record (30 November 1961) UN Doc S/PV.985, ¶52.

¹²⁸⁸ UNSC Draft Res (6 January 1980) UN Doc S/13729.

¹²⁸⁹ UNSC Draft Res (22 August 1968) UN Doc S/8761.

¹²⁹⁰ UNSC Draft Res (27 October 1983) UN Doc S/16077/Rev.1.

¹²⁹¹ UNSC Draft Res (28 October 1986) UN Doc S/18428; UNSC Draft Res (31 July 1986) UN Doc S/18250.

¹²⁹² UNSC Draft Res (7 March 1988) UN Doc S/19585; UNSC Verbatim Record (8 March 1988) UN Doc S/PV.2797; UNSC Draft Res (19 February 1987) UN Doc S/18705; UNSC Draft Res (17 June 1986) UN Doc S/18163; UNSC Draft Res (23 May 1986) UN Doc S/18087/Rev.1; UNSC Draft Res (26 July 1985) UN Doc S/17354/Rev.1; UNSC Draft Res (31 August 1981) UN Doc S/15585/Rev.2; UNSC Draft Res (26 October 1977) UN Doc S/12312/Rev.1; UNSC Draft Res (26 October 1977) UN Doc S/12311/Rev.1; UNSC Draft Res (26 October 1977) UN Doc S/12310/Rev.1; UNSC Draft Res (24 October 1974) UN Doc S/11543.

¹²⁹³ UK, UNSC Verbatim Record (30 November 1961) UN Doc S/PV.985, ¶52.

political and strategic alliances became central to the decisions of the Council when to use their veto. Violating the authority and entrusted guardianship upon which the veto was established, the Council's veto record between the years 1945 and 1990 is a damning tale of the superiority of domestic foreign policy above the interests of international peace and security.

Whilst the end of the Cold War heralded a new era in cooperation at the Council and a distinct decline in the number of vetoes used can be noted throughout the 1990s,¹²⁹⁴ the number of vetoes being exercised have crept up since the turn of the century.¹²⁹⁵ France and the UK last used their vetoes in 1989, prior to the post-Cold War period I am examining and France has even been active in its pursuit of less frequent recourse to the veto, advocating a return to the original principles underlying the purpose of the veto and calling for “the five permanent members of the Security Council voluntarily and collectively suspending their right to exercise the veto when mass atrocities are under consideration.”¹²⁹⁶ As such, the sole users of the veto since 1990 have been the US, the Russian Federation and China; moreover, when the subjects of their veto usage is examined, it is highly evident that national interests lie at the heart of their objections.

X.3.2.1 The US

By far the subject of the most vetoes at the Council is the Palestinian Question, on which the US has exercised its veto rights no less than thirty times; almost half of these have taken place since 1990.¹²⁹⁷ Despite the recognition that the Palestinian Question poses a threat to the international peace by fellow P5 Members¹²⁹⁸ the US most recently took the stance that a draft resolution

¹²⁹⁴ Less vetoes were exercised in the entire decade 1990-1999 as in the two years 1989-9 alone: 9 vetoes versus 12, 1 per year versus 6 per year.

¹²⁹⁵ In the 14 years since 2000 there have been 20 vetoes, an average of 1.5 per year.

¹²⁹⁶ France, UNGA Verbatim Record (7 November 2013) UN Doc A/68/PV.46, 28.

¹²⁹⁷ UNSC Draft Res (18 February 2011) UN Doc S/2011/24; UNSC Draft Res (14 June 2009) UN Doc S/2009/310; UNSC Draft Res (11 July 2008) UN Doc S/2008/447; UNSC Draft Res (12 January 2007) UN Doc S/2007/14; UNSC Draft Res (11 November 2006) UN Doc S/2006/878; UNSC Draft Res (13 July 2006) UN Doc S/2006/508; UNSC Draft Res (5 October 2004) UN Doc S/2004/783; UNSC Draft Res (21 April 2004) UN Doc S/2004/313; UNSC Draft Res (25 March 2004) UN Doc S/2004/240; UNSC Draft Res (14 October 2003) UN Doc S/2003/980; UNSC Draft Res (16 September 2003) UN Doc S/2003/891; UNSC Draft Res (20 December 2002) UN Doc S/2002/1385; UNSC Draft Res (30 June 2002) UN Doc S/2002/712; UNSC Draft Res (14-5 December 2001) UN Doc S/2001/1199; UNSC Draft Res (27-8 March 2001) UN Doc S/2001/270; UNSC Draft Res (25 February 1999) UN Doc S/1999/201; UNSC Draft Res (21 March 1997); UN Doc S/1997/241; UNSC Draft Res (7 March 1997) UN Doc S/1997/199; UNSC Draft Res (9 January 1997) UN Doc S/1997/18; UNSC Draft Res (17 May 1995) UN Doc S/1995/394; UNSC Draft Res (2 December 1994) UN Doc S/1994/1358; UNSC Draft Res (29 April 1993) UN Doc S/25693; UNSC Draft Res (31 May 1990) UN Doc S/21326.

¹²⁹⁸ UK, UNSC Verbatim Record (18 February 2011) UN Doc S/PV.6484, 5: “The United Kingdom, France and Germany are seriously concerned about the current stalemate in the Middle East peace process. We each voted in favour of the draft Security Council resolution because our views on settlements, including in East Jerusalem, are

condemning settlements that they themselves recognise to be illegal under international law¹²⁹⁹ risks hardening the positions of both sides . . . could encourage the parties to stay out of negotiations and, if and when they did resume, to return to the Security Council whenever they reached an impasse”,¹³⁰⁰ yet when discussing the situation in Syria, the US adamantly imposed the prerogative upon the Council that “[i]t is the Council’s responsibility to stop atrocities if we can and, at a minimum, to ensure that the perpetrators of atrocities are held accountable.”¹³⁰¹ Indeed, one P5 Member has gone on record to state that “[a]s the principal organ responsible for the maintenance of international peace and security, the Security Council can and should continue to play an important role in resolving the question of Palestine, in promoting the Middle East peace process and in safeguarding the peace and security of that region.”¹³⁰² Moreover, it seemed hypocritical to cite as a reason for the use of its veto to block the adoption of S/2006/878 a “characterization of Israeli military actions as excessive and disproportionate [which] constitutes a legal judgement [sic] that the Security Council would be ill-advised to make”¹³⁰³ in light of the legislative role and norm-setting that the Council engaged in recently before in resolutions 1373, 1422 and 1540. The Council’s failure to adopt resolutions condemning the disproportionate violence perpetrated by Israeli forces “conveyed to Israel that it can continue to behave as though it were above international law . . . [and] conveyed to the Palestinian people that, with regard to their issue, the Security Council is not dealing with justice in the proper way.”

The intense and mutually beneficial relationship between Israel and the US is difficult to deny: for decades, the US leadership has highlighted the importance of Israel to the nation.¹³⁰⁴

clear: they are illegal under international law, are an obstacle to peace and constitute a threat to a two-State solution.”

¹²⁹⁹ US, *ibid* 4.

¹³⁰⁰ *ibid* 4-5.

¹³⁰¹ US, UNSC Verbatim Record (22 May 2014) UN Doc S/PV.7180, 4.

¹³⁰² China, UNSC Verbatim Record (27 March 2001) UN Doc S/PV.4305, 4-5.

¹³⁰³ US, UNSC Verbatim Record (11 November 2006) UN Doc S/PV.5565, 2.

¹³⁰⁴ See eg Gerald Ford, ‘Remarks welcoming PM Rabin to USA’ (September 10 1974) <<http://www.presidency.ucsb.edu/ws/index.php?pid=4701&st=Israel&st1=3>> accessed 16 December 2014: “America must and will pursue friendship with all nations. *But, this will never be done at the expense of America’s commitment to Israel*”; Jimmy Carter, ‘The President’s News Conference’ (May 12 1977) <<http://www.presidency.ucsb.edu/ws/?pid=7495>> accessed 16 December 2014: “We have a special relationship with Israel. *It’s absolutely crucial that no one in our country or around the world ever doubt that our number one commitment in the Middle East is to protect the right of Israel to exist, to exist permanently, and to exist in peace*”; George Bush Sr., Address to the 46th Session of the United Nations General Assembly (September 23 1991) <<http://www.presidency.ucsb.edu/ws/?pid=20012>> accessed 16 December 2014: “The friendship, the alliance between the United States and Israel is strong and solid, built upon a foundation of shared democratic values, of shared history and heritage, *that sustains the life of our two*

Israel also provides key strategic importance that, whilst historically providing a bastion against the USSR during the Cold War,¹³⁰⁵ remains integral to strategic cooperation and mutual security to this day. In fact, so close are the US and Israel, that the concept of damaging Israel or siding against it has been likened at the highest echelons of US government as tantamount to political suicide.¹³⁰⁶ As a result, despite the fact that the Israeli-Palestinian conflict repeatedly features on the agenda of the Council – which in itself underscores the importance, acuteness and urgency of the situation – only thirteen resolutions have been passed on the subject of the Israeli/Palestine conflict since 1990,¹³⁰⁷ the last of which was in 2009; the US has vetoed more resolutions on the Palestine Question since 1990 than it has allowed to pass. At the root of the vetoes are claims that the resolutions are “lopsided and unbalanced”¹³⁰⁸ despite assertions from fellow Council Members to the contrary¹³⁰⁹ and the US’s own biased analysis of the situation in 2014.¹³¹⁰ This

countries”; Barack Obama, ‘Remarks at the 2011 AIPAC Policy Conference’, (May 22 2011) <<http://www.whitehouse.gov/the-press-office/2011/05/22/remarks-president-aipac-policy-conference-2011>> accessed 16 December 2014: “I and my administration have made *the security of Israel a priority*. It’s why we’ve *increased cooperation between our militaries to unprecedented levels*. It’s why we’re making our most advanced technologies available to our Israeli allies. It’s why, *despite tough fiscal times, we’ve increased foreign military financing to record levels*. And that includes *additional support* — beyond regular military aid — for the Iron Dome anti-rocket system ... So make no mistake, *we will maintain Israel’s qualitative military edge*” [emphasis added].

¹³⁰⁵ Stephen Wenne, ‘It has one of world’s best armies, but US may expect too much help in case of Soviet attack’ *Christian Science Monitor* (31 July 1981) <<http://www.csmonitor.com/1981/0731/073136.html>> accessed 16 December 2014: Ronald Reagan has stated that “only by full appreciation of the critical role the State of Israel plays in our strategic calculus . . . can we build the foundation for thwarting Moscow’s designs on territories and resources vital to our security and our national well-being.”

¹³⁰⁶ Jimmy Carter, ‘Los Angeles, California Remarks at a Democratic National Committee Fundraising Dinner’ (October 22 1977) < <http://www.presidency.ucsb.edu/ws/?pid=6837>> accessed 16 December 2014: “If I should ever hurt Israel, which I won’t, I think a political suicide would almost automatically result, because it’s not only our Jewish citizens who have this deep commitment to Israel but there’s an overwhelming support throughout the Nation . . . [for] an unshakable partnership with Israel, an unshakable support of Israel--the only staunch and dependable major ally on which Israel can depend.”

¹³⁰⁷ UNSC Res 904 (23 September 1994) UN Doc S/RES/904; UNSC Res 1322 (7 October 2000) UN Doc S/RES/1322; UNSC Res 1397 (12 March 2002) UN Doc S/RES/1397; UNSC Res 1402 (29-30 March 2002) UN Doc S/RES/1402; UNSC Res 1403 (4 April 2002) UN Doc S/RES/1403; UNSC Res 1405 (19 April 2002) UN Doc S/RES/1405; UNSC Res 1435 (24 September 2002) UN Doc S/RES/1435; UNSC Res 1450 (13 December 2002) UN Doc S/RES/1450; UNSC Res 1515 (19 November 2003) UN Doc S/RES/1515; UNSC Res 1544 (19 May 2004) UN Doc S/RES/1544; UNSC Res 1624 (14 September 2005) UN Doc S/RES/1624; UNSC Res 1850 (16 December 2008) UN Doc S/RES/1850; UNSC Res 1860 (8 January 2009) UN Doc S/RES/1860.

¹³⁰⁸ US, UNSC Verbatim Record (5 October 2004) UN Doc S/PV.5051, 2. See also, eg US, UNSC Verbatim Record (11 November 2006) UN Doc S/PV.5565, 2; US, UNSC Verbatim Record (25 March 2004) UN Doc S/PV.4934, 2; US, UNSC Verbatim Record (27 March 2001) UN Doc S/PV.4305, 5.

¹³⁰⁹ See, eg France, UNSC Verbatim Record (5 October 2004) UN Doc S/PV.5051, 4; Algeria, UNSC Verbatim Record (25 March 2004) UN Doc S/PV.4934, 4.

¹³¹⁰ A seemingly one-sided condemnation of Gazan aggression was issued in January 2014. See, US, UNSC Verbatim Record (20 January 2014) UN Doc S/PV.7096, 17: “We condemn rocket attacks from Gaza into Israel and the attempt to kill civilians by placing a bomb on a public bus in Tel Aviv. We are also seriously concerned about the humanitarian situation in the Gaza Strip, and urge all parties to cooperate in expanding access for people, goods and humanitarian supplies.”

is an unprecedented situation on the Council – never has a situation been the subject of so many vetoes by one State.

The US – and the wider Council too – was eerily silent throughout the Israeli bombings in Gaza Strip in 2014, despite the “appalling”¹³¹¹ toll, including the bombing of UNRWA schools “on six occasions”, where “almost 2,000 Palestinians have been killed, of whom 459 are children and 239 are women.”¹³¹² The Council met no less than thirteen times in 2014 to discuss or remain seized of the situation in the Gaza Strip; nonetheless, only one Presidential Statement emerged. As the UN High Commissioner for Human Rights has noted, “[s]hort-term geopolitical considerations and national interests, narrowly defined, have repeatedly taken precedence over intolerable human suffering and grave breaches of and long-term threats to international peace and security.”¹³¹³

This was certainly true of the veto used by the US that led to the adoption of UNSC Res 1422.¹³¹⁴ In its original incarnation of S/2002/712, the resolution extending the mandate of the UN Mission was blocked by the US due to “concerns on the question of the International Criminal Court (ICC), in particular the need to ensure [their] national jurisdiction over [their] personnel and officials involved in United Nations peacekeeping and in coalition-of-the-willing operations.”¹³¹⁵ Despite lamentation by New Zealand that “[t]he fact that any permanent member can unilaterally decide to exercise its veto privilege to defeat the efforts of the other 14 members to extend the mandate of an agreed United Nations peacekeeping mission holds disturbing implications for the other 174 Members of the United Nations and for the entire world in general”,¹³¹⁶ UNSC Res 1422, accommodating the US demands for postponement of any investigation of peacekeeper personnel from a non-signatory State to the Rome Statute before the ICC was adopted unilaterally. Gone, too, were charades that the use of the veto was for anything other than national interests, contrary to the intended purpose of the veto:

¹³¹¹ Special Coordinator for the Middle East Peace Process and Personal Representative of the Secretary-General, UNSC Verbatim Record (18 August 2014) UN Doc S/PV.7243, 2.

¹³¹² *ibid*: “Civilians represent more than two thirds of that total. Some 10,000 – again, roughly a third of them children – have been injured. Sixty-four Israel Defense Forces (IDF) soldiers, two Israeli civilians and one foreign national have reportedly been killed. A few dozen Israelis have been directly injured by rockets or shrapnel.”

¹³¹³ Navi Pillay, UNSC Verbatim Record (21 August 2014) UN Doc S/PV.7247, 4.

¹³¹⁴ UNSC Res 1422 (12 July 2002) UN Doc S/RES/1422.

¹³¹⁵ US, UNSC Verbatim Record (30 June 2002) UN Doc S/PV.4563, 2.

¹³¹⁶ New Zealand, UNSC Verbatim Record (10 July 2002) UN Doc S/PV.4568, 7.

it is clear that our veto of the draft resolution on the United Nations Mission in Bosnia and Herzegovina (UNMIBH) did not reflect rejection of peacekeeping in Bosnia. But it did reflect our frustration at our inability to convince our colleagues on the Security Council to take seriously our concerns about the legal exposure of our peacekeepers under the Rome Statute.¹³¹⁷

The reason, then, for the US veto – far from the wholesome purposes of the principle of unanimity in the advancement or maintenance of peace and security – was, by its own admission, entirely one of self-preservation and non-subordination to the ICC. Simply put, as non-signatories to the Rome Statute, they did not wish to have their “decisions second-guessed by a court whose jurisdiction [they] do not recognize.”¹³¹⁸ Whilst in domestic foreign policy national interest can be argued as paramount, the Council P5 are entrusted with responsibilities that extend beyond their domestic spheres and immediate situations of focus. As was noted by Cuba, the veto exercised against renewal of the mission in Bosnia and Herzegovina had potentially far reaching consequences and “[t]he threat of the veto jeopardize[d] not only the existence of the United Nations Mission in Bosnia and Herzegovina; it also threaten[ed] the other 14 operations [at the time] deployed.”¹³¹⁹ Nonetheless, in the face of criticism and pressure from other P5¹³²⁰ and non-permanent¹³²¹ Members, the US maintained its stance until the remainder of the Council acquiesced.

Since the end of the Cold War, the US has not once exercised its veto in a manner consistent with the principles and spirit of the veto power granted by the Charter drafters at San Francisco. In fact, the use of the veto by the US has been exclusively in the pursuit of either its own national interests or the interests of arguably its closest ally, from which it “has never flinched from its commitment [towards] – a commitment which remains unshakeable.”¹³²² Regrettably, the US appears to exemplify the criticism of veto by other States Member: “its use and the threat of its use operate as a procedural device when permanent members pursue their

¹³¹⁷ US, *ibid* 9.

