

**Law-Making by the Security Council in Areas of Counter-Terrorism
And Non-Proliferation of Weapons of Mass-Destruction**

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Abstract

The purpose of this thesis is to determine whether the Security Council has opened a new avenue for law-making at the international level by adopting resolutions under Chapter VII of the UN Charter which create new norms of international law or modify international norms already in force (the normative resolutions). The normative resolutions analyzed in this study pertain to the areas of counterterrorism and the non-proliferation of weapons of mass-destruction. The new approach of the Security Council has been examined in light of the Third World Approaches in International law (TWAIL), as well as from the viewpoint of mainstream lawyers. Furthermore, 15 years of State practice relating to the implementation of these normative resolutions has been studied with a view to determining whether subsequent State practice confirms the exercise of a law-making function by the Security Council.

Despite some incremental success in promoting international standards in the fight against terrorism, this thesis illustrates that the Security Council has not succeeded in introducing a new viable form of law-making. The Security Council's authority to exercise such a function is now under serious doubt and its legitimacy questioned, as its normative resolutions were improperly initiated and adopted under the influence of a Permanent Member of the Security Council. Furthermore, the Security Council's intervention in areas that are already highly regulated runs the risk of contributing to the fragmentation of international law—a phenomenon that undermines the coherence of international law. Currently, the Council's normative resolutions are facing serious challenges at the implementation stage and several proceedings before national and regional courts have either directly challenged the normative resolutions, or questioned their enforceability. The Security Council is under continued pressure to further revise its practice or potentially face additional challenges before national, regional, and even international courts which may annul or

quash relevant implementing measures. Thus, in light of relevant State practice, it is almost inconceivable that the Security Council would repeat its use of normative resolutions as a means of law-making in the future.

Nevertheless, the increasing powers of the United Nations Security Council also stimulates an increasing demand to hold the United Nations accountable for the possible wrongful acts of its principal organ, particularly when its decisions harm individuals. It is argued that in the absence of a compulsory judicial mechanism at the international level, non-compliance with the Council's decisions is the only viable way to challenge the Security Council wrongful acts. Yet, non-complying State or group of States should clearly identify their actions as countermeasures vis-à-vis *ultra vires* acts of Security Council and seek support from other likeminded States to avoid being declared recalcitrant, which may be followed by Security Council sanctions.

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Abbreviations

AJIL	American Journal of International Law
ASIL	American Society of International Law
ANF	Jabhat-Al-Nosra
AQTO	Al-Qaida and Taliban Order
AU	African Union
BWC	Biological Weapons Convention
BH	Bosnia and Herzegovina
BYIL	British Yearbook of International Law
CFI	EU Court of First Instance
CTC	Counter Terrorism Committee
CWC	Chemical Weapons Convention
DASRIWA	Draft Articles on the Responsibility of States for Internationally Wrongful Acts
DARIO	Draft Articles on the Responsibility of International Organizations
EEZ	Exclusive Economic Zone
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council (United Nations)
ECtHR	European Court of Human Rights
EGC	General Court of the European Union
EU	European Union
EUC	European Union Council
ECJ	European Court of Justice
EGC	European General Court
FSRY	Federal Socialist Republic of Yugoslavia
G-77	Group of 77
GA	General Assembly (United Nations)
GAOF	General Assembly Official Records
GGOs	Global Governance Organizations
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICSER	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IFOR	Multinational Implementation Force
ICPOA	Joint Comprehensive Plan of Action
ICRC	International Committee of the Red Cross
ICTY	International Criminal Court for the former Yugoslavia
ICTR	International Criminal Court for Rwanda
ICSFT	International Convention for the Suppression of the Financing of Terrorism
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Material
ILO	International Labor Organization
ILOAT	International Labor Organization's Administrative Tribunal

IMF	International Monetary Fund
ISIL	The Islamic State of Iraq and the Levant
ISIS	The Islamic State in Iraq and Syria
IOs	International Organizations
LAS	League of Arab States
NAIL	New Approaches in International Law
NAM	Non-Aligned Movement
NATO	North Atlantic Treaty Organization
NGOs	Non-Governmental Organizations
NIEO	New International Economic Order
NPT	The Treaty on the Non-proliferation of Weapons Nuclear Weapons
OAU	Organization of African Unity
OIC	Organization of the Islamic Cooperation/Conference
OPCW	Organization for the Prohibition of Chemical Weapons
P5	Permanent Members of the Security Council
PCIJ	Permanent Court of International Justice
PKO	United Nations Peace Keeping Operations
SC	Security Council (United Nations)
SCOR	Security Council Official Records
SOFA	Status of Force Agreement (United Nations Model Agreement for PKO)
TEC	Treaty on the European Community
TEU	Treaty on European Union
TWAIL	Third World Approaches in International Law
UN	United Nations
UDHR	Universal Declaration of Human Rights
UK	United Kingdom of Great Britain and Northern Ireland
UNCLOS	United Nations Convention on the Law of the Sea
UNCAC	United Nations Convention against Corruption
UNPROFOR	United Nations Protection Force
US/USA	United States of America
VCLT	Vienna Convention of the Law of Treaties
WMD	Weapons of Mass Destruction
WTO	World Trade Organization

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General Introduction

On 28 September 2001, a draft resolution of the Security Council concerning combating the financing of terrorism was informally circulated in the Sixth Committee of the General Assembly, the United Nations' legal body. Delegates¹ in the Committee were informed that the draft resolution would soon be adopted by the Security Council. Later that day, the Security Council convened its 4385th meeting, lasting for only five minutes,² in which the Council unanimously adopted the draft resolution—known as Security Council Resolution 1373. The resolution contained new norms for combating the financing of terrorism and purported to directly bind all states (the “normative resolutions”). The resolution also established a number of law-making goals for states to achieve through the enactment of national legislation.

Circulating a draft Security Council resolution in the Sixth Committee was an unusual practice. However, the delegation of the Russian Federation did so to implicitly send two important messages to the other delegates in the Committee. First, while the Sixth Committee was entrusted with conducting studies and making recommendations on international law-making,³ the Security Council claimed to exercise a law-making function. The Russian Federation acted at a time when the Committee was preparing the draft text for a comprehensive convention on terrorism.⁴ Second, the draft resolution imported certain provisions of the recent *International Convention for the Suppression of the Financing of Terrorism* (ICSFT), and made them binding on all States under Chapter VII of the UN Charter, before the Convention actually entered into force. The

¹ The author was the Iranian delegate to the Sixth Committee of the General Assembly from 1989 through 1994, and again from 1997 through 2002. He also served as an international civil servant in the United Nations' Office of Legal Affairs, Codification Division, from 2003 through 2008 and in 2011.

² The Security Council meeting convened at 9:55 pm and rose at 10 pm. See, S/pv.4385.

³ See, Charter Article 13 (1)(a).

⁴ The Sixth Committee began its work on a draft comprehensive convention on terrorism in 1999, which has yet to be completed. For more information, see, Chapter Two, at 56.

International Convention on the Suppression of the Financing of Terrorism was prepared by the Sixth Committee and adopted by the General Assembly in 1999,⁵ but it had not yet entered into force at the time of the adoption of Security Council Resolution 1373.⁶ In the political environment that prevailed after the September 11, 2001, terrorist attacks in the United States, the Sixth Committee was unable to take any action directly or indirectly opposing the Security Council's new approach in the fight against terrorism.

Gaining momentum, three years after the adoption of Resolution 1373, the Security Council adopted its Resolution 1540 (2004), which supplemented the existing non-proliferation regimes on nuclear, chemical, and biological weapons. It imposed the obligation upon all states to not provide "any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical, or biological weapons and their means of delivery."⁷ Resolution 1540 also required all states to enact and enforce "effective laws" and take appropriate measures to implement the resolution.⁸ By the same resolution, the Security Council established a committee consisting of all of its members to monitor the implementation of the resolution, and also obligated states to report to the committee on the measures they would take in this regard.⁹

Prior to the adoption of the above-mentioned resolutions, the Security Council had imposed sanctions against individuals, violating their human rights. Under its Resolution 1267 (1999), the Security Council had imposed an asset freeze and travel ban against the Taliban and Al-Qaeda terrorist groups and their associates. Resolution 1267 and subsequent resolutions, although

⁵ See, GA Resolution 54/109 at para 1, and annex to the Resolution.

⁶ The *International Convention on the Suppression of the Financing of Terrorism* entered into force on 10 April 2002.

⁷ Security Council Resolution 1540 (2004) at para.1.

⁸ *Ibid* at para 2.

⁹ *Ibid* at para 6.

imposed sanctions against designated individuals, obligated all states to take the necessary measures to ensure that the funds or financial resources of designated persons were not made available for the benefit of the Taliban.¹⁰

Security Council Resolutions 1373 (2001) and 1540 (2004), as well as the Al-Qaeda sanctions regime pursuant to Resolution 1267 (1999), generated a significant question, namely, has the Security Council opened a new avenue for international law-making by developing international norms of general character in the areas of counterterrorism and the non-proliferation of weapons of mass-destruction via the use of Chapter VII of the Charter?

As a political organ of the United Nations, the Security Council has primarily been entrusted with the maintenance of international peace and security. In the exercise of its mandate, the Council interacts with international law in a number of ways and its decisions must comply with international law because the United Nations is a subject of international law. Also, the Security Council promotes international law by calling on states in general or parties to a dispute to act in accordance with international law. Moreover, by applying and interpreting Charter provisions, the Security Council contributes to the development of Charter articles which provide clarity to Charter provisions relating to the mandate of the Council.

While addressing situations threatening international peace and security, it is a long-standing practice of the Security Council to make legal determinations in the form of political decisions which bind parties to a dispute, such as in the *Lockerbie* case.¹¹ In accordance with its Resolutions 731 and 748 (1992), the Security Council endorsed requests made by France, the

¹⁰ See, SC Resolution 1267 (1999) at para 4(b).

¹¹ See, *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)*, [1998] ICJ Rep.

United Kingdom and the United States of America, which had demanded that Libyan Arab Jamahiriya surrender individuals who were allegedly involved in the international terrorist attack.¹² The Security Council's decision, which deviated from provisions of the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* relating to the discretion of States to prosecute or extradite alleged offenders found in their own territories,¹³ was applied to the dispute at hand and binding on the parties involved, without establishing any precedential effects for future disputes.

Security Council Resolution 1422 (2002) is yet another example of using a Chapter VII resolution to modify provisions of a treaty.¹⁴ Under this resolution, the Security Council requested that the International Criminal Court (ICC) abstain from commencing or proceeding with the investigation or prosecution against officials or personnel of a state not a party to the *Rome Statute of the International Criminal Court* for a period of twelve months.¹⁵ This general exemption, which was extended for another 12 months by Resolution 1487 (2003),¹⁶ was extraneous to Article 16 of the Rome Statute, which deals with the powers of the Security Council in referring situations to the ICC, as well as making decisions to defer a proceeding before the Court on a case-by-case basis.

¹² See SC Resolutions 731 (1992) at para 3 and SC Resolution 748 (1992) at para 1.

¹³ *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 23 September 1971, Montreal, Canada, UNTS at articles 6 and 7. France, the United Kingdom, the United States of America and Libyan Arab Jamahiriya are parties to the Convention.

¹⁴ Andreas Zimmerman, "Acting Under Chapter VII (...): Resolution 1422 and Possible Limits of the Powers of the Security Council" in Jochen Abr. Frowein, K. Scharioth & R. Wolfrum, eds, *Verhandeln für den Frieden – Negotiating for Peace* (Springer-Verlag Berlin Heidelberg, 2003) at 253, 262–66.

¹⁵ See, SC Resolution 1422 (2002) at para 1

¹⁶ Though Resolution 1422 had been adopted unanimously, Resolution 1487 which extended the original resolution received 12 votes in favour and three abstentions.

These resolutions were widely criticized by the Member States of the United Nations for failing to indicate that there was a threat to peace—a precondition for Chapter VII action.¹⁷ It was also argued that under Article 16 of the Rome Statute, the Security Council is only permitted to request the deferral of investigations or prosecutions in *specific cases*. The general request for deferral of investigations or prosecutions contained in the Council’s resolutions was considered to be an amendment of the treaty.¹⁸ Under severe criticism and after the lapse of two twelve-month periods, the Council did not renew the application of Resolution 1422 (2004).

The Security Council made another type of legal determination with specified spatial and temporal dimensions, which created a legal obligation for the entire membership of the United Nations. Specifically, the establishment of *ad hoc* tribunals by the Security Council falls in this category. Although the Security Council resolutions founding the International Criminal Tribunal for the former Yugoslavia (ICTY) and the United Nations International Criminal Tribunal for Rwanda (ICTR) provide a limited temporal and territorial jurisdiction for the tribunals,¹⁹ they also create obligations for the entire membership of the United Nations, particularly in terms of financing and judicial cooperation with the tribunals.²⁰ Despite the initial doubts expressed by

¹⁷ Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford-New York: Oxford University Press, 2011) at 61.

¹⁸ See, statements by Canada: “We are troubled that action would be taken in the absence of any apparent threat to international peace and security, which is the fundamental precondition for action under Chapter VII of the Charter.” New Zealand expressed “serious concerns about the use of the specific procedure laid down in Article 16 of the Rome Statute in a generic resolution to provide an immunity from the International Court’s jurisdiction for personnel engaged in United Nations-mandated or - authorized operations. S/PV. 4772 at 5; Jordan expressed the view that “[t]he resolution is . . . a misapplication of Article 16, and a contravention of the Rome Statute.” S/PV. 4772 at 6.

¹⁹ The ICTY was mandated to prosecute persons responsible for serious violation of international humanitarian law committed in the territory of the former Yugoslavia in 1991; see, SC Resolution 808 (1993) at para 1. The ICTR was mandated to prosecute “persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994.” See, SC Resolution 955 (1994) at para 1.

²⁰ See, SC Resolution 827 (1993) at para 4. Paragraph 2 of SC Resolution 905 (1994) “[d]ecides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic

some states regarding the Security Council's competence to establish judicial organs,²¹ in practice, all states have supported the activities of the Tribunals by providing financial resources through the United Nations and through extended judicial cooperation with the Tribunals through bilateral arrangements. Moreover, it seems that the establishment of the International Criminal Court and hybrid international tribunals, by way of treaties,²² has satisfied those states that had earlier expressed their concerns about the establishment of *ad hoc* tribunals.²³

A third category of legal determination is found in resolutions in which the Security Council creates new norms of general and abstract character. These resolutions, which occur particularly in the areas of counterterrorism and the non-proliferation of weapons of mass destruction (WMDs), do not address specific situations, nor are they time-bound. For instance, in accordance with Resolution 1373 (2001), the Council established a complex legal regime in the fight against terrorism. It demanded all states to criminalize the financing of terrorism through their national laws, and simultaneously provided a definition of the financing of terrorism.²⁴ This

law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute”

²¹ China and Mexico expressed their concerns in the Security Council and General Assembly, respectively, concerning the competence of the Security Council to establish *ad hoc* tribunals. In their view, the establishment of international tribunals, as matter of principle, should take place by way of conclusion of international treaties. For the position of China, see, UN Docs. S/PV. 3175 at 7 and S/PV. 3217 at 33. For the position of Mexico, see, Note Verbal dated 12 March 1993 from the Permanent Mission of Mexico to the United Nations Addressed to the Secretary-General of the United Nations, UN Doc. S/25417 at para 6.

²² The International Criminal Court was established in accordance with *The Rome Statute of the International Criminal Court*, which is a multilateral treaty adopted on 17 July 1998 and entered into force on 1 July 2002. The Special Court for Sierra Leone was set up through an agreement between the UN and the government of Sierra Leone signed on 16 January 2002. The Special Tribunal for Lebanon was established by an agreement between the United Nations and the Government of Lebanon pursuant to the Security Council Resolution 1664 (2006) of 29 March 2006. Since the agreement could not be ratified by the Lebanese Parliament, the Security Council acting under Chapter VII of the Charter endorsed the agreement on 30 May 2007 (SC Resolution 1757 (2007)).

²³ It is generally understood that the establishment of *ad hoc* tribunals falls in the purview of the powers vested in the Security Council under Article 41 of the Charter. See, *Repertory of Practice of United Nations Organs*, Supplements 7-9 and 10, studies relating to Article 41, online: <<http://legal.un.org/repertory/>>.

²⁴ SC Resolution 1373 (2001) at para 1(b) “[d]ecides that all States shall: (a) Prevent and suppress the financing of terrorist acts; (b) Criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.

definition is based on the definition provided for in the *International Convention for the Suppression of the Financing of Terrorism*.²⁵ Nevertheless, the Security Council called on all states to ratify the Convention. Though the Convention is in force now, not all states are parties to it.²⁶ This double track law-making approach of the Council raises a number of legal questions and contributes to the fragmentation of international law, a phenomenon that is kept under review by the International Law Commission (ILC).²⁷

Since the first and second categories of the Security Council's legal determinations have been accepted by states in practice, they will not be covered in this thesis. The focus of this study will be confined to analyzing the Security Council's normative resolutions in the areas of counterterrorism and the non-proliferation of weapons of mass destruction. These topics are among the contemporary core values of the international community.²⁸ That is to say, the international community has shown resolute interest and exerted significant effort in tackling these issues. Several universal and regional instruments are in force in the area of counterterrorism and the non-proliferation of WMDs. Negotiations are also underway in the General Assembly to finalize the draft comprehensive convention on terrorism. Moreover, various bodies in the United Nations, in

²⁵ *International Convention for the Suppression of the Financing of Terrorism*, adopted by the United Nations General Assembly in Resolution 54/109 of 9 December 1999 at para 2: "Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

²⁶ Currently there are 171 parties to the *International Convention for the Suppression of the Financing of Terrorism*. The list of parties to the Convention can be found online at the following address: <http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&lang=en>.

²⁷ See, the Report of the Study Group of the ILC on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International law, UN Doc. A/CN. 4/L. 682, dated 13 April 2006.

²⁸ As for the discussion of the contemporary core values of international law, see, Edward McWhinney, *United Nations Law Making: Cultural and Ideological Relativism and International Law Making for an Era of Transition* (UNESCO, Paris: Holmes & Meier Publishers, 1984) at ch 9 and 10.

particular, the Security Council, as well as a number of specialized agencies of the United Nations, are actively involved in setting standards and modalities for combating terrorism. Additionally, discussions are under way to revive previous negotiations on the establishment of an international criminal court to prosecute perpetrators of terrorist crimes.²⁹

In light of the spread of nuclear energy and weapons technology, the danger of non-state actors accessing weapons of mass-destruction has become alarming. However, there are diverse perspectives on the ways and means of addressing their proliferation. On the one hand, states that do not have this technology urge the international community to speed up the nuclear disarmament process—a goal envisaged in Article VI of the *Treaty on the Non-Proliferation of Nuclear Weapons*.³⁰ On the other hand, states that have acquired the technology are seeking enhanced standards of regulation and practice to prevent the access of non-state actors to this technology. This is another area to which the Security Council has paid a great deal of attention in recent years. It has established, *inter alia*, a committee on the non-proliferation of WMDs, known as the “1540 Committee,” to receive, analyze, and give feedback on the states’ reports that describe the measures they have taken to implement Security Council Resolution 1540 (2004).³¹

It must be emphasized, however, that the core values of the international community are not limited to those mentioned above. Following the adoption of the normative resolutions, state practice indicates that states are not prepared to abandon their enduring core values, such as

²⁹ During the Rome Conference on the establishment of the ICC, there was a proposal to include the crime of terrorism along with two other treaty crimes, drug trafficking and crimes against peacekeeping operations, among the crimes that fall under the jurisdiction of the Court. However, this proposal was rejected on the grounds that there was no generally agreed definition of terrorism. See, Herman von Hebel and Darryl Robinson, “Crimes within the Jurisdiction of the Court” in *The International Criminal Court: The Making of the Rome Statute*, Roy S. Lee, ed. at 85-87. During the 70th session of the General Assembly, delegation of Spain and Romania convened a panel discussion to assess the possibility of establishing an international court to prosecute perpetrators of terrorist crimes on 4 November 2015. See, UN Journal, 4 November 2015.

³⁰ See, Treaty on the Non-Proliferation of Nuclear Weapons, Article VI, online: <http://disarmament.un.org/treaties/t/npt/text>.

³¹ See, SC Resolution 1540 (2004) at para 4.

fundamental human rights, in favor of emerging core values, such as the fight against terrorism. Rather, the international community is seeking a balanced approach in upholding such core values, the respect for basic human rights law while fighting terrorism. In this regard, a reference should be made to the 2005 World Summit Outcome, which re-emphasized respect for human rights during the fight against terrorism. This document calls upon “the Security Council . . . to ensure 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.”³²

As such, the question of this thesis, whether the Security Council has succeeded in introducing a new form of law-making through its normative resolutions, cannot be addressed in the abstract without paying due attention to various aspects of law making at the international level, including the following subsidiary questions:

1. What is the role and place of the Security Council’s normative resolutions among other sources of international law?
2. In the absence of express Charter provision, is law-making by the Security Council a violation of the United Nations Charter?
3. Is the Security Council entitled to modify the existing norms of international law by relying on the preeminence of Charter obligations over any other international obligations of states pursuant to Charter Article 103?
4. Does the Security Council, by setting law-making goals for states, violate the principle of non-intervention in matters that are essentially within the domestic jurisdiction of States, as protected by Article 2(7) of the Charter?

³² See, GA Resolution 60/1 at para 109.

5. Is the Security Council bound to ensure respect for human rights law while combating terrorism?
6. Does subsequent State practice endorse the law-making function exercised by the Security Council?
7. Can the potentially *ultra vires* activities of the Security Council be challenged before national or international courts? and,
8. To what extent are the United Nations and its Member States responsible for any harm incurred as a result of the Security Council's *ultra vires* activities, in particular harm to individuals?

Before explaining how these questions will be addressed, it is worthwhile to specify the theory employed in this research. Primarily, various issues within the ambit of this research will be examined through the Third World Approaches in International Law (TWAIL) lens. TWAIL scholars criticize the exercise of law-making functions by the Security Council on the grounds that the Council has become an imperial body, its composition is not representative, nor are its procedures democratic. Moreover, by selectively handling the issues before it, the Council mainly serves the interests of big Western powers. Such a body, as a result, lacks democratic legitimacy and its wrongful decisions must be opposed.