¹³¹⁸ US, UNSC Verbatim Record (30 June 2002) UN Doc S/PV.4563, 2.

¹³¹⁹ Cuba, UNSC Verbatim Record (10 July 2002) UN Doc S/PV.4568 (Resumption 1), 15.

¹³²⁰ France, UNSC Verbatim Record (10 July 2002) UN Doc S/PV.4568, 11.

¹³²¹ Iran, UNSC Verbatim Record (10 July 2002) UN Doc S/PV.4568, 15; Canada, *ibid* 3-4; New Zealand, *ibid* 7; Cuba, *ibid* (Resumption 1), 15.

¹³²² Wenne (n 1305).

national interests, a process that affects both the working methods and the effectiveness of the Council in achieving its objective of enforcing international peace and security.”¹³²³

X.3.2.2 The Russian Federation and China

Following the flurry of vetoes during the Cold War when the overwhelming number of vetoes exercised came from the USSR, the Russian Federation has exercised the veto eleven times since 1990.¹³²⁴ Whilst their first veto of financing for the mission in Cyprus had “no political basis of any kind . . . [and was] dictated solely by practical considerations of the Government of the Russian Federation concerning the way to develop further the expanding United Nations peace-keeping operations and concerning, approaches to financing the expenditures for such operations”,¹³²⁵ later uses of the veto were due to situations that were deemed “politically inadmissible.”¹³²⁶ In fact both of these stances are incompatible with the intended purpose of the veto and a Russian veto over funding of a peacekeeping mission can be argued to embody the same national interests as the protection of peacekeepers, albeit without the international legal ramifications and potential abuse of an international treaty. Even more brazenly, as a party to the conflict in Georgia, the Russian Federation did not hesitate to use its veto to block the adoption of S/2009/310 on the subject, due to “its continued insistence on removing all references to Georgia’s territorial integrity in the draft resolution.”¹³²⁷ As a result, UNMIG, established in 1993, ceased to exist in 2009 – a prime example of the derogatory effect of national interests on the maintenance of international peace and security.

Of the three P5 members to have used the veto power since 1990, China has been the most sparing, having exercised its right to the veto a total of eight times since 1990.¹³²⁸ More telling,

¹³²³ Argentina, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 16.

¹³²⁴ UNSC Draft Res (22 May 2014) UN Doc S/2014/348; UNSC Draft Res (15 March 2014) UN Doc S/2014/189; UNSC Draft Res (19 July 2012) UN Doc S/2012/538; UNSC Draft Res (4 February 2012) UN Doc S/2012/77; UNSC Draft Res (4 October 2011) UN Doc S/2011/612; UNSC Draft Res (14 June 2009) UN Doc S/2009/310; UNSC Draft Res (11 July 2008) UN Doc S/2008/447; UNSC Draft Res (12 January 2007) UN Doc S/2007/14; UNSC Draft Res (21 April 2004) UN Doc S/2004/313; UNSC Draft Res (2 December 1994) UN Doc S/1994/1358; UNSC Draft Res (29 April 1993) UN Doc S/25693.

¹³²⁵ Russia, UNSC Verbatim Record (11 May 1993) UN Doc S/PV.3211, 4-5. This is supported by the passing of UNSC Res 831 (1993), which resolved the funding issue that Russia objected to earlier.

¹³²⁶ Russia, UNSC Verbatim Record (2 December 1994) UN Doc S/PV.3475, 10.

¹³²⁷ UK, UNSC Verbatim Record (15 June 2009) UN Doc S/PV.6143, 6.

¹³²⁸ UNSC Draft Res (22 May 2014) UN Doc S/2014/348; UNSC Draft Res (19 July 2012) UN Doc S/2012/538; UNSC Draft Res (4 February 2012) UN Doc S/2012/77.; UNSC Draft Res (4 October 2011) UN Doc S/2011/612; UNSC Draft Res (11 July 2008) UN Doc S/2008/447; UNSC Draft Res (12 January 2007) UN Doc S/2007/14; UNSC Draft Res (25 February 1999) UN Doc S/1999/201; UNSC Draft Res (9 January 1997) UN Doc S/1997/18.

perhaps, is the Sino-Russian regional cooperation on the Council that becomes evident upon examination of voting records. China has used its veto alongside Russia in six of these eight draft resolutions,¹³²⁹ has abstained in one of Russia's other vetoed draft resolutions¹³³⁰ and has been supported by Russian abstention in another of its own,¹³³¹ suggesting that – in contrast to Western P5 Members of the Council – China and Russia appear far more closely aligned and willing to openly provide mutual support on the Council.¹³³² This is not, however, to say that national interest has not underscored some Chinese decisions at the Council: the Chinese veto of a 1999 draft resolution¹³³³ that would have authorised “the attachment to MINUGUA of a group of 155 military observers”¹³³⁴ was the direct result of Guatemalan recognition of Taiwanese independence and support for their readmission to the General Assembly,¹³³⁵ a stance that China interpreted as “actions to infringe upon China’s sovereignty and territorial integrity.”¹³³⁶ The observer attachment was later endorsed by the Council,¹³³⁷ but not before Guatemala severely toned down its support for and interaction with Taiwan,¹³³⁸ “thereby removing the obstacles to

¹³²⁹ UNSC Draft Res (22 May 2014) UN Doc S/2014/348; UNSC Draft Res (19 July 2012) UN Doc S/2012/538; UNSC Draft Res (4 February 2012) UN Doc S/2012/77; UNSC Draft Res (4 October 2011) UN Doc S/2011/612; UNSC Draft Res (11 July 2008) UN Doc S/2008/447; UNSC Draft Res (12 January 2007) UN Doc S/2007/14.

¹³³⁰ UNSC Draft Res (2 December 1994) UN Doc S/1994/1358.

¹³³¹ UNSC Draft Res (25 February 1999) UN Doc S/1999/201.

¹³³² The UK has abstained on several resolutions concerning the Palestinian Question, objecting to the language or lean of the text, but has never used its veto to block their adoption. See eg UNSC Draft Res (5 October 2004) UN Doc S/2004/783; UNSC Draft Res (11 November 2006) UN Doc S/2006/878; UNSC Draft Res (27-8 March 2001) UN Doc S/2001/270.

¹³³³ UNSC Draft Res (7 March 1997) UN Doc S/1997/199.

¹³³⁴ *ibid* ¶1.

¹³³⁵ On December 29, 1996, a Taiwanese envoy attended the signing of peace accords in Guatemala City. Guatemala also voted consistently for the adoption of Taiwan as an item on the agenda of the General Assembly. See, eg UNGA ‘Provisional Agenda of the Fifty-first regular session of the General Assembly’ (19 July 1996) UN Doc A/51/150, ¶159.

¹³³⁶ China, UNSC Verbatim Record (10 January 1997) UN Doc S/PV.3730, 20.

¹³³⁷ UNSC Res 1094 (20 January 1997) UN Doc S/RES/1094.

¹³³⁸ Guatemala, UNSC Verbatim Record (20 January 1997) UN Doc S/PV.3732, 4: “the necessary measures to be taken to pursue the peace process with United Nations participation have been overcome.”

China's support for the draft resolution."¹³³⁹ Similar situations have also befallen Macedonia¹³⁴⁰ and Haiti¹³⁴¹ over their links with the island.

What is most interesting, however – particularly in contrast with the use of the veto by the US, which overwhelmingly seeks to protect the interests of the one State of Israel – is the self-declaration of Russia and China as protectors of State sovereignty and territorial integrity. Whereas the US is highly partisan in its use of the veto towards a *State*, Sino-Russian voting records on the Council suggest that they use the veto in pursuit of the *principle* of non-intervention. It is no coincidence that both P5 Members vote in unison against resolutions involving intervention in what they consider to be the domestic affairs of States, since both have proclaimed themselves quasi-guardians not only of the sovereignty of non-Council States Member of the UN but also of the purity of the meaning of the Charter. Certainly this appears to be the central theme that runs through the vast majority of the resolutions blocked by Russia and China in recent years on Myanmar,¹³⁴² Zimbabwe¹³⁴³ and Syria.¹³⁴⁴

Both Russia and China have made clear their opposition to the abuse of power and derogation from the strict verse of the Charter. During discussions on draft resolution S/2008/447 (2008), Russia was unequivocal in its condemnation of what it saw to be the expanding scope of Council action:

¹³³⁹ China, *ibid* 3.

¹³⁴⁰ Although not explicitly stated in the records as forming the reason for the use of the veto by China, Macedonia's agreement with Taiwan for direct economic aid and investments were alluded to in the Canadian representative's speech. See, UNSC Verbatim Record (25 February 1999) UN Doc S/PV.3982, 7: "We believe that China's decision, seemingly compelled by bilateral concerns unrelated to UNPREDEP, constitutes an unfortunate and inappropriate use of the veto. In this same light, we deeply regret that actions taken by the Government of the former Yugoslav Republic of Macedonia precipitated the bilateral dispute leading to the present situation." These accusations were denied by China as "totally groundless", *ibid* 9.

¹³⁴¹ In both 1996 and 2007, resolutions relating to Haiti were jeopardised by links to Taiwan. Following an invitation to Taiwanese Vice-President Li Yuan-zu to attend the inauguration of former President René Préval on February 7 1996, the Chinese only voted in favour of UNSC Res 1048 (1996) "[i]n view of the fact that the draft resolution before us has basically incorporated the amendments by the Chinese delegation", China, UNSC Verbatim Record (29 February 1996) UN Doc S/PV.3638, 12. In response to Haitian diplomatic ties with Taiwan, in adopting UNSC Res 1743 (15 February 2007) UN Doc S/RES/1743, China agreed only to "an extension for a reasonable period, as an ad hoc arrangement, beyond the original six months", UNSC Verbatim Record (15 February 2007) UN Doc S/PV.5631, at 3.

¹³⁴² UNSC Draft Res (12 January 2007) UN Doc S/2007/14.

¹³⁴³ UNSC Draft Res (11 July 2008) UN Doc S/2008/447.

¹³⁴⁴ UNSC Draft Res (18 February 2011) UN Doc S/2011/24; UNSC Draft Res (4 October 2011) UN Doc S/2011/612; UNSC Draft Res (4 February 2012) UN Doc S/2012/77; UNSC Draft Res (19 July 2012) UN Doc S/2012/538; UNSC Draft Res (22 May 2014) UN Doc S/2014/348.

In the positions of a number of Council members, we have of late seen an increasingly obvious attempt to take the Council beyond its Charter prerogatives and beyond the maintenance of international peace and security. We believe such practices to be illegitimate and dangerous and apt to lead to a realignment of the entire United Nations system. The Russian Federation intends to continue to counter such trends, so that all States without exception will firmly comply with the Charter of the Organization.¹³⁴⁵

The situation in Myanmar, too, was deemed to be “mainly the internal affair of a sovereign State . . . [and did] not constitute a threat to international or regional peace and security”;¹³⁴⁶ accordingly, any Council involvement in the situation would “not only exceed the mandates of the Council, but also hinder discussions by other relevant agencies.”¹³⁴⁷ Russia concurred, stating that it “believe[d] that the situation in that country does not pose any threat to international or regional peace. . . . [and] deem[ed] unacceptable any attempt to use the Security Council to discuss issues outside its purview.”¹³⁴⁸

The situation in Syria, however, has been the crux of Sino-Russian veto cooperation in recent times, with a total of four draft resolutions “double-vetoed” in as many years.¹³⁴⁹ In the aftermath of Council authority for military action in Libya¹³⁵⁰ – from which Russia and China abstained – both disapproved of the manner and results of Council-mandated NATO action,¹³⁵¹ rendering them hesitant to support any similar authorization of action in Syria:¹³⁵² Yet the situation in Syria

¹³⁴⁵ Russia, UNSC Verbatim Record (11 July 2008) UN Doc S/PV.5933. See, also, China, *ibid* 13: “the development of the situation in Zimbabwe to date has not gone beyond the realm of internal affairs. It does not constitute a threat to the world’s peace and security.”

¹³⁴⁶ China, UNSC Verbatim Record (12 January 2007) UN Doc S/PV.5619, 3. Thus, “China [held] that there is no need for the Security Council to get involved. Nor should it take action on the issue of Myanmar”, *ibid*

¹³⁴⁷ *ibid*.

¹³⁴⁸ Russia, *ibid* 6.

¹³⁴⁹ UNSC Draft Res (22 May 2014) UN Doc S/2014/348; UNSC Draft Res (19 July 2012) UN Doc S/2012/538; UNSC Draft Res (4 February 2012) UN Doc S/2012/77; UNSC Draft Res (4 October 2011) UN Doc S/2011/612.

¹³⁵⁰ UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970.

¹³⁵¹ See, eg Russia, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627, 4: “The situation in Syria cannot be considered in the Council separately from the Libyan experience. The international community is alarmed by statements that compliance with Security Council resolutions on Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect. It is easy to see that today’s “Unified Protector” model could happen in Syria.”

¹³⁵² Russia, UNSC Verbatim Record (19 July 2012) UN Doc S/PV.6810, 8: “The Russian delegation had very clearly and consistently explained that we simply cannot accept a document, under Chapter VII of the Charter of the United Nations, that would open the way for the pressure of sanctions and later for external military involvement in Syrian domestic affairs”. See, also, China, *ibid* 13: “[S]overeign equality and non-interference in the internal affairs of other countries are the basic norms governing inter-State relations enshrined in the Charter of the United Nations. China has no self-interest in the Syrian issue. We have consistently maintained that the future and fate of Syria should be independently decided by the Syrian people, rather than imposed by outside forces. We believe that the Syrian issue must be resolved through political means and that military means would achieve nothing”

continues to pose great suffering and danger to the people of Syria, lending credibility to charges made by other Council Members that “they have chosen to block efforts to achieve justice for the Syrian people.”¹³⁵³ These allegations are difficult to negate when Syrian orders for weaponry from Russia are said to amount to \$3.5bn¹³⁵⁴ and Russia maintains a naval station in the Syrian port of Tartus; as such, Russian vetoes on Syria may not be as entirely morally based or defensive of international legal principles as they may first appear.

Moreover, territorial integrity has not barred Russia from annexing Crimea in 2014, in a series of events that most recently culminated at the Council in a Russian veto of draft resolution S/2014/189 declaring illegal the contested shotgun referendum of March 16, 2014, and has led to several rounds of sanctions imposed by Japan, Canada, the EU and US.¹³⁵⁵ At the core of the vetoed draft resolution was the “commitment to the sovereignty, independence, unity and territorial integrity of Ukraine within its internationally recognized borders.”¹³⁵⁶ Numerous representatives pointed to the inviolable and non-derogable elements of the principles at its core,

the fundamental principles and norms governing relations between States in the post-1945 world — obligations that form the core of the Charter of the United Nations — respect for the sovereignty and territorial integrity of all States, the obligation to refrain from the threat or use of force against the territorial integrity or political independence of any State, the illegality of the acquisition of territory through the threat or use of force and the obligation to settle disputes by peaceful means.¹³⁵⁷

Nevertheless, despite the Council meeting no less than fourteen times¹³⁵⁸ since the beginning of 2014 to discuss the situation in the Ukraine, one resolution has been successfully passed

¹³⁵³ UK, UNSC Verbatim Record (22 May 2014) UN Doc S/PV.7180, 7. See, also, Luxembourg, *ibid* 8; France, *ibid* 15; US, *ibid* 4.

¹³⁵⁴ ‘Why Russia is standing by Syria’s Assad’, *BBC News* (London, 15 June 2012) <<http://www.bbc.co.uk/news/world-europe-18462813>> accessed 16 December 2014.

¹³⁵⁵ Both the EU and the US have blacklisted individuals, businesses, and the State’s finance, energy and arms sectors. France recently cancelled an arms deal with Russia. See, eg, ‘How far do EU-US sanctions go?’ *BBC News* (5 September 2014) <<http://www.bbc.co.uk/news/world-europe-28400218>> accessed 16 December 2014; Dan Lamothe, ‘France backs off sending Minstral warship to Russia in \$1.7 billion deal’ *Washington Post* (Washington DC, 3 September 2014) <<http://www.washingtonpost.com/news/checkpoint/wp/2014/09/03/france-backs-off-sending-mistral-warship-to-russia-in-1-7-billion-deal/>> accessed 16 December 2014.

¹³⁵⁶ UNSC Draft Res (15 March 2014) UN Doc S/2014/189.

¹³⁵⁷ Australia, UNSC Verbatim Record (15 March 2014) UN Doc S/PV.7138, 9. See, also, Nigeria, *ibid*

¹³⁵⁸ UNSC Verbatim Record (28 August 2014) UN Doc S/PV.7253; UNSC Verbatim Record (8 August 2014) UN Doc S/PV.7239; UNSC Verbatim Record (21 July 2014) UN Doc S/PV.7221; UNSC Verbatim Record (18 July 2014) UN Doc S/PV.7219; UNSC Verbatim Record (24 June 2014) UN Doc S/PV.7205; UNSC Verbatim Record (28 May 2014) UN Doc S/PV.7185; UNSC Verbatim Record (29 April 2014) UN Doc S/PV.7165; UNSC Verbatim

condemning the downing of flight MH370 in Ukrainian territory,¹³⁵⁹ while the other has been vetoed by Russia. Meanwhile, a pro-Russian Prime Minister has been installed, a Treaty signed on March 18 to initiate Crimea's accession to the Russian Federation and Ukrainian Armed Forces have been evicted from their bases. Furthermore, the recognition of the Republic of Crimea and Sevastopol as federal subjects of Russia by Syria¹³⁶⁰ only serves to fuel allegations of national interests at the heart of the use of the veto in the Syrian conflict. Nonetheless, whilst this reflects poorly on Russia at the international level, it has not impacted as greatly on its work at the Council as the US stance towards Israel; whilst not an ideal role model of a Council Member, Russia's disparity between its stance on the Council and its political impact outside of the UN is perhaps an example of the dual roles that P5 members are required to play and highlights that there should be a disconnect between the role of a P5 Member when dealing with Council business and when dealing as a sovereign State in its domestic and foreign policy.