It is worth noting that many mainstream lawyers also disapprove of the Security Council's law-making functions for various compelling reasons, including for many of the same reasons as the TWAIL scholars. For this reason, it is essential to study the legal perspectives of mainstream lawyers regarding the Security Council as one can gain insight into their views, but also into the possibility for collaboration with TWAIL scholars. The latter, as shown in this thesis, are open to collaborating with other disciplines in order to advance their own objectives. Consequently, the

methodology employed in the thesis is focused on TWAIL perspectives in conjunction with critical mainstream lawyers' viewpoints. Also, non-critical mainstream lawyers' views have been examined to present a comprehensive analysis of the topic.

As such, the primary question of this thesis and the supplementary questions will be treated in six chapters in the following order. The first question, the role and place of the Security Council's normative resolutions among other sources of international law, is addressed in Chapter One.

In Chapter Two, the Security Council's normative resolutions are examined in detail in order to clarify certain facts and answer certain questions posed by this thesis. The Security Council has adopted several dozens of resolutions in the area of counter-terrorism and the non-proliferation of WMDs. But not all of these resolutions are normative in nature; they are omnibus texts, producing different types of obligations for States, including executive, cooperative, and legal obligations. The normative resolutions have also been supplemented over the years by several subsequent resolutions in an attempt to modify their contents, clarify their ambiguities, and make improvements to the sanctions regimes. However, the Council's subsequent decisions have created complex problems for States, which are expected to amend their national legislation each time that the Security Council makes a supplementary decision. Moreover, the normative resolutions intervene in the areas that are already highly regulated, creating contradictory obligations for States.

Question two, whether, in the absence of express Charter language, law-making by the Security Council is a violation of the United Nations Charter, is partially examined in Chapter Three, which is devoted to the study of Third World Approaches in International Law in relation to this thesis' topic. TWAIL scholars view the Security Council as a political organ, dominated by

the big powers, and as a body without adequate representation, where the veto power has paralyzed the Organ from properly functioning. The Council is not entrusted with the law-making capacity, but rather it misuses the powers entrusted to it under Chapter VII of the Charter. By so doing, the Council encroaches on the General Assembly's sphere of responsibilities. Law-making by the Security Council is, therefore, *ultra vires* in nature and should be disregarded. In view of this general approach, TWAIL scholars have rarely entered into detailed discussion of the Council's law-making. However, this discipline encourages collaboration with other disciplines of international law in areas of common concern, which justifies exploring mainstream lawyers approach on the subject.

As such, question two, is also partially addressed in Chapter Four, which is devoted to examining the viewpoints of mainstream lawyers who have either been critical of the law-making activities of the Security Council or supported the exercise of such a function. In contrast to the TWAIL approach, mainstream lawyers have comprehensively covered this topic, mainly criticizing the normative resolutions in light of the Charter provisions and other norms and principles of international law, including international human rights and humanitarian law. In their view, the Charter should not be considered as a distinct instrument putting limits on the Security Council activities. Rather, other norms and the principles of international law, peremptory norms and fundamental human rights law, in particular, should be respected by the Security Council. Thus, Security Council resolutions that violate the above norms are *ultra vires* and entail accountability of the Council. By examining mainstream lawyers' view points on the Security Council's law-making, questions three to five will also be covered in Chapter Four.

Chapter Five is devoted to examining the normative resolutions against fifteen years of State practice in their implementation, including several rulings by national and regional courts in

which decisions by States and regional organizations in implementing the normative resolution have been challenged. Some mainstream lawyers believe that, in the absence of an express Charter language authorizing the Security Council to exercise law-making activities, the normative resolutions should be examined against relevant State practice. Most States have to enact national legislation in order to implement the commitments emanating from the normative resolutions, including the obligations ensuing from their amendments. A glimpse at the reports of the sanctions committees indicate that despite expressed political support from States, the implementation of normative resolutions has become cumbersome to many States that are unable to implement various obligations ensuing from the normative resolutions due to their complexities and a lack of sufficient assistance—funding and resources—from the United Nations.

In light of the rulings by several national and regional courts, which have found States' implementing measures in violation constitutional or human rights laws, it is imperative to address the relevant question of the United Nations and its Member States' responsibility for possible harm incurred as a result of the *ultra vires* activities of the Security Council, in particular harm caused to individuals. The draft articles prepared by the *International Law Commission on the Responsibility of International Organizations* (DARIO) does not cover the responsibility of international organizations in respect of individuals. The time has come to reflect on this question. Chapter Six deals with this matter.

Finally, this thesis will conclude that the Security Council has not succeeded in introducing a credible and legitimate new form of law-making at the international level. 15 years of contradictory State practice confirms this conclusion. Whereas States have expressed political support for the Security Council normative resolutions, they complain about problematic obligations emanating from these resolutions and seek assistance from the United Nations. More

importantly, rulings of national regional courts, challenging States' implementing measures have manifestly lowered the cooperation of States in executing the normative resolutions.

Chapter One

Revisiting the Sources of International Law in the Light of Normative Resolutions

Abstract

This Chapter is premised on the assumption that in the modern era International Organizations (IOs) play an increasing role in world affairs and that their contribution to the development of international law is an undeniable fact. They contribute to the law-making at the international level in the forms of both hard and soft law. Soft law instruments, including resolutions of IOs, have become a convenient method through which the international community expeditiously produces international standards with varying degree of legal effects. Thus, no general conclusion can be made regarding the legal weight of IOs resolutions. Instead, they should be assessed on a case-by-case basis while paying due attention to the powers of producing organs, the language employed in each instrument, and their relationship with other sources of international law. As such, the normative resolutions of the United Nations (UN) Security Council should be examined in light of the factors mentioned.

I. Introduction

Following the adoption of Security Council Resolution 1540 (2004), the President of the Security Council called the Council's decision "the first major step towards having the Security Council legislate for the rest of the United Nations' membership." He noted that Resolution 1373 (2001) was the first step in this process and that the Council should do more of "that kind of legislative work."¹ Thereafter, some writers referred to these types of resolutions as "legislation" or "international

¹ Office of the President, United Nations Security Council, *Press Conference by Security Council President on April 2, 2004* (2004), online: United Nations Meetings Coverage and Press Releases <<http://www.un.org/News/briefings/docs/2004/pleugercp.DOC.htm>>.

legislation,” and have also described the Security Council as “a legislator” or “the world legislator.”² These references have given rise to discussions among scholars as to whether “legislation” or “international legislation” is an appropriate term for these norm-creating resolutions of the Security Council, or if the term “law-making” better describes the new approach of the Security Council in creating norms under Chapter VII of the Charter of the United Nations (UN Charter) of 1945. Thus, the first issue requiring clarification is how best to describe the normative resolutions, legislation, international legislation or law-making.

It is argued that the term *legislation* is not a suitable term to be employed for norm creation at the international level. Rather, “law-making” is the generally accepted term to identify the process of standard setting at the international level. The term “legislation” is usually employed to denote law-making acts of states at the national level. At this level, a law comprises “a set of rules that are usually enacted by a national legislature of a state,” regulating matters pertaining to natural and legal persons. This legislation is enforceable in the entire territory of the State, where the legislation has been enacted. A law is usually drafted in abstract terms, without naming particular individuals or entities. As Roberto Lavalle observes, a “set of rules that is applicable only to particular individuals identified by name could not be qualified as a law.”³

Following the adoption of normative resolutions by the Security Council, both the terms “legislation” and “international legislation” have been used by writers in a broad sense, to cover both “the process and the product of the conscious efforts to make additions to, or changes in, the laws of nations.”⁴ Cathleen Powell, for instance, argues that the term “legislation” applies only to those resolutions by which the Security Council unilaterally purports to create “general norms of law” binding on all states, irrespective of the States’ consent. She identifies four distinctive criteria of

² Stefan Talmon, “The Security Council as World Legislature” (2005) 99 AJIL 1 at 175.

³ Roberto Lavalle, “A Novel, If Awkward, Exercise in International Law-Making: Security Council Resolution 1540” (2004) 51 NILR 3 at 412.

⁴*Ibid.*

legislative resolutions: that the Security Council acts unilaterally when it legislates; that it intends to make mandatory norms by invoking Chapter VII; that the legislative resolutions have general and abstract language; and, that the norms so created are new or change existing norms.⁵

By contrast, Nicholas Tsagourias is of the view that the use of legislation at the international level, triggered by the adoption of a number of normative resolutions by the UN Security Council, is aimed at the “harmonization of domestic rules world-wide,” rather than at regulating a concrete situation. That is to say, by adopting decisions under Chapter VII, the Security Council, obligates states to enact legislation at the national level and thereby facilitates the harmonization of regulations in a given area at the international level.⁶

Krzysztof Skubiszewski differs from the above writers, correctly pointing out that the term “law-making” is predominantly used by writers to refer to the process of creating norms at the international level.⁷ Tsagourias affirms this view by stating that legislation is an unfamiliar concept in international law and that there is no institution or process at the international level entrusted with the power to routinely enact international legislation. The fundamental principles of law-making at the international level, specifically sovereignty and the consent of States, have effectively prevented the international community from introducing uniform law-making procedures and norms with equal binding force.⁸ Consequently, law-making at the international level is “multi-sourced and multi-layered.” Naturally, international norms developed through different mechanisms have different binding force.

⁵ Cathleen Powell, “The Legal Authority of the United Nations Security Council” in Nicole LaViolette and Craig Forcece, eds, *The Human Rights of Anti-terrorism* (Toronto: Irwin Law, 2008) at 167.

⁶ Nicholas Tsagourias, “Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity” (2011) 24:03 LJIL at 539.

⁷ Krzysztof Skubiszewski “International Legislation,” *Encyclopedia of Public International Law*, vol 2 by Rudolf Bernhardt (1995) at 1255. On the use of the term “international legislation,” see, L.F.L. Oppenheim, *Oppenheim’s International Law*, 9th ed, Robert Jennings and Arthur Watts, eds, Vol. I and II (London, Longman 1992) at 32.

⁸ Tsagourias, *supra* note 6 at 3.

For the reasons cited above, the processes of international law-making are not comparable to legislation at the national level, where states' constitutions provide the procedures applicable to the legislation. There exist fundamental differences between law-making activities of the Security Council and national legislation. Contrary to national legislation, which is enforceable at the territory of the state concerned, the norm creating resolutions of the Council require some kind of legislative activity by the Member States of the United Nations to make them applicable in their territories.⁹

It seems that normative resolutions, which are omnibus in nature, are the source of confusion in the use of these terms. As will be illustrated in the next chapter, normative resolutions, *inter alia*, create direct obligations for states. However, the obligations so created are not executable in most cases at the national level without enacting some kind of implementing legislation. On the other hand, normative resolutions also set legislative goals for states to be achieved by enacting national legislation. This is why writers use the terms "legislation," "international legislation" and "law-making" in tandem. Nevertheless, as indicated earlier, "law-making" is the most suitable term to identify international standard making.

In contrast with the national level, norm-making at the international law is decentralized and there are multiple formal methods of law-making such as treaties, customary laws, and general principles of law, as enunciated in the Statute of the International Court of Justice (the "ICJ"). At the same time, there is an emerging trend in the international community to expeditiously produce international instruments with varying legal effects, known as soft law, which include decisions of IOs. In order to locate the place and legal value of normative resolutions amongst various other forms of law-making at the international level, sources of international law (the sources doctrine) will be discussed in the forthcoming sections. In so doing, a particular attention will be paid to the relationship between formal and emerging sources of international law, as the origins of soft law can be traced

⁹ Axel .Marschik, "Legislative Powers of the Security Council" in Ronald St. John Macdonald and Douglas M. Johnston, eds, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden, Boston: Martinus Nijhoff Publishers, 2005) at 476.

back to hard-law in many instances. Conversely, under certain circumstances soft law functions as a precursor to hard law and its status may be transformed to hard law.

II. Formal Sources of International Law

In the absence of a central authority at the international level, law-making is conducted in a decentralized manner and there are a number of methods to establish international norms. Treaties, international custom and general principles of law are the formal sources of international law, enumerated in Article 38(1) of the Statute of the International Court of Justice. Additionally, judicial decisions and authoritative teachings are subsidiary sources of international law which may help ascertain the rule of law at the international level. In order to better understand the role and legal weight of normative resolutions in international law, they must be examined in connection with the formal sources of international law (the sources doctrine). In sum, the sources doctrine lays down verifiable conditions for ascertaining and validating norms of international law.¹⁰ This doctrine also helps to distinguish the law as it is (*lex lata*), from what it ought to be, or what it may be or become (*lex ferenda*).¹¹

Treaties, which are known under different names,¹² are written agreements formulated by participating parties to legally bind themselves “to act in a particular way or to set up particular transactions between themselves.”¹³ The increasing number of bilateral and multilateral treaties and

¹⁰ Oscar Schachter, “International Law in Theory and Practice: General Course in International Public Law” (1982), Collected Courses of The Hague Academy of International Law, No. 178 at 60-61.

¹¹ *Oppenheim’s International Law*, *supra* note 7 at 23.

¹² Treaties may have, *inter alia*, the following titles: Pact, General Act, Convention, Covenant, Charter, Statute, Protocol, Declaration, etc.

¹³ Malcolm N. Shaw, *International Law*, 6th ed (London: Cambridge University Press, 2008) at 93. The definition provided in Article 2 of the Vienna Convention on the Law of Treaties is as follows: “treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” See, The Vienna Convention on the Law of Treaties, adopted by a diplomatic conference on 23 May, 1969 and entered into force on 27 January, 1980. The text of the Convention is reproduced in the *Work of the International Law Commission*, ILC, Vol II, 7th ed (2007) 1 at 116-146.

the wide range of issues they cover demonstrate the growing significance of treaties in contemporary international relations.¹⁴

Regarding multilateral treaties, attention should be paid to subsequent norm-making based on the provisions of a given treaty. Some treaties contain provisions concerning additional norm-making within their framework or provide for modalities of amending the treaty in question. In most instances, the addition or alteration of treaty provisions requires the consent of specified number of parties to the treaty. However, in some cases, additional norms created in accordance with the provisions of the original treaty directly bind its parties and separate consent is not required.¹⁵ From a legal point of view, the term “derivative treaty obligations” is based on the consent of parties to be bound by obligations created based on the original treaty provisions. Nevertheless, this procedure constitutes a deviation from the traditional consent principle, which provides that states are bound only by the obligations that they have expressly agreed to.¹⁶

International custom is another source of international law specified in the ICJ Statute. Custom has been defined as the “customary behavior of states when motivated by the belief that such behavior was required by law.”¹⁷ Thus, two elements are required for the existence of a customary law: a material element and a subjective element. The material element refers to the actual behavior of states while the subjective element signifies the conviction of the state that the behavior in question was required by the law.¹⁸

¹⁴ There are several hundred multilateral and tens of thousands of bilateral treaties registered with the United Nations Secretariat. They cover a wide variety of topics such as health, environment, crime prevention and criminal justice. For detailed information about the number of treaties and topics they cover, visit the United Nations Office of Legal Affairs online: <http://legal.un.org/ola/div_treaty.aspx?section=treaty>.

¹⁵ Article XXVIII, *Articles of Agreement of the International Monetary Fund*, 22 July 1944 (entered into force 27 December 1945).

¹⁶ Paul Szasz, “General Law-Making Process” in Oscar Schachter and Christopher C. Joyner, eds, *United Nations Legal Order* (Cambridge, New York: Cambridge University Press, 1995) at 41.

¹⁷ *Ibid.*

¹⁸ This element distinguishes customary norms from usages, which are traditions of acting without having a conviction that the actions were required under law. See, *Oppenheim's International Law*, *supra* note 7 at 26.

Notwithstanding diverse procedures in the formation of customary norms and those of treaties, a constant interaction between these two sources of international law exists. For instance, a number of multilateral treaties have codified international customary norms. The 1969 Vienna Convention on the Law of Treaties is a good example, as it has codified the majority of customary rules pertaining to treaty-making. The ICJ has confirmed this assertion on several occasions.¹⁹ On the other hand, international treaties that have been followed by sufficient state practice and *opinio juris* have become customary international law in some instances.²⁰ The United Nations Convention on the Law of the Sea (“UNCLOS”), except for its Chapter XI, is considered to have acquired customary status²¹ and therefore its provisions are binding even on states that are not parties to it.

The third source of international law under the ICJ Statute is “the general principles of law recognized by civilized nations.”²² Though the Statute has accorded the same status to the general principles as it has to treaties and customs, it is largely understood that the general principles of law have an independent character from the two other sources. The predominant view suggests that general principles have their origin in national laws of states, and because of their widespread use in the major legal systems of the world, they have been recognized in international law.²³ General principles of law were assumed, at the time of their inclusion in the Statute, to fill gaps in cases not covered either by treaty law or customary law (*non liquet*).²⁴ As Alain Pellet puts it, the general principles are “additional sources of international law,” and the Court usually employs them to fill a gap in treaty

¹⁹ See *The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 ICJ, [1996] ICJ Report at para 94, 174; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, 1996 ICJ, [1996] 2 ICJ Reports at para 23, 812.

²⁰ Szasz, *supra* note 16 at 43.

²¹ Budislav Vukas, *The Law of the Sea: Select Writings* (Leiden, Boston: Martinus Nijhoff Publishers, 2004) at 19.

²² It is generally understood that the reference to “civilized nations,” in Article 38, in relation to the general principles, does not have any actual meaning in contemporary international law. See, separate opinions of Judge Ammoun in the *North Sea Continental Shelf (Federal Republic of Germany v Netherlands)*, Judgment, [1969] ICJ Reports 4 at 100, 132-133; *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, [1970] ICJ Reports 3 at 286, 308-313. Consequently, as indicated by Shabtai Rosenne, reference to “civilized nations” has been eliminated from recent literature on the Court and on international law. Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005* (vol. III), 4th ed. (Leiden, Boston: Martinus Nijhoff Publishers, 2006) at 1602.

²³ Birgit Schlütter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia* (The Hague: Martinus Nijhoff Publishers, 2010) at 75.

²⁴ *Oppenheim's International Law*, *supra* note 7 at 40.

law, customary rules, or both. Thus, the Court does not invoke the general principles where other rules already exist.²⁵ This understanding of Article 38 sub-paragraph 1(c) confirms the view that the Court is not authorized to legislate.²⁶

It must be noted, however, that some scholars distinguish “the general principles of law” from the “general principles of international law.” In their view, the general principles of law had their origin in national laws of states, but the general principles of international law were the principles that were “abstracted from positive international law, independent of the specific will or consent of states.”²⁷ The principles enshrined in the Charter Article 2, such as sovereign equality of states and the prohibition of the threat or use of force are general principles of international law.

The ICJ Statute cites “judicial decisions and the teachings of the most highly qualified publicists of various nations” as “subsidiary means for the determination of rules of law.” However, these subsidiary means have been inconsistently interpreted. For Manley Hudson, they are “subordinate means.”²⁸ In his view, if applicable international laws cannot be found under treaties, custom, and general principles, the subordinate means should be relied upon for guidance. For Pellet, however, the French term “*auxiliaire*” indicates that evidence of the applicable rules can be found in the jurisprudence of tribunals and doctrinal analysis of writers.²⁹ In the view of Shabtai Rosenne, “the subsidiary means” are indeed a “store house” from which the sources specified in Article 38 can be extracted.³⁰

Apart from divergent interpretations of the subsidiary means of international law, their role in determining contemporary rules of international law has evolved. While the role of international courts

²⁵ Alain Pellet, “Article 38” in Andreas Zimmerman et al, eds, *The Statute of the International Court of Justice—A Commentary* (Oxford: Oxford University Press, 2006), at 780.

²⁶ *Ibid* at 765.

²⁷ Schlütter, *supra* note 23 at 75-76.

²⁸ Manley Hudson, *The Permanent Court of International Justice 1920-1942* (New York: The MacMillan Company, 1943) at 612.

²⁹ Pellet, *supra* note 25 at 783-784.

³⁰ Rosenne, *supra* note 23 at 1607.

and tribunals has been strengthened due to their proliferation and the increasing number of cases brought before them, the role of publicists has become limited to describing the status of international law in the wide range of areas they cover.

Most contemporary writers begin the discussion of the sources doctrine with an examination of the sources referred to above.³¹ This Chapter does not repeat the detailed examination of the sources doctrine, as a large body of publications already addresses this subject.³² Nevertheless, as mentioned earlier, in contemporary international relations, norm setting is not limited to the traditional international law sources, but other sources of law, such as resolutions of IOs are emerging. Often, the legal status and value of emerging sources depends on the status of traditional sources of international law. As an example, an IO's resolutions usually derive their legal value from the IO's constitutive instruments. Also, the legal value of any interpretative resolutions of IOs is based either on treaty or customary law. Moreover, the status of emerging sources has repeatedly been upgraded to those of treaties or customary sources.

As a consequence of these developments, academic discussions are continuing on this subject with a view to locating the role and weight of soft instruments among the formal sources of international law. While for some scholars, soft law is an inevitable phenomenon responding to the practical needs of the international community, other scholars who remain loyal to formal sources do not hide their skepticism and believe that soft law contributes to uncertainty in international relations

³¹ *Oppenheim's International Law*, *supra* note 7 at 24; Szasz, *supra* note 17 at 38; Schlütter, *supra* note 23 at 2. However, some authors believe that the discussion of the doctrine of sources should be separated from the discussion of sources specified in Article 38. In the view of d'Aspremont, for instance, the law-ascertainment model enshrined in Article 38 has proven to be unsatisfactory because each textbook on public international law contains a list of drawbacks of the Article. He suggests that law-ascertainment in international law must be conceived independently from Article 38, which was devised to serve another purpose—to guide the Court in finding the law in cases before it. See Jean d'Aspremont, *Formalism and the Sources of International Law*, (New York, Oxford: Oxford University Press, 2011) at 150.

³² *Oppenheim's International Law* employs the “concept of sources” instead of the “doctrine of sources”. However, its definition of concept is similar to the definition of the doctrine by other writers. *Oppenheim's International Law*, *supra* note 7 at 23. Fitzmurice criticizes Article 38 for not distinguishing between “sources of international law” and “sources of obligations”. In his view, treaties provide for the sources of obligations, which are different from other sources mentioned in Article 38. Pellet disagrees with the criticism by advancing the argument that sources of international law can be general or particular. In his view, Article 38 covers both particular sources (treaties) and general sources. Pellet, *supra* note 25 at 38.

and is the origin of rising disputes in the international community. The salient points of the contemporary debate on the subject are summarized below.

III. Salient Points of Contemporary Discourse on the Doctrine of Sources

As mentioned, the sources doctrine addresses the conditions under which treaties, custom, or general principles of international law become binding on the actors at the international level.³³ Much of the contemporary doctrinal discourse on the sources of international law centers on three main themes: consensual versus non-consensual law-making, loyalty to formal sources of law versus innovation in law-making, and the increasing role of IOs and non-state actors in the formation of international law. In addition, since the approach employed in this thesis comprises an analysis of the phenomenon of law-making by the Security Council through a Third World Approaches in International Law (“TWAIL”) lens, it seems imperative to briefly discuss a TWAIL perspective on the sources of international.

A. Consensual v. Non-consensual Law-making

The first theme in the contemporary discourse of the sources of international law is the “familiar and continuous” debate that revolves around the tension between the predominant role of sovereign consent in the formation of international law on the one hand, and the inevitability of applying some extra-consensual norms on the other.³⁴ Jonathan Charney observes that depending on the theory, the consent of States may or may not be required for the formation of all international law. In his view, positivism is the most popular theory, according to which states become bound by international law through their actual or tacit consent. Other theories, however, refer to situations where the uniform consent of all States is not necessary for the creation of international norms.³⁵

³³ David Kennedy, “A New Stream of International Law Scholarship” (1988) 7:1 Wisconsin Int’l LJ 1 at 33.

³⁴ *Ibid.*

³⁵ Jonathan Charney cites three theories which ignore the principle of consent when determining if a State is bound by international law. Specifically, Charney states that a) natural law imposes an obligation to those who are located in the spatial limit of a legal system to abide by it; b) the principles of fair play or gratitude bind those who benefit from the legal system to abide by its rules; and c) utilitarian considerations based on the value of the rule to individuals compels them to abide by the law. Jonathan Charney, “Universal International Law” (1993) 87 AJIL 529 at 529.

Laurence Helfer, for instance, has identified three methods by which non-consensual law-making³⁶ has been undertaken in recent decades.³⁷ First, there is “the delegation of legislative authority” to an international organization to adopt new rules that bind all member states of the organization. The normative resolutions of the Security Council are manifest examples of the delegation of legislative authority.³⁸ Despite its limited membership, the Security Council attempts to use its resolutions to circumvent consensual international law-making by purportedly making certain norms binding on all members of the organization.³⁹

Second, non-consensual law-making also exists when a majority of states parties of a treaty is empowered to amend an international agreement with binding effect for all parties to the treaty. This procedure is common when protecting the global environment, where, due to the advancement of knowledge and technology, rapid changes to international norms become unavoidable.⁴⁰ Some of these types of treaties provide an opportunity for opposing states to opt out of the amendment but in others, by contrast, amendments take effect without consideration of opposing views.⁴¹ In the case of the International Monetary Fund (“IMF”), for example, amendments to its constitutive instrument that are adopted by a three-fifths majority of member-states having eighty-five percent of total votes become binding on the entire membership of the Fund.⁴²

³⁶ Non-consensual law-making has been defined as “the creation of a legal obligation that binds a Member State of a treaty or an international organization” in the absence of express consent by the State.

³⁷ Laurence R. Helfer, “Nonconsensual International Lawmaking,” (2008) U. Ill. L. Rev. at 71.

³⁸ *Ibid.* at 75.

³⁹ In Resolution 1373, the Security Council imposed a series of obligations on the UN membership to combat the threat of terrorism by non-State actors. These included the obligation to criminalize the financing of terrorism and freeze terrorist assets. The core provisions of Resolution 1373 were taken directly from the Terrorism Financing Convention, a treaty that at the time had been ratified by only four countries and was not yet in force. *Ibid.* at 81.

⁴⁰ A prominent example of this approach is the Vienna Convention for the Protection of the Ozone Layer (1985) and its Montreal Protocol on Substances that Deplete the Ozone Layer. Since its adoption in 1987, the Montreal Protocol has been revised seven times. These revisions are aimed at recovering the ozone layer by 2050. Visit the United Nations Ozone Secretariat online: <http://ozone.unep.org/new_site/en/montreal_protocol.php>.

⁴¹ For instance, the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (1994) has provided for a simplified procedure of becoming bound by the agreement. Under Article 5 of the Agreement, States parties to the Convention on the Law of the Sea that had signed the Agreement were presumed to have accepted its binding character, unless they notify the depositary to the contrary (Article 5).

⁴² Article XXVIII, *Articles of Agreement of the International Monetary Fund*, 22 July 1944 (entered into force 27 December 1945).

Finally, the third method of non-consensual law-making is employed in the human rights area, where international courts and tribunals clarify ambiguities and fill in gaps in treaties. In a number of cases, the tribunals and human rights bodies have found reservations made by states to human rights treaties to have defeated the object and purpose of the treaty in question, and thus, the reservations have been nullified.⁴³ These rulings and decisions have purported to expand the scope of existing human rights treaties and transformed non-binding norms into legally binding obligations.⁴⁴ However, states have also objected to this practice as has the International Law Commission (ILC).⁴⁵

B. Loyalty to the Formal Sources V. Innovation in Law-Making

The second theme of the doctrine of sources is a relatively new discourse, centered on loyalty to the formal sources of law versus innovation in law-making. Some writers believe that the sources of law enumerated in the ICJ Statute are universally accepted “as a complete statement of the sources of international law.”⁴⁶ Other writers, however, argue that the list of sources provided in Article 38 is in no way *intended to be an exhaustive one*,⁴⁷ that the formal sources of international law as enunciated in Article 38 of the ICJ Statute no longer meets the exigencies of contemporary international relations, and that innovation in international law-making has become indispensable. For instance, Paul Szasz confirms the view that Article 38 of the ICJ Statute does not prescribe an “authoritative list” of sources

⁴³ For example, over the objections of the United States, the Inter-American Court of Human Rights has held that the originally nonbinding American Declaration on the Rights and Duties of Man has become binding by virtue of its indirect incorporation into the Charter of the Organization of American States (OAS). In reviewing a complaint by a criminal defendant who challenged the United States’ failure to comply with the Declaration, the Commission concluded that “a norm of international customary law has emerged prohibiting the execution of offenders under the age of 18 years at the time of their crime” and that “this rule has been recognized as being of a sufficiently indelible nature to now constitute a norm of *jus cogens*.” See *Domingues v. United States*, Case 12.285, Report No. 62/02, Inter-Am C.H.R., Doc.5 rev. 1 at 913 (2002).

⁴⁴ Helfer, *supra* note 37 at 87.

⁴⁵ It is widely acknowledged that the inclusion of the item “The law and practice relating to reservations to treaties” on the agenda of the ILC, in 1993, was mainly motivated by a higher number of reservations made to human right treaties. Following preliminary studies, the ILC changed the title of the item to read “Reservations to treaties,” and decided that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions on the Law of Treaties. See, A/66/10, p. 12, para. 52. From 1994 to 2011 the ILC continued its work on this topic and prepared a set of guidelines to practice, which is intended to assist States in making reservations with a view to avoid making reservations that defeat the object and purpose of the Vienna Conventions. The text of these guidelines is reproduced in UN Doc. A/66/10, Add. 1.

⁴⁶ Shaw, for instance, argues that since all members of the United Nations are parties to the ICJ Statute, they have thus accepted the sources enumerated in the Statute as the sources of international law. Shaw, *supra* note 13 at 71. See also Ian Brownlie, *Principles of Public International Law*, 5th ed (New York, Oxford: Oxford University Press, 1998) at 3.

⁴⁷ *Oppenheim’s International Law*, *supra* note 7 at 45.

of international law.⁴⁸ In his view, its main purpose is to provide direction to the former Permanent Court of International Justice (PCIJ) and its successor, the ICJ, to base its decisions on the sources specified in Article 38.⁴⁹ It was not intended to put limits on the Court in using other sources of international law.⁵⁰

In practice, the ICJ has relied on other manifestations of rights and obligations such as unilateral acts of states and decisions of international organizations.⁵¹ In certain situations, unilateral acts of states, including statements made by relevant state officials, may give rise to international legal obligations.⁵² These acts are deemed to be undertaken with the intention to have legal consequences. The ICJ, in its 1974 judgments in the *Nuclear Tests (New Zealand v France) Case*, stressed that where states make statements with the intention of limiting their actions, it becomes a legal undertaking.⁵³ A further example of these types of unilateral acts can be found in the declarations accepting the compulsory jurisdiction of the ICJ, pursuant to Article 36 (2) of its Statute.

Moreover, decisions of IOs have widely been cited by the ICJ as evidence of international law. Perhaps the lack of controversy on this source emanates from the fact that resolutions of IOs are based on constitutive instruments of IOs, generally prepared in the form of treaties which are sources of international law. As will be discussed later, the ICJ has extensively relied on the resolutions of IOs to determine the status of law in cases before it.

C. The Increasing Role of International Organizations and Non-State Actors

⁴⁸ Szasz, *supra* note 17 at 38.

⁴⁹ *Ibid* at 38; d'Aspremont has also expressed a similar point of view. d'Aspremont, *supra* note 31 at 149.

⁵⁰ *Ibid*. See also, Pellet, *supra* note 25 at 705.

⁵¹ Onuma Yasuaki, "A Transnational Perspective on Global Order in the Twenty-first Century: A Way to Overcome West-centric and Judiciary-centric Deficits in International Legal Taught" (2006) 8 Int.C.L.Rev. at 49.

⁵² Such acts include, *inter alia*, recognition of States, protests, declarations concerning accepting the compulsory jurisdiction of the ICJ; See the text of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. *Guiding Principles*, ILC, 58th session, UN Doc A/61/10 para 176 at 367.

⁵³ ICJ Reports (1974) para 43 at 253, 267, and para 46 at 457, 472.

The doctrine of sources' third theme pertains to the increasing role of international organizations and non-State actors in making international law. The proliferation of international organizations has transformed law-making from a purely inter-State process to a procedure in which other actors at the international level, including Non-Governmental Organizations ("NGOs"), also play a role.

NGOs have become actively involved in processes of international law-making in the United Nations and international conferences. Though NGOs do not participate in decision-making, they do contribute to law-making by various other means. As an example, the Coalition for the International Criminal Court (CICC) is comprised of over eight hundred NGOs and was actively engaged in the negotiations of both the 1998 Rome Conference and the Preparatory Commission for the Establishment of an International Criminal Court (ICC). In the course of these negotiations, the Coalition influenced discussions by making statements in open meetings, preparing and circulating various studies and position papers on matters before the conferences, and functioning as a communication channel with the public.⁵⁴

IOs' contribution to law-making processes is an undeniable fact and they contribute to these processes in two key ways. First, the proliferation of IOs has accelerated the process of international law-making, which has expanded to almost all aspects of international relations.⁵⁵ IOs facilitate the law-making process by providing convenient venues for States' delegates to convene and negotiate, by preparing initial drafts and studies that help start negotiations, and by ensuring the continuation of negotiations until a conclusion is reached.

Second, proceedings and decisions of IOs can have legal effects at the international level, which, in turn, contribute to the development of international law. In particular, some decisions of the General Assembly and those of the Security Council generate rights and obligations for the United

⁵⁴ William Pace, "Participation of Non-Governmental Organizations" in Roy S. Lee, ed, *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999) at 391-398.

⁵⁵ Jose E. Alvarez, *International Organizations as Law-makers* (USA: Oxford University Press, 2006). This book discusses at length the increasing role of international inter-governmental organizations in law-making at the international level.

Nations and its Member States. The fact that resolutions of IOs are not covered under the ICJ Statute has not prevented international courts and tribunals from relying on them in their search for applicable laws. Neither has it averted the discussion by scholars of the role of IOs' resolutions in the development of international law. Within the framework of the doctrine of sources, decisions and resolutions of IOs are discussed under soft law, which will be the subject of detailed analysis in Section E. But, before doing so, as mentioned earlier, it is useful to briefly discuss the TWAIL's perspectives on the sources of international law.

D. TWAIL Perspectives on the Sources of International Law

Third World Approaches to International Law is a relatively new school of thought originating in the post-colonial era. It is comprised of a network of scholars from developing and developed countries who criticize mainstream international law for having contributed to Western nations' domination over developing countries, as well as the economic divide between the rich North and the poor South.⁵⁶

It should be noted, however, that Third World States have shown signs of pragmatism in practice and their behavior has not always aligned with TWAIL's pessimistic view of international law. Upon gaining independence in the 1960s and 1970s, Third World States joined the United Nations, thereby accepting the obligations emanating from the UN Charter and the basic principles of international law applicable in inter-State relations. Hence, Third World States did not insist on rewriting international law after decolonization, but rather sought its reform so as to be attentive to the new realities of the international community and responsive to the needs of a large number of newly developed States.⁵⁷ These new States attempted to redeem international law by removing from the discipline those doctrines and principles that had advanced colonial objectives in the past.

⁵⁶ For further information, See, Chapter Three, Section II, pp 99-115.

⁵⁷ Saeid Mirzaee-Yengejeh, "Contribution of Developing Countries to the Formation and Application of International Law" in Ronald St. John Macdonald and Douglas M. Johnston, eds, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Economy* (Leiden: Brill Academic Publishers, 2005) at 192.

In the post-colonial era, the immediate question was to what extent norms of international law were binding on new States. In this period, Western countries employed the traditional sources of international law to oppose the Third World's view that new rules of international law were necessary. By contrast, Third World States argued that international law had mainly been developed prior to their independence and they had not played a role in the formation of existing international norms. Therefore, such norms were not binding on new States.⁵⁸ Areas of contention centered on the following points: unequal treaties, the customary norms developed in the era of colonization, and standards for compensation in cases of nationalization of natural resources.

(i) Unequal Treaties

As R.P. Anand has noted, treaties were a favourite method of norm-making for Third World countries—in comparison to customary norms—for a number of reasons: treaties provide for clearer provisions, Third World countries could find opportunities to participate in negotiations leading to the conclusion of treaties, and States were not legally committed by treaties until they freely accept being bound by them.⁵⁹

Notwithstanding this general position, Asian and African countries protested against some of the old treaties and several “established principles of international law” contained therein. The new States repeatedly advanced the “unequal treaties” argument that past treaties were imposed on them in unequal circumstances or under duress, and therefore declared the treaties invalid *ab initio*. The new States claimed the right to terminate such treaties by denunciation⁶⁰ and frequently invoked *rebus sic stantibus*, the doctrine that considers a treaty no longer obligatory if a material change in

⁵⁸ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), p. 312.

⁵⁹ See, Vienna Convention on the Law of Treaties, Article 11. This Article identifies several means of expressing consent to be bound by a treaty, including signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or any other means agreed by the parties.

⁶⁰ Sinha, “Perspectives of the Newly Independent States on the Binding Quality of International Law” in Frederick E. Snyder/Surkiartha, eds, *Third World Attitudes Towards International Law* (Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1987) at 25.

circumstances occurs, to terminate “unequal treaties.”⁶¹ As to the binding nature of certain legislative treaties formed prior to their independence, the position of Third World States is similar to their views on customary international law, which is discussed below.⁶²

(ii) Customary Norms Developed Prior to Independence of New States

TWAIL scholars do not support an unqualified acceptance of international customary norms. They advance the argument that customary norms of international law are generally developed prior to the independence of Third World countries, without their contribution, and thus are not binding on them. A number of examples can be cited that show Third World States also share this viewpoint. Third World States’ opposition to the three-mile limit of a country’s territorial sea in the United Nations Conference on the Law of Sea (UNCLOS) is an example of their position with respect to customary norms. Coordinating their position in the framework of the Group of 77 (“G-77”) at the United Nations, the Third World countries sought a wider territorial sea limit, which culminated in an agreement on 12 nautical miles as the limit for the breadth of the territorial sea.⁶³ In addition, the inclusion of 200 nautical miles as the Exclusive Economic Zone (“EEZ”) was indeed a success for developing States.⁶⁴

The views expressed by representatives of Third World States during the debate in the General Assembly in the context of the Declaration on the Granting of Independence to Colonial Countries and Peoples, along with their rejection of customary rules concerning colonies and protectorates, are further evidence of this assertion.⁶⁵

(iii) Standards for Compensation

⁶¹ *Ibid.*

⁶² *Ibid* at 24.

⁶³ See Article 3, *United Nations Convention on the Law of the Sea*, 10 December 1982 (entered into force 16 November 1994).

⁶⁴ See, Mirzaee-Yengejeh, *supra* note 57, at 206.

⁶⁵ *Ibid.*

The newly independent States did not accept the binding character of the traditional rules of international law governing State responsibility. They argued that the rules of State responsibility for injuries to aliens does not constitute a part of universal international law, and they questioned the validity of international standards of justice. In their view, the doctrine of State responsibility was simply aimed at protecting the imperialist interests of former colonizers.⁶⁶

Latin American States also questioned the doctrine of diplomatic protection⁶⁷ as biased against their interests. As a result, an Argentinian jurist⁶⁸ developed the Calvo Doctrine, pursuant to which a foreign investor is required to settle all disputes in accordance with the national laws of the country of investment, and refrain from seeking diplomatic protection from his State of nationality.⁶⁹ The Calvo Doctrine thus challenged the traditional international norm of diplomatic protection, which was considered to be detrimental to interests of debtor States. European and American jurists disputed the validity of the Doctrine on the grounds that a private party and a sovereign State are not equal parties to appear before national courts. They insisted that the doctrine of diplomatic protection remained valid.⁷⁰

It was against this backdrop that the ILC was mandated to take up a project entitled “Diplomatic Protection,” which was culminated in the adoption by the ILC a set of Draft Articles on Diplomatic Protection, in 2006. The Draft Articles are now before the General Assembly for further action.⁷¹

⁶⁶ *Ibid.*

⁶⁷ Diplomatic protection as defined by the ILC is the invocation by a State of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State. The invocation of responsibility should be carried out through diplomatic action or other means of peaceful settlement. See, *ILC Draft Articles on the Diplomatic Protection, Article 1*, ILC, UN Doc A/61/10 at 14.

⁶⁸ Carlos Calvo (1824-1906).

⁶⁹ See, Third report of the Special Rapporteur on the Diplomatic Protection, UN Doc A/CN. 4/523, an Add. 1, p. 75.

⁷⁰ R. P. Anand, “Attitude of the Asian-African States Towards Certain Problems of International Law” in Frederick E. Snyder/Surkiarthai, eds, *Third World Attitudes Towards International Law* (Dordrecht, Boston and Lancaster: Martinus Nijhoff Publishers, 1987) at 14.

⁷¹ See, Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10), Chapter IV, GA Resolution 61/35 and UN Doc. UN Doc, A/71/100, at 146.

IV. Soft Law

There is no reference to soft law in the Statute of the International Court of Justice. Although international legal scholars have attempted to provide a definition, divergent views have been expressed on the legal value of soft law and its format. In the view of Alan Boyle and Christine Chinkin, soft law is “a convenient description for a variety of non-legally binding instruments” employed in contemporary international relations.⁷² Similarly, Andrew Guzman and Timothy Meyer believe that soft law covers a very broad range of instruments “between fully binding treaties and fully political positions that can be changed at will.”⁷³ From this viewpoint, soft law may be viewed as a “precursor” to hard law. This understanding of soft law is consistent with the practice of States concerning the diversity of soft law instruments, as well as the changes in States’ positions, which can result in adjustments in the status of a soft law instrument. The corresponding discussion of soft law in comparison with hard law is common, and sheds further light on our understanding of soft law.

A. Hard, Soft and Non-Law

Scholars who attempt to define soft law in comparison with hard law maintain that, unlike treaties, soft law instruments do not have binding legal effects. Nonetheless, the subjects of international law may at times still respect the norms contained in soft law instruments. Guzman and Meyer, for instance, describe soft law as “nonbinding rules that have legal consequences because they shape States’ expectations as to what constitutes complying behavior.”⁷⁴ Szasz also believes that States are expected to “follow or at least subscribe” to the norms contained in non-binding resolutions, which are often referred to as soft law.⁷⁵

⁷² Alan Boyle and Christine Chinkin, *The Making of International Law* (New York: Oxford University Press, 2007) at 212.

⁷³ Andrew T. Guzman and Timothy L. Meyer, “Explaining Soft Law”, Berkeley Program in Law and Economics, Working Paper Series at 2 on <<http://escholarship.org/uc/item/7796m4sc>>.

⁷⁴ Guzman and Meyer, *supra* note 73 at 3.

⁷⁵ Szasz, *supra* note 17 at 39.

Anthony D’Amato utilizes the “penalty” yardstick to distinguish between hard and soft law.⁷⁶ A soft law system, in his view, does not have penalties. However, a violator of a soft law norm might suffer from a “reputational loss”—though the violator will not be held accountable for its conduct, the international community will pass judgment on the matter. By contrast, a hard law system endeavours to punish every violation of the law by some form of sanction.⁷⁷

For other scholars, however, the categories of international standards referred to as “soft law” are not law at all. Positivists, for instance, claim that the term “soft law” is redundant because the norms contained therein would subsequently be transformed into either hard law or non-law.⁷⁸ A positivist analysis of soft law is useful to better understand these types of instruments, and is therefore discussed below.

B. Positivists’ Perspective of Soft Law

From the extreme positivist perspective, soft law simply does not exist.⁷⁹ Through this lens, international law is either hard law or not law at all.⁸⁰ Positivists claim that “theories of soft law reflect the growing appetite of legal scholars for new legal materials,”⁸¹ and that these theories constitute the proliferation of international legal thinking.⁸² For Malcolm Shaw, as an example, the instruments referred to as “soft law” are not laws in the strict sense, but rather influence the development of general international law.⁸³

⁷⁶ Penalty is defined by D’Amato as “forcible imposition of a cost upon the law-violator which is calculated to exceed the expected utility to be derived from the violation.” Anthony D’Amato, “Softness in International Law: A Self-Serving Quest for New Legal Materials: A Reply to Jean d’Aspremont” (2009) 20:3 EJIL at 902.

⁷⁷ *Ibid.*

⁷⁸ Jean d’Aspremont, “Softness in International Law: A Self-Serving Quest for New Legal Materials” (2008) 19:5 EJIL 1075 at 1083.

⁷⁹ D’Amato, *supra* note 76 at 911.

⁸⁰ d’Aspremont, *supra* note 78 at 1076.

⁸¹ d’Aspremont has demonstrated that “the difficulties inherent in the proliferation of international legal thinking have buoyed many lawyers to stretch the limits of their field of study by capturing objects which are intrinsically alien to it.” In his view “many theories of softness boil down to an attempt to extend the material studied by scholars with a view to providing more room for international legal scholarship”. See, d’Aspremont, *supra* note 78 at 912.