China and Russia maintain that their interest in using the veto strictly complies with the letter of the Charter provisions; their insistence on the territorial integrity of States and the prohibition of extending the scope of the Council to include elements within the definition of peace and security is an admirable principle to maintain, which supports other components of the rule of law, such as Separation of Powers and Transparency. However, their actions do not always comply with the standards that they set out to maintain; accusations of political bias have been exchanged from both pro-interventionist¹³⁶¹ and pro-sovereignty¹³⁶² camps, but Russia and China remain – on paper and at the Council, at least – firm in their resolve to ensure territorial integrity and sovereignty in the majority of their uses of the veto.

Record (16 April 2014) UN Doc S/PV.7157; UNSC Verbatim Record (19 March 2014) UN Doc S/PV.7144; UNSC Verbatim Record (15 March 2014) UN Doc S/PV.7138; UNSC Verbatim Record (13 March 2014) UN Doc S/PV.7134; UNSC Verbatim Record (10 March 2014) UN Doc S/PV.7131; UNSC Verbatim Record (3 March 2014) UN Doc S/PV.7125; UNSC Verbatim Record (1 March 2014) UN Doc S/PV.7124; UNSC Verbatim Record (28 February 2014) UN Doc S/PV.7123.

¹³⁵⁹ UNSC Res 2166 (21 July 2014) UN Doc S/RES/2166.

¹³⁶⁰ Matthew Rosenburg, 'Breaking With the West, Afghan Leader Supports Russia's Annexation of Crimea', *New York Times* (New York, 23 March 2014) < http://www.nytimes.com/2014/03/24/world/asia/breaking-with-the-west-afghan-leader-supports-russias-annexation-of-crimea.html?_r=0> accessed 16 December 2014.

¹³⁶¹ France, UNSC Verbatim Record (19 July 2012) UN Doc S/PV.6810, 3: It is now clear that Russia merely wants to win time for the Syrian regime to crush the opposition"; UK, *ibid* 3: China and Russia "have chosen to put their national interests ahead of the lives of millions of Syrians."

¹³⁶² Russia, *ibid* 8: "These Pharisees have been pushing their own geopolitical intentions, which have nothing in common with the legitimate interests of the Syrian people."

X.3.2.3 Efforts to reform the use of the veto

The veto power, which guarantees the dominance of the five permanent members, has to be re-examined. It is our view that the veto power has now become untenable and anachronistic. If we need to accept some kind of weighting in terms of asymmetries within the Council, we cannot accept a situation in which one, two or three in the Council are more powerful than the rest of the membership of the United Nations.¹³⁶³

Efforts to regulate the use of the veto have traditionally fallen within the framework of the general reform of the Council.¹³⁶⁴ Throughout discussions “the veto continued to come under criticism, with many delegations emphasizing the need to either abolish it or limit its use.”¹³⁶⁵ In the aftermath of the Cold War, the veto was not exercised for several years, leading to its designation as a “power . . . instituted in response to realities and situations that no longer obtain.”¹³⁶⁶ Proposals by UN Member States for veto reform included subjects of debate where the veto could be prohibited, such as the voluntary abolition of the veto when dealing with the election of the Secretary-General of the UN¹³⁶⁷ and matters of reform.¹³⁶⁸ There were numerous ideas, also, with respect to amendments to the practice of veto-usage, in essence to avoid the

¹³⁶³ Malaysia, UNGA Verbatim Record (23 November 1993) UN Doc A/48/PV.61, 10.

¹³⁶⁴ See, eg UNGA ‘Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council’ (1 January 2004) UN Doc A/58/47, ¶14: “Members of the Working Group also agreed to use as a basis for their exchange of views specific topics proposed by the Bureau. Those topics were the size of an enlarged Security Council; the question of regional representation; criteria for membership; the relationship between the General Assembly and the Security Council; accountability; *and the use of the veto*” [emphasis added].

¹³⁶⁵ *ibid* ¶12. See, eg Canada, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 11: “The Security Council would also benefit from a serious consideration of the use of the veto. We all know the inhibiting effect that the veto — or even the threat of the veto — can have on Council deliberations”; Vietnam, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968, 11: “My delegation and the majority of Member States believe that, *pending their eventual elimination*, vetoes should be confined to matters truly appropriate for consideration under [Chapter VII]” [emphasis added]; Cuba, *ibid* 33: “The Movement also reiterates the need to reform and democratize the decision-making processes of the Council, including limiting and curtailing the use of the veto, *with a view to its eventual elimination*” [emphasis added]; Egypt, *ibid* (Resumption 1), 3: “The working methods of the Council will not be reformed unless we effectively address the misuse of the right of veto and take the necessary measures to restrict and rationalize its use *until it is eliminated altogether*” [emphasis added]; Syria, UNGA Verbatim Record (23 November 1993) UN Doc A/48/PV.61, 2, “we must abolish the right of veto if possible or, at least, restrict its use.”

¹³⁶⁶ Syria, UNGA Verbatim Record (23 November 1993) UN Doc A/48/PV.61, 2. See also, Iran, UNGA Verbatim Record (24 November 1993) UN Doc A/48/PV.64, 2 (1993): “This procedure, introduced by the victorious Powers in 1945, has lost its *raison d’être* as a consequence of the dramatic changes in international relations. The veto power, therefore, should be abolished and replaced by a democratic decision-making procedure.”

¹³⁶⁷ Chile, *ibid* 4.

¹³⁶⁸ New Zealand, UNGA Verbatim Record (24 November 1993) UN Doc A/48/PV.64, 9: “We are opposed to the idea of vetoes in the Council, and we are equally opposed to vetoes on reform.”

maintenance of international peace and security from being held “hostage to the dictates of one State that has the power to veto its resolutions whenever it has to”;¹³⁶⁹ proposals included the requirement of two P5 members for the exercise of the veto¹³⁷⁰ or the “granting to the General Assembly or to the enlarged Security Council, specially expanded for such cases, of the right to overrule the veto by qualified majority if the veto is invoked by only one permanent member of the Security Council.”¹³⁷¹ States generally took the view that, although “each Member State has to protect its national objectives and interests, this approach needs to include an appreciation for the broader interests of the United Nations and of the general membership”¹³⁷² and that equitable participation was central to reform of the veto.¹³⁷³

Nonetheless, the situation today remains the same as over two decades ago: “reform of the veto power is not viable.”¹³⁷⁴ There has been recognition on the part of States as early as 1993 during General Assembly debates that “[t]he cases in which recourse was made to the veto have demonstrated that it has been used, in most cases, not in the service of principles, but in the service of special interests.”¹³⁷⁵ This is as true today as it was in 1993, as shown in the analysis of the veto usage by Russia, China and the US. The establishment of an Open-ended Working Group on Equitable participation¹³⁷⁶ has done little in the way of improving the situation; despite annual reports for a decade,¹³⁷⁷ the Working Group’s functions and efforts have trailed off with

¹³⁶⁹ Libya, UNGA Verbatim Record (23 November 1993) UN Doc A/48/PV.62, 10.

¹³⁷⁰ Belize, UNGA Verbatim Record (24 November 1993) UN Doc A/48/PV.64, 12: “the suggestion that at least two permanent members must agree to the exercise of the veto has some merit.”

¹³⁷¹ Ukraine, *ibid* 16.

¹³⁷² Singapore, UNGA Verbatim Record (23 November 1993) UN Doc A/48/PV.61, 6.

¹³⁷³ See, eg Vietnam, UNGA Verbatim Record (23 November 1993) UN Doc A/48/PV.62, 2; Indonesia, *ibid* 4; Argentina, *ibid* 15; Portugal, UNGA Verbatim Record (24 November 1993) UN Doc A/48/PV.64, 19; Nigeria, *ibid* 19; Spain, *ibid* 27.

¹³⁷⁴ Chile, UNGA Verbatim Record (23 November 1993) UN Doc A/48/PV.61, 3.

¹³⁷⁵ Libya, UNGA Verbatim Record (23 November 1993) UN Doc A/48/PV.62, 10.

¹³⁷⁶ UNGA Res 48/26 (3 December 1993) UN Doc A/RES/48/26, ¶1 established the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council.

¹³⁷⁷ UNGA ‘Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council’ (2 September 1994) UN Doc A/48/47; UNGA ‘Letter dated 15 September 1995 from the Permanent Representatives of Finland and Thailand to the United Nations addressed to the President of the General Assembly’ (18 September 1995) UN Doc A/49/965, Annex; UNGA ‘Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council’ (13 September 1996) UN Doc A/50/47; UNGA ‘Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council’ (8 January 1997) UN Doc A/51/47; UNGA ‘Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council’ (24 August 1998) UN Doc A/52/47; UNGA ‘Report of the Open-ended Working Group on the

the last report in 2008.¹³⁷⁸ The question of equitable representation on and increase in the membership of the Council has been included on every Assembly agenda since well before the establishment of the Working Group,¹³⁷⁹ yet any change on the Council composition has yet to be achieved. Despite forming a key element of UN reform, the Council has been a disappointingly stationary subject of discussion with no action having been taken. This should come as no surprise, however, against the backdrop of the inclusion of the veto itself in 1945, when the entire organisation of the United Nations risked being derailed as a result of the loggerheads reached over the inclusion of the veto,¹³⁸⁰ with the P5 adamant on its inclusion and a number of States opposing it, as discussed previously.

X.4 Conclusions

This section has shown that there has been a clear pattern of inequitable participation in the decision-making process on the Council, from the apparent ostracism of States that hold entitlement to participate in discussions and debates to the use of the veto in denying the passing of resolutions for national interests of the P5 members; contrastingly, there has been little

Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council' (5 August 1999) UN Doc A/53/47; UNGA 'Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council' (25 July 2000) UN Doc A/54/47; UNGA 'Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council' (March 15 2001) UN Doc A/55/47; UNGA 'Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council' (March 18 2002) UN Doc A/56/47; UNGA 'Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council' (July 3 2003) UN Doc A/57/47; UNGA 'Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council' (1 January 2004) UN Doc A/58/47; UNGA 'Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council' (September 2007) UN Doc A/61/47 ; UNGA 'Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council' (9 October 2008) UN Doc A/62/47.

¹³⁷⁸ A/62/47 (2008) *ibid*.

¹³⁷⁹ Eg UNGA 'Agenda of the forty-seventh session of the General Assembly' (18 September 1992) UN Doc A/47/251, ¶40; UNGA 'Agenda of the forty-sixth session of the General Assembly' (20 September 1991) UN Doc A/46/251, ¶38; UNGA 'Agenda of the forty-fifth session of the General Assembly' (21 September 1990) UN Doc A/45/251, ¶41.

¹³⁸⁰ Tom Connally, *My Name is Tom Connally* (Thomas Y Crowell 1954) 282-3: "You may go home from San Francisco – if you wish . . . and report that you have defeated the veto . . . But you can also say, 'We tore up the Charter.' At that point, I sweepingly ripped the Charter draft in my hands to shreds and flung the scraps upon the table." See also, Secretary of State Cordell Hull's insistence that the US "Government would not remain there a day without retaining its veto power" in Townsend Hoopes and Douglas Brinkley, *FDR and the Creation of the UN* (Yale UP 1997) 126.

activity in the way of reform of the Council due to a combination of confusion as to the correct path towards reform, failure to follow verbal acknowledgements and pledges with action and the inevitable impact of domestic interests of the P5 members on the reform process. As a result, this component of the rule of law is one of the poorest complied with by the Council and, moreover, there seems to be little appetite for or signs of improvement on the horizon. In direct opposition to the intended purpose of the veto, domestic interests continue to reign supreme for the US, Russia and China, which have exercised their right of veto six times since 2010 alone.¹³⁸¹ France's proposal that the veto be voluntarily suspended by P5 members when the Council is debating humanitarian matters has not been adopted and despite grave situations in Syria and the Occupied Arab Territories, there have been numerous vetoes cast by China and the Russian Federation, and the US respectively. The efforts on the part of the UK and France to move away or limit the use of vetoes have been undermined by the continued abuse of the power by the US, Russia and China.

Expansion of the Council has also stagnated. Despite several rounds of reform talks and numerous plans put forward by groups of States and individual States, none have come to fruition. Although the P5, which ultimately must decide to endorse the expansion of the Council through a Charter amendment as per article 108,¹³⁸² appears to support the expansion of the Council in word but not in deed; stumbling blocks of the extent of power to be granted as well as the number of new seats to be created have meant that the Council has remained as unchanged on paper as 1965, when the number of non-permanent seats were last expanded,¹³⁸³ and in practice since 1991, when the USSR notified the UN that the Russian Federation was its designated successor.¹³⁸⁴ As the world has changed around the Council, the constituent

¹³⁸¹ UNSC Draft Res (22 May 2014) UN Doc S/2014/348; UNSC Draft Res (15 March 2014) UN Doc S/2014/189; UNSC Draft Res (19 July 2012) UN Doc S/2012/538; UNSC Draft Res (4 February 2012) UN Doc S/2012/77; UNSC Draft Res (4 October 2011) UN Doc S/2011/612; UNSC Draft Res (18 February 2011) UN Doc S/2011/24.

¹³⁸² Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

¹³⁸³ UNGA Res 1991A (XVIII) (1963) UN Doc A/RES/17/1991A

¹³⁸⁴ President of the Russian Federation, Letter to the Secretary-General from the President of the Russian Federation (24 December 1991) UN Doc 1991/RUSSIA, 1: "the membership of the Union of Soviet Socialist Republics in the United Nations, including the Security Council and all other organs and organizations of the United Nations system is being continued by the Russian Federation (RSFSR) with the support of the countries of the Commonwealth of Independent States. In this connection, I request that the name 'Russian Federation' should be used in the United Nations in place of the name ['USSR']. The Russian Federation maintains full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations, including financial obligations."

permanent members have remained the same, undermining the legitimacy and relevance of the Council in the modern world.

Security Council reform will, once again, be on the agenda during the 69th General Assembly Session of 2014-15,¹³⁸⁵ since the “need to reform the Security Council is urgent, as reflected in the 2005 World Summit Outcome.”¹³⁸⁶ Indeed, as referred to by the President of the General Assembly, urgent reform of the Council has been highlighted almost a decade ago¹³⁸⁷ and the Open-Ended Working Group considering Council reform has been in operation since 1993;¹³⁸⁸ yet little, if anything, has been done. In over 20 years, despite reports by the Open-ended working group,¹³⁸⁹ an Austrian Initiative,¹³⁹⁰ the 2005 World Summit¹³⁹¹ and numerous Member State groups in support of expansion or reform of the veto and other elements of equitable participation,¹³⁹² there has been no reform of the Council on this front. In fact, in contrast to the environment under which reform of the Council was initially tabled in 1993, where the veto had not been used for 3 years, for several years the veto has been regularly made use of in relation, as shown, to overtly national interest matters.

Similarly, Member States’ criticism in 1993 is as relevant today with respect to the make-up of the Council. “It is . . . essential that the Security Council, which acts on behalf of all the Members of the Organization, pursuant to Article 24 of the Charter, should have a membership that reflects adequately the increase in the membership of the Organization, and also its regional, political, cultural and religious diversity”;¹³⁹³ the current Council reflected none of these in 1993 and presents an even more skewed representation of the geo-political situation today. The Council – and more importantly, the P5 Members – have acknowledged that reform of the composition of the Council is necessary; the General Assembly has also identified that the

¹³⁸⁵ UNGA ‘Provisional agenda of the sixty-ninth regular session of the General Assembly’ (18 July 2014) UN Doc A/69/150, ¶122. UN reform is an agenda item that has been carried over from previous years to little avail.

¹³⁸⁶ UNGA ‘Opening address by the President at the opening of the 69th session’ (16 September 2014) <<http://www.un.org/pga/statements/opening-69th-session>> accessed 16 December 2014.

¹³⁸⁷ UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, ¶153.

¹³⁸⁸ UNGA Res 48/26 (3 December 1993) UN Doc A/RES/48/26, ¶1.

¹³⁸⁹ 2004-2008 (n 1377)

¹³⁹⁰ Chesterman (n 3).

¹³⁹¹ UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1.

¹³⁹² South Africa, UNSC Verbatim Record (26 November 2012) UN Doc S/PV.6870, 16: “The past few years have seen greater demands by the global community for democracy, transparency and accountability. That has translated into positive changes in many Member States. The Security Council cannot remain immune to such complexities of a changing international environment. To remain relevant, the reform of the Council in both its composition and its working methods remain one of the key priorities of the United Nations.”

¹³⁹³ Chile, UNGA Verbatim Record (23 November 1993) UN Doc A/48/PV.61, 3.

situation should be resolved urgently. Nonetheless, these oral intentions have not translated into action by either party and the Council remains, even omitting the existence of the veto as an inherent element of the UN Charter, an imbalanced and inequitable decision-making forum that has a great way to go before reaching any adequate standard of the rule of law.