⁸² d’Aspremont defines prolific literature as legal writings that fail “to clarify or add anything to the understanding of law, grapples with issues outside the realm of law, or is utterly tautological in the sense that it only revolves around itself.” *Ibid* at 913.

⁸³ Shaw, *supra* note 13 at 117.

(i) Distinction Between Legal Acts and Legal Facts

The positivists' opposition to soft law is primarily based on the distinction between legal acts and legal facts. "Legal acts" denote the conduct of States that is intended to generate rights and obligations in the international plane. Thus, legal acts of States are at the origin of the primary rules of international law. In cases of non-conformity of legal acts with the primary rules,⁸⁴ States can be held responsible for the commission of wrongful acts.

From the positivist's perspective "legal facts" refer to the regular "behaviours" of States that are not intended to generate legal rights and obligations. Conversely, "legal acts" are those State actions which create international obligations. Although legal facts are also acts of State and thus some legal effects flow from them, they do not constitute "legal acts" and consequently do not create the international obligations mentioned above.⁸⁵

The main difficulty in understanding the positivist viewpoint, as Jean d'Aspremont has pointed out, is the distinction between *legal facts* and *legal acts*, especially when legal facts take the form of acts by States. This problem has been elaborated on by the ILC in its commentary to the Draft Articles on State Responsibility for Internationally Wrongful Acts. The commentary of Article 1 acknowledges the inadequacy of the English translation to precisely reflect the concept of State responsibility, which deals with the consequences of a legal fact, not those of a legal act:

The French term 'fait internationalement illicite' is better than 'acte internationalement illicite', since wrongfulness often results from omissions which are hardly indicated by the term 'acte'. Moreover, the latter term appears to imply that the legal consequences are intended by its author. For the same reasons, the term 'hecho internacionalmente ilícito' is adopted in the Spanish text. In the English text, it is necessary to maintain the expression 'internationally wrongful act,' since the French 'fait' has no exact equivalent; nonetheless, the term 'act' is intended to encompass omissions, and this is made clear in [A]rticle 2.⁸⁶

⁸⁴ Primary rules of international law are "the rules that place obligations on States, the violation of which may generate responsibility." See the ILC commentary on *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, ILC, UN Doc A/56/10 para 77.

⁸⁵ d'Aspremont, *supra* note 78 at 1078.

⁸⁶ *Ibid* at 68.

(ii) Legal Instrument and its Language

Under the positivists' scheme, legal acts of States have two elements: a legal instrument and its language. Legal acts of States are usually expressed in language that reflects what its authors had wished (*negotium*). The agreed language is usually recorded in a document called the instrument (*instrumentum*). The author of a legal act has full authority to decide both the language and the type of instrument.⁸⁷ Therefore, in distinguishing soft law from hard law, attention should be paid to the format of an instrument and its language. That is to say, even if an instrument is prepared in a hard law format, it may not be sufficient for creating a legal obligation at the international level. Attention should be paid to the intention of parties to the instrument, as well.

(a) Soft Instrument

The instrument of a legal act is deemed soft when the parties to it decide to use something other than a formal treaty or binding unilateral declaration. It has generally been acknowledged that a resolution produced by an international organization has soft law status unless otherwise provided for in the constitutive instrument of the given organization.⁸⁸ Also, it has become common practice at international conferences to adopt the final act of the conference in the form of declarations.⁸⁹ The choice of this type of instrument demonstrates the parties' intention to not generate legally binding obligations. The final act usually deals with procedural aspects of the conference and includes political pronouncements that do not generate legal obligations. These practices are in line with the positivists' perception that the subjects of international law are entitled to agree to follow a certain type of behavior by way of adopting instruments other than a treaty or a unilateral act.

⁸⁷ d'Aspremont, *supra* note 78 at 1081.

⁸⁹ *Ibid* at 1082.

Soft law instruments may be prepared in different forms. They may be adopted in the form of guidelines, which provide procedures for the interpretation and application of other legally binding instruments, or they may pave the way for subsequent State practice, thereby facilitating the emergence of binding norms in the form of a treaty or customary law. It is beyond doubt, even in the view of positivists, that these types of soft instruments produce legal effects. It is due to these legal effects that many scholars qualify these types of instruments as “law” despite their soft nature.

As clarified by the ICJ, even some soft law instruments may contain binding language and create rights and obligations for their parties. In the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, the ICJ rejected Bahrain’s contention that the Minutes of Ministerial Meeting of 25 December 1990 were “no more than a simple record of negotiations” and were not international agreements and, therefore, could not serve as a basis for jurisdiction of the Court.⁹⁰ The Court observed that, under the Vienna Convention on the Law of Treaties of 1969, “international agreements may take a number of forms” and may be given different names. In opposing the contention of Bahrain, the Court maintained that “the Minutes are not a simple record of a meeting They enumerate the commitments to which the Parties have consented.” In the Court’s view, the minutes created rights and obligations for the parties, and thus they constituted “an international agreement.”⁹¹

(b) Soft Language

As explained above, under the positivists’ scheme the subjects of international law have complete control over the law-making process. They may wish to use a binding legal instrument but soften its language with a view toward avoiding the creation of a binding legal obligation. According to the

⁹⁰ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Judgment, [1994] ICJ Reports para 25 at 121. In its ruling on the *Aegean Continental Shelf (Greece v Turkey)*, the Court concluded, however, that the Joint Communiqué of 31 May 1975 “was not intended to, and did not [generate], an immediate commitment by the Greek and Turkish Prime Ministers . . . to accept unconditionally the unilateral submission of the present dispute to the Court.” [1975] ICJ Reports para 107 at 3-44.

⁹¹ [1994] ICJ Reports para 25 at 121.

scheme, these instruments – or those parts of instruments – that do not lay down any precise “directive as to conduct” and that do not produce normative provisions are, indeed, another type of soft law because of the softness of their language.⁹²

The positivists’ proposition concerning the second category of soft law, i.e. instruments containing soft language, is in line with prevailing State practice. There are many examples of treaties which contain non-binding language. Framework conventions usually contain flexible language and their parties have a great deal of discretion in the application of these conventions. For instance, the 1995 Council of Europe Framework Convention for the Protection of National Minorities does not provide a definition for “national minorities” but rather it is left to the parties to define “national minorities” at the national level.⁹³ Provisions of conventions that do not provide direction on their application do not have normative value and are thus considered to be “potestative”⁹⁴—a condition included in a contract or treaty that will be fulfilled only if obligated parties choose to do so.

The provisions of treaties that are purely indicative or suggestive and do not formulate any obligations, such as the preamble, also contain soft language.⁹⁵ Moreover, operational provisions that endorse certain guiding principles, such as “peace,” “amity,” and “friendship” between parties, are also considered to have non-binding character. In the case concerning the *Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, the ICJ concluded that Article 3(d) of the Charter of the Organization of American States did not provide for any sort of obligation on the parties.⁹⁶ Likewise, in its judgment on the preliminary objections in the *Oil Platforms (Islamic Republic of Iran v. United States of America)* case, the ICJ observed that the phrase “there

⁹² d’Aspremont, *supra* note 78 at 1084.

⁹³ The Framework Convention for the Protection of National Minorities, drawn up within the Council of Europe by the Ad Hoc Committee for the Protection of National Minorities (CAHMIN), was adopted by the Committee of Ministers of the Council of Europe on 10 November 1994 and opened for signature by the member States of the Council of Europe on 1 February 1995. *Explanatory Report of the Convention* online: <<http://conventions.coe.int>>.

⁹⁴ d’Aspremont, *supra* note 78 at 1085.

⁹⁵ *Ibid* at 1086.

⁹⁶ See the ICJ Report, 1986 para 259, the Court observed that “The Charter of that Organization however goes no further in the direction of an agreed limitation on sovereignty of this kind than the provision in Article 3(d), and that “the solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy.”

shall be firm and enduring peace and sincere friendship,” which is contained in Article I of the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States, did not amount to a legal obligation.⁹⁷ According to the Court, such words were only meant to “stress that peace and friendship constituted the precondition for a harmonious development of the commercial, financial and consular relations between the parties and that such a development would in turn reinforce that peace and that friendship.”⁹⁸

A third form of soft language is found in agreements that do not have an independent character, and thus a supplementary instrument must be developed in order to give effect to their provisions. Under the framework conventions in the areas of environment,⁹⁹ non-navigational uses of international watercourses,¹⁰⁰ and non-proliferation of weapons of mass-destruction,¹⁰¹ parties have to prepare additional instruments to elaborate on the provisions spelled out in the original soft language agreements. Accordingly, the provisions contained in these types of soft language agreements do not create specific obligations and have no value without the supplementing instruments (*pacta de contrahendo* or *de negociando*).¹⁰²

Treaties can also be considered soft law between the time of signature and ratification.¹⁰³ Generally, treaties do not create legal obligations for States before the treaty’s ratification or acceptance. However, States are under the obligation to not take any action that would defeat the object and purpose of a treaty.¹⁰⁴ For instance, many States have signed but not yet ratified the 1998

⁹⁷ The ICJ observed that “Article 1 cannot be interpreted as incorporating into the Treaty all of the provisions of international law concerning such relations. See ICJ Reports, 1996 at 814 [28].

⁹⁸ *Ibid.*

⁹⁹ See the *United Nation’s Framework Convention on Climate Change* (9 May 1992), Article 4 (effective 21 March 1994).

¹⁰⁰ The 1997 *United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses* is the only universally applicable treaty governing shared freshwater resources. The provisions of this convention may be adjusted by its parties to suit the characteristics of particular international watercourses. Article 3(3) of the Convention provides that “[w]atercourse States may enter into one or more agreements, hereinafter referred to as ‘watercourse agreements’, which apply and adjust the provisions of the present Convention to the characteristics and uses of a particular international watercourse or part thereof.”

¹⁰¹ See Article III, *Treaty on the Non-Proliferation of Nuclear Weapons*, 1 July 1968 (effective 5 March 1970).

¹⁰² See, d’Aspremont, *supra* note 78 at 1087.

¹⁰³ Schlütter, *supra* note 23 at 99.

¹⁰⁴ Vienna Convention on the Law of Treaties, *supra* note 14, Article 18.

Rome Statute of the International Criminal Court,¹⁰⁵ and yet they are under an obligation to not take any action which might defeat the object and purpose of the Statute.¹⁰⁶ These kinds of obligations are considered to be soft obligations because in the event of their violation States cannot be held accountable.¹⁰⁷

It must be clarified, however, that the use of certain soft language does not render the qualified obligations contained in these treaties without legal value. For instance, conventions that provide for a given obligation to be abided by “where necessary,”¹⁰⁸ “to the extent possible,”¹⁰⁹ “as far as possible,”¹¹⁰ “as appropriate,”¹¹¹ “in accordance with its capabilities,”¹¹² or “within available resources,”¹¹³ are not potestative.¹¹⁴ Rather, the obligation required of the parties has been qualified under these instruments, which could be objectively determined in courts and tribunals should a dispute arise concerning their implementation.

C. Increasing Demand for Soft Law

Regardless of divergent views on its legal status, soft law¹¹⁵ is gaining increasing significance due to growing demand in the contemporary international community to produce international norms expeditiously and in a flexible format and language.¹¹⁶ Guzman and Meyer have explored reasons

¹⁰⁵ For the list States signatories of the Rome Statute, visit: <http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx>.

¹⁰⁶ See, Vienna Convention on the Law of Treaties, *supra* note 14.

¹⁰⁷ The United States of America had signed the Rome Statute of the ICC on 31 December 2000. However, in a communication dated 6 May 2002, the United States notified the Secretary-General that “the United States does not intend to become a party to the Treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31 2000.” See, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XVIII-10&chapter=18&lang=en>.

¹⁰⁸ 1992 Convention on Biological Diversity, Article 15 (7).

¹⁰⁹ Article 4 of the *United Nations Convention on the Rights of the Child* provides that “[w]ith regard to economic, social and cultural rights, State parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”

¹¹⁰ The Convention on Biological Diversity, *supra* note 113 Articles 5, 7, 9, 10, 11, 14.

¹¹¹ *Ibid*, Articles 7, 8, 9, 10, 11, 14, 15 (7), 16 (3) and 16 (4).

¹¹² *Ibid* at Article 20.

¹¹³ *Ibid* at Article 17.

¹¹⁴ d’Aspremont, *supra* note 78 at 1087.

¹¹⁵ Hillgenberg employs the term “non-treaty arrangements” instead of soft law. See, Hartmut Hillgenberg, “A Fresh Look at Soft-Law” (1999) 10:3 EJIL 499 at 500.

¹¹⁶ Guzman and Meyer, *supra* note 73 at 1.

why States prefer soft law instead of hard law in certain circumstances, and have come up with the following theoretical explanation:

Under the “loss avoidance” theory, States choose soft-law because it is a less risky approach and they are less likely to be held accountable for not fulfilling their commitments. Risks of non-fulfillment of obligations include harm to the reputation of violators as well as retaliation by the affected parties. It seems that, in the case of violation of soft law obligations, loss would usually be in the form of a reputational loss, but would not entail retaliation by the affected parties.¹¹⁷

In accordance with the “delegation theory,” in certain cases governments prefer soft law to circumvent parliamentary ratification, which might entail risks of disapproval, the degree of which might vary depending on the circumstances in each country.¹¹⁸ “Such agreements might be easier to achieve and adhere to for domestic reasons.”¹¹⁹ By opting for a soft-law approach, States also reserve their rights to further reflect on the norms so developed and keep avenues open for the incorporation of soft law standards in hard law instruments at a later stage.¹²⁰

“International common law theory” views the soft-law approach as a procedure which has enabled non-State actors to get involved in international law-making. The proliferation of IOs and international tribunals, has increasingly facilitated the engagement of non-State actors in law-making at the international level.¹²¹

In short, proponents of soft law doctrine believe that the “binary nature” of international law”—treaty law and customary law—is incapable of regulating the growing complex issues of contemporary international relations, and that producing “complementary normative instruments” is

¹¹⁷ *Ibid* at 19.

¹¹⁸ *Ibid* at 13. Joint Comprehensive Plan of Action (JCPOA), agreed between Iran on the one hand and the five Permanent Members of the Security Council and Germany on the other, on 14 July 2015, clearly demonstrate this doctrine. Both the United States and Iran avoided the risk of disapproval by their respective parliaments by preparing a soft law instrument (JCPOA), which was not formally presented to their parliaments. It was annexed to SC Resolution 2231 (2015).

¹¹⁹ Shaw, *supra* note 13 at 118.

¹²⁰ Guzman and Meyer, *supra* note 73 at 24.

¹²¹ *Ibid* at 27.

necessary to regulate various aspects of the modern international community.¹²² They criticize opponents of soft law for ignoring the growing practice among the subjects of international law in the format of soft law.¹²³

The above arguments should in no way be construed as overemphasizing the weight and legal value of soft law, which requires consideration of a number of factors. Soft laws are adopted in different forms, and, therefore, various soft law instruments have different legal significance and different degrees of effectiveness. In weighing the legal value of soft laws, in addition to their normative content, attention should also be paid, *inter alia*, to different contexts and the institutional settings within which an instrument has been adopted.¹²⁴

Nevertheless, soft law is gaining importance in contemporary international relations for various reasons.¹²⁵ As stated earlier, on many occasions, elements contained in a soft law have been incorporated into a hard law instrument, thereby leading to binding rights and obligations.¹²⁶ On other occasions, soft laws have become customary laws because of universal compliance with their provisions.¹²⁷ Finally, international organizations have increasingly been producing international standards in the form of resolutions and declarations. This has become the usual practice in the United Nations General Assembly and Security Council.

D. Instruments Produced by International Organizations

¹²² d'Aspremont, *supra* note 31 at 128.

¹²³ Guzman and Meyer, *supra* note 73 at 7.

¹²⁴ Hillgenberg, *supra* note 119 at 504.

¹²⁵ Hillgenberg provides a list of reasons as to why States prefer soft law instead of hard law: they include *inter alia*: concluding agreements with the parties which do not have the capacity of concluding an agreement, such as 1998 Belfast Multi-Party Agreement on the future of Northern Ireland; avoidance of cumbersome national ratification procedure; simple procedure, facilitating arriving at agreements and understanding. As for the complete list of issues, see: Hillgenberg, *supra* note 119 at 501.

¹²⁶ In the proponent's view of soft law, norms contained in soft instruments such as political declarations, codes of conduct, and gentlemen's agreements, are considered part of the continuum between law and non-law. *Ibid.*

¹²⁷ The United Nations Declaration on Human Rights (1948) originally adopted in the form of a General Assembly Resolution A/RES/217(III) A, is now widely recognized as having customary status, thereby binding all States. See for instance P. Humphrey, "The Universal Declaration of Human Rights: Its History, Impact and Judicial Character" in B.G. Ramcharan, ed, *Human Rights: Thirty Years after the Universal Declaration* (The Hague: Martinus Nijhoff Publishers, 1979) at 21 – 37.

International intergovernmental organizations are usually established by multilateral treaties, which are sources of international law under Article 38 (a) of the ICJ Statute. It is generally accepted that IOs are subjects of international law and enjoy an international legal personality.¹²⁸ IOs are empowered under their respective constitutive instruments to conclude agreements with each other and also with States, which are governed by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986). The agreements thus concluded are also sources of international law under the ICJ Statute.

In the course of their activities, IOs produce other types of instruments that may or may not constitute a formal source of international law as specified in the ICJ Statute. The legal value of these instruments varies depending on the powers of the producing organ or organization, the format of instrument in question and its language, and the relationship of the instrument in question to other sources of international law.

IOs are either expressly empowered by their constitutive instruments or have implied powers to develop new norms for internal use or external application.¹²⁹ Internal rules usually cover procedural issues, structural arrangements, and administration of justice in the organization concerned. These decisions, if adopted by the type of majority required, become binding on the organization and its members.¹³⁰ As will be discussed, IOs also produce norms for external application, which usually create standards for the conduct of subjects of international law on the international plane. It must be

¹²⁸ *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Reports at 179.

¹²⁹ In its advisory opinion on *Effect of Awards of Compensation made by the UN Administrative Tribunal* the ICJ opined that “[i]n these circumstances, the Court finds that the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.” ICJ Reports, 1954, p. 57.

¹³⁰ In the *Certain Expenses* case the ICJ opined that the GA decision on the regular expenses of the organization was a legally binding obligation; Stephen M. Schwebel, “The Effect of Resolutions of the U.N. General Assembly on Customary International law” Proceedings of the Annual Meeting (1979) 73 ASIL Proc. at 301.

noted, however, that making a distinction between internal and external rules is not always easy, and in most cases internal rules have external application and *vice versa*.¹³¹

In the age of proliferation of international organizations, the contribution of IOs to the process of multilateral treaty-making has been on the rise. The United Nations, its specialized agencies, and regional organizations have greatly facilitated negotiations among States in the preparation of multilateral treaties by not only providing convenient venues for discussion and negotiations, but by also rendering technical expertise and draft texts to initiate said negotiations.¹³² In particular, the ILC's contribution to the law-making process in key areas of international relations is worthy of note. So far, the ILC has created many draft conventions that have been presented to both the General Assembly and diplomatic conferences, and thereby adopted as draft multilateral treaties.¹³³ Texts prepared by the Commission, even where they do not result in treaties, are authoritative and have influenced the development of international law and been referred to by international courts and tribunals.¹³⁴

Expert bodies of IOs also produce other types of instruments on a regular basis, such as model laws and guides to practice, which neither result in binding instruments nor have legal value similar to hard or soft law but are prepared in order to assist States in developing national legislation.¹³⁵ Szasz has a different view of these types of instruments and refers to them as non-law. In his view, these types of instruments do not have a binding character and do not “form a part of the corpus of

¹³¹ Alvarez, *supra* note 55 at 143-145.

¹³² During the negotiations on the preparation of draft International Convention for the Suppression of Acts of Nuclear Terrorism (2005), which took place in the Ad Hoc Committee on International Terrorism of the United Nations from 1998 to 2004, technical experts from IAEA assisted the Ad Hoc Committee in the drafting of technical definitions which were finally included in Article 1 of the Convention. See, Rohan Pererea, “International Convention for the Suppression of Acts of Nuclear Terrorism, 13 April 2005,” online: <<http://untreaty.un.org/cod/avl/ha/icsant/icsant.html>>.

¹³³ The text of the Convention is reproduced in the *Work of the International Law Commission*, ILC, Vol II, 7th ed (2007) 1 at 116-146.

¹³⁴ See, for instance, *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (1997), ICJ Reports paras 47, 50-54 and 58. It should also be noted that upon request by the General Assembly a draft statute for the ICC was prepared by the ILC, in 1994, which was the basis to begin the negotiations on the establishment of the ICC. See, UN Doc. A/49/10 at 43-140.

¹³⁵ For instance, United Nations Commission on International Trade Law has prepared several model laws to assist States in the preparation of national legislation. See as an example United Nations Model Law on Cross-border Insolvency (2011), available on the Internet: http://www.uncitral.org/uncitral/uncitral_texts/insolvency/2011Judicial_Perspective.html

international instruments creating rights and obligations for the subjects of international law.”¹³⁶ Nevertheless, these types of instruments continue to influence the law-making process at the national level, but to what extent it is difficult to ascertain.

E. International Organizations’ Decisions

IOs are authorized to take action on various issues brought before them by their members or through other mechanisms specified in their constitutive instruments. IOs decisions are usually adopted in the form of resolutions either by consensus or a required majority vote, but also go by other titles such as declarations or procedural decisions. However, it is important to note that the title of a decision is not germane when evaluating its legal effects. Decisions must be weighed, as mentioned earlier, in light of the powers of their producing organs and in relationship to other international instruments and international customary norms. In the *Namibia* case, the ICJ commented on this very point, stating in its advisory opinion that “the language of a resolution . . . should be carefully analyzed before a conclusion can be made as to its binding effect.”¹³⁷ This fact applies to both the United Nations’ General Assembly and the Security Council and will be expounded below in the following subsections.

(i) General Assembly Resolutions

While it is generally perceived that General Assembly resolutions are merely recommendations, the General Assembly has also been empowered to make binding decisions.¹³⁸ Powers of the Assembly to make binding decisions have been spelled out in the UN Charter provisions and are related to

¹³⁶ Schachter, *supra* note 10 at 47.