CHAPTER XI
ACCOUNTABILITY

XI.1 Introduction

Accountability was identified by the Secretary-General as one of the integral components of the rule of law¹³⁹⁴ and provides mechanisms for safeguarding all standards of the rule of law. It requires detailed reporting and explanation¹³⁹⁵ as well as a mechanism to which the Council is answerable. Where Council decisions are poorly explained, arbitrarily taken, obscured behind closed door meetings or otherwise taken in contravention of the rule of law, there can be no accountability; similarly, where the Council appears to be acting *legibus solitus*, there is an even greater need for an oversight body for the Council to bring it in line with its obligations to abide by the rule of law. Accountability for the Council would, therefore, involve the existence of a structure or entity to combat impunity and deliver consequences for transgressions and violations of the Charter and its meaning.

As the overarching document that governs the behaviour of the Council and sibling organs, the Charter is the appropriate starting point when searching for measures of accountability for the Council; however, the Charter is vague in its stipulations for this. Sparse reference to examples of accountability include Article 24(3) of the UN Charter, which specifies that the Council is to “submit annual and, when necessary, special reports to the General Assembly for its consideration”,¹³⁹⁶ these reports “shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security.”¹³⁹⁷ Whilst the Assembly is obliged to “receive and consider”¹³⁹⁸ these reports, the Charter is unclear on the precise reasoning behind this practice and gives no indication of any Assembly capacity

¹³⁹⁴ Report of the Secretary-General, ‘The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies’ (2004) UN Doc S/2004/616, ¶6.

¹³⁹⁵ See eg Argentina, UNSC Verbatim Record (27 August 2008) UN Doc S/PV.5968 (Resumption 1), 16: “[A]n assessment should be included in the annual report prepared by the Council and submitted to the General Assembly. That report, which is currently of a narrative character, must be made more analytical and explanatory as regards positions on the various issues being dealt with by the Council. It must also include the reasons for the Council’s refraining from certain actions and for its inability to take decisive action in certain situations, in particular those related to the maintenance of international peace and security. Moreover, the report must include explanations for the Council’s various responses vis-à-vis its resolutions, presidential and press statements and reports, including the criteria followed by the Council in deciding how to respond.”

¹³⁹⁶ UN Charter (1945) art 24(3).

¹³⁹⁷ *ibid* art 15(1).

¹³⁹⁸ *ibid*.

or obligation to monitor the Council's behaviour. In fact, the Charter makes explicit reference to the capacity of the Council to "adopt its own rules of procedure",¹³⁹⁹ including the method and content of the reports to the Assembly. In the absence of Charter guidance on accountability, it is necessary to examine the powers of other internal organs to review the Council decision-making process, including the Council itself.

XI.2 Self-regulation

Whilst the Council has shown an increased willingness to promote accountability in its work promoting the rule of law at the domestic level,¹⁴⁰⁰ there has been much less discussion on turning the focus inwards and the Council itself abiding by any mechanisms for accountability for its actions. Discussions have taken place sporadically¹⁴⁰¹ but despite the recognition that "it is high time to enhance the Security Council's accountability to the wider membership"¹⁴⁰² no progress has been made in recent years. Of the seven meetings in 2013 on Presidential Note S/2010/507 providing guidance in "efforts to enhance the efficiency and transparency of the Council's work"¹⁴⁰³ six have been closed meetings¹⁴⁰⁴ to which the wider UN audience and global population are not privy; similarly, in 2014, there have been almost as many closed meetings as open – four of ten.¹⁴⁰⁵ Incongruously, one of the matters contained in the document discussed behind closed doors was the Council's "commitment to increase recourse to open meetings,"¹⁴⁰⁶ a matter that four years later the organ has trouble implementing even as the

¹³⁹⁹ *ibid* art 30.

¹⁴⁰⁰ See, eg UNSC 'Letter dated 7 June 2006 from the Permanent Representative of Denmark to the United Nations addressed to the Secretary-General' (7 June 2006) UN Doc S/2006/367; UNSC Presidential Statement 28 (2006) UN Doc S/PRST/2006/28; UNSC Presidential Statement 11 (2010) UN Doc S/PRST/2010/11; USA, UNSC Verbatim Record (19 January 2012) UN Doc S/PV.6705, 9: "We have supported those international accountability mechanisms across the globe, from the Extraordinary Chambers in the Courts of Cambodia to commissions of inquiry in places like Kyrgyzstan, Côte d'Ivoire and Libya."

¹⁴⁰¹ eg UNSC 'Note by the President of the Security Council' (26 July 2010) UN Doc S/2010/507; UNSC Verbatim Record (26 November 2012) UN Doc S/PV.6870; UNSC 'Note by the President of the Security Council' (5 June 2012) UN Doc S/2012/402.

¹⁴⁰² Netherlands, UNSC Verbatim Record (26 November 2012) UN Doc S/PV.6870 (Resumption 1), 5.

¹⁴⁰³ UNSC 'Note by the President of the Security Council' (26 July 2010) UN Doc S/2010/507, ¶1.

¹⁴⁰⁴ UNSC Official Communiqué (31 January 2013) UN Doc S/PV.6914; UNSC Official Communiqué (28 February 2013) UN Doc S/PV.6927; UNSC Official Communiqué (30 April 2013) UN Doc S/PV.6958; UNSC Official Communiqué (30 May 2013) UN Doc S/PV.6972; UNSC Official Communiqué (27 June 2013) UN Doc S/PV.6992; UNSC Official Communiqué (29 August 2013) UN Doc S/PV.7027.

¹⁴⁰⁵ UNSC Official Communiqué (27 February 2014) UN Doc S/PV.7122; UNSC Official Communiqué (31 March 2014) UN Doc S/PV.7151; UNSC Official Communiqué (30 April 2014) UN Doc S/PV.7166; UNSC Official Communiqué (29 May 2014) UN Doc S/PV.7189.

¹⁴⁰⁶ UNSC 'Note by the President of the Security Council' (26 July 2010) UN Doc S/2010/507, ¶28.

President confirms the need for “more effective use . . . of public meetings, informal interactive dialogues and Arria-formula meetings.”¹⁴⁰⁷ As discussed earlier, transparency “constitute[s] a ‘prerequisite’ of accountability”¹⁴⁰⁸

Efforts to reform the Council from an accountability perspective have hitherto failed in gaining notable traction. Despite recognition that “[t]ransparency, accountability and coherence are key elements that the Security Council should observe in all its activities, approaches and procedures”¹⁴⁰⁹ and that “decisions on behalf of the membership of the United Nations are more effective when they are taken in a transparent, inclusive and accountable manner,”¹⁴¹⁰ any active movement in this direction has been almost static. For example, the initiative pioneered by Brazil of “interaction with the broader membership through briefings, not only at the beginning of each presidency, but also at the conclusion . . . [was] see[n] as a voluntary exercise in accountability . . . which has, unfortunately, not been replicated by other members of the Council.”¹⁴¹¹ The most notable recent attempt for internal Council accountability reform came in the shape of a draft General Assembly resolution¹⁴¹² proposed by the Small Five Group¹⁴¹³ that laid “out a clear road map . . . for improving the Council’s transparency, accountability, distribution of tasks and fulfilment of responsibilities through a stronger use of [UN] legal and political instruments”;¹⁴¹⁴ however, “opposition to the proposal was fierce, particularly on the part of the five permanent members . . . [and] procedural legalism, which was unjustified but institutionally legitimate . . . forced [the withdrawal of] the draft resolution.”¹⁴¹⁵ This simple five page document contained

¹⁴⁰⁷ UNSC ‘Note by the President of the Security Council’ (28 August 2013) UN Doc S/2013/515, ¶2(a).

¹⁴⁰⁸ Tzanakopoulos (n 17) 392.

¹⁴⁰⁹ Guatemala, UNSC Verbatim Record (29 October 2013) UN Doc S/PV.7052, 7. See also, eg South Africa, UNSC Verbatim Record (30 November 2011) UN Doc S/PV.6672, 11, which “support[s] the call for formalizing the Council’s rules of procedure in order to improve its transparency and accountability”; Brazil, *ibid* 16, which “highlight[ed] the importance of enhanced procedures that could help to monitor and assess the manner in which the resolutions adopted by the Council are interpreted and implemented, in particular those that authorize the use of force”; Senegal, UNSC Verbatim Record (26 November 2012) UN Doc S/PV.6870 (Resumption 1), 10, where “[r]egarding the Council’s working methods, Africa favours a more accessible, democratic, representative, accountable, transparent and effective Security Council that is and must be able to respond in a timely manner.”

¹⁴¹⁰ Switzerland, UNSC Verbatim Record (30 November 2011) UN Doc S/PV.6672, 18.

¹⁴¹¹ Brazil, *ibid*.

¹⁴¹² UNGA Draft Res (15 May 2012) UN Doc A/66/L.42/Rev.2.

¹⁴¹³ Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland.

¹⁴¹⁴ Costa Rica, UNSC Verbatim Record (26 November 2012) UN Doc S/PV.6870 (Resumption 1), 4.

¹⁴¹⁵ *ibid*.

recommendations for improved relationship with the Assembly,¹⁴¹⁶ increased input from Member States¹⁴¹⁷ and most importantly, pivotal accountability elements such as

[e]xplaining the reasons for resorting to a veto or declaring its intention to do so, *in particular with regard to its consistency with the purposes and principles of the Charter of the United Nations and applicable international law*. A copy of the explanation should be circulated as a separate Security Council document to all members of the Organization.¹⁴¹⁸

The rejection, however, signalled the start of another initiative, calling for increased accountability. Founded in May 2013, the Accountability, Coherence and Transparency group “is a cross-regional group of 22 States aiming at enhancing the effectiveness of the Security Council through the improvement of its working methods.”¹⁴¹⁹ The group does not fall within the traditional school of Council reform – it assumes the Council’s continuation in its present composition – but attempts to find pragmatic methods of increasing elements related to Council accountability and “to strengthen the responsibility, coherence and transparency of the Security Council.”¹⁴²⁰ As a relatively new initiative, it is difficult to measure its efficacy and until now it has limited itself to supporting initiatives taken by existing mechanisms rather than making concrete recommendations itself.¹⁴²¹

¹⁴¹⁶ UNGA Draft Res (15 May 2012) UN Doc A/66/L.42/Rev.2, ¶1 ff.

¹⁴¹⁷ *ibid* ¶8.

¹⁴¹⁸ *ibid* ¶19 [emphasis added]. This self-imposed imperative, though not a panacea to the Council’s lack of adherence to the rule of law in many cases, would be a veritable leap in the direction of accountability; the veto is arguably the most divisive power at the discretion of any Council Member and, as seen in *Chapter X* has led to accusations of abuse and arbitrary usage by P5 Members. Moreover, the components of transparency and accountability are interlinked and thus, in light of my findings in *Chapter X*, it is perhaps unsurprising that these Council Members were against the initiative of more transparency and accountability for their use of the veto.

¹⁴¹⁹ UNSC ‘Letter dated 19 September 2013 from the Permanent Representative of Switzerland to the United Nations addressed to the President of the Security Council’ (23 September 2013) UN Doc S/2013/568, 1. Its members are Austria, Chile, Costa Rica, Estonia, Finland, Gabon, Hungary, Ireland, Jordan, Liechtenstein, Maldives, New Zealand, Norway, Papua New Guinea, Peru, Portugal, Saudi Arabia, Slovenia, Sweden, Switzerland, Tanzania and Uruguay.

¹⁴²⁰ Luxembourg, UNSC Verbatim Record (29 October 2013) UN Doc S/PV.7052, 4.

¹⁴²¹ See, eg UNSC ‘Letter dated 19 September 2013 from the Permanent Representative of Switzerland to the United Nations addressed to the President of the Security Council’ (23 September 2013) UN Doc S/2013/568, 1: “ACT commends all members of the Informal Working Group for their work leading to the adoption on 28 August of the aforementioned presidential note on enhancing efficiency and transparency as well as on the interaction and dialogue with non-Security Council members and bodies.”

Externally-facing, too, the Council has made hesitant efforts to ensure accountability to individuals affected by its decisions. The Ombudsperson Office¹⁴²² appears to be the sole attempt by the Council to self-regulate on any notable level; yet, this is limited in its scope – focusing only on the list of Al-Qaeda targeted sanctions list.¹⁴²³ There have been no efforts to instigate similar processes for other sanctions regimes, which led to criticism by the Ombudsperson herself in the most recent discussion on Council reform that “it remains a procedure applicable only in the context of one targeted sanctions regime.”¹⁴²⁴ Aside from the lack of judicial review¹⁴²⁵ in the appointment of the Ombudsperson¹⁴²⁶ and transparency in disclosure of the reasoning behind a decision,¹⁴²⁷ the Office of the Ombudsperson has no powers of recommendation to maintain or remove individuals from the sanctions list and the Council is in no way answerable to it; rather, the Ombudsperson’s mandate is curtailed to preparing a “Comprehensive Report that will exclusively . . . [b]ased on an analysis of all the information available . . . lay out for the [Al-Qaeda Sanctions] Committee the principal arguments concerning the delisting request.”¹⁴²⁸ Indeed, the decision is taken by the Committee – which itself monitors

¹⁴²² Established under UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904. See earlier discussion of the Ombudsperson in III.5.3.1.

¹⁴²³ UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267.

¹⁴²⁴ Ms Prost, UNSC Verbatim Record (23 October 2014) UN Doc S/PV.7285, 2. *ibid*: “The ramifications of this, given the requirements of Article I of the Charter of the United Nations, in terms of international law and human rights obligations, is evidently a matter for the consideration of the Security Council and of States . . . [O]ther regimes benefit from the focal point mechanism . . . [b]ut the law is clear that, even with improvements, the focal point mechanism, by its very nature and structure, does not have the fundamental characteristics necessary to serve as an independent review mechanism or to deliver an effective remedy.”

¹⁴²⁵ Both in terms of the process of appointing an Ombudsperson and the function of the Office of the Ombudsperson.

¹⁴²⁶ UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904, ¶20: The Council “*requests* the Secretary-General, in close consultation with the [Al-Qaeda Sanctions] Committee, to appoint an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism and sanctions, to be Ombudsperson” [emphasis in original].

¹⁴²⁷ UNSC ‘Report of the Office of the Ombudsperson pursuant to Security Council resolution 2161 (2014)’ (31 July 2014) UN Doc S/2014/553, ¶46: “As discussed in detail in the seventh report (S/2014/73, paras. 49-52), the Ombudsperson process also suffers from limited public transparency. As noted, the comprehensive report, which details the reasoning of the Ombudsperson, is not made available to the petitioner or the public. As a result, the only information about a decision that the petitioner will receive is that conveyed through the reasons, which are provided. This is the sole mechanism prescribed by resolution for possible disclosure of factual information and findings in a case other than the Office of the Ombudsperson, the Committee and now, under resolution 2161 (2014), an interested State. However, there is no provision in the resolution for publication of those reasons by the Ombudsperson, a measure that would enhance the general transparency of the process. Unfortunately, resolution 2161 (2014) does not address disclosure by the Ombudsperson, and an obvious deficiency in transparency therefore remains. This is particularly perplexing given that the petitioner is free to disseminate the reasons—in whole or in part—while the Ombudsperson must continue to keep the information confidential. The benefits of, or reasons for, this non-disclosure requirement remain opaque.”

¹⁴²⁸ *ibid* Annex II, ¶7.

the implementation of the sanctions rather than measuring Council compliance with the rule of law¹⁴²⁹ – and later informs the Ombudsperson of this decision.¹⁴³⁰ However, even with respect to full access to documents in order to create such reports, the Office of the Ombudsperson has repeatedly made the same comments regarding increased transparency in each report that it has filed since 2013¹⁴³¹ and even as recently as July 2014 raised concerns that the Council may choose to ignore its reasoning.¹⁴³²

In fact, accountability in this respect appears to be taking steps backwards; whereas in 2011, where a delisting request has been rejected, description to the petitioner of reasoning “to the extent possible and drawing upon the Ombudsperson’s Comprehensive Report”¹⁴³³ was a requirement, in 2014 the “Comprehensive Report, and any information contained therein, should be treated as strictly confidential and not shared with the petitioner or any other Member State.”¹⁴³⁴

XI.3 Sibling UN Organs

Of the four¹⁴³⁵ remaining organs of the UN referred to in the UN Charter,¹⁴³⁶ there are two that are potentially eligible or suitable for review of the Council.¹⁴³⁷ As the “principal judicial organ

¹⁴²⁹ UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267, ¶6 (1999).

¹⁴³⁰ UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904, Annex II, ¶11.

¹⁴³¹ UNSC ‘Report of the Office of the Ombudsperson pursuant to Security Council resolution 2083 (2012)’ (31 January 2014) UN Doc S/2014/73, ¶71: “further steps can be taken to enhance the effectiveness of the process. It is imperative that increased access be provided to classified or confidential material concerning particular listings. This is the only means of ensuring that the Ombudsperson can deliver on the mandate to comprehensively consider the delisting case and provide a fully informed recommendation. See also, UNSC ‘Report of the Office of the Ombudsperson pursuant to Security Council resolution 2083 (2012)’ (31 July 2013) UN Doc S/2013/452, ¶58; ‘Report of the Office of the Ombudsperson pursuant to Security Council resolution 2083 (2012)’ (31 January 2013) UN Doc S/2013/71, ¶60; ‘Report of the Office of the Ombudsperson pursuant to Security Council resolution 1989 (2011)’ (30 July 2012) UN Doc S/2012/590, ¶58.