¹³⁷ ICJ Reports, 1971, p. 53, para 114.

budgetary,¹³⁹ administrative¹⁴⁰ and procedural matters.¹⁴¹ Other non-binding resolutions of the General Assembly are recommendations which¹⁴² “put forward opinions on various issues with varying degrees of majority support.”¹⁴³ A particular reference should be made to Article 13 (1) (a) of the UN Charter, which mandates the General Assembly to conduct studies and make recommendations with respect to “the progressive development of international law and its codification.” The use of this language corresponds with the general understanding among the founders of the United Nations at the San Francisco Conference, to entrust the General Assembly with parliamentary advisory competencies and to empower the Security Council with the binding decision capabilities.¹⁴⁴

In addition, the General Assembly has been entrusted with powers to make mandatory decisions in certain other areas. The ICJ referred to this point in its advisory opinion in the *Namibia* case in 1971, where it observed that: “[...] it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.”¹⁴⁵

Furthermore, if recommendations of the General Assembly are accepted by parties to a dispute, they become binding upon them.¹⁴⁶ The same is also true with respect to the recommendations made by the Security Council under Chapter VI of the UN Charter. This view has been confirmed by the ICJ in the *Corfu Channel* case, in which the Security Council recommended that the dispute between the

¹³⁹ Under Article 17 of the UN Charter, the General Assembly shall approve and apportion the budget of the Organization, which shall be borne by the Member States. The Assembly has been authorized under Article 19 of the Charter to prevent States from voting if their arrears exceed a certain amount.

¹⁴⁰ For instance, powers of the General Assembly in the election of the Secretary-General and other UN official are binding on all Member States.

¹⁴¹ In accordance with Article 21 of the Charter, “The General Assembly shall adopt its own rules of procedure. It shall elect its President for each session.” For the complete list of the areas in which the General Assembly can take binding decision, see, Blaine Sloane, “General Assembly Resolutions Revisited” (1988) 58 BYIL at 47.

¹⁴² Schwebel, *supra* note 130 at 302.

¹⁴³ Shaw, *supra* note 13 at 114-155.

¹⁴⁴ *Ibid.*

¹⁴⁵ ICJ Reports, 1971, p. 50, para. 105.

¹⁴⁶ Pellet, *supra* note 25 at 711.

United Kingdom and Albania concerning the explosion occurred in the Corfu Channel,¹⁴⁷ be referred to the ICJ. The parties accepted the recommendation and submitted the dispute to the ICJ.¹⁴⁸

The General Assembly, in the course of its activities, has adopted several declarations on various topics, annexed to its resolutions.¹⁴⁹ While entitled as a declaration, this only signifies the political importance¹⁵⁰ of the question before the General Assembly, and not the legal value of declaration. The true legal value of these declarations should be assessed in light of their links with other sources of international law,¹⁵¹ as well as on the basis of their impacts on the development of modern international law.¹⁵² Declarations of the General Assembly may be understood by the Assembly as authoritative interpretations of various principles of the UN Charter¹⁵³ or customary international norms.¹⁵⁴ As Blaine Sloane observed, “[t]hey are assertions as to the law either as interpretations of the UN Charter or declarations of general international law”¹⁵⁵ and cannot be dismissed because they are considered to be recommendations. For instance, as the ICJ in the *Nicaragua* case in reference to the *Declaration on the Principles of International Law Concerning*

¹⁴⁷ The explosion occurred in the Corfu Channel, Albanian territorial waters, on 22 October 1946, inflicting harm and causing loss of human life.

¹⁴⁸ See, the ICJ Judgement of March 25th 1948, ICJ Reports 1947-1948 at 17 and 26.

¹⁴⁹ The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (Resolution 2625 (XXV)), the Manila Declaration on the Peaceful Settlement of International Disputes (Resolution 37/10), the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations (Resolution 42/22), the Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field (Resolution 43/51), the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security (Resolution 46/59) and the Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security (Resolution 49/741).

¹⁵⁰ Eric Suy, a former legal counsel of the United Nations has observed that “[s]olemn declarations adopted either unanimously or by consensus have no different status [than resolutions], although their moral and political impact will be an important factor in guiding national policies.” UN Doc. E/CN.4/L. 610, 2 April 1962.

¹⁵¹ In Eric Suy’s words “[d]eclarations frequently contain references to existing rules of international law. They do not create, but merely restate and endorse them. Other principles contained in such declarations may appear to be new statements of legal rules.” *Ibid.*

¹⁵² As Eric Suy has put it, “[o]ther principles contained in such declarations may appear to be new statements of legal rules. But the mere fact that they are adopted does not confer on them any specific and automatic authority. The most one could say is that overwhelming (or even unanimous) approval is an indication of *opinio juris sive necessitates*.” *Ibid.*

¹⁵³ Mark S. Bergman, “The Norm-Creating Effect of a General Assembly Resolution on Transnational Corporations” in Frederick E. Snyder & Surakiart Sathirathai, eds, *Third World Attitudes Towards International Law* (Dordrecht-Boston-Lancaster: Martinus Nijhoff Publishers, 1987) at 234.

¹⁵⁴ *Ibid* at 235. General Assembly Resolution on the Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, GA Resolution 95 (1946).

¹⁵⁵ Sloane, *supra* note 141 at 44-45.

Friendly Relations has noted, the wording of several General Assembly declarations adopted by States demonstrate their recognition of the principle of the prohibition of use of force as “definitely a matter of customary international law.”¹⁵⁶

In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ has opined that resolutions of the General Assembly may have normative value:

“The Court notes that 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.”¹⁵⁷

General Assembly declarations may also, as a result of extensive State practice subsequent to their adoption, acquire the status of customary international law. As an example, the Universal Declaration of Human Rights (UDHR) was not intended to be a legally binding instrument at its adoption in 1948. Rather, UDHR “reflected the determination of leaders then to put behind [them] the atrocities committed during or prior to World War II.”¹⁵⁸ However, as John P. Humphrey argues, abundant references in UN documents and State practice demonstrate that the Declaration has now acquired the status of customary international law.¹⁵⁹ Humphrey’s argument is echoed by others and the reference to customary law status of the Declaration has become a standard argument in discussions about the Declaration and its provisions.¹⁶⁰

The ICJ itself has accorded important weight to the General Assembly’s *Declaration on the Granting of Independence to Colonial Countries and Peoples*.¹⁶¹ It has also given weight in the same

¹⁵⁶ Case concerning *Military and Paramilitary activities in and against Nicaragua* (1986), ICJ reports para 193.

¹⁵⁷ ICJ Reports, 1996, pp. 254-255, para 70.

¹⁵⁸ Jochen von Bernstorff, “The Changing Fortunes of the Universal Declaration of Human Rights” (2008) 19:5 EJIL 903.

¹⁵⁹ Humphrey, *supra* note 127 at 21 – 37.

¹⁶⁰ Sloane, *supra* note 141 at 71 and 88.

¹⁶¹ GA Resolution 1514 (XV), 1960.

sphere to the *General Assembly's Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the UN Charter*.¹⁶²

Finally, Sloane observes that General Assembly resolutions may also characterize an independent source of international law if they represent a manifest intent of the international community. He posits that if the community of nations declares the status of law in a particular field, by consensus, it would be hard to question that position with reasonable argument. Nevertheless, he suggests that in determining legal effects of General Assembly resolutions, no general conclusion could be made. In considering the legal effects of any of the General Assembly resolutions, the following factors should be taken into considerations: “its binding force or obligatory effect; its general acceptability as an interpretation; its declaratory effect; its contribution to law-making processes; its status as State or institutional practice or *opinio juris*; its weight as evidence; its effectiveness; and other legal and non-legal effects.”¹⁶³

Onuma Yasuaki has identified the merits of General Assembly resolutions *vis-a-vis* customary international law. In his view, rules established by General Assembly resolutions and declarations “have more advantages in terms of global legitimacy than mystical rules and principles of customary international law.”¹⁶⁴ Most customary norms have been provided for in treaties concluded between, or among, the great powers of Europe and are referred to in the text books of lawyers from these countries.¹⁶⁵ By contrast, the norm-creating process in the General Assembly is “far more centralized and transparent.” It not only involves the participation of the entire membership of the Organization, but also provides opportunities for the contributions of non-State actors, such as NGOs.¹⁶⁶

(ii) Security Council Resolutions

¹⁶² GA Resolution 2625 (XXV), 1970.

¹⁶³ Sloane, *supra* note 141 at 93 and 125.

¹⁶⁴ Onuma, *supra* note 51 at 52.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid* at 56.

It is generally understood that the Security Council has been authorized to make decisions under Chapter VII of the UN Charter that are binding on the Member States under Article 25.¹⁶⁷ In its advisory opinion on the *Namibia* case, the Court observed:

Thus when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.¹⁶⁸

In the *Libya* case, the Court reiterated the same position and emphasized that the obligations of members of the United Nations “prevail over their obligations under any other international agreement.”¹⁶⁹

It must be emphasized, however, that decisions of the Security Council under Chapter VII are usually adopted on a case-by-case basis with defined temporal and spatial effects. On a number of occasions in the post-Cold War era, however, the Security Council has departed from its traditional practice of international crisis management and engaged in what could be perceived as law-making at the international level. It has, *inter alia*, adopted a number of resolutions in the areas of counter-terrorism and non-proliferation of weapons of mass-destruction (“the normative resolutions”), purportedly creating new norms¹⁷⁰ or modifying existing norms of international law.¹⁷¹ These normative resolutions have been adopted under Chapter VII of the UN Charter and, in principle, are binding on all States, irrespective of their involvement in the cases before the Council. Since these types of resolutions are the focus of study in this thesis, they will be examined in detailed in the next chapter.

V. Conclusion

¹⁶⁷ Pellet, *supra* note 5 at 700; See *Namibia case*, ICJ Reports, 1971, pp. 16 and 54.

¹⁶⁸ ICJ Reports, 1971, p. 55-56, para. 116.

¹⁶⁹ ICJ Reports, 1992, p. 15, para 39, and p. 114, para 42.

¹⁷⁰ Security Council Resolution 1373 (2001), para 1(b).

¹⁷¹ Security Council Resolution 1540 (2004), para 1.

As discussed above, the contemporary discourse on the doctrine of sources revolves around three main themes. The first theme, consensual foundation versus extra-consensual basis of the sources, is not a new discourse. Furthermore, continuous discussion of this theme has not helped arriving at a conclusion in favor of either of the bases of the sources—consensual or extra-consensual. David Kennedy has eloquently elaborated on the point:

Sources discourse, so long as it seems consensual, guarantees that the legal order will not derogate from -will indeed express - sovereign authority and autonomy. So long as it seems extra-consensual, sources rhetoric guarantees that the international legal order will not be hostage to sovereign whim. The important thing is the co-existence of these two rhetorics—and the relationship between them. Each must temper the other and the discourse as a whole must seem to move forward from autonomy to community.¹⁷²

The second theme, namely, loyalty to formal sources of law versus the necessity of innovation to address the new demands of the international community, is a new but important discourse. Proponents of formalism have rightly argued that, for the sake of precision, consistency and predictability, the formal sources of international law should continue to be employed as viable mechanisms in developing international norms. However, experiences gained from multilateral treaty-making indicate that it is unimaginable that the international community would be in a position to develop written rules on all aspects of inter-State relations. This process has proven to be costly and time-consuming, and in certain areas States are unwilling to proceed further with the codification or progressive development of international law due to a lack of knowledge and, or practice. For these reasons, the development of international norms in a soft law format has proven to be practical and useful in particular areas, such as human rights and the environment. It is likely that the discussion on this theme will continue for years to come, and thus it is not possible to make a conclusion at this stage.

¹⁷²David Kennedy, “the Sources of International” (1987) 2:1 Am UJ Int. Law and Policy, at 87.

In regards to the third theme, the increasing role of international organizations in developing international standards is an undeniable fact. Nonetheless, no general conclusion can be made regarding the legal weight of most IO's decisions that are produced in the form of soft law. Instead, they should be assessed on a case-by-case basis with due regard for the powers of the producing organs, the language employed in each instrument, and their relationship with other sources of international law. As such, the normative resolutions of the Security Council should be examined in the light of the factors mentioned.

Chapter Two

Unpacking Flaws in the Security Council's Normative Resolutions

Abstract

This Chapter examines the Security Council's normative resolutions with a view to exposing their shortcomings. The norm creation by the Council in the areas of counterterrorism and the non-proliferation of weapons of mass-destruction is unwarranted since both areas are well regulated through multilateral treaties. The discrepancy between the respective treaty regimes and the Council's normative resolutions is a significant problem, which cannot be resolved by invoking Article 103 of the Charter of the United Nations (UN Charter), stipulates that States' Charter obligations prevail over their other obligations under international agreements. Additionally, repeated revisions of these normative resolutions by the Security Council has become burdensome for many States, as the Council expects States to take modifying legislative or administrative measures each time it adopts a normative resolution or modifies said resolutions. Additionally, the exercised quasi-judicial functions by the Council has been severely criticized by States, human rights bodies and scholars for the lack of due process, a matter that has been confirmed by national and international courts' judgments.

Introduction

This Chapter is devoted to the examination of the Security Council's normative resolutions regarding counterterrorism and the non-proliferation of weapons of mass-destruction (WMDs) and is based on resolutions' texts and the corresponding views of States. This effort is a necessary step in unpacking the flaws inherent in the Council's normative resolutions.

Since the end of the Cold War, the Security Council has adopted more than 40 resolutions to combat international terrorism and over 25 resolutions in relation to the non-proliferation of weapons

of mass-destruction. Most of these resolutions are omnibus texts and contain, *inter alia*, recommendations, enforcement measures, legal determinations, quasi-judicial decisions, and norm-creating or normative provisions. In this study, normative provisions refer to those provisions in Security Council resolutions that create new international norms or alter an existing rule of international law. Labelling a resolution as “normative” should in no way suggest that the entire text of the resolution in question is norm-creating, but rather that the resolution contains a provision or provisions which are norm-creating in nature.

While the Security Council’s normative resolutions are mainly related to the field of counterterrorism, following the Council’s practice, they will be discussed in three sub-sections: counterterrorism, the non-proliferation of weapons of mass-destruction, and sanctions against entities and individuals.

II. Security Council Law-Making in the Area of Counterterrorism

The item entitled “Measures to Eliminate International Terrorism” was included in the agenda of the twenty-seventh session of the General Assembly, in 1972, upon the initiative of the Secretary-General.¹ At that session, the Assembly decided to establish the Ad Hoc Committee on International Terrorism with the mandate of considering States’ proposals and making recommendations “for the speedy elimination of the problem.”²

The definition of terrorism has been a major issue since its inclusion on the agenda of the UN General Assembly in 1972. The problem arises because the international community cannot agree whether the definition should embrace a broad range of terrorism, or whether certain groups, such as

¹ See *Request for the Inclusion of an Additional Item in the Agenda of the Twenty-Seventh Session: Measures to Prevent Terrorism and other Forms of Violence which Endanger or Take Human Lives or Jeopardize Fundamental Freedoms*. UNGAOR, 27th sess, UN Doc. A/8791 (1972).

² Due to lack of agreement on the definition of terrorism, they General Assembly choose a temporary title for the item: “*Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes.*” See, A/Res/3034(XXVII), UNGAOR, 27th sess, sup. 30, UN Doc (1972) at para 10. The current title of the item is *Measures to Eliminate International Terrorism*. See, UN Doc. A/70/100 (2015) at 9, item No. 109.

national liberation movements, should be excluded from the definition. This problem remains unresolved to date and prevents the completion of a draft comprehensive convention on international terrorism.³

In the absence of an agreement on the definition of international terrorism, the international community has opted to take a piecemeal approach to address the phenomenon, by identifying specific terrorist acts and developing international instruments aimed at suppressing these particular acts. As a result, nineteen universal and twenty-two regional instruments which criminalize specific acts and provide for modalities of prosecuting such criminals have been developed thus far.⁴

In the aftermath of the September 11th terrorist attacks in the United States, the Security Council intervened in counterterrorism endeavours by making binding decisions in areas that seemingly were either unregulated, or where relevant international instruments had not yet entered into force. Therefore, the Security Council's resolutions have mainly been aimed at filling gaps in existing international instruments dealing with counterterrorism, which consequently obligates States to ratify relevant international instruments and adopt national legislation to implement these changes.

³See, the report of the Chair of the Working Group of the Sixth Committee on International Terrorism convened during the seventieth session of the General Assembly (A/C.6/70/SR.27), and General Assembly Resolution 70/120, UNGAOR, 70th sess, para 24 [70/120].

⁴ The following international instruments have been developed under the auspices of the United Nations and its specialized agencies: the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, 1973; *International Convention against the Taking of Hostages*, 1979; *International Convention for the Suppression of Terrorist Bombings*, 1997; *International Convention for the Suppression of the Financing of Terrorism*, 1999; *International Convention for the Suppression of Acts of Nuclear Terrorism*, 2005; *Convention on the Physical Protection of Nuclear Material*, 1979, and *Amendment to the Convention on the Physical Protection of Nuclear Material*, 2005; *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, 1963; *Convention for the Suppression of Unlawful Seizure of Aircraft*, 1970; *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*, 2010; *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 1971; *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 1988; *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, 1991; *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*, 2010; *Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft*, 2014; *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 1988; *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, 1988; *Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*. See the Report of the Secretary-General on Measures to Eliminate International Terrorism,” UN Doc. A/70/211, at 22-24.

Security Council Resolution 1373 (2001), the first norm-creating resolution in a series of resolutions adopted by the Security Council in its fight against terrorism, outlawed the financing of terrorism. The Security Council took similar decisions regarding the prohibition of the incitement to terrorism, kidnapping by terrorists to seek ransom, and foreign terrorist fighters. These decisions will be the subject of further examination below.

A. Suppressing the Financing of Terrorism: Security Council Resolution 1373 (2001)

(i) Outlawing the Financing of Terrorism

The key provision of Security Council Resolution 1373 (2001), operative paragraph 1, obligates all States to criminalize the financing of terrorism and prohibits “the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.”⁵ Under the terms of the Resolution, this mandatory definition should be incorporated into the national legislation of UN Member States. Evidently, mandatory definitions imply that any inconsistent definitions contained in national legislation should also be aligned.

In accordance with this resolution, all States are also obligated to ensure that “their nationals or any persons and entities within their territories” do not directly or indirectly finance “persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts”⁶ Furthermore, the resolution directs all Member States to “[f]reeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts.”⁷ It should be noted

⁵ SC Res 1373, UNSCOR, 4385th mtg, UN Doc S/Res/1373 (2001) at 1(b) [1373].

⁶ *Ibid* at para 1(d), which read as follows: “Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons.”

⁷ *Ibid* at para 1(c), which reads: “[f]reeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.”

that the obligation to freeze the assets of States under Resolution 1373 (2001) is different from that of the Al-Qaeda/Taliban sanctions regime.⁸ Whereas under the Al-Qaeda/Taliban regime individuals are identified and blacklisted by the Security Council, under the 1373 regime, it is the obligation of Member States to identify individuals who finance terrorists' acts and freeze their assets accordingly.

(ii) US Influence on the Swift Preparation and Adoption of Resolution 1373

Security Council Resolution 1373 (2001) was unanimously adopted on 28 September 2001 despite the absence of a transparent process in the preparation of the resolution. In fact, the United States prepared the draft resolution and circulated it among the Permanent Members of the Security Council a few days before its adoption.⁹ Despite the fact that the Resolution was norm creating nature, not only was the entire membership of the United Nations not consulted on the matter, but the representatives of the Security Council's members had little time to consult their governments. The speed at which the draft resolution was prepared was greatly facilitated by replicating certain provisions of the preexisting draft of the *International Convention for Suppression of the Financing of Terrorism* (ICSFT).¹⁰ As a result of the prevailing political environment, being sympathetic to the United States in the aftermath of the September 11th attacks, the adoption of a hastily prepared draft resolution was swift, and, unusually, was not commented on by any Security Council member or any other member of the Organization either before or after its adoption.¹¹

(iii) Analysis of the Key Provisions of the Resolution

⁸ See Section IV of this Chapter, pp. 81-93.

⁹ The draft resolution was contained in UN Doc. S/2001/921 dated 28 September 2001. See, also, Eric Rosand, "Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism" (2003) 97:2 AJIL at 333-341, and Eric Rosand, "The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions" (2004) 98:4 AJIL at 745-763.

¹⁰ See, *International Convention for the Suppression of the Financing of Terrorism*. GA Res 54/109, UNGAOR, 54thSess, sup. 49, UN Doc A/54/109 (1999).

¹¹ See, UNSCOR, 4385 mtg, UN Doc S/PV. 4385 (2001).

It is noteworthy that prior to the adoption of Resolution 1373 (2001), the General Assembly had approved the text of the ICSFT, in December 1999.¹² However, at the time of the adoption of Resolution 1373, in September 2001, the Convention had not yet entered into force,¹³ and, thus, there was no binding international instrument to criminalize the financing of terrorism. Accordingly, it may be argued that the adoption of Resolution 1373 was intended to produce a temporary binding instrument to criminalize the financing of terrorism until the Convention entered into force. Such an argument can be made based on paragraph 3(d) of the resolution, which requires all States to “[b]ecome parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the *International Convention for the Suppression of the Financing of Terrorism* of 9 December 1999.”¹⁴ Nevertheless, it is important to note that the resolution’s definition of the financing of terrorism is broader than that of the Convention and thus, despite the entry into force of the Convention on 10 April 2002, the resolution has not become obsolete and continues to be binding on all States. Hence, the existence of parallel legal regimes on the financing of terrorism, one established in accordance with the ICSFT and another pursuant to Security Council Resolution 1373, created a number of legal issues.

First, the Security Council by extracting certain provisions from the text of a Convention which was not yet in force and making it binding on all Member States under Chapter VII, violated the principle of consent, which is the essential requirement for creating and accepting norms at the international level.¹⁵

Second, by modifying the definition of the financing of terrorism provided for in the Convention, the resolution’s drafters broadened the definition and the corresponding obligations of States. Whereas the Convention prohibits the financing of acts outlawed by the treaties in force,¹⁶ the

¹² See, *supra* note 10.

¹³ In accordance with Article 26 of the Convention, for its entry into force ratification by 22 States was required.

¹⁴ 1373, *supra* note 5 at para 3(d).

¹⁵ This aspect is extensively discussed in Chapter Three, pp 136-138.

¹⁶ *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, The Hague, Netherlands, UNTS; *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 23 September 1971, Montreal,

definition contained in the resolution is a general commitment that covers the prohibition of financing of *all* acts of terrorism. In addition, the resolution omits the important opt-out clause for States not party to the existing counterterrorism treaties or for those who may choose to withdraw in the future from any of treaties referred to in the annex of the Convention.¹⁷ By eliminating the opt-out clause, the resolution has bound all States to the commitments arising out of the counterterrorism instruments, as annexed to the Convention, irrespective of any lack of express consent to become bound.

Simply put, by law-making in the area of counterterrorism where dozens of international instruments are in force, the Security Council has created confusion rather than strengthening the relevant legal regimes. This confusion now exists because there are at least two different set of rules applicable to the financing of terrorism; the rules created pursuant to Resolution 1373, which outlaws the financing of all acts of terrorism; and the rules established by the ICSFT, which outlaws the financing of terrorism for the acts of terrorism as defined in the treaties annexed to the Convention. It should be emphasized that the Convention permits States to be exempted from the application of the Convention in respect of treaties annexed to the Convention, to which they are not parties.¹⁸

It may be argued that under Article 103 of the Charter, obligations of States arising out of the Charter prevail over their other obligations, and thus, the obligations established by the resolution prevail over any others emanating from various counterterrorism instruments. If that was the intention of the resolution's drafters, it is not clear why the same resolution urges States to become parties to existing counterterrorism instruments or why, on several occasions, the General Assembly and the

Canada, UNTS ; *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, 14 December 1973, New York, United Nations, UNTS; *International Convention against the Taking of Hostages*, 18 December 1979, New York, United Nations, UNTS; *Convention on the Physical Protection of Nuclear Material*, 3 March 1980, New York, USA, Vienna, Austria, UNTS; *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 24 February 1988, Montreal, Canada, UNTS; *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 10 March 1988, Rome, Italy, I.M.O.T. 29004; *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf*, 10 March 1988, Rome, Italy, UNTS; and, *International Convention for the Suppression of Terrorist Bombings*, 12 January 1998, New York, United Nations, UNTS.

¹⁷Article 2 (2)(a) of the *International Convention for the Suppression of the Financing of Terrorism* provides: "On depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the annex may declare that . . . the treaty shall be deemed not to be included in the annex"

¹⁸ *Ibid.*

Security Council have called on States to become parties to counterterrorism instruments, including in particular the 1999 *International Convention for the Suppression of the Financing of Terrorism*.¹⁹

B. Suppressing Incitement to Terrorist Acts: Security Council Resolutions 1624 (2005)

In an attempt to outlaw the incitement to commit terrorist acts, the Security Council by its Resolution 1624 (2005) obligated all States to (a) prohibit by law incitement to commit terrorist acts, (b) prevent said conduct, and (c) deny safe haven to any persons who have been guilty of such conduct.²⁰ The Council directed the UN's Counterterrorism Committee to include in its dialogue with Member States ways and means of implementing this resolution and to report back to the Security Council accordingly.²¹

As per the terms of Resolution 1624, the incitement to commit terrorist acts is a distinct crime. However, the language employed in Resolution 1624 does not constitute direct law-making by the Council, but rather it obligates all States to outlaw the incitement to commit terrorist acts by way of national legislation. Although this is a binding commitment for all States, it cannot be executed unless States enact the necessary implementing legislation in accordance with their domestic procedures. In the absence of a generally agreed definition of terrorism, as mentioned above, uniform measures by States at the national level should not be expected. While some States already have domestic legislation covering this crime, other States will have to enact new laws to execute their international obligations and will likely rely on the definition of terrorism in their national legislation.

In drafting this resolution, the Security Council was cognizant of the fact that the obligations emanating from it would be in conflict with States' other obligations under international law, such as "freedom of expression"²² and the right of individuals to seek and enjoy asylum.²³ With regard to

¹⁹ See, SC Res 1456, UNSCOR, 4688th mtg, UN Doc S/Res/1456 (2003) at annex para 2(a) [1456].

²⁰ SC Res 1624, UNSCOR, 5261st mtg, UN Doc S/Res/1624 (2005) at para 1 [1624].

²¹ *Ibid* at para 6.

²² See, Article 19 of the *Universal Declaration of Human Rights* (1948), and Article 19 of the *International Covenant on Civil and Political Rights* (1966).

²³ See, Article 14 of the *Universal Declaration and the non-refoulement obligation of States under the Convention relating to the Status of Refugees adopted* (1951) and its Protocol (1967).

freedom of expression, the Council noted in the resolution's preamble that any restriction to the freedom of expression should be applied only in accordance with law, as recognized in the *Covenant on Civil and Political Rights*.²⁴

Concerning the right to asylum, the Security Council limited the scope of “the protections afforded by the *Refugees Convention and its Protocol*” and decided that the right to asylum should not be extended to any person who, based on serious reasons, is suspected to be “guilty of acts contrary to the purposes and principles of the United Nations.”²⁵ In applying such a broad criterion to limit the right to asylum it seems that the Security Council attempted to justify the requirement of the resolution, which is in conflict with other obligation of States. Consequently, it is up to States to reconcile their conflicting obligations emanating from the Security Council resolution with their other international obligations.

C. Suppressing Kidnapping for Ransom: Security Council Resolution 2133 (2014)

In the wake of the increase in hostage-taking and demands for ransom, the Security Council decided that “ransom payments to terrorist groups are one of the sources of income which supports their recruitment efforts, strengthens their operational capability to organize and carry out terrorist attacks, and incentivizes future incidents of kidnapping for ransom.”²⁶ Consequently, the Council by adopting Resolution 2133 (2004) called upon all States “to prevent terrorists from benefiting directly or indirectly from ransom payments or from political concessions and to secure the safe release of hostages.”²⁷

As noted by Argentina in a statement before the adoption of the resolution, there is no new normative obligation emanating from Resolution 2133 (2004).²⁸ The Security Council considers

²⁴ See *International Covenant on Civil and Political Rights*, Article 19 at para 3.

²⁵ 1624, *supra* note 20 at the preamble.

²⁶ SC Res 2133, UNSCOR, 7101st mtg, UN Doc S/Res/2133 (2014) at para 7.

²⁷ *Ibid* at para 3.

²⁸ See statement by the representative of Argentina made before the Security Council after the adoption of Security Council Resolution 2133, UNSCOR, 69th Year, 7101st mtg, UN Doc. S/PV. 7101 (2014) at 1 [7101].

payments of ransom to kidnappers as a way of financing terrorism that has been outlawed under Resolution 1373 (2001) and the *Convention for Suppression of the Financing of Terrorism*. Therefore, the Council's Resolution 2133 (2004) should be seen as a reminder to States of their obligations under existing instruments to prevent the financing of terrorism by means of ransom payment to terrorist kidnappers.

Acting along the same lines, the Security Council extended the asset freeze requirement contained in its Resolution 2161 (2014)²⁹ to “apply to the payment of ransoms to individuals, groups, undertakings or entities on the Al-Qaida Sanctions List, regardless of how or by whom the ransom is paid.”³⁰ It appears that the asset freeze applies to the funds before or after the ransom payment.

Like previous Security Council resolutions, this resolution affects States' other obligations under international law, particularly those under human rights law. For instance, the right-to-life³¹ is a key element in deciding to freeze assets that are likely to be used to pay ransom for terrorists. In kidnapping scenarios, the individual's interests and rights clash with those of the community. While the individual or individuals want a ransom to be paid, the community does not want to pay ransom that will in turn be used for terrorist acts. Due to the complexity of the matter, Argentina suggested that a “dialogue should be initiated on ways of combating this particular form of financing of terrorism.” In its view, such a dialogue must take place in the context of the General Assembly, which is the competent organ, as discussions

²⁹ Paragraph 1(a) of Resolution 2161 reads as follows: “Freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly for such persons' benefit, by their nationals or by persons within their territory.”

³⁰ SC Res 2170, UNSCOR, 7242nd mtg, UN Doc S/Res/2170 (2014) at para 17 [2170].

³¹ The *Universal Declaration of Human Rights* provides that “Everyone has the right to life, liberty and security of person.” (Article 3). The *International Covenant on Civil and Political Rights* while reaffirming the right to life provides that “No one shall be arbitrarily deprived of his life.” Lawful targeting of combatants in the context of the armed conflict or death inflicted pursuant to the appropriate legal process resulting in the death penalty are not considered arbitrary deprivation of the right to life. See, Helen Duffy, *The War on Terror and the Framework of International Law* (UK: Cambridge University Press, 2015) at 503.

therein would ensure the participation of all Member States on the subject with a view to arriving at “the necessary consensus.”³²

D. Suppressing Foreign Terrorist Fighters: SC Resolutions 2170 and 2178 (2014)

In the past few years, splinter terrorist organizations of Al-Qaeda have taken advantage of political instability in the Middle East and have committed terrorist acts on an unprecedented scale throughout the region. Three groups, namely the Islamic State in Iraq and Syria (“ISIS”), the Islamic State of Iraq and the Levant (“ISIL”), and Jabhat-Al-Nosra (“ANF”) in Syria, have committed numerous terrorist acts, which have been condemned by the international community and the Security Council.³³ While addressing this situation, the Security Council has also had to deal with the new phenomenon of “foreign terrorist fighters,” who travel to a “State other than their States of residence or nationality” for the purpose of the perpetration, planning, or participation in terrorist acts or the providing or receiving of terrorist training.³⁴

Resultantly, the Security Council has adopted two resolutions³⁵ in relation to the resurgence of terrorism in the region which are more or less based on previous measures used to combat the threat posed by Al-Qaeda.³⁶ In particular, the Council reminded States of their obligations emanating from its previous resolutions to suppress the financing of terrorism,³⁷ to counter incitement of terrorist acts,³⁸ and to implement the travel ban and asset freeze of individuals included in the lists of Security Council sanctions committees.³⁹ In addition, the Council addressed the international flow of foreign terrorist fighters and called upon all States “to take national measures to suppress the flow of foreign

³² See statement by Argentina. 7101, *supra* note 28 at 1.

³³ See, 2170, *supra* note 30; SC Res 2178, UNSCOR, 7242nd mtg, UN Doc S/Res/2178 (2014) at para 20 [2178]. Also see, the Security Council Presidential statement 2004/23 dated 19 November 2004.

³⁴ 2178, *supra* note 33 at the preamble. In the course of the adoption of this resolution, the United States delegate observed that “more than 15,000 foreign fighters from more than 80 nations have travelled to Syria in recent years. Many have joined terrorist organizations such as Al-Qaida’s affiliate, the Nusra Front, and the Islamic State of Iraq and the Levant (ISIL), which now threatens people across Syria and Iraq.” Threats to international peace and security caused by terrorist acts. UNSCOR, 69th Year, 7272nd mtg, UN Doc S/PV. 7272 (2014) [provisional] at 3.

³⁵ 2170, *supra* note 30; and 2174 (2004).

³⁶ See, Section II, subsections (c) and (d), pp. 62-64.

³⁷ 2170, *supra* note 30 at para 11; 2178, *supra* note 33 at para 6.

³⁸ *Ibid* at para. 6.

³⁹ 2078 (2004) at para 4.

terrorist fighters to, and bring to justice, in accordance with applicable international law, foreign terrorist fighters of ISIL, ANF, and all other individuals, groups, undertakings and entities associated with Al-Qaida.”⁴⁰

Since all the measures required of States with respect to combatting the foreign terrorist fighters were based on the Security Council’s previous decisions, there was no serious reservation on the part of States during adoption of these resolutions. However, the inclusion of six key figures of ISIL and Jabahat Al-Nusra under the Al-Qaida sanctions regime was criticised by the Russian delegation. In the Russian delegate’s view, it was self-defeating to ignore the rules that the Security Council itself had established⁴¹ to govern the work of the Taliban/Al-Qaida Sanction Committee relating to the listing of individuals.⁴² It seems that the Russian delegate was referring to the listing and de-listing procedure established pursuant to Security Council Resolution 2161 (2014). In accordance with this resolution, States are required to provide the Sanctions Committee with identifying and background information on individuals that they are proposing to be included on the blacklist. Furthermore, States are expected to report on the measures that they have adopted with respect to such individuals. In the case at hand, however, by circumventing these procedures, the Security Council directly annexed the names of six individuals to the resolution.

A comparison of this resolution with the Council’s earlier resolutions that were adopted at the initial stages of work in the fight against terrorism reaffirms two emerging trends in the approach of the Council to deal with this menace. First, it has recently become a usual practice in the Council to emphasize in its resolutions that measures to be adopted by States in the fight against terrorism should be “consistent with international human rights law, international refugee law, and international humanitarian law.”⁴³ Nonetheless, as discussed in section IV, the

⁴⁰ *Ibid* at para 7; 2178, *supra* note 33 at para 6.

⁴¹ See Section IV, D (i), p. 88.

⁴² See, UNSCOR, 69th Year, 7242 mtg, UN Doc S/PV.7242 (2014) [provisional] at 3.

⁴³ 2178, *supra* note 33 at paras 4 and 5.

Security Council itself only pays lip service to human rights requirements and repeatedly ignores calls to establish an independent body to assist in the listing and de-listing processes. It is confirmed by national and international courts that the Security Council, by including individuals on the blacklist without providing them an opportunity to be heard by an independent body, violates the fundamental rights of individuals.⁴⁴

Second, the Security Council is moving away from direct law-making towards establishing legislative goals for States. In its Resolution 2178, for instance, the Security Council has underlined that States' measures in the fight against terrorism "shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize . . . the offense."⁴⁵

E. The Call Upon States to Ratify Counterterrorism Instruments

In most of the resolutions referred to above, the Security Council, while acting under Chapter VII of the Charter, calls upon all States to become parties to international counterterrorism instruments.⁴⁶ By its Resolution 1566 (2004), for instance, the Council calls upon all States "to become party, as a matter of urgency, to the relevant international conventions and protocols whether or not they are a party to regional conventions on the matter."⁴⁷ These types of clauses are problematic for two reasons.

First, the Security Council has yet to clarify in cases of conflict between its normative resolutions and other counterterrorism instruments which will prevail. It seems that the Security Council cannot invoke Charter Article 103,⁴⁸ which expresses the preeminence of a State's Charter-based obligations over other obligations, on the grounds that both the normative provisions of its resolutions and the Security Council's requirement that all States become parties to international counterterrorism instruments, have been adopted under Chapter VII. This creates the impasse that both

⁴⁴ See, Chapter Four, Section IV (C), pp 193-198.

⁴⁵ 2178, *supra* note 33 at para 6.

⁴⁶ 1373, *supra* note 5 at para 3(d); 1456, *supra* note 20 at annex at para (a); 1624, *supra* note 20 at the preamble; 2178, *supra* note 33 at the preamble.

⁴⁷ See, SC Res 1566, UNSCOR, 5053rd mtg, UN Doc S/RES/1566 (2004) at para 4.

⁴⁸ See, See, Chapter Four, Section IV, P. 187.

types of provisions are equaled and have the same status. Therefore, the argument that normative provisions of Chapter VII resolutions prevail over States' other commitments emanating from relevant conventions, seems immaterial.

Second, although these repeated calls seem to be binding on all States, the language employed in the resolutions does not directly bind States to the counterterrorism instruments. In order to become bound, States must follow their national implementing procedures. A survey of the universal counterterrorism instruments reflects the fact that they are not yet universally adhered to by States,⁴⁹ and yet the Security Council has not taken measures against those States which have failed to become parties to these instruments. Hence, the added value of such provisions is unclear. That is to say, if the provisions were intended to be merely recommendations, why were they adopted under Chapter VII? If, however, they were intended to be mandatory, why has the Security Council refused to take action against non-ratifying States? One possible explanation for the acquiescence of the Security Council toward non-compliance is that States cannot be forced to become bound by treaties against their free will, and Chapter VII resolutions are not a substitute for this free will.

III. Law-Making in the Area of Non-Proliferation of Weapons of Mass-Destruction

A. American Influence in the Adoption of Resolution 1540 (2004)

A review of the preparation and adoption of Security Council Resolution 1540 (2004) identifies the key player in the process, namely the United States of America, and explains the ways and means employed by the US to achieve its objective. In his speech before the fifty-eighth session of the General Assembly, President George W. Bush called on the Security Council to adopt a resolution to counter the growing threat caused by the proliferation of weapons of mass-destruction and their possible use by terrorists.⁵⁰ Subsequently, in the fall of 2003, the United States Mission in

⁴⁹ See, "Measures to Eliminate International Terrorism (Agenda item 108)" in *Report of the Secretary-General presented to the Sixty-ninth session of the General Assembly under agenda item 109*, online: <http://www.un.org/en/ga/sixth/70/int_terrorism.shtml>. See also, Chapter Five.

⁵⁰In his address to the fifty-eight session of the General Assembly, President Bush outlined objectives of the resolution: to criminalize the proliferation of weapons of mass destruction, to ensure that all countries have strong export controls and

New York initiated negotiations with the Permanent Members of the Security Council (the “P5”) on the preparation of a draft resolution on this issue. A draft resolution was informally circulated among non-Permanent Members of the Council on 23 December 2003. Thereafter, as is the usual practice in the Security Council, consultations continued strictly among the P5, until a revised version of the draft was circulated to Member States of the Organization at the end of March 2004.⁵¹

Due to severe criticism by both States and scholars of the Security Council’s law-making activities following the adoption of Resolution 1373 (2001), strong pressure from the Non-Aligned Movement, and in view of the fact that the proposed resolution extended the scope of the treaty-based legal regimes of non-proliferation of weapons of mass-destruction, the Security Council decided to hold an open debate on the draft resolution. Following the debate on 22 April 2004, the Security Council adopted Resolution 1540 (2004) by unanimous vote on 28 April 2004.⁵²

Although the Security Council demonstrated considerable transparency in the preparation process of the draft Resolution 1540 *vis-à-vis* previous instances of its law-making activities, the entire membership of the United Nations did not have a meaningful role in the process when compared to the prevailing practice in treaty-making. The sponsors⁵³ of the draft resolution had discretion to incorporate or put aside any proposals made during informal consultations with Member States and regional groups. Brazil, for instance, complained in the course of public debate that the resolution’s sponsors “were not really responsive to [Brazil’s] proposals.”⁵⁴

to secure sensitive materials within each country’s borders. See, Statement by President Bush delivered before the fifty-eight session of the General Assembly, Press Release, Office of the Press Secretary, September 23, 2003, accessible online.

⁵¹Axel Marschik, *Legislative Powers of the Security Council* in Ronald St. John Macdonald & Douglas M. Johnston, eds, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden-Boston: Martinus Nijhoff Publishers, 2005) at 475.

⁵²See, UNSCOR, 59th Year, 4956th mtg, UN Doc S/PV.4956 (2004) [provisional] at 2 [4956].

⁵³ France, the Philippines, Romania, the Russian Federation, Spain, the United Kingdom of Great Britain and Northern Ireland and the United States of America. *Ibid* at 1.

⁵⁴ See, UNSCOR, 59th Year, 4950th mtg, UN Doc S/PV. 4950 (2004) [provisional] at 4 [4950]. Pakistan also raised similar concerns in the debate, stating that “in the negotiations that have been held so far, the sponsors have been reluctant to reflect most of these assurances in the text of the draft resolution.” *Ibid* at 15.

B. Prohibiting the Transfer of WMDs to Non-State Actors as a New International Norm

Security Council Resolution 1540 (2004), like the other resolutions which are the subject of this analysis, is an omnibus resolution containing, *inter alia*, a number of provisions that generate new obligations for all States in the areas of counterterrorism and non-proliferation of weapons of mass-destruction. The key provision in Resolution 1540 is contained in Paragraph 1, creating a similar obligation found in the relevant counterterrorism treaties. Specifically, it directs States to “refrain from providing any form of support to non-State actors that attempt to develop, acquire . . . or use nuclear, chemical or biological weapons and their means of delivery.” Moreover, this resolution defines non-State actors as individuals and entities not acting under the lawful authority of a State.⁵⁵ Contrary to general practice in the Security Council, this resolution does not examine a specific situation but addresses the general threat of possible proliferation of weapons of mass-destruction by non-State actors.

The resolution’s sponsors argued that this provision is aimed at filling the gap that exists in the current non-proliferation regimes⁵⁶ established pursuant to the *Convention on the Physical Protection of Nuclear Materials*⁵⁷ and the *Convention on the Prohibition of Chemical Weapons*,⁵⁸ which do not cover the non-proliferation of these weapons by *non*-States actors. This argument endorses the view that the obligations emanating from the resolution are similar to the obligations contained in the abovementioned treaties.

⁵⁵ SC Resolution 1540 (2004), definitions.

⁵⁶ See, the statement made by the Representative of France in the open debate prior to the adoption of Resolution 1540 on 22 April 2004. 4950, *supra* note 54 at 8. He repeated the same position while adopting the resolution on 28 April 2004. See, 4956, *supra* note 52 at 2.

⁵⁷ The *Convention on the Physical Protection of Nuclear Materials* was opened for signature on 3 March 1980, both at Vienna and New York, and entered into force on 8 February 1987.

⁵⁸ The *Convention on the Physical Protection of Nuclear Materials* and the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, 13 January 1993, Paris, France, UNTS, entered into force on 29 April 1997.

Paragraph 2 of Resolution 1540 demands all States adopt appropriate national laws to implement their obligations under 1540's paragraph one and to enforce such laws effectively. Enacting this implementing legislation is usually a practice undertaken by States when they voluntarily choose to be bound by a treaty. Thus, the language employed in the resolution also reaffirms the view that the obligations emanating from the resolution are comparable to those of relevant treaties.

Paragraph 5 of the Resolution 1540 is a safeguard clause intended to ensure the continuity of "the rights and obligations of State Parties to the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention, and the Biological and Toxin Weapons Convention" and the "responsibilities of the International Atomic Energy Agency or the Organization for the Prohibition of Chemical Weapons." Like Resolution 1373, this resolution does not specify which obligation is paramount in instances of conflict. As previously mentioned,⁵⁹ it seems that the argument of prevalence of a State's Charter obligations over any other obligations is irrelevant in the case of the normative resolutions.

Paragraph 3 of the resolution is a general enforcement clause found in several other resolutions of the Security Council and mandates that all States enforce the obligations emanating from Resolution 1540 and report back to the Security Council. However, the scope of this Paragraph 3 is wider than the subject of Paragraph 1 and extends to the application of relevant treaties as well. Paragraph 3 requires all States to take appropriate preventive and enforcement measures in the area of non-proliferation of weapons of mass-destruction. It must be noted, however, that States are committed in accordance with non-proliferation treaties to report to respective international agencies. Hence, it seems that the procedure established by the Security Council simply duplicates reporting procedures under respective treaties.