¹⁴³² UNSC ‘Report of the Office of the Ombudsperson pursuant to Security Council resolution 2161 (2014)’ (31 July 2014) UN Doc S/2014/553, ¶51: “There is some progress on the important question of reasons for the decisions taken to grant or deny the petition contained in resolution 2161 (2014), which should ensure a more timely delivery of reasons. However, *there remains a fundamental inconsistency between the decision-making process and the delivery of reasons, particularly in retention cases. This creates the potential for an unfair process if the reasons are not consistent with the comprehensive report of the Ombudsperson*” [emphasis added].

¹⁴³³ UNSC Res 1989 (17 June 2011) UN Doc S/RES/1989, ¶14(a).

¹⁴³⁴ UNSC Res 2161 (17 June 2014) UN Doc S/RES/2161, ¶13(c).

¹⁴³⁵ The Trusteeship Council has been disbanded.

¹⁴³⁶ UN Charter (1945) art 7(1).

¹⁴³⁷ Under Charter art 97, the Secretary-General is the “chief administrative officer of the Organization” and, though he “may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security,” (UN Charter (1945) art 99) the post-holder – and by extension the Secretariat which they lead – lacks the requisite mandate for the official judicial or political review of any actions taken by UN organs; similarly, the mandate of the Economic and Social Council, whilst including the power to “make or initiate

of the United Nations”¹⁴³⁸ the ICJ is the sole existing candidate for judicial review of the Council. Despite the political nature of the Council in its decision-making process, this is not mutually exclusive to assessment of the legality of its actions. As the Council is bound by the parameters of its powers under the Charter and is obliged to observe the limitations of both international norms and the rule of law, judicial review – at least of the procedure followed and its adherence to the components of the rule of law – should be a task for the ICJ. The decision-making process of the Council impact myriad other elements of international law, particularly the Council’s bold ventures into legislating and the impact this has on establishing international norms and precedent. However, other elements also touch on the international legal plane, such as the intersection between international human rights law and Council-mandated sanctions or military action. As a result, the ICJ’s power to review the Council must be examined.

The Assembly, too, has powers of review that can be invoked to review decisions of the Council. As the democratic counterweight to the exclusive Council, the Assembly potentially provides a forum for discussion and action that is more representative of the international community. Under the Charter, it is authorised to “discuss *any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter.*”¹⁴³⁹ This has overwhelming potential and in essence translates into a competency to not only review the Council’s powers itself in the Assembly but to discuss the ICJ’s powers to review the Council should such powers not exist. Moreover, the Assembly is tasked with considering “general principles of co-operation in the maintenance of international peace and security”¹⁴⁴⁰ and was designed for extensive interaction with both the Council in an advisory role¹⁴⁴¹ and as an organ “encouraging the progressive development of international law

studies and reports with respect to international economic, social, cultural, education, health and related matters” (UN Charter (1945) art 62(1)) also lacks the required mandate for oversight of the Council. Indeed, whilst it is authorised to make recommendations to the General Assembly, Members of the UN and certain specialised agencies (UN Charter (1945) art 62(3)), prepare draft conventions for the Assembly (UN Charter (1945) art 62(4)), and call international conferences on matters within its competences (UN Charter (1945) art 92), there is no specific reference in the Charter to any interaction with the Council itself; this highlights the narrow interpretation of the meaning of peace and security that was initially envisioned by the Charter drafters, which has now expanded to include elements of human security, health and socio-cultural rights that were traditionally within the exclusive remit of the Economic and Social Council. Whilst there has been an evolution of the definition of peace and security that has allowed the Council to include parts of its fellow organ’s work in its own, there has been no reciprocity and the Economic and Social Council is as ill-suited to review of the Council today as in 1945.

¹⁴³⁸ *ibid* art 92.

¹⁴³⁹ *ibid* art 10 [emphasis added].

¹⁴⁴⁰ *ibid* art 11(1).

¹⁴⁴¹ *ibid* art 11-12.

and its codification.”¹⁴⁴² In light of recent Council practice of legislating, this latter responsibility should be addressed under the powers granted to the Assembly in Article 10.

IX.3.1 The International Court of Justice

In contrast to the notion that the Council should be seen exclusively through a political lens, Orakhelashvili sees “the entire process of maintenance of peace and security [as] a legal process”¹⁴⁴³ and considers that “[p]eace and security can and shall be maintained only in so far as the relevant legal norms provide for this.”¹⁴⁴⁴ Accordingly, De Wet explores whether judicial criteria should even be used to measure a threat to international peace, concluding that the “United Nations does not yet acknowledge a positive definition of peace that provides the Security Council with an unlimited discretion in determining whether a threat to the peace exists.”¹⁴⁴⁵ She claims that “such an all-inclusive definition would undermine the structure of the Security Council, which would be incapable of effectively restoring or maintaining an all-inclusive concept of peace.”¹⁴⁴⁶ Writing in 2004, she viewed the definition of peace and security remaining “negatively” interpreted by the Council: when discussing the East Timor conflict, she claims that since “it had an international dimension as it involved Indonesian armed forces . . . it would therefore not be accurate to interpret the threats to the peace contained in UNSC Res 1264 (1999) and UNSC Res 1272 (1999) as being underpinned exclusively by large scale violations of human rights and humanitarian law”¹⁴⁴⁷; international terrorism does not, in de Wet’s opinion, relate “to a de-linking of a ‘threat to peace’ from the potential outbreak of international armed conflict”¹⁴⁴⁸; and, at the time of writing, “the Security Council [had] not (yet) determined that the HIV/AIDS pandemic constitutes a threat to peace in terms of Article 39 of the Charter.”¹⁴⁴⁹

In the decade since de Wet’s analysis new threats to the peace that fall outside the limited scope of international conflict have emerged on topics as wide-ranging as internal armed conflicts in Sudan and Libya,¹⁴⁵⁰ the threat posed by climate change¹⁴⁵¹ and the use of sexual

¹⁴⁴² *ibid* art 13.

¹⁴⁴³ Orakhelashvili (n 53) 147.

¹⁴⁴⁴ *ibid*.

¹⁴⁴⁵ de Wet (n 34) 367.

¹⁴⁴⁶ *ibid*.

¹⁴⁴⁷ *ibid* 167.

¹⁴⁴⁸ *ibid* 172.

¹⁴⁴⁹ *ibid* 174.

¹⁴⁵⁰ Both conflicts were the subjects of Security Council resolutions: UNSC 1593 (2005) and 1973 (2012) respectively.

violence as a tactic of war,¹⁴⁵² leading to a substantial evolution in the definition of a threat to the peace;¹⁴⁵³ today, as this thesis has shown, it has become an all-encompassing concept for the Council. Nonetheless, the principle behind her assertions remain correct and the Court may have no role to play in determining a threat to the peace. There would, today, remain no basis upon which the Court would have the right to qualify or moderate any Council *determination* of a threat to the peace under Article 39 of the Charter;¹⁴⁵⁴ the Charter is explicit in stipulating that the Council “shall determine the existence of any threat to the peace”¹⁴⁵⁵ and to subjugate such a decision to the Court would be to permit a judiciary to make a political decision, for which the Court is as ill-equipped as the Council is to carry out the ICJ’s functions.

Nonetheless, there may yet be a role for the ICJ in reviewing the legitimacy of Council action. Whilst there is no explicit provision for it in the Charter, it has been long been identified by the ICJ and others¹⁴⁵⁶ that the United Nations as an organisation has a legal personality.¹⁴⁵⁷ Judicial review of the Council’s resolutions has been touched upon at the ICJ in previous years, most notably in 1992 when the Court declined to grant Provisional Measures to Libya in its *Lockerbie* case,¹⁴⁵⁸ from the perspective of ICJ judicial review of the Security Council, this was a disappointing decision. During the course deliberations, it was identified that

¹⁴⁵¹ This was the subject of discussion in UNSC Verbatim Record (20 July 2011) UN Doc S/PV.6587.

¹⁴⁵² UNSC Res 1820 (19 June 2008) UN Doc S/RES/1820.

¹⁴⁵³ US, UNSC Verbatim Record (20 July 2011) UN Doc S/PV.6587, 7: “The Council needs to keep pace with the emerging threats of the twenty-first century. Old threats have not disappeared, but new threats are upon us, and they demand more of us than business as usual. The Council has shown an impressive ability in the past to embrace its responsibilities to combat new peace and security threats, as it has done over the past 20 years in adapting traditional peacekeeping tools to address new and more complex political and security crises around the world.”

¹⁴⁵⁴ For an excellent discussion on this topic, see Sarooshi (n 11).

¹⁴⁵⁵ UN Charter (1945) art 39.

¹⁴⁵⁶ *Reparations case* (n 1042) 179: “In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying functions and rights which can only be explained on the basis of possession of a large measure of international personality, and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. See, also, eg Nigel D White, *The United Nations System: Towards International Justice* (Lynne Rienner 2002) 28 ff; ‘Status, privileges and immunities of international organizations, their officials, experts, etc.’, [1985] Ybk LC 145, 158, where “[t]he Swiss Federal Council recognises the international personality and legal capacity of the United Nations.”

¹⁴⁵⁷ *Reparations case* (n 1042) 179: “[i]t must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.” However, the Council itself, as a constituent organ of the UN, does not have a separate legal personality to the organisation.

¹⁴⁵⁸ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)* (Provisional Measures: Order) [1992] ICJ Rep 114, 127.

the Court is the guardian of legality for the international community as a whole, *both within and without the United Nations*. One may therefore legitimately suppose that the intention of the founders was not to encourage a blinkered parallelism of functions but a fruitful interaction.¹⁴⁵⁹

Nonetheless, this acceptance of concurrent jurisdiction and the Court's previous rulings in support of this principle in its *Hostages*¹⁴⁶⁰ and *Nicaragua*¹⁴⁶¹ cases, the Court appears to have folded before the fact that the resolution of Council¹⁴⁶² on the matter had been issued. The Council's Chapter VII resolution demanding the extradition of suspects in the Lockerbie bombings would have been in direct opposition to any Provisional Measures issued by the Court; indeed, Judge Bedjaoui highlighted the crux of the matter when he alluded to "the grave question of . . . the possible inconsistency between the decisions of the two organs and of how to deal with so delicate a situation."¹⁴⁶³ Accordingly, despite the fact that UNSC Res 748 was adopted *after* the Libyan Applications to the ICJ and lengthy discussions at the Court and even in light of the recognition that "the Court . . . was not obliged to take into account a resolution passed after the closure of the proceedings and to apply it, retroactively as it were, to the case which had been submitted to it,"¹⁴⁶⁴ the Court considered the resolution. In short, aware of the case pending before the ICJ, the Council nonetheless adopted a resolution in an apparent effort to either circumvent or eclipse any decision of the Court; reciprocally, even though the resolution was adopted *ex post facto* to the Court's initial consideration of the case, the Court recognized its admissibility and chose to dismiss the request for Provisional Measures.

Should it have wished to, the Council was well aware of its powers under Charter article 96(1) to request an advisory opinion from the Court; indeed, it had already done such in the 1971 *Namibia* case¹⁴⁶⁵ subsequent to UNSC Res 276.¹⁴⁶⁶ The absence of a referral to the Court "may

¹⁴⁵⁹ *ibid* Separate Opinion of Judge Lachs, 138 [emphasis added].

¹⁴⁶⁰ *United States of America v Iran* (n 1018) ¶37: "never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court ; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful resolution of international disputes."

¹⁴⁶¹ *Nicaragua* (n 237) ¶106: "the Court considers that even the existence of active negotiations in which both parties might be involved should not prevent both the Security Council and the Court from exercising their separate functions under the Charter and the Statute of the Court."

¹⁴⁶² UNSC Res 748 (31 March 1992) UN Doc S/RES/748.

¹⁴⁶³ *Lockerbie* (n 1458), Dissenting Opinion of Judge Bedjaoui, 143.

¹⁴⁶⁴ *ibid* 151.

¹⁴⁶⁵ *Namibia* (n 102) 17.

be regrettable, but there is, alas, no provision in the Charter making it mandatory to consult the Court.”¹⁴⁶⁷ Joyner recommends a revisitation of the “arguments of long provenance regarding the Court’s jurisdiction *rationae personae*, and amendment of Article 36 of its Statute to make its compulsory jurisdiction truly universal”¹⁴⁶⁸ but it is questionable how this can be realistically implemented. For the time being, at least, the jurisdiction of the ICJ over the Council remains exclusively advisory and instigated by the Council itself on an ad hoc basis. Key to this, certainly, is the recognition by certain judges that the Court is not empowered to

exercise judicial review of the decisions of the Security Council. . . [and is] particularly without power to overrule or undercut decisions of the Security Council made by it in pursuance of its authority under Articles 39, 41 and 42 of the Charter to determine the existence of any threat to the peace, breach of the peace, or act of aggression and to decide upon responsive measures to be taken to maintain or restore international peace and security.¹⁴⁶⁹

Although the ICJ has previously held that it is “not the function of a court merely to provide a basis for political action if no question of actual legal rights is involved,”¹⁴⁷⁰ this cannot be interpreted to be the case in situations where the Council’s action has legislative or legally binding effects.¹⁴⁷¹ Moreover, for the Council to adopt a resolution on the same subject that the Court has begun addressing that later emerged to be contradictory suggests a lack of inter-organ cooperation; a similar complementarity must be forthcoming from the Council, notwithstanding the capacity of both to be seized of the same matter simultaneously. That is to say, for a resolution contrary to the content of a case seised by the Court to emerge *after* the Court has begun consideration of the matter is likely – particularly in light of the political considerations of the Council – to be an effort to prejudice the course of justice at the Court. Indeed, such action by the Council is a step away from accountability rather than a move towards; rather than using

¹⁴⁶⁶ UNSC Res 276 (30 January 1970) UN Doc S/RES/276.

¹⁴⁶⁷ *Lockerbie* (n 1458), Dissenting Opinion of Judge Bedjaoui, 152 [emphasis added].

¹⁴⁶⁸ Joyner, *International Law* (n 51) 189.

¹⁴⁶⁹ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)* (Preliminary Objections) [1992] ICJ Rep 115, 127, Dissenting opinion of President Schwebel, 53-4.

¹⁴⁷⁰ *Case concerning the Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections) [1963] ICJ Rep 15, 37.

¹⁴⁷¹ *Kosovo Advisory Opinion* (n 174) ¶46: “[w]hile the interpretation and application of a decision of one of the political organs of the United Nations is, in the first place, the responsibility of the organ which took that decision, the Court, as the principal judicial organ of the United Nations, has also frequently been required to consider the interpretation and legal effects of such decisions.”

the powers granted to the Council to refer a question to the Court for an advisory opinion on its legality, the Council mobilised to undermine the activity of the Court. This fact was recognised in the dissenting opinion of Judge El-Koshi on the *Lockerbie* case.¹⁴⁷²

Naturally, there is an argument to be made for the dismissal of the case and for judicial review to be limited from a pragmatic perspective. To empower the Court to decide a case in opposition to an existing Chapter VII resolution risks “appearing to offer to recalcitrant States a means to parry and frustrate decisions of the Security Council by way of appeal to the Court.”¹⁴⁷³ However, the Court has previously differentiated between advisory opinions a sterner judicial review of the Council.¹⁴⁷⁴ Martenczuk acknowledges that there “might be disagreement over the effect of a judgment finding a Council resolution to be invalid”¹⁴⁷⁵ but finds that “justiciability could not act to prevent the judicial review of Security Council resolutions by the Court.”¹⁴⁷⁶ The political nature of a dispute is therefore no bar to the intervention of the Court. Indeed, an examination of the ICJ Statute shows that the “Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party”¹⁴⁷⁷ and that “[p]ending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council,”¹⁴⁷⁸ indicating that the Court is well within its jurisdiction to ensure that provisional measures are adopted where necessary. Moreover, the decision to dismiss the *Lockerbie* case – irrespective of its consideration after a further six years of sanctions¹⁴⁷⁹ on Libya – underscores Judge Shahabuddeen’s questions at the time, which remain valid to this very day:

Are there any limits to the Council’s powers of appreciation? . . . [I]s there any conceivable point beyond which a legal issue may properly arise as the competence of the Security Council to produce such overriding results? If there

¹⁴⁷² *Lockerbie* (n 1458), Dissenting Opinion of Judge El-Koshi, 210.

¹⁴⁷³ *Lockerbie* (n 1469), Dissenting opinion of President Schwebel, 53.

¹⁴⁷⁴ *Kosovo Advisory Opinion* (n 174) ¶33: “The advisory jurisdiction is not a form of judicial recourse for States but the means by which the General Assembly and the Security Council, as well as other organs of the United Nations and bodies specifically empowered to do so by the General Assembly in accordance with Article 96, paragraph 2, of the Charter, may obtain the Court’s opinion in order to assist them in their activities.”

¹⁴⁷⁵ Martenczuk (n 53) 528.

¹⁴⁷⁶ *ibid* 529.

¹⁴⁷⁷ Statute of the International Court of Justice (1945) art 41(1).

¹⁴⁷⁸ *ibid* art 41(2).