C. Criticism of Security Council Law-Making in its Open Debate

⁵⁹ See, Section II (E), p. 66.

In the course of an open debate in the Security Council on 22 April 2004, almost a third of the United Nations membership took advantage of the unique opportunity to raise their concerns about the growing tendency in the Security Council to exercise law-making function. Though extensive consultations with the membership of the organization was praised by speakers, several concerns were raised by Member States which, *inter alia*,⁶⁰ centered on five main points: specifically the Council's lack of legislative competency, its unwarranted action under Chapter VII, the inability of normative resolutions to address the shortcomings in non-proliferation treaties, the fact that certain resolutions simply duplicate the function of certain UN and treaty bodies, and India and Pakistan's unique position vis-à-vis the resolutions.

(i) The Security Council's Lack of Legislative Competency

During the open debate, several delegates reiterated the point that the Security Council does not have the necessary competency to exercise general law-making authority for the world.⁶¹ Indonesia argued that law-making by the Security Council is inconsistent with UN Charter provisions and observed that "[a]ny far-reaching assumption of authority by the Security Council to enact global legislation is not consistent with the provisions of the United Nations Charter."⁶² Nepal further observed that the Security Council, without the necessary treaty-making capacity, is attempting to use resolutions to create norms which are "tantamount to a treaty by its fiat." Hence, by adopting the draft resolution, the Council undermines "the intergovernmental treaty-making process and implementation mechanisms."⁶³

Cuba argued that the Security Council, with its limited membership, is not the proper organ to be entrusted with the responsibility of regulating non-proliferation issues as this subject should be "considered in the framework of the traditional multilateral disarmament machinery, where the

⁶⁰ The relationship between non-proliferation of WMDs and disarmament was one of the issues covered by the majority of speakers in the debate. But it is not discussed in this Chapter because it is beyond the scope of this work. For instance, see the statement made by South Africa. 4950, *supra* note 54, at 22.

⁶¹ See, for instance, the statement by Egypt. 4950, *supra* note 54 at 3.

⁶² *Ibid* at 31.

⁶³ *Ibid* at 14.

appropriate space exists to negotiate a legally binding instrument.”⁶⁴ Furthermore, international legal obligations, including those relating to disarmament and non-proliferation, should not be imposed upon Member States without their participation in the negotiations and their consent to be bound by treaties.⁶⁵ Switzerland echoed Cuba’s sentiments and stated that “[i]n principle, legislative obligations, such as those foreseen in the draft resolution under discussion, should be established through multilateral treaties, in whose elaboration all States can participate.” However, Switzerland clarified that the Security Council may “assume such a legislative role only in exceptional circumstances and in response to an urgent need.”⁶⁶ Egypt agreed and pointed out that the initiative of the Security Council should be valid on a “temporary basis and for a specific, limited time until an internationally ratified agreement can be concluded.”⁶⁷

Conversely, Namibia was of the view that the subject matter before the Council belonged to “the General Assembly, whose membership will be required by the terms of this draft resolution to at least align their national laws with it if these measures are to be implemented effectively.”⁶⁸ India supported this view by stating that the exercise of legislative functions by the Council could disrupt the balance of power between the General Assembly and the Security Council, set up by the Charter.⁶⁹

Speaking on behalf of the Non-Aligned Movement (NAM), Malaysia observed that “the substance of the resolution, once adopted by the Council, should form a useful basis for Member States of the United Nations to consider formulating in due course a comprehensive and multilaterally-negotiated legal instrument to address the specific question of preventing the acquisition of WMD by non-State actors in all its aspects.”⁷⁰ Even Japan cautioned that the

⁶⁴ *Ibid* at 30.

⁶⁵ *Ibid*.

⁶⁶ *Ibid* at 28.

⁶⁷ *Ibid* at 2. See. Also, the statement by Nigeria. *Ibid* at 15.

⁶⁸ *Ibid* at 17.

⁶⁹ *Ibid* at 23.

⁷⁰ *Ibid* at 4.

Security Council, by exercising law-making function, should not “undermine the stability of the international legal framework.”⁷¹

Responding to these concerns, sponsors of the resolution maintained that the menace posed by non-State actors’ acquisition of WMD constitutes a serious threat to international peace and security, making it imperative for the Security Council to act. They emphasized that the action under Chapter VII demonstrates the determination of the Council to resolutely address the question before it.⁷²

(ii) Acting Under Chapter VII Unwarranted

In these same debates, several delegates raised their concern about the adoption of the resolution under Chapter VII of the Charter⁷³ on the grounds Chapter VII is designed for enforcement measures against States that pose a threat to international peace and security. In the view of these delegates, taking punitive or enforcement measures against States due to non-compliance with the provisions of the resolution was unjustified.⁷⁴ Switzerland, for instance, pointed out that “the fact that the draft resolution is based on Chapter VII of the Charter cannot be understood as a pre-authorization for States to resort to unilateral sanctions.”⁷⁵

These delegates favoured the adoption of the resolution without reference to Chapter VII and argued that, in accordance with Article 25 of the Charter, decisions of the Council are also binding on Member States of the Organization.⁷⁶ Accordingly, removing the reference to Chapter VII would not

⁷¹ *Ibid* at 28. The Republic of Korea, too, emphasized that “the Security Council’s legislative authority should be exercised with caution, and in exceptional circumstances.” See, *Ibid* at 7.

⁷² See, Statements by Australia. *Ibid* at 7; United Kingdom. *Ibid* at 11; United States. *Ibid* at 17; Germany. *Ibid* at 18.

⁷³ See, the statement made by Malaysia on behalf of the Non-Aligned Movement. *Ibid* at 4; statement by Mexico. *Ibid* at 5; Statement by Nepal. *Ibid* at 14; Statement by Nigeria. *Ibid* at 15.

⁷⁴ Pakistan for instance stated: “The threat of WMD proliferation by non-State actors may be real, but it is not imminent. It is not a threat to peace within the meaning of Article 39 of the United Nations Charter. A legitimate fear arises when one sees the draft resolution under Chapter VII, with language such as that used — “to combat by all means” — an authorization is being sought which could justify coercive actions envisaged in Articles 41 and 42 of the Charter, including the use of force.” *Ibid* at 15. See, also, India’s position. *Ibid* at 25.

⁷⁵ *Ibid* at 28. See also the statement by Cuba. *Ibid* at 30; by Indonesia. *Ibid* at 32.

⁷⁶ See, for instance statement by Jordan. *Ibid* at 11.

weaken the binding nature of the resolution but would only allay States' fears that the resolution's provisions would be used to enforce measures in the future against States for non-compliance.

The sponsors did not accept this suggestion. Instead, the resolution's sponsors tried to reduce States' fears by other means, such as the United States pointing out that "the draft resolution is not about enforcement," but rather it is placed under Chapter VII only because the Council is acting under that Chapter, levying binding requirements. Moreover, the resolution is also intended to "send the important political message of the seriousness with which the Council views the threat to international peace and security."⁷⁷

(iii) Normative Resolutions Cannot Address Shortcomings of Non-Proliferation Treaties

Several delegates to the UN such as Namibia and Algeria, among others, acknowledged that international instruments relating to the non-proliferation of weapons of mass-destruction may have possible omissions. However, these delegates felt that the Security Council was not in a position to address these shortcomings and they should be taken up by existing channels of negotiations on non-proliferation and disarmament. For instance, Namibia recognized that there were gaps in the "existing multilateral legal instruments which need to be filled" but, in its view, such gaps could only be filled through multilaterally negotiated instruments and not by Council measures, which "are unbalanced and selective, as they represent only the views of those who drafted them."⁷⁸

Pakistan expressed the view that the existing treaties, specifically the *Chemical Weapons Convention* (CWC), the *Biological Weapons Convention* (BWC) and the *Nuclear Non-Proliferation Treaty* (NPT), already prescribed most of the legislation necessary to cover the proliferation by both

⁷⁷ *Ibid* at 17.

⁷⁸ *Ibid*.

States and non-State actors. If necessary, these instruments could be improved through multilateral negotiations with sovereign States participating on an equal footing.⁷⁹

The Philippines pointed out that existing multilateral obligations on WMDs emanate from multilateral treaties and that the parties consented to be bound by their provisions after close examination of the obligations therein. The Philippines further contended that the Security Council's normative resolutions "deviate from time-tested modes of creating multilateral obligations," and in its view this was "an exceptional measure to address a new and urgent potential threat not covered by existing treaty regimes."⁸⁰ Algeria echoed this view by stating that the Security Council "is acting in an exceptional manner," since the Charter does not give it a mandate to legislate on behalf of the international community.⁸¹

Responding to these concerns, France indicated that the Council is only establishing goals and it "leaves each State free to define the penalties, legal regulations and practical measures to be adopted." It does not compel any State to abide by the rules of the instruments to which some States have chosen not to accede.⁸² Kazakhstan expressed a similar view, that "the main objective of the draft resolution is the adoption by all States at the national level of measures to prevent non-State actors from acquiring WMD and their components." It clarified that it was the responsibility of each State to decide on the specific steps to be "take[n] at the national level in order to secure its borders, sensitive military assets and scientific and research capabilities," and to remove the possibility of possession and use of these weapons by terrorists.⁸³ Finally, the United States emphasized that the sponsors had "been careful to make clear that this draft

⁷⁹ See, statement by Pakistan. *Ibid* at 15.

⁸⁰ See, statement by the Philippines. *Ibid* at 3.

⁸¹ See, statement by Algeria. *Ibid* at 5.

⁸² See, statement by France. *Ibid* at 9.

⁸³ See, statement by Kazakhstan. *Ibid* at 7.

resolution is in no way meant to undermine, undercut or otherwise weaken the existing treaties and regimes, and there is specific language in the draft resolution to that effect.”⁸⁴

(iv) The 1540 Committee Duplicates the Functions of UN and Treaty Bodies

Several speakers such as Mexico and Egypt opposed the creation of a Security Council Committee to monitor the implementation of Resolution 1540.⁸⁵ In their view, creation of such a committee was unnecessary on the grounds that the Committee’s functions overlapped those of UN and treaty bodies.⁸⁶ Egypt, in particular, sought clarification about the relationship of this Committee with Security Council Committees established pursuant to Resolutions 1373 (2001) and 1267 (1999).⁸⁷ Similarly, Mexico sought a clear definition of the Committee’s mandate in order to avoid duplicating “the functions of other existing bodies, particularly the Counterterrorism Committee, whose functions already included eliminating the supply of all weapons to terrorists.”⁸⁸ Indonesia observed that the establishment of a committee under the auspices of the Security Council would lead to a separate regime for non-proliferation and could undermine the functions and the proven role of the CWC, BWC, and NPT. It also emphasized that the Committee would not serve any useful purpose, as the overwhelming majority of Member States would not be represented in it.⁸⁹

(v) The Unique Position of India and Pakistan

India and Pakistan, non-signatories to the NPT, were concerned about possible use of Resolution 1540 as an instrument of pressure on them to become parties to the NPT against their will. They raised these

⁸⁴ See, statement by the United States. *Ibid* at 17.

⁸⁵ In accordance with paragraph four of the resolution, the Security Council established a Committee to report to the Security Council on the implementation of the resolution, and demanded all States to present their first reports in a six months’ period. The initial mandate of the Committee was two years, which was extended several times, and its current mandate expires on 25 April 2021. See, SC Res 1977, UNSCOR, 6518th mtg, UN Doc S/Res/1977(2011) at para 2.

⁸⁶ See, statement by Pakistan. 4950, *supra* note 54 at 15.

⁸⁷ See, statement by Egypt. *Ibid* at 2. See also statement by Austria. *Ibid* at 10.

⁸⁸ See, statement by Mexico. *Ibid* at 5.

⁸⁹ See Statements by Indonesia. *Ibid* at 10; South Africa. *Ibid* at 22; and Liechtenstein. *Ibid* at 12.

concerns in distinct ways. India was categorical in observing that it “shall not accept any interpretation of the draft resolution that imposes obligations arising from treaties that India has not signed or ratified.”⁹⁰ In Pakistan’s view, the resolution sought to impose obligations on States that had not been freely accepted by their Governments and sovereign legislatures, especially as related to national security and the right of self-defence.⁹¹

Taking these concerns into consideration, the sponsors introduced changes to the draft resolution that clarified that States would not be obligated to join treaties or arrangements to which they are not parties. Thus, the preamble of the resolution specified that the binding legal commitments arising from the resolution were only those obligations emanating from “treaties to which [States were] parties.” Similarly, operative paragraph 8(a) restricted the universal adoption, full implementation and possible strengthening of multilateral treaties to States that are parties to these treaties. The assurances given by the sponsors of the resolution, in particular the United States,⁹² that the resolution was not intended to pressure States to accede to treaties they were not parties to, facilitated the unanimous adoption of the resolution on 28 April 2004.

In the light of these assurances and given the changes made to the text of the resolution, Pakistan, a member of the Security Council, voted in favor of the resolution but nevertheless made the following reservations during the resolution’s adoption:

Pakistan shares the general view expressed in the Council’s open debate that the Security Council cannot legislate for the world. . . . Pakistan also shares the general view of the United Nations membership that the Security Council cannot assume the stewardship of global non-proliferation and disarmament issues. The Council, composed of 15 States, is not a representative body. It cannot enforce the obligations assumed by five of its members which retain nuclear weapons, since they also possess the right of veto in the Council. Global disarmament and non-proliferation can be achieved only in more

⁹⁰ *Ibid* at 24.

⁹¹ *Ibid* at 15.

⁹² In particular, the United States clarified that “Member States not parties to treaties or regimes will not be forced, through this draft resolution, to adopt them.” *Ibid* at 18.

universal and non-discriminatory forums, especially the Conference on Disarmament — the sole multilateral negotiating body on disarmament.⁹³

India, a non-member of the Security Council, chose to circulate its position in the form of a letter, which reads in part:

“India is concerned at the increasing tendency of the Security Council in recent years to assume legislative and treaty-making powers on behalf of the international community, binding on all States, a function not envisaged in the Charter of the United Nations.

. . . India cannot accept any obligations arising from treaties that India has not signed or ratified. This position is consistent with the fundamental principles of international law and the law of treaties.

India will not accept externally prescribed norms or standards, whatever their source, on matters within the jurisdiction of its Parliament, including national legislation, regulations or arrangements, which are not consistent with India’s constitutional provisions and procedures or are contrary to India’s national interests or infringe on its sovereignty.”⁹⁴

As is usual in multilateral negotiations leading to the adoption of treaties and resolutions, the United Kingdom expressed a different interpretation of obligations emanating from the resolution immediately following its adoption. In its view, the obligations emanating from the resolution “apply without favour to all Members of the United Nations, be they Permanent Members of the Security Council or any other Member State. The obligations in the legally binding areas set out in this resolution are exactly that: a binding obligation on all States.”⁹⁵ Thus, it remains to be studied how and to what extent these differences of opinion have affected the implementation of Resolution 1540—a subject matter which will be the focus of Chapter Five.

The discussion of the preparation and adoption of Resolution 1540 reaffirms a number of flaws that surfaced as a result of the Security Council’s law-making. First, the process initiated by the United States succeeded in garnering the support of all members of the

⁹³ 4956, *supra* note 52 at 3.

⁹⁴ *Letter dated 27 April 2004 from the Permanent Representative of India to the United Nations addressed to the President of the Security Council*. UNSCOR, UN Doc S/2004/329 (2004).

⁹⁵ 4956, *supra* note 52 at 7.

Security Council, despite opposition expressed in the course of the open debate. Second, the open debate provided an opportunity for the membership of the United Nations to express their concerns on the growing tendency of the Security Council to encroach on the General Assembly's sphere of responsibilities. Nonetheless, the entire membership of the United Nations did not participate in the drafting of the resolution. Views expressed by Member States were filtered by the Permanent Members under the influence of the United States, which had the discretion to incorporate the proposals that were fitting and ignore the others.⁹⁶ Third, the Security Council's law-making process is in no way comparable to the negotiations conducted in multilateral treaty-making bodies. Unlike the practice in the Security Council, in multilateral treaty-making negotiations each States' representative participates on equal footing, and any proposals submitted are subject to discussion and evaluation by all participants. Proposals are accepted, amended, or rejected by the States' representatives participating in the negotiation. Fourth, despite its strong objections, Pakistan, then a member of the Security Council, chose to vote in favour of the resolution. However, Pakistan reserved its position that the resolution could not force it to join the NPT against its will. Pakistan's contradictory words and deeds cannot be explained except if acting under pressure from a Permanent Member of the Security Council.⁹⁷ Although India could not explain its position before the adoption of the resolution because it was not a member of the Security Council, it reiterated its position in the form a letter circulated as a document of the Security Council, following the adoption of the resolution.

⁹⁶ Despite these changes, other concerns expressed during the open debate were not considered. They include, *inter alia*, a stronger reference to the concept of disarmament, a reference to the positive contribution that the establishment of zones free of weapons of mass-destruction could make to non-proliferation and a call for the early conclusion of a binding international legal instrument on weapons of mass-destruction and non-State actors. See, statement by Algeria after the adoption of the resolution. 4956, *supra* note 52 at 7.

⁹⁷ In the prevailing environment in the Security Council, use of political and economic leverages by the Permanent Members is customary. Nevertheless, unlike the regime applicable in the case of treaties, the vote under pressure does not affect the validity of the resolution that has been adopted in accordance with the rules of procedure of the Security Council. The *Vienna Convention on the Law of Treaties* provides that "[a] treaty is void" if its conclusion has been procured under the threat of a State party or its representative. See, *Vienna Convention on the Law of Treaties*, Articles 51 and 52.

D. Multilateral Negotiations on Relevant International Instruments Accelerated Following the Adoption of Resolution 1540

The decision of the Security Council stimulated negotiations on two relevant international instruments. Following the adoption of Resolution 1540, negotiations in the General Assembly on the draft international convention for the suppression of acts of nuclear terrorism which had previously stalled, were revived. Subsequently, the General Assembly approved the text of the Convention on 13 April 2005, which was opened for signature three months later.⁹⁸

Similarly, a diplomatic conference was convened in Vienna in July 2005, to amend the *Convention on the Physical Protection of Nuclear Material* of 1980. The amended Convention obligates State Parties to protect nuclear facilities and material in peaceful domestic use, storage, and transportation. It also provides for expanded cooperation among States regarding rapid measures to locate and recover stolen or smuggled nuclear material, mitigate any radiological consequences of sabotage, and prevent and combat related offences.⁹⁹

Though it might be argued that Security Council Resolution 1540 stimulated these processes, it may be that the international community, by its quick action in producing the international instruments, demonstrated its willingness to take urgent measures when required. The amended and new instruments cover the main objective of Resolution 1540—to prevent the access of non-State actors to nuclear technology and weapons. Arguably, the fact that States took such action was a clear signal to the Security Council that it should not interfere in law-making in areas that are already highly regulated and furthermore that any modifications to international law should be made through negotiations among sovereign States.

IV. Imposing Sanctions against Entities and Individuals

⁹⁸ See, GA Res 58/290, UNGAOR, 58th sess, sup 49, UN Doc A/Res/58/290 (2005).

⁹⁹ See, the background information provided by International Atomic Energy Agency, online:

<<http://www.iaea.org/publications/documents/conventions/convention-physical-protection-nuclear-material>>.

The Security Council began imposing sanctions against entities and individuals in 1999, when it decided that the Taliban¹⁰⁰ should turn over Osama bin Laden¹⁰¹ to the appropriate authorities of the country where he had been indicted [United States], or to any other country from where he could be transferred to the requesting country.¹⁰² In order to implement its decision, the Council mandated all States to freeze “funds and other financial resources” of the Taliban”¹⁰³ and established a committee of the Council to monitor the implementation of the resolution.¹⁰⁴

The regime established pursuant to Resolution 1267 (1999) has been modified by a dozen Security Council resolutions adopted under Chapter VII,¹⁰⁵ which expanded the scope of the regime and refined its implementing procedures. Modifications made to the mandate and procedure of the 1267 regime will be discussed below with a view toward finding out whether the Council, by imposing sanctions against entities and individuals, is exercising a law-making function, making judicial decisions, or both.

A. Components of Sanctions Against Individuals

The sanctions imposed by the Security Council against individuals and entities under 1267 Resolution have three components with a number of exceptions.

(i) The Freezing of Assets

¹⁰⁰ The Taliban, which also called itself the Islamic Emirate of Afghanistan, was an Afghan faction, which controlled a large part of the territory of Afghanistan at the time of the adoption of the resolution, and was accused of providing sanctuary and training for international terrorists and their organizations. See, SC Res 1267, UNSCOR, 4051st mtg, UN Doc S/RES/1267 (1999) at para 1 [1267].

¹⁰¹ Osama bin Laden and his associates were accused by the United States of America of, *inter alia*, to have committed the 7 August 1998 bombings of the United States Embassies in Nairobi, Kenya, and Tanzania. See, *Ibid* at the preamble.

¹⁰² 1267, *supra* note 100 at para 2.

¹⁰³ *Ibid* at para 4.

¹⁰⁴ *Ibid* at para 6. See, also, Section IV, p. 90.

¹⁰⁵ See, SC Res 1333, UNSCOR, 4251st mtg, UN Doc S/RES/1333 (2000) [1333]; SC Res 1390 UNSCOR, 4452nd mtg, UN Doc S/Res/1390 (2002) [1390]; SC Res 1455, UNSCOR, 4686th mtg, UN Doc S/Res/1455 (2003) [1455]; 1526 (2004) SC Res 1526, UNSCOR, 4908th mtg, UN Doc S/Res/1526 (2004) [1526]; SC Res 1617, UNSCOR, 5244th mtg, UN Doc S/Res/1617 (2005) [1617]; SC Res 1735, UNSCOR, 5609th mtg, UN Doc S/Res/1735 (2006) [1735]; SC Res 1822, UNSCOR, 5928th mtg, UN Doc S/Res/1822 (2008) [1822]; SC Res 1904, UNSCOR, 6247th mtg, UN Doc S/Res/1904 (2009) [1904]; SC Res 1989, UNSCOR, 6557th mtg, UN Doc S/Res/1989 (2011) [1989]; SC Res 2083, UNSCOR, 6890th mtg, UN Doc S/Res/2083 (2012); and SC Res 2161, UNSCOR, 7198th mtg, UN Doc S/Res/2161 (2014) [2161].