¹⁴⁷⁹ UNSC Res 1192 (1998) suspended the sanctions following the arrival of the two accused Pan Am flight bombers.

are any limits, what are those limits, and what body, other than the Security Council, is competent to say what those limits are?¹⁴⁸⁰

The Court can, however, assess the legality of enforcement action both within the Charter and against international norms and law. Martenczuk argues that “it does not appear . . . that it was the intention of the Charter to preclude the examination of the validity of decisions of the UN political organs, for instance when this validity is relevant to the decision of a dispute between two UN Member States.”¹⁴⁸¹ Particularly with reference to the *Lockerbie* case, he argues that “the lack of a power of judicial review was not even mentioned as a possible objection to the jurisdiction of the Court.”¹⁴⁸² Sanctions regimes, for example, can be measured against international human rights norms; the scope of military intervention can be analysed against international humanitarian law and the mandate issued by the Council, which would have avoided – or confirmed – allegations such as those made by Russia that NATO exceeded the powers granted to it under UNSC Res 1973; and the very extent of the powers that the Council has assumed can be assessed on an *ad hoc*, even retrospective, basis. In the event that an advisory opinion is sought by the Council from the Court on the legality of a decision that it has taken – such as the imposition of general and open-ended legislation upon States through Chapter VII resolutions – the jurisdiction *rationae materiae* of the Court is clear and the motion itself would augment the faith of the wider UN and international community in the volition of the Council to increase its transparency and accountability efforts.¹⁴⁸³

Even if – due to the inevitable delay that a referral to the ICJ would take and which would be incompatible with the urgency that is frequently encompassed by a threat to the peace and the need for a response – an advisory opinion is sought *after* the adoption of a Chapter VII resolution, the advisory opinion would serve multiple functions. Primarily, referral to the Court may partially eliminate the necessity for reform of the Council’s composition, as many of the sentiments of injustice and exploitation by P5 Members of their positions on the Council would

¹⁴⁸⁰ *Lockerbie* (n 1458), Judge Shahabuddeen’s Separate Opinion, 142.

¹⁴⁸¹ Martenczuk (n 53) 526-7.

¹⁴⁸² *ibid* 527. See, also, Vera Gowlland-Debbas, ‘The Relationship Between the International Court of Justice and the Security Council in the Light of the *Lockerbie* case’ (1994) 88(4) AJIL 646 where “[t]he Court did not ground the dismissal on the absence of a jurisdictional basis.”

¹⁴⁸³ The Court may base its decisions on an interpretation of the Charter as well as general principles and customary international law.

be undermined by the validity of judicial review.¹⁴⁸⁴ Moreover, as a focused, reasoned and legal opinion, the Council can make use of the Court's advisory judgment as precedent in its future decision-making process on both the same threat and specifically analogous threats and, in the same way that it refers to previous resolutions and UN documents in its preamble, can refer to the advisory opinion in both its discussions¹⁴⁸⁵ and in subsequent resolutions. For the Council to seek an advisory opinion from the ICJ for a situation and later referred to by the Council's within the framework of its desire to 'remain seized of the situation'¹⁴⁸⁶ would be a marked step towards accountability for the Council. This would allow for so-called "course-correction" in the response to – but not the identification of – a threat to the peace.

More fundamentally, the reasoning behind the outcome of the advisory opinion can be used to better shape the response of the Council in its general decision-making process. Frequent recourse to the ICJ would result in recommendations for general best practice, legitimacy of the scope of powers of the Council¹⁴⁸⁷ and increased authority to the Council. From such advisory opinions, the Council could confirm or seek to modify its behaviour and enforcement action: agreement by the Court of a Council response would free the Council from the burden of justification of its actions and allegations of ulterior motives; similarly, a statement by the Court that the Council has exceeded its mandate of powers would set the threshold beyond which the Council would be trespassing. This is particularly important in cases where the Council takes new action, such as its foray into generic legislation; were the Council to have submitted UNSC Res 1373 for analysis, for example, subsequent disagreement with the legality of the contents of the resolution would have been moot, as the ICJ would have pronounced its legal opinion. Subsequent resolutions such as 1540 and 2178 which build upon the model of UNSC Res 1373 would have unequivocally been either valid or *ultra vires* in their foundation. Such decisions on *ultra vires* action can also be included in the ICJ advisory opinions; in this way, the ICJ could

¹⁴⁸⁴ This may, of course, be hindered by the fact that the P5 States always have judges on the Court, but would at the very least demonstrate a willingness on the part of the Council to request legal advice from a valid, legitimate source.

¹⁴⁸⁵ Verbatim records would be the ideal place to search for reference to the Court in deliberations and negotiations on the Council.

¹⁴⁸⁶ This phrase concludes the vast majority of resolutions dealing with ongoing situations and paves the way for future resolutions or decisions on a matter. To incorporate the ICJ advisory opinion as a source of input into the decision-making process going forward would allow the Council a wider yet more thorough perspective on a situation.

¹⁴⁸⁷ If the Court were to agree with the legality of Council action after having studied them in depth, despite protestations of Member States, this would add legitimacy to the actions of the Council.

pronounce on the scope of the Council's powers to respond to an international threat, whilst avoiding entering into any discussions on the determination of the threat itself.

Nonetheless, this has not been the case and the Council has made no efforts to refer to the Court any significant questions of either Charter interpretation or substantive matters for judicial review despite intensive calls as recently as 2009 by members of the Non-Aligned Movement.¹⁴⁸⁸ Whilst in recent years, the Council has “emphasized the key role of the [ICJ] . . . in adjudicating disputes among States and the value of its work and call[ed] upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute,”¹⁴⁸⁹ the Council has not made any attempts to make use of its powers to seek advisory opinions. This, despite the fact that advisory opinions were recognised as a means to enhance international peace and security that have been successfully resorted to in the past and to promote the rule of law by the Council.¹⁴⁹⁰

It would appear, therefore, that the Council has no intention to refer any element of the legality of its decision-making process – even *ex post facto* – to the ICJ for any form of judicial review. As a result, although the Council is not *legibus solutus*, at least from the perspective of the ICJ there is neither a willingness from the Court to rule on the legality of the political decisions of the Council, nor is there any volition from the Council as an organ to request legal clarification on the extent of its Charter powers, the legality of the ramifications of its political decisions or any other aspect of the decision-making process.

XI.3.2 *The General Assembly*

If the Court is either unwilling or unable to rule on the legality of the Council's decision-making process, then one may also turn to the Assembly for a form of review. Charter article 10 grants

¹⁴⁸⁸ UNGA ‘Letter dated 24 July 2009 from the Permanent Representative of Egypt to the United Nations addressed to the Secretary-General’ (14 September 2009) UN Doc A/63/965-S/2009/514, Annex ¶18.9: “[urging] the Security Council to make greater use of the ICJ, the principal judicial organ of the UN, as a source of advisory opinions and interpretation of relevant norms of international law, and on controversial issues, *further urge* the Council to use the ICJ as a source of interpreting relevant international law, and *also urge* the Council to consider its decisions be reviewed by the ICJ, *bearing in mind* the need to ensure their adherence to the UN Charter, and international law.”

¹⁴⁸⁹ UNSC Presidential Statement 11 (2010) UN Doc S/PRST/2010/11, ¶2.

¹⁴⁹⁰ South Africa, UNSC Verbatim Record (29 June 2010) UN Doc S/PV.6347 (Resumption 1), 16: “A . . . possible role that the Security Council can play in the promotion of the rule of law through the use of the International Court of Justice is through regular recourse to advisory opinions from the Court . . . [T]he General Assembly has not been shy about requesting advisory opinions, and we encourage the Security Council to follow suit when faced with questions of legal complexity. In this regard, we remind the Council of the important consequences of its decision to request an advisory opinion from the International Court of Justice, which resulted in the now famous 1971 Namibia opinion.”

the most expansive powers to the Assembly in its review of the “powers and functions”¹⁴⁹¹ of the Council, allowing it to discuss both and make “recommendations to . . . the Security Council . . . on any such question or matters,”¹⁴⁹² notwithstanding Charter Article 12.¹⁴⁹³ In essence, the Assembly may discuss the scope, content and function of the Council’s Charter powers, provided this does not interfere with a dispute or situation that the Council is addressing; it may also recommend for them to alter or curb its behaviour based on Assembly discussions. The Assembly has made use of or hinted at this privilege in over forty resolutions since 1990¹⁴⁹⁴ and – promisingly – has discussed the scope of reform of Council working methods,¹⁴⁹⁵ reflecting the assertion that

¹⁴⁹¹ UN Charter (1945) art 10.

¹⁴⁹² *ibid.*

¹⁴⁹³ “1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests. 2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.”

¹⁴⁹⁴ UNGA Res 47/120B (20 September 1993) UN Doc A/RES/47/120B; UNGA Res 48/25 (10 December 1993) UN Doc A/RES/48/25; UNGA Res 48/42 (14 March 1992) UN Doc A/RES/48/42; UNGA Res 48/264 (17 August 1994) UN Doc A/RES/48/264; UNGA Res 49/31 (30 January 1995) UN Doc A/RES/49/31; UNGA Res 49/57 (17 February 1995) UN Doc A/RES/49/57; UNGA Res 50/6 (9 November 1995) UN Doc A/RES/50/6; UNGA Res 50/30 (22 December 1995) UN Doc A/RES/50/30; UNGA Res 50/151 (9 February 1996) UN Doc A/RES/51/151; UNGA Res 51/193 (11 March 1996) UN Doc A/RES/51/193; UNGA Res 51/208 (16 January 1997) UN Doc A/RES/51/208; UNGA Res 51/55 (9 January 1997) UN Doc A/RES/51/55; UNGA Res 52/20 (9 January 2001) UN Doc A/RES/52/20; UNGA Res 52/162 (15 January 1998) UN Doc A/RES/52/162; UNGA Res 53/71 (4 January 1999) UN Doc A/RES/53/71; UNGA Res 53/91 (29 January 1999) UN Doc A/RES/53/91; UNGA Res 53/107 (20 January 1999) UN Doc A/RES/53/107; UNGA Res 55/2 (18 September 2000) UN Doc A/RES/55/2; UNGA Res 56/87 (31 January 2002) UN Doc A/RES/56/87; UNGA Res 57/25 (3 February 2003) UN Doc A/RES/57/25; UNGA Res 57/337 (18 July 2003) UN Doc A/RES/57/337; UNGA Res 58/80 (8 January 2004) UN Doc A/RES/58/80; UNGA Res 58/187 (22 March 2004) UN Doc A/RES/58/187; UNGA Res 59/45 (16 December 2004) UN Doc A/RES/59/45; UNGA Res 59/213 (3 March 2005) UN Doc A/RES/59/213; UNGA Res 59/313 (21 September 2005) UN Doc A/RES/59/313; UNGA Res 59/314 (26 October 2005) UN Doc A/RES/59/314; UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1; UNGA Res 60/286 (9 October 2006) UN Doc A/RES/60/286; UNGA Res 61/296 (5 October 2007) UN Doc A/RES/61/296; UNGA Res 62/159 (11 March 2008) UN Doc A/RES/62/159; UNGA Res 62/275 (7 October 2008) UN Doc A/RES/62/275; UNGA Res 63/114 (26 February 2009) UN Doc A/RES/63/114; UNGA Res 63/159 (4 February 2009) UN Doc A/RES/63/159; UNGA Res 63/185 (3 March 2009) UN Doc A/RES/63/185; UNGA Res 63/304 (11 August 2009) UN Doc A/RES/63/304; UNGA Res 63/310 (7 October 2009) UN Doc A/RES/63/310; UNGA Res 64/168 (22 January 2010) UN Doc A/RES/64/168; UNGA Res 65/221 (5 April 2011) UN Doc A/RES/65/221; UNGA Res 66/171 (30 March 2012) UN Doc A/RES/66/171; UNGA Res 68/178 (28 January 2014) UN Doc A/RES/68/178; UNGA Res 68/307 (18 September 2014) UN Doc A/RES/68/307.

¹⁴⁹⁵ See eg, Saint Vincent and the Grenadines, UNSC Verbatim Record (22 April 2010) UN Doc S/PV.6300, 27; Qatar, *ibid.* (Resumption 1), 26; Egypt, UNSC Verbatim Record (30 November 2011) UN Doc S/PV.6672, 25.

[i]t is impossible to read Article 30 in such a way as to make it immune from the General Assembly's explicit authority to discuss and make recommendations on any matters within the scope of the Charter relating to the functions of any organ of the United Nations – including the Council – and to make recommendations to the Council on these matters . . . The Council may have the responsibility of formally adopting its rules of procedure, but the General Assembly is clearly empowered not only to discuss the Council's working methods but to make recommendations to the Council, whether or not those recommendations touch on and concern the rules of procedure.¹⁴⁹⁶

However, the Assembly has not requested action from the Council in recent years, nor has it requested action from the Council in accordance with Article 11 of the Charter, although it has “encourage[d] the Security Council to consider appropriate measures to ensure accountability in the Syrian Arab Republic”¹⁴⁹⁷ and felt it necessary to remind the Council of its “primary responsibility for the maintenance of international peace and security.”¹⁴⁹⁸ Yet despite all these previous references to article 11 of the Charter and the repeated reaffirmation of “the role and authority of the General Assembly, including on questions relating to international peace and security,”¹⁴⁹⁹ the Assembly has failed to make an impact on the working methods of the Council. Several efforts of States to support the powers of the Assembly under Article 10 have not borne fruit;¹⁵⁰⁰ the Council is still stagnant in its reform and remains inwards-looking for review and implementable guidance.

Whilst Article 10 permits the Assembly to make recommendations on the scope of the Council's powers – which it has not done – as well as matters of reform – which appear to have been ignored – it does not, however, issue the Assembly with the power to monitor or review the actual decisions of the Council. That is to say, the Assembly does not have a mandate that, even in the most liberal of interpretations, would permit it the power of review of Council actions or

¹⁴⁹⁶ Saint Vincent and the Grenadines, *ibid.*

¹⁴⁹⁷ UNGA Res 68/182 (30 January 2014) UN Doc A/RES/68/182, ¶10.

¹⁴⁹⁸ *ibid.* ¶12.

¹⁴⁹⁹ See eg UNGA Res 68/307 (18 September 2014) UN Doc A/RES/68/307, ¶6; UNGA Res 68/297 (18 September 2013) UN Doc A/RES/67/297, ¶4; UNGA Res 66/294 (8 October 2012) UN Doc A/RES/66/294, ¶4; UNGA Res 65/315 (11 October 2011) UN Doc A/RES/65/315.

¹⁵⁰⁰ eg Switzerland, UNSC Verbatim Record (22 April 2010) UN Doc S/PV.6300, 27, representing the Group of five small nations (S5) and stressing the outcome of the 2005 World Summit in line with Article 10; Jordan, UNSC Verbatim Record (30 November 2011) UN Doc S/PV.6672, 23, presenting a new draft Assembly resolution containing measures to enhance the implementation of UNSC Presidential Note S/2010/507 (2010) on the “right accorded to the General Assembly under Article 10.”

decisions. The Assembly can choose to make use of UNGA Res 377A (1950)¹⁵⁰¹ – also known as the *Uniting for Peace* resolution – to intervene in situations where “the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security”¹⁵⁰² but this lacks the potential to excel beyond a mere auxiliary measure to the Council. *Uniting for Peace* does not authorise the Assembly to review the Council itself, but rather to attempt to fill in where the Council has reached an impasse. The working methods, legality of Council action, scope of Council powers and other integral elements of Charter interpretation have been eliminated from discussion at the Assembly despite their potential for inclusion under Article 10. The Assembly is incapable of grasping fully the matters under examination at the Council due to a lack of cooperation between the two organs. The Council’s reports to the Assembly have been labelled as “a bland summary and listing of meetings and outcome documents”¹⁵⁰³ and it has been identified that “there is a need to ensure more informative annual Security Council reporting to the General Assembly.”¹⁵⁰⁴ Although it is known to the Council that “there is a need to increase transparency and coordination between the Security Council and the General Assembly,”¹⁵⁰⁵ little reform has taken materialised; “despite the current positive trends in the working methods of the Security Council, [it has] yet to live up to the expectations of the 2005 World Summit, mainly with respect to representativity and legitimacy, to efficiency and effectiveness, to transparency and accountability, and to the implementation of Council decisions.”¹⁵⁰⁶

XI.4 Conclusions

Despite an explicit mechanism for review of the Council by the ICJ under article 96, disappointingly, this has not been made use of by either organ for the purposes of subjecting Council behaviour to a standard of review. Under article 96, in combination with its mandate under article 10 of the Charter, it is also discouraging to note that the Assembly has not made use of its prerogative to request advisory opinions from the ICJ in order to review Council behaviour. De Wet’s summation in 2004 that the ICJ be used by means of an authorisation of “the

¹⁵⁰¹ UNGA Res 377(V) (3 November 1950) UN Doc A/RES/377(V).

¹⁵⁰² *ibid* ¶1.

¹⁵⁰³ India, UNSC Verbatim Record (22 April 2010) UN Doc S/PV.6300, 19.

¹⁵⁰⁴ India, UNSC Verbatim Record (29 October 2013) UN Doc S/PV.7052, 23.

¹⁵⁰⁵ Jordan, UNSC Verbatim Record (23 October 2014) UN Doc S/PV.7285, 18.

¹⁵⁰⁶ Rwanda, *ibid* 14.

Secretary-General to request advisory opinions that can guide the United Nations political organs in relation to the legality of their own actions . . .”¹⁵⁰⁷ was by her own admission unlikely, and she stated that the “advisory opinion procedure will probably remain under-utilised in future.”¹⁵⁰⁸ This has, disappointingly, been proven correct; the Assembly, despite having numerous tools at its discretion to review the Council or refer the process of decision-making to the ICJ, has failed to utilise them in the promotion of the rule of law.