Although the freezing of individuals' and entities' assets began in 1999 under Resolution 1267 and was initially targeted at the Taliban,¹⁰⁶ the procedure has since evolved through subsequent Security Council resolutions to include Osama bin Laden and individuals associated with him and the Al-Qaida organization.¹⁰⁷

Generally, the trend has been to define specific language of the resolution to broaden its application. When initially adopted, the language of Resolution 1267 demanded that “the Taliban turn over Usama bin Laden without further delay,” and imposed travel ban and asset freeze against the Taliban.¹⁰⁸ Five years later, the Security Council defined individuals, groups, undertakings, or entities that are “associated with” Al-Qaida, Osama bin Laden, or the Taliban. Under the Council’s definition, the term “associated with” included participation in the financing, supply of arms, recruiting for or supporting acts or activities of Al-Qaida, Osama bin Laden, or the Taliban, or any cell, affiliate, splinter group or derivative thereof.¹⁰⁹

Similarly, when the Security Council adopted its Resolution 2161 (2014), a subsequent modification to the 1267 regime, it defined the terms “financial and economic resources” contained therein. The 2161 modification obligates States to “[f]reeze without delay the funds and other financial assets or economic resources of these individuals [and] groups . . . and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly for such persons’ benefit, by their nationals or by persons within their territory.”¹¹⁰ The Security Council expanded the definition of “financial and economic resources” to apply to every kind of resource, including those “used for the provision of Internet hosting or related services, used for the support of Al-Qaida, Osama bin Laden, or the Taliban and other individuals, groups, undertakings, or entities

¹⁰⁶ 1267, *supra* note 100 at para 4(b).

¹⁰⁷ 1333, *supra* note 105 at para 8(c).

¹⁰⁸ 1267, *supra* note 100, paras. 3-4.

¹⁰⁹ 1617, *supra* note 105 at para. 2.

¹¹⁰ 2161, *supra* note 105 at para 1(a).

associated with them.”¹¹¹ The Council also expanded the asset freeze to apply “to the payment of ransoms to individuals, groups, undertakings or entities on the Consolidated List.”¹¹²

It is, therefore, submitted that the 1267 regime was not comprehensive at the initial stages and its subsequent modifications have caused practical problems to the States that are expected to implement the sanctions, including several changes to be made to their implementing legislation.

(ii) Travel Bans

The Security Council has obligated States to prevent “the entry into or transit through their territories” of individuals included on the list of the 1267 Committee. However, there are two exceptions to the travel ban. First, States are not under the obligation to apply the travel ban to their own citizens. Second, the travel ban is not applicable to cases where entry or transit through a country is necessary for the fulfilment of a judicial process, upon the determination by the Committee, particularly when the State’s national lives outside of its territory.¹¹³ The Council at a later stage excepted those members of the Taliban that were travelling to participate in peace negotiations.

(iii) Arms Embargo

Under the sanctions regime, States are under the obligation to prevent “direct or indirect supply, sale, or transfer” of arms, weapons, and related material to the individuals, groups, undertakings and entities included on the list prepared by the Security Council Committee. States’ obligations are not confined to preventing arms transfers from their territories, but also to enforce these restrictions in vessels or aircrafts using their flags, as well as to apply them against their nationals living outside of their territories.¹¹⁴

¹¹¹ 1822, *supra* note 105 at para 4; 1904, *supra* note 105 at para 4; SC Res 1988, UNSCOR, 6557th mtg, UN Doc S/Res/1988 (2011) at para 6 [1988]; 2161, *supra* note 105 at para 5.

¹¹² 1904, *supra* note 105 at para 5; 1988, *supra* note 115 at para 7; 2161, *supra* note 105 at para 7.

¹¹³ 2161, *supra* note 105 at para 1.

¹¹⁴ Based on the information provided by States, the list of members of the Taliban, Al-Qaida organization and other individuals, groups, undertakings and entities associated with them, against whom the sanctions should be imposed are regularly prepared and updated by the Committee established pursuant to Resolution 1267 (1999).

As will be illustrated in Chapter Five, arms embargos against individuals and entities who are engaged in terrorist activities is not an area of contention for States. However, there still exist other problems such as identifying sanctioned individuals and effectively monitoring and verifying the proper implementation of this obligation.

B. Preventive Measures Versus Penal Sanctions

The measures mentioned above are binding on all States, as they are adopted under Chapter VII, irrespective of the existence of any rights or obligations emanating from any other international instruments entered into force prior to the measures being imposed.¹¹⁵ In addition to the general obligation to implement these measures, the Security Council also demands that “all States . . . take immediate steps to enforce and strengthen, through legislative enactments or administrative measures,” the prevention and punishment of violators of the sanctions imposed under the resolutions pertaining to the Taliban/Al-Qaida regime,¹¹⁶ and to inform the Committee of the adoption of such measures.¹¹⁷

The Security Council emphasizes that these measures “are preventative in nature and are not reliant upon criminal standards set out under national law.”¹¹⁸ However, many States are not in agreement with the Security Council’s preemptive argument. While not inclined, States may have to restrict individuals’ liberties without due process. Elaborating on this point, the *Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*¹¹⁹ (“the Special Rapporteur”) observed that the effect of sanctions on designated individuals and entities is comparable to that of penal sanctions.¹²⁰

¹¹⁵ 1267, *supra* note 100 at para 6.

¹¹⁶ SC Res 1363, UNSCOR, 4352nd mtg, UN Doc S/Res/1363 (2001) at para 8 [1363].

¹¹⁷ 1390, *supra* note 105 at para 8; 1455, *supra* note 105 at para 5; 1526, *supra* note 105 at para 20.

¹¹⁸ 2161, *supra* note 105 at para 31.

¹¹⁹ UN Commission on Human Rights, Resolution 2005/80, O. P. 6.

¹²⁰ See, *Promotion and protection of human rights and fundamental freedoms while countering terrorism: Note by the Secretary-General*. UNGAOR, 67th sess, UN Doc A/67/396 at para 55 [A/67/396]. The Human Rights Committee has observed that certain measures must be regarded as penal, regardless of their formal classification, because of their

This comparison with penal sanctions gains weight due to the fact that the sanctions regime is of an “indeterminate nature.”¹²¹ Viewed in conjunction with the severity of the measures imposed, the risk that sanctions will effectively become permanent makes them comparable to penal sanctions. The General Court of the European Union (EGC) confirms this concern, observing that due to the length of time individuals remain listed “the question of the classification of the measures in question as preventative or punitive, protective or confiscatory, civil or criminal seems now to be an open one”.¹²² The Special Rapporteur thus recommended that the Security Council revisit proposals previously advanced by the “like-minded” group of States¹²³ for the introduction of a “sunset clause” imposing a time limit on the duration of designations.¹²⁴

Another flaw in the sanctions regime is that in some cases, counterterrorism measures are solely based on intelligence information that has not been disclosed to those who are subject to the measures.¹²⁵ The 2016 report of the UN Counter-Terrorism Committee (CTC) acknowledges that relying on intelligence information “without disclosing it to the defence stands in clear contrast to fundamental human rights principles.”¹²⁶ Similarly, under the current procedures of the sanctions regime, petitioners have no right to know the identity of the designating State.¹²⁷ As the ECtHR has opined, this “procedure falls short of the essential requirements of due process.”¹²⁸ At a minimum, the

“character or severity”. See, CCPR/C/GC/32, at para 15. The European Court of Human Rights has observed that preventative and deterrent objectives “may be seen as constituent elements in the very notion of punishment”. See, European Court of Human Rights, *Welch v. United Kingdom*, (1995) 20 EHRR 247 at para 30. The sanctions under the Al-Qaida regime have rightly been characterized as “drastic and oppressive” and as “paralysing.” *Her Majesty’s Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants)* [2010] UKSC 2, [2010] 2 AC 534, para. 6.

¹²¹ A/67/396, *supra* note 120 at para 58.

¹²² *Yassin Abdullah Kadi v European Commission*, General Court (Seventh Chamber), [2011] CMLR 24 at para 150.

¹²³ The informal group of like-minded countries on targeted sanctions includes: Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland; see *Les fondements de notre ordre juridique court-circuités par l’ONU*, 1 March 2010, motion passed by the Foreign Policy Commission of the Federal Parliament of Switzerland.

¹²⁴ A/67/396, *supra* note 120 at para 59(b)(vii).

¹²⁵ *Ibid* at para 42.

¹²⁶ *Letter dated 18 January 2016 from the Chair of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council*. UNGAOR, UN Doc S/2016/49 (2016) at para 402 [S/2016/49].

¹²⁷ The Security Council, in its Resolution 1989 (2011), strongly encourages designating States to give permission for their identity to be revealed, but stops short of requiring this. See, 1989, *supra* note 105 at 14.

¹²⁸ See, European Court of Human Rights, *A. v. United Kingdom* (2009) 49 EHRR 29 at para 218.

individuals concerned must be provided with sufficient information to enable them to give an effective answer to the allegations.¹²⁹

Finally, the Special Rapporteur has come to the conclusion that intelligence information obtained by means of torture has been employed to justify the designation of individuals.¹³⁰ There is a general agreement that the prohibition of torture is a peremptory norm, and thus statements made under the use of torture should not be invoked as evidence in any proceedings.¹³¹ The Special Rapporteur accordingly considers that where there is a plausible basis¹³² for believing that intelligence information may have been obtained through torture, the Office of the Ombudsperson is under an obligation to investigate the manner in which the information was obtained.¹³³ It is then for the designating State to establish that the information was not so obtained.¹³⁴

C. Exemptions on Humanitarian and Political Grounds

A few years after the start of sanctions against individuals, the Security Council decided to make exceptions to asset freezes and travel bans on individuals either for humanitarian or political reasons.

The Security Council decided to allow exceptions to the asset freeze on humanitarian grounds, as the sanctions were affecting the payment of basic expenses of individuals whose assets were frozen under Security Council decisions. In its revised decision, the Security Council authorized States to forego the freezing of funds and other financial resources of individuals if they determined that it was necessary for basic and extraordinary expenses.¹³⁵ However, States are required to notify the

¹²⁹The Supreme Court of the United Kingdom has followed this approach in *Secretary of State for the Home Department v. AF*. See, *Secretary of State for the Home Department v. AF*, [2010] 2 AC 269 HL at paras 57 and 83.

¹³⁰ A/67/396, *supra* note 120 at para 47.

¹³¹ The United Nations *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 15.

¹³² Information derived from detainee reporting in a State known to practice torture is sufficient to provide such a plausible basis (see *A and others v. Secretary of State for the Home Department (No. 2)* [2005] UKHL 71).

¹³³ A/67/396, *supra* note 120 at para 59(b)(v).

¹³⁴ *Ibid* at para 49.

¹³⁵ SC Res 1452, UNSCOR, 4678th mtg, UN Doc SC/Res/1452 (2002) at para 1 [1452].

Committee of their determination and only implement it “in the absence of a negative decision by the Committee.”¹³⁶

The Security Council also decided that exceptions to travel bans on individuals were necessary on political grounds. Due to developments in Afghanistan’s political environment,¹³⁷ its authorities were engaged in a “comprehensive peace process” and were negotiating with Taliban leaders who were on the Taliban/Al-Qaida Sanctions Committee’s list.¹³⁸ The Security Council decided to permit these individuals to travel where the Committee determined that such travel was justified. Any such exemptions were limited to the “requested period for any travel to the specified location or locations.”¹³⁹ It is clear, that the Security Council made this decision on political grounds—in an effort to promote the peace process in Afghanistan. At the same time, this decision supports the view that the Council’s earlier decision to blacklist Taliban leaders was also politically motivated. Undoubtedly, the Security Council as a political organ can modify or change its earlier decisions; however, changing a quasi-judicial decision is more problematic. Had the blacklisted individuals committed terrorist crimes, it raises questions as to why they were later permitted to participate in the peace process. If in fact, these individuals had not committed terrorist crimes why, then, were they blacklisted by the Security Council. Herein lies the dilemma: a political organ blacklisting individuals without examining the evidence, and then imposing sanctions, like a judicial body, that can be changed by political will. Hence, the Security Council’s credibility is undermined when it exercises a judicial function without guarantees of due process.

D. The Taliban/Al-Qaida Sanctions Committee

In 1999, the Security Council established a Committee of the Security Council (“The Taliban/Al-Qaida Sanctions Committee”) also known as 1267 Sanction Committee, to seek information from

¹³⁶ 1735, *supra* note 110 at para 15.

¹³⁷ SC Res 2082, UNSCOR, 6890th mtg, UN Doc S/Res/2082 (2012) at para 9 [2082].

¹³⁸ SC Res 2160, UNSCOR, 7198th mtg, UN Doc S/Res/2160 at para 13 [2160].

¹³⁹ 2082, *supra* note 137 at para 10; and 2160, *supra* note 147 at para 14.

States regarding the implementation of sanctions, report on the violations of sanctions,¹⁴⁰ consider requests for exemptions, and make recommendations to the Security Council concerning listing and delisting and exemptions.¹⁴¹ At a later stage, the Committee's mandate was expanded to "establish and maintain updated lists of individuals, groups, undertakings and entities for inclusion in the sanctions list, based on information provided by States and regional organizations,"¹⁴² and to consider petitions for the removal of individuals from the sanctions list who no longer meet the criteria established in the relevant resolutions.¹⁴³

Since Committee members are usually the same members of the Security Council who do not have the necessary expertise on the technical aspects of sanctions and judicial matters, the Council has established an expert group to assist the Committee in discharging its functions. The Council has also established an office of Ombudsman to receive petitions from individuals regarding removal from the sanctions list.

(i) The Sanctions Listing and De-Listing Procedure

The Taliban/Al-Qaida Sanctions Committee is responsible for the preparation of lists of individuals against whom sanctions should be imposed. The Committee prepares and updates the list of members of the Al-Qaida organization, the Taliban, and other individuals, groups, undertakings and entities associated with them, based on information it receives from Member States. In the years since the inception of this Committee, the Security Council has developed guidelines for submitting

¹⁴⁰ SC Res 1967 (1999) at para 6.

¹⁴¹ 1452, *supra* note 135 at para 1.

¹⁴² 1333, *supra* note 105 at para 16.

¹⁴³ 1822, *supra* note 105 at para 21. The Security Council has assigned additional functions to the Committee in several revisions made to its mandate, which include, *inter alia*: to ensure that fair and clear procedures exist for placing individuals, groups, undertakings and entities on the Al-Qaida Sanctions List and for removing them from the list, as well as for granting exemptions (2161, *supra* note 105 at para 24); to identify possible cases of non-compliance with the sanctions imposed by the Council and to recommend the appropriate course of action on each case (*Ibid* at para 27); to facilitate, through the Monitoring Team or United Nations agencies specialized, assistance on capacity-building for enhancing implementation of the measures, upon request by Member States (*Ibid* at para 29).

individuals' and entities' names for listing and removing them from the list.¹⁴⁴ The latest version of the guidelines is contained in Security Council Resolution 2161 (2014).¹⁴⁵

Several revisions made by the Security Council to the listing and de-listing procedure were aimed at addressing the concerns of States and human rights bodies on unwarranted limitations imposed on individuals' liberties. However, these revisions have led to increased bureaucracy in the work of the 1267 Committee without addressing the substance of the misgivings. Many UN Member States have developed domestic asset-freezing mechanisms, but their use remains limited. One reason for the lack of conformity among sanctions is the confusion between the freezing requirements of Resolution 1373 (2001) and those introduced by Security Council Resolutions 1267 (1999) and 1988 (2011), which establish a Security Council sanctions regime.¹⁴⁶

The listing procedure continues to lack transparency.¹⁴⁷ A study commissioned by the United Nations Office of Legal Affairs summarizes the problems relating to listing and de-listing of individuals and entities by the 1267 Committee,¹⁴⁸ which currently continues unabated. The study highlights the following issues in particular: first, targeted individuals are not informed prior to their inclusion on the blacklist and they do not have the opportunity to demonstrate that the listing was unjustified under the terms of relevant Security Council resolutions; secondly, individuals and entities are not permitted to petition for de-listing directly before the respective Security Council committee; thirdly, it is easier for a State to place an individual or entity on the blacklist than it is to take them off;¹⁴⁹ fourthly, listed

¹⁴⁴ SC Res 1730, UNSCOR, 5599th mtg, UN Doc S/Res/1730 (2006) at para 1.

¹⁴⁵ 2161, *supra* note 105 at paras 30-67. Under these procedures, States are required to provide identifying and background information on individuals and groups participating, by any means, in the financing or support of acts or activities of Al-Qaida, Usama bin Laden, and the Taliban, and other individuals associated with them. Moreover, States are required to report on the measures that they have imposed against individuals and entities, and of any relevant court decisions and proceedings.

¹⁴⁶ S/2016/49, *supra* note 126 at para 416.

¹⁴⁷ Finnur Magnusson, "Targeted Sanctions and Accountability of the United Nations' Security Council" (2008) 13:1 *Austrian Rev Int'l & EL Online* 35 at 54.

¹⁴⁸ The study is reproduced in Bardo Fassbender, "Targeted Sanctions and Due Process" online: United Nations (2006) <http://www.un.org/law/counsel/Fassbender_study.pdf> at 3-5.

¹⁴⁹ For instance, the United States move to delist Abdul Hakim Monib, a former Taliban official who later switched sides, was blocked by the Russian Federation. Again, when three Somali born Swedish citizens were included in the sanctions list and their assets frozen as a result, upon request from the US, it took more than a year of intensive negotiations between the US and Sweden to secure their names removal from the list. See Finnur Magnusson, *supra* note 147, at 35-78.

individuals and entities have little opportunity to challenge a listing before a national or international tribunal, because, under Article 103 of the Charter, States are obligated to implement Chapter VII decisions of the Security Council; fifthly, in cases of proceedings before national or international tribunals, the United Nations enjoys absolute immunity under the Charter and the *General Convention*;¹⁵⁰ and, finally, the current situation is equal to the denial of justice for listed individuals and entities.

(ii) The Sanctions Monitoring Team

In 2004, the Security Council established a Monitoring Team¹⁵¹ to assist the Committee in fulfilling its mandate, as well as to support the Ombudsperson in discharging its responsibilities.¹⁵² The Monitoring Team is mandated to gather information and keep the Committee abreast of “instances and common patterns of non-compliance” and to provide recommendations to the Committee on actions to be taken in cases of non-compliance with the measures imposed under Council resolutions.¹⁵³ The Monitoring Team has also been mandated to give recommendations to the Committee regarding the granting of exceptions and to keep the Committee’s relevant listing and de-listing procedures under constant review. The Team has also been authorized to assist States in implementing the sanctions upon request.¹⁵⁴

(iii) Ombudsman of the Sanctions Committee

¹⁵⁰ See, Article 105 of the United Nations Charter and the General Convention on the Privileges and Immunities of the United Nations (1946).

¹⁵¹ The Monitoring Team consists of eight members appointed by the Secretary-General who have expertise in the areas of “counterterrorism and related legislation; financing of terrorism and international financial transactions, including technical banking expertise; alternative remittance systems, charities, and use of couriers; border enforcement, including port security; arms embargoes and export controls; and drug trafficking.” 1526, *supra* note 105 at 7 and 1617, *supra* note 105 at para 17.

¹⁵² 1526, *supra* note 105 at para 7. Initially the Monitoring Team was established for a period of 18 months which was extended several times. The mandate of the Monitoring Team will be extended for a further period of thirty months from the date of expiration of its current mandate in June 2015. 2161, *supra* note 105 at para 73.

¹⁵³ 1989, *supra* note 105 at para 58.

¹⁵⁴ 2161, *supra* note 105 at para 74. The latest version of detailed responsibilities of the Monitoring Team is contained in the annex to the SC Resolution 2161 (2014).

In 2009, the Security Council decided to establish an Office of the Ombudsman under Resolution 1904 (2009) to assist the Committee in handling de-listing requests.¹⁵⁵ The Ombudsman was mandated, *inter alia*, to receive requests from individuals, groups, undertakings or entities seeking removal from the Al-Qaida Sanctions List. However, Member States are not permitted to submit de-listing petitions to the Office of the Ombudsperson on behalf of individuals, groups or entities. They can submit such requests directly to the sanctions committee. The Ombudsman is required to perform its functions in an independent and impartial manner and should neither seek nor receive instructions from any government. It advises the Committee on requests for de-listing.¹⁵⁶

The establishment of the Office of the Ombudsman by the Security Council was in response to the severe criticism of lack of due process when blacklisting individuals. However, the creation of this office does not seem to have addressed the concerns regarding the right of individuals to be heard by an independent body. An ombudsman is an institution that functions in the field of administrative law, where it plays an actual role in the settlement of disputes between employers and employees. As an example, the United Nations itself established an Office of the Ombudsman in 2002 to play a role in the settlement of disputes between the United Nations' management and its employees.¹⁵⁷ While successful in administrative law, this institution is ill suited for criminal law or the law enforcement fields. For this precise reason, some Member

¹⁵⁵ 1904, *supra* note 105 at para 20. The initial mandate of the Office of Ombudsman was for 18 months, which was extended by several resolutions of the Council. Lastly, the Council renewed its mandate for a period of thirty months from the date of expiration of the Office of the Ombudsperson's current mandate in June 2015. 2161, *supra* note 105 at para 41.

¹⁵⁶ 2161, *supra* note 105 at para 41. The Council requested the Secretary-General 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, counterterrorism and sanctions, to be Ombudsperson." A detailed function of the Ombudsman is contained in annex II of the resolution.

¹⁵⁷ Pursuant to *Human Resources Management*, GA Res 55/258, UNGAOR, 55th sess, sup. 49, UN Doc A/Res/55/258 and *Questions relating to the proposed programme budget for the biennium 2002-2003*, GA Res 56/253, UNGAOR, 56th sess, supp 49, UN Doc A/Res/56/253, the Secretary-General established in 2002 an office of Ombudsman, in his Office, to "to make available the services of an impartial and independent person to address the employment-related problems of staff members." See, Secretary-General's Bulletin ST/SGB/2002/12, dated 15 October 2002.

States have called for the establishment of an independent expert body to advise the Security Council on listing and de-listing,¹⁵⁸ which has thus far been ignored.

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, in his second report to the General Assembly, evaluated the mandate of the Office of the Ombudsperson and its compatibility with international human rights norms.¹⁵⁹ In his view, there were two major shortcomings to the procedure under Resolution 1904 (2009). Firstly, the Ombudsperson was not provided the power to make recommendations.¹⁶⁰ Secondly, a consensus was required by the 1267 Committee for removing individuals from the blacklist.¹⁶¹