In both cases, the Council has made no efforts to ensure that it subjects its decision-making process to the minimum legal standards expected from a rule of law. Such advisory opinions, although technically not legally binding, would be significantly influential in the evolution of Charter interpretation and defining the parameters of Council powers; moreover, given the primacy of the ICJ as the “principal judicial organ of the United Nations”, a legal opinion on matters of Council practice based on its history would be integral to any genuine efforts of reform - indeed, it is difficult to imagine how the Council might achieve this without such judicial input.

¹⁵⁰⁷ de Wet (n 34) 373.

¹⁵⁰⁸ *ibid.*

CHAPTER XII

THE CASE FOR A *RULE OF LAW TRIBUNAL*

XII.1 Introduction

The Council has acknowledged that the rule of law should apply internally, although it has not effected this adequately in the years since. As a result, there remains a long journey to be made for the Council and the outlook is bleak for full Council compliance in and of itself; it would appear that external stimuli or oversight is required to bring the Council in line with the components of the international rule of law. The Council has shown that it is hesitant or unwilling to make the required changes over the course of the quarter of a decade since the end of the Cold War and in components such as Accountability and Transparency it appears to have regressed rather than evolving.

Hitherto, in focusing on the decision-making process of the Council, this thesis has deliberately omitted detailed discussion of the repercussions of action taken by the Council on States and individuals at the domestic level, as it has centred entirely on the process rather than the outcome of decisions. Whilst I intend to briefly discuss these, I also intend to propose a new solution to the evidenced disregard for rule of law on the Council, by arguing the case for the creation of a bespoke subsidiary organ by the Council to exclusively judicially review the Council. Such an establishment can effect rapid change and immediately increase compliance with components such as transparency and accountability, but requires the involvement and engagement of the Council itself.

XII.2 Regional and individual State review

Both regional courts and individual State actions can, in some ways, play a vital role in providing a counter-balance to the real world application of decisions of the Council upon citizens of its Member States. By dealing with the outcomes and implementation of the resolutions, although the Council itself remains out of reach for review, regional courts can empower themselves – and the States over which they hold jurisdiction – to grant the right to interpret within the scope of other applicable international law and obligations the decisions of the Council. Moreover, it would appear that States may either individually or as a group take measures to shape the

decisions of the Council into effect with input from other obligations,¹⁵⁰⁹ or even to refuse compliance altogether in certain circumstances. States may find that a “Council decision infringing the applicable international law constitutes an internationally wrongful act by the UN [which] . . . can be invoked by any member as a breach of an obligation owed to the international community as a whole.”¹⁵¹⁰ Consequently, they may refuse to comply with the resolution. In this way, effectively, the Council’s decisions – although not the process – are reviewed.

XII.2.1 Regional Courts

The *Kadi* cases are prime examples for analysis of the interaction of the regional and domestic Court system with the resolutions of the Security Council.¹⁵¹¹ Over the course of four landmark cases – spanning almost a decade – the European Court of Justice tackled the dynamic between obligations of States as part of the European Community and their obligations to the UN Charter to carry out decisions of the Council. That is to say that, notwithstanding the legality or lack thereof upon which a Council resolution is adopted¹⁵¹² – which is not the remit of any domestic or regional court to enter into discussion over¹⁵¹³ – the implementation of measures mandated by the Council can and should be filtered through the lens of other State obligations such as the adherence to fundamental rights of their citizens.¹⁵¹⁴ That the Council orders compliance with a resolution under Articles 25 and 103 of the Charter no longer supersedes the obligations of States

¹⁵⁰⁹ See eg, UNSC ‘Letter dated 18 September 2006 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council’ (20 September 2006) UN Doc S/2006/750, Annex III, ¶6, where the Pakistan High Court of Sindh ruled in favour of Al-Rashid Trust in a petition against the freezing of its assets as a result of its “finding that the legislation under which the Government had acted, the United Nations (Security Council) Act 1948, required for its implementation a statutory notification (SRO) for each individual and entity subject to the sanctions”; and *ibid* ¶11, where “[i]n the Al-Qadi case, the State Council (Danistay) issued a judgement on 4 July 2006, cancelling the relevant sections of the Cabinet decision of 22 December 2001 that had frozen Al-Qadi’s assets in Turkey. The State Council based its decision on the fact that the information and documents of the United Nations Security Council which alleged that Al-Qadi was associated with Al-Qaida should have been (but were not) presented to the judiciary in Turkey to enable an evaluation of the materials”; *Nada* (n 855).

¹⁵¹⁰ *Simma and others* (n 363) 1786.

¹⁵¹¹ See also, eg *HM Treasury v Ahmed* [2010] UKSC 2; *Abdelrazik v Canada (Minister of Foreign Affairs)*, [2010] 1 FCR 267, 2009 FC 580 (Can LII).

¹⁵¹² *Kadi III* (n 854) ¶87: “Judicial review of the lawfulness of the contested regulation is not equivalent to review of the validity of the resolution which that regulation implements.”

¹⁵¹³ *ibid*: “Nor is such judicial review intended to substitute the political judgment of the Courts of the European Union for that of the competent international authorities.”

¹⁵¹⁴ *ibid*: “Its purpose is solely to ensure observance of the requirement that Security Council Resolutions are implemented within the European Union in a manner compatible with the fundamental principles of European Union law. More specifically, such review contributes to ensuring that a balance is struck between the requirements of international peace and security, on the one hand, and the protection of fundamental rights, on the other.”

to incorporate judicial review into their own practices that serve as manifestations of the will of the Council. In this way, Security Council resolutions are reduced from their quasi-sacrosanct enormity to measures comparable with other sources of international law.¹⁵¹⁵

There is now a precedent for the review of the implementation of Security Council resolutions and, although this does not touch upon the legitimacy, legality or scope of Council activity and decision-making, it does venture some way towards ensuring that individuals are not subjected to lengthy and illegal measures without judicial review. Elberling notes the “recent trend towards judicial review of Security Council measures by national and regional courts”¹⁵¹⁶, qualifying that “with regard to legislative resolutions . . . it will be the national implementation, not the Security Council resolution itself, that is the focus of judicial review.”¹⁵¹⁷

The final *Kadi* judgment came only a year ago¹⁵¹⁸ and it is yet to be seen whether other regional courts will adopt the same attitude towards the hierarchy of State obligations against the backdrop of the Charter and Council resolutions. Throughout the years, the *Kadi* judgements have had an impact on the domestic interpretation of the resolutions of the Council¹⁵¹⁹ and can go some way towards shifting attitudes even at the ICJ level.¹⁵²⁰ Nonetheless, the effect of *Kadi* is not a substitute for the effective adoption of rule of law elements by the Council; there are a great deal of issues that fall outside of the scope of jurisdiction adopted under *Kadi*, including the allegations of double-standards, the encroachment of the Council on the mandates of other organs and the equitable participation in the decision-making process. These are issues that the courts in regional or domestic systems have no place in pronouncing upon. However, in both principle and effect, it is noteworthy that a regional Court has assumed the responsibility of overturning the implications of a Council resolution, granting itself supremacy over the effects of the decision-making process of the Council – albeit in the ring-fenced arena of sanction measures of an adopted Chapter VII resolution.

¹⁵¹⁵ *ibid* ¶88: “[T]he General Court’s approach is consistent with European Union law, which requires respect for fundamental rights and the guarantee of independent and impartial judicial review, including review of European Union measures based on international law.”

¹⁵¹⁶ Elberling (n 3) 353.

¹⁵¹⁷ *ibid* 360.

¹⁵¹⁸ *Kadi III* (n 854).

¹⁵¹⁹ See eg *Hay v HM Treasury* [2009] EWHC 1677; *A, K, M, Q & G v HM Treasury* [2008] EWHC 869.

¹⁵²⁰ Statute of the International Court of Justice (1945) art 38(1) allows for the application to its interpretation of the law “international custom, as evidence of a general practice accepted as law” and “the general principles of law recognized by civilized nations”

XII.2.2 State disobedience

Numerous authors have also referred to State disobedience as a means of post-decision review for the Council; Elberling, for example, terms this a State's "right to last resort"¹⁵²¹ whereas Joyner posits that "UN members are not obligated to comply with the decisions of the Council one whit further than those decisions themselves comply with the provisions of the Charter."¹⁵²² Tzanakopoulos argues that such type of review can autopoetically impact on the Council; his argument that it is the "fear of disobedience (predominantly as non-implementation) or non-cooperation (when it can impose no obligation) that forces the Security Council to concede to demands for (some) transparency"¹⁵²³ supports an ongoing "pattern of reaction-protest-threat of disobedience or non-cooperation [that] allows the Member States to keep the Security Council in check."¹⁵²⁴ He acknowledges too that, whilst "[d]isobedience is in the first instance illegal, as it constitutes a breach of the obligation of [Member States] to comply with [Security Council] decisions (Article 25 [UN Charter]) . . . [t]he threat of massive disobedience – which has now found legal justification – is a potent tool for inducing compliance of a powerful organ with international law."¹⁵²⁵ Cogan concurs, arguing "that noncompliance – particularly operational noncompliance – is a necessary component of less capable legal systems, such as international law."¹⁵²⁶

Whilst scholarly support for State disobedience is widespread, and the act itself can counterbalance illegal and illegitimate Council decisions, it does so on an ad hoc, individual basis. Moreover, the threshold necessary for such State disobedience is set high. Such action would need to be taken only as a last resort and based on the clear illegality of a resolution, in accordance with the ICJ's interpretation, for "when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization."¹⁵²⁷ As a result, States must be compelled by a strong motive in order to cast doubt upon a resolution of the

¹⁵²¹ Elberling (n 3) 354.

¹⁵²² Joyner, 'Legal Hegemon' (n 51) 234, referring to *de Wet* (n 34) 377.

¹⁵²³ Tzanakopoulos (n 17) 387.

¹⁵²⁴ *ibid.*

¹⁵²⁵ Tzanakopoulos (n 11) 202.

¹⁵²⁶ Cogan, (n 3) 193. See, also Cogan, (n 3) 190, where Cogan defines operational noncompliance as situations where States opt "to take actions that reflect current or developing expectations of lawfulness or make existing law effective – that is to bridge the operational gaps in the international system"

¹⁵²⁷ *Certain Expenses* (n 1041) 168.

Council.¹⁵²⁸ Joyner sees one such scenario as the legislating by the Council and argues that “because of the procedural invalidity of the Security Council’s passage of Resolution 1540, the resolution itself is void of legal effect *ab initio*.”¹⁵²⁹

As a result, in reality, although the Council appears to have relied on the opinions of regional groups in a few resolutions that it has adopted¹⁵³⁰ or avoided,¹⁵³¹ instances of State disobedience are rare; the African Union’s response to the Lockerbie illustration is one such example.¹⁵³² Due to the short and uninformative nature of both the Council Presidential Statement¹⁵³³ and accompanying verbatim records,¹⁵³⁴ it is difficult to discern to what extent this OAU resolution played a part in the deliberations to end sanctions on Libya four months after its adoption but during the discussions that led to the adoption of UNSC Res 1973, the praise heaped on the “Arab League, which, to its great credit, instead of acting on its own went to the

¹⁵²⁸ Erika de Wet and André Nollkaemper, ‘Review of Security Council Decisions by National Courts’ in 45 German Ybk Intl L 166, 189: States are only obliged “to carry out those decisions that were adopted in accordance with the Charter *i.e.* in accordance with its purposes and principles and the norms of *jus cogens*,”

¹⁵²⁹ Joyner, *International Law* (n 51) 197. He goes even further in ‘Legal Hegemon’ (n 51) 257 to propose the creation of an international bill of rights for States, which would “form an effective legal curtailment of the authority of the Security Council to restrict this fundamental right and would serve to protect developing countries in their exercise of this right” (ibid).¹⁵²⁹ I would argue, however, that any international bill of rights would need to extend beyond the textual enshrinement of rules or laws to the practicability and enforcement mechanisms that might govern these rules – what might be referred to as “institution building” or “community-capacity building” at the national level. See, eg OHCHR ‘Monitoring legal systems’ (Geneva/London 2006) UN Doc HR/PUB/06/3, 1 where “[d]eveloping a justice system that protects human rights and promotes the rule of law is a critical aspect of securing peace and preventing future conflict”; UNSC ‘Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies’ (12 October 2011) UN Doc S/2011/634, ¶16 where the Secretary-General noted that “efforts to build the rule of law require the support and involvement of national stakeholders to ensure the authority and legitimacy required for rule of law initiatives to achieve results [and that t]he involvement of national actors in coordinating and developing rule of law strategies should be further encouraged.”

¹⁵³⁰ US, UNSC Verbatim Record (17 March 2011) UN Doc S/PV.6498, 5 relied on the fact that “[o]n March 12, the League of Arab States called on the Security Council to establish a no-fly zone and to take other measures to protect civilians”; China, ibid 9 “attache[d] great importance to the relevant position by the 22-member Arab League on the establishment of a no-fly zone over Libya. We also attach great importance to the position of African countries and the African Union.”

¹⁵³¹ China, UNSC Verbatim Record (12 January 2007) UN Doc S/PV.5619, 2 (2007), in exercising its veto on a resolution concerning Myanmar, relied on the fact that “[j]ust yesterday, on 11 January 2007, the ASEAN Ministers meeting in the Philippines reaffirmed that Myanmar is no threat to international peace and security.”

¹⁵³² Organization for African Unity (Council of Ministers) ‘The Crisis between the Great Socialist People’s Libyan Arab Jamahiriya and the United States of America and the United Kingdom’ (OAU Addis Ababa 1998) AHG/Dec.127 (XXXIV), ¶2-3. In response to Council action over the *Lockerbie* incident, the Organisation of African Unity announced its decision “not to comply any longer with Security Council Resolutions 748 (1992) and 883 (1993) on sanctions, with effect from September 1998 . . . [and] DECIDE[d] on moral and religious grounds and with immediate effect that the OAU and its members will not comply from now on with the sanctions imposed against Libya related to religious obligations, providing humanitarian emergencies or fulfilling OAU statutory obligations”.

¹⁵³³ UNSC Presidential Statement 10 (1999) UN Doc S/PRST/1999/10.

¹⁵³⁴ UNSC Verbatim Record (8 April 1999) UN Doc S/PV.3992.

Council to call for it to discharge the functions assigned to it by the Charter,”¹⁵³⁵ suggests an acknowledgement that States are empowered to act in the absence of the Security Council where required.

Furthermore, aside from localised results in isolated incidents, State disobedience itself appears to have made little difference in the long term. Despite the remarks of Tzanakopoulos et al on the potency of State disobedience and its potential as a catalyst for change on the Council, the legislating of the Council has continued, most recently with UNSC Res 2178,¹⁵³⁶ the structure of the Council remains unchanged, the controversial veto remains active and little appears to have been achieved in the way of Council reform within the framework of a rule of law. Such an approach also risks being ineffective in all but a handful of cases, due to the lengthy and time-consuming nature of a states examining individual decisions and resolutions on a case-by-case basis. Finally, State disobedience requires the existence of a resolution in order to be effective; in the absence of a resolution – where the Council has chosen *not* to act, like in Syria – State disobedience cannot occur.

XII.3 The creation of a bespoke judicial mechanism

Such State disobedience, as is the case with regional mechanisms, can be a useful tool in attempts to rein in the metaphorical “wild horses” of Council overextension or *ultra vires* action, but in no part does it attempt to impose a framework to govern the Council or attempt to establish other mechanisms to bring the Council in line with the rule of law in its decision-making process. In short, current mechanisms are “inadequate in terms of ensuring full compliance of the Council and the UN with their international legal obligations.”¹⁵³⁷ The veto cannot serve as an effective curb to Council powers as it was originally intended,¹⁵³⁸ State disobedience can only effect any change rarely and after the decision-making process and the existing review mechanisms for sanctions are drastically minimal in scope and unable to make

¹⁵³⁵ Colombia, UNSC Verbatim Record (17 March 2011) UN Doc S/PV.6498, 7-8.

¹⁵³⁶ UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178 continues the precedent of UNSC Res 1373 (2001) and UNSCR Res 1540 (2004) before it.

¹⁵³⁷ Tzanakopoulos (n 11) 203.

¹⁵³⁸ See, eg Simma and others (n 363) 1774: “the problem is, first, that the guardian of legality would not be the Security Council as a whole, but in fact each veto power for itself. Scound and most importantly, the veto is mainly exercised on political grounds. It need not (and in most cases does not) comprise any legal scrutiny.”

fully enforceable recommendations.¹⁵³⁹ Drastic and novel steps must be taken in bringing the Council in line with the rule of law, as it has repeatedly acknowledged that it should.

As a result, the establishment of an independent judicial mechanism by the Council to oversee the Council's compliance with the various components of the rule of law should be considered. This *Rule of Law Tribunal* would be mandated first to design a rule of law framework – based on the sources I have identified and discussed – to which the Council should comply, following which it would examine and review the working methods, composition, decisions, omissions and other actions of the Council relevant to such a rule of law framework. It could pronounce on the absence of transparency in the Council decision-making process and propose solutions to reduce opacity within the Council, thereby paving the way for accountability; it would also review the equitable distribution of the decision-making process, perhaps by recommending the expansion of Council members to render it more proportionally representative; and it may also provide an 'Amparo'¹⁵⁴⁰ mechanism for States, wherein States may present any violations they may see of the UN Charter in an extension of State disobedience.¹⁵⁴¹

The establishment of such a subsidiary organ to the Council needs little discussion with respect to legality: the Charter explicitly grants the Council full scope to “establish such subsidiary organs as it deems necessary for the performance of its functions”¹⁵⁴² and the Council has historically relied upon this provision numerous times in the establishment of counter-terrorism committees,¹⁵⁴³ sanctions committees,¹⁵⁴⁴ standing committees¹⁵⁴⁵ and peacekeeping operations. The Council has also established an advisory subsidiary body – the Peacebuilding Commission¹⁵⁴⁶ – in part under article 29¹⁵⁴⁷ “[t]o provide recommendations and information to

¹⁵³⁹ The Office of the Ombudsperson has repeatedly criticised the process and structure of its own establishment.

¹⁵⁴⁰ Constitutional complaint or *verfassungsrecht* provides direct access to a Constitutional Court by citizens and allows individuals to argue for any violations of the State's constitution before a court.

¹⁵⁴¹ My proposed equivalent would permit States to present their complaints before the *Rule of Law Tribunal* either as an individual State or as a group of States, in an effort to provide a legal interpretation and analysis of the Charter and its provision by a competent and authoritative body that has direct access to, if not power over, the Council.

¹⁵⁴² UN Charter (1945) art 29.

¹⁵⁴³ Committee established pursuant to resolution 1373 (2001) concerning Counter-Terrorism; Committee established pursuant to resolution 1540 (2004).

¹⁵⁴⁴ eg Somalia and Eritrea (2002, 2009); Al-Qaeda (1999, 2011); the Taliban (2011); Iraq (2003); Liberia (2003); Democratic Republic of Congo (2003); Cote d'Ivoire (2004); Sudan (2005); Lebanon (2005); Democratic People's Republic of Korea (2006); Iran (2006); Libya (2011); and Guinea-Bissau (2012).

¹⁵⁴⁵ eg Committee of Experts (1946); the Committee on Admission of New Member States (1946); and the Committee on Meetings away from UN Headquarters (1972).

¹⁵⁴⁶ The Peacebuilding Commission (PBC) is an intergovernmental advisory body that supports peace efforts in countries emerging from conflict.

improve the coordination of all relevant actors within and outside the United Nations, to develop best practices”¹⁵⁴⁸; a *Rule of Law Tribunal* would therefore build on existing and previous mechanisms for coordination and best practice.

Some may argue that the establishment of a judicial body by the Council would lack legitimacy and would play a biased role in a wider Council agenda; such arguments have been discussed at great length in relation to the international criminal tribunals for the Former Yugoslavia and Rwanda.¹⁵⁴⁹ With the establishment of an independent judiciary composed of independent judges, allegations of bias could soon be disproved; moreover, with frequent referrals to and implementation of the recommendations of such a subsidiary organ by the Council, the *Rule of Law Tribunal* would rapidly gain the legitimacy required to be an effective tool in the decision-making process.¹⁵⁵⁰ Nonetheless, any legitimacy would rapidly be undermined were the Council to choose not to implement the recommendations and decisions of the Tribunal.

The difficulty would therefore not be so much legitimacy and legality, but rather the dynamic between the Council and the *Rule of Law Tribunal*. It may be that the Council has demonstrated the rhetoric necessary to create a shift in its internal attitude to the rule of law, albeit without following this with effective actions. However, the creation of a Tribunal itself would be a step in the direction of transparency, accountability and respect for the rule of law. It would be equally important to make use of the judicial decisions of the *Rule of Law Tribunal*. In light of the reticence towards reform shown by the P5 members of the Council, it is unlikely that subsidiary organ would exercise any considerable power or mandatory jurisdiction over the Council itself; as a result, the creation of the *Tribunal* would be highly likely to be in an advisory capacity. Whilst this may appear similar to the dynamic with the ICJ, it would have an added benefit over any other judiciary advisory bodies in being specialised in the work of the Council. This would allow the *Tribunal* to exponentially consolidate its own subject knowledge and

¹⁵⁴⁷ UNSC Res 1645 (20 December 2005) UN Doc S/RES/1645, ¶1: “acting concurrently with the General Assembly, in accordance with Articles 7, 22 and 29 of the Charter of the United Nations.”

¹⁵⁴⁸ *ibid* ¶2 (c).

¹⁵⁴⁹ For further discussion on the legitimacy of the ICTY, see eg Franck (n 472); José E Alvarez, ‘The Quest for Legitimacy: Review Essay of Thomas Franck’s The Power of Legitimacy Among Nations’, (1999) 24 N Y U J Intl L & Pol 199; Caron (n 796); Martti Koskeniemi, ‘The Police in the Temple: Order, Justice and the UN: A Dialectical View’ (1995) 6 EJIL 325

¹⁵⁵⁰ See, M Cherif Bassioni, ‘The ICC – *Quo Vadis?*’ (2006) 4(3) JICJ 421, 424, where “it was not the *Tadic* case that gave credibility and legitimacy to the ICTY but the flow of cases that followed.”

practice based on its own precedent as the years progressed; it would also allow it to accommodate the political element of the Council's work as a hybrid politico-legal entity. A prime example of this would be the balance between practicality on the one hand and equitable participation in the decision-making process on the other, as alluded to in *Chapter X.2*. The Tribunal would be able to examine the facts and propose amendments accommodating the requirement for both.

As a bespoke solution, the *Tribunal* could operate in perpetuity providing swift and detailed judicial review of the Council both in situations of which the Council is seized and ongoing reform of the Council's working methods. The Council would then incorporate the findings, recommendations and decisions of the *Tribunal* into its working methods, its decision-making process and its composition. The recommendations themselves would carry more authority than simply the protestations of a State or group of States and would be legally justified based upon Charter law, international law and the obligations of the Council to respect agreed components of the rule of law. Martenczuk, referring to the ICJ, saw that "advisory opinions, which also do not have binding force on the political organs of the United Nations . . . have generally been respected due to the judicial authority and impartiality of the Court."¹⁵⁵¹ There is no reason to doubt that such respect would also be attached to the decisions and recommendations of the *Tribunal*. As lamented by many States, the Rules of Procedure for the Council remain to this day provisional; amending them, therefore, would provide little difficulty. The only remaining barrier to the establishment of such a subsidiary organ, therefore, appears to be the Council's own volition. As the Costa Rican representative lamented, "much progress can be made by improving the working methods of the Security Council. All that is missing is the political will to do so."¹⁵⁵²

¹⁵⁵¹ Martenczuk (n 53) 528.

¹⁵⁵² Costa Rica, UNSC Verbatim Record (26 November 2012) UN Doc S/PV.6870 (Resumption 1), 5.

CHAPTER XIII
THESIS CONCLUSIONS

The Security Council is entrusted with primary responsibility for the maintenance of peace and security; this thesis has argued that in fulfilling this responsibility, it should comply with standards of the rule of law that have been delineated and examined throughout the preceding Chapters. This thesis has therefore identified the components of the rule of law relevant to the Security Council and evidenced using primary material such as resolutions and verbatim records both the intentions and resulting decisions that have emerged from the Council. It has then examined the extent to which it has complied with these rule of law components in its decision-making process, which includes its composition. As a result, it is clear that – whilst Council practice since 1990 appears to have evolved in some cases – on many fronts it has stagnated or deteriorated and there has been little serious volition for transition in the quarter of a decade that have passed since the fall of Communism that signalled the seismic shift in its political composition and renewed vigour of passing resolutions.

This thesis therefore concludes that there are no components of the rule of law to which Council action currently fully complies. The Council has undoubtedly improved in its human rights considerations, moving from a sanctions regime that crippled entire nations in the early 1990's to more targeted sanctions and measures that, as a result of being more focused, produce less collateral effects on the populations of target States. It has also made efforts to establish committees to monitor its sanctions regimes and has created and established an ombudsman to monitor the enforcement of anti-terrorism measures taken under Chapter VII. However, more action is needed to incorporate human rights considerations into resolutions dealing with military intervention and peacekeeping. Whilst advances have been made on the front of compliance with human rights standards, the Council remains an exclusive club primarily governed by the national interests of the P5 members. It would appear that seizure of a matter by the Council remains arbitrary and that even once seized, effective Council action is taken only where a decision or resolution does not run contrary to the national interests of one of the P5 Members: responses to the continuing situations in Israel and Syria are muted despite their key strategic value to international peace and importance to redressing the balance of international peace in the Middle East region; meanwhile, during the same time period, sanctions and the use of “all

necessary means” are authorised against States that pose threats to international peace and are not close political or economic allies of the P5, such as South Sudan,¹⁵⁵³ the Congo¹⁵⁵⁴ and Libya.¹⁵⁵⁵

At times, these interests are in direct conflict: the situation in Syria is permissive, if not supportive, of the spread of international terrorist groups such as the Islamic State and, despite resolutions condemning and even authorising the military intervention against international terrorist groups such as the Taliban and Al-Qaeda¹⁵⁵⁶ as well as general resolutions condemning international terrorism,¹⁵⁵⁷ no action under Chapter VII – either under article 41 or 42 – has been taken thusfar against State or non-State actors in Syria. At other times, the standards imposed by the Council appear malleable to the country in question: whilst India is engaged in talks to sign a civil nuclear pact by 2015¹⁵⁵⁸ and Pakistan continue to test nuclear warheads capable of mid-range payload delivery, Iran and the DPRK have been subject to numerous rounds of sanctions by the Council for civilian and military nuclear aspirations.

The Council’s record on transparency, too, is in critical need of reform, with increasing use being made of the private meetings in contravention of the working methods it has adopted itself. Moreover, the transparency afforded by public promulgation of information is superficial, since minutes or verbatim records of private meetings are not publicly disseminated. The decision-making process itself remains obscure, with the Council relying increasingly on closed-door meetings after a failed period of attempted transparency; where invitations to meetings are distributed, at times these are delayed, thereby eliminating the opportunity for non-Council Member States to attend and participate. Allegations of cliques or “mini-Councils” are also concerning from the perspective of transparency, where some Member States have expressed their discontent at the *fait accompli* attitude taken on the Council. Whereas during the Cold War years, the P5 would explain their vote and the reasoning behind any use of the veto in the

¹⁵⁵³ UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996.

¹⁵⁵⁴ UNSC Res 1925 (28 May 2010) UN Doc S/RES/1925; UNSC Res 1991 (28 June 2011) UN Doc S/RES/1991.

¹⁵⁵⁵ UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

¹⁵⁵⁶ UNSC Res 1386 (20 December 2001) UN Doc S/RES/1386 led to the expansion of ISAF’s mandate under UNSC Res 1510 (13 October 2003) UN S/RES/1510. This enabled NATO to expand outside of Kabul to the remainder of Afghanistan once they had assumed control of the mission in August 2003.

¹⁵⁵⁷ eg UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178; UNSC Res 2170 (15 August 2014) UN Doc S/RES/2170; UNSC Res 1624 (14 September 2005) UN Doc S/RES/1624.

¹⁵⁵⁸ See eg ‘India, EU to sign civil nuclear pact by 2015’ *CNN-IBN* (16 November 2014) <<http://ibnlive.in.com/news/india-eu-to-sign-civil-nuclear-pact-by-2015/513090-2.html>> accessed 16 December 2014.

interests of transparency and mutual understanding, recent verbatim records display an increased recourse to opacity in statements of P5 Member State representatives. Despite non-P5 Member State calls for more openness and their warnings of the derogatory effect such Council behaviour has on the legitimacy of the organ, as highlighted in Chapter IV, the use of closed meetings is on the rise.

This trend is continued in the Council's attitude towards legal certainty, which remains lacking in the decisions of the Council. There is a renewed effort by the Council to use the gateway Article 39 determination in its Chapter VII resolutions, even at times referring explicitly to the Article of Chapter VII under which action is taken;¹⁵⁵⁹ yet, whilst at times there does appear a pattern of determinations under Article 39 of the Charter, the Council is not consistent in this practice, which in turn undermines the nature of its work, calls into question its integrity and raises questions of arbitrary behaviour. Moreover, resolutions are not always clear in establishing the precise nature of the threat, nor indeed how the measures taken seek to impart international peace to the situation the Council is tackling in a resolution; whilst the Council clearly makes efforts to establish the grounds for the use of Chapter VII resolutions under Chapter 39, it has increasingly grown lax in specifying the legal basis for its action or the precise threat to which it is responding. This type of action, more than simply leading to accusations that the Council is misusing its prerogative to invoke Chapter VII powers, is in fact more serious: Chapter VII, as argued in *Chapter V.3*, may only be invoked once a determination of a threat to the peace is made. As such, the use of Article 41 and 42 of the Charter by the Council without such determination is an *ultra vires* action on the part of the Charter – a clear contravention of the rule of law.

This is even more serious given the lack of equality before the law, as highlighted by the juxtaposition of the Iranian and Japanese nuclear situations. Indeed, coupled with the lack of legal certainty, the absence of equality before the law in situations that the Council deals with is even more damning for its decision-making process. The selective nature with which it addresses situations and its varied responses to analogous threats to the international peace cannot be overcome by simply citing the need for ad hoc responses to different situations. The Council should ensure that the same standard is applied not only to similar situations and threats, but also

¹⁵⁵⁹ eg UNSC Res 2141 (5 March 2014) UN Doc S/RES/2141, which explicitly states that the Council is “[a]cting under Article 41 of Chapter VII of the Charter of the United Nations” [emphasis in original].

that it holds itself accountable to the same standard. Without ensuring that all Member States are treated equally under international law and by the Council itself, the organ risks creating a hierarchy where some States are above the law, which is a grave violation of this component of the rule of law as well as contravening standards of predictability.

The Council has also shown that it has encroached upon the jurisdiction and powers of sibling UN organs, as well as over-reaching in its own jurisdiction by imposing legislative obligations upon UN Member States. The frequently self-serving use of the veto by some P5 members, coupled with the decision to abuse the powers of Chapter VII and to foray into the judicial or norm-setting roles of the ICJ or Assembly are blatant displays of a disregard for the separation of powers and indifference to the *ultra vires* nature of certain actions that other Member States have warned against. Rather than working in unison with other organs as the Council was accustomed to doing in the early years of the UN, the Council has, over the past 20 years, grown bolder in the exploitation of its *kompetenz kompetenz*, aware of the absence of a steering committee or overarching governing body to reign in its actions. Indeed, the ICTY, the ICJ and the ECJ have all rejected the opportunity to give legal opinions on the actions of the Council, preferring to address the specific issue they are tasked with rather than offer any general rules or guidance.

Finally, the most damaging component of the rule of law for the integrity and legitimacy of the Council is that of equitable participation, which for decades has been paid lip service without a single shred of reform. Notwithstanding the *de facto* reform of the Russian Federation filling the seat of the former USSR, which was a move of necessity, the Council is a snapshot of an antiquated political landscape that pre-dates not only the fall of the second superpower, but also the rise of numerous other significant nations on the international plane. The current composition of the Council all but ignores the post-colonialist rise of BRICS nations, the global South and the African continent, which at 54 recognised nations forms over a quarter of the entire UN membership. Nations and regions that rightfully should be represented on the Council as permanent members – with or without the veto – have been shunned in favour of more talks that result in the perpetual inclusion of reform on the agenda of the Assembly and no action taken. In true Council fashion, protection of national interests has become paramount even with respect to any equitable, democratic element of its composition.

Whilst State actions and regional mechanisms in the aftermath of a resolution can in certain cases counter-balance any violations or omissions of the Council with respect to the rights of the individual, there is little that can be done at the subordinate level.¹⁵⁶⁰ Moreover, this thesis has focused on how to ensure that the Council complies with the rule of law in its decision-making process, rather than how the Council's decisions themselves comply with the international rule of law. Accordingly, any change needs to be effected internally, at the deliberative stages of a resolution and prior to this in the composition of the Council itself. The Council has not succeeded at effectively monitoring and curbing its own powers, processes and accessibility and therefore an independent mechanism needs to be established to monitor and advise it. In light of the construction of the Charter, the exclusive jurisdictions granted to the Council and the requirement for at least the acquiescence of the P5 Council Members to any changes, initiatives to reform the Council have thus far failed. By removing the review mechanism from the Council itself and granting powers of recommendation and review to a bespoke subsidiary judicial organ, exclusively mandated to deal with the decisions and decision-making process of the Council, a large part of the political considerations that have typically plagued the Council's efficiency, barred the organ from taking action, hindered its maintenance of the international peace and stalled any efforts towards equitable participation would be removed.

This *Rule of Law Tribunal* mechanism recognises and incorporates the existing realities of the Council and acknowledges the antiquated founding document of the UN that no longer adequately reflects the political and economic situations that led to the establishment of the Council. However, it also provides a way to reform the Council's decision-making process without grand changes to the UN Charter.¹⁵⁶¹ If the Charter were to be rewritten today, it would not be difficult to imagine a drastically different Council with somewhat dissimilar permanent members to the current P5. In order to remain relevant to the world today and in the absence of an entire overhaul of the Charter and the United Nations system, the creation of an independent judiciary that oversees the decision-making process of the Council is the most effective and

¹⁵⁶⁰ Whilst the international plane is horizontal, I use the term "subordinate" here to refer to the subjects of binding resolutions – States – and those subsequently lower in the vertical domestic hierarchy – individuals.

¹⁵⁶¹ The Council has previously taken unofficial steps in Council composition to avoid the redrafting or amendment of the UN Charter: in 1991, Russia assumed the USSR seat on the Council with no objections and no official vote, unlike the People's Republic of China in 1971. Neither amended the UN Charter, yet the Council functions based on the same principles as the original Charter despite these substitutions. The Charter also makes reference to the requirement for a positive vote from all P5 Members for a resolution to pass; in practice, an abstention has been accepted.

feasible option for the Council to comply with the principles of international law and the components of the rule of law.

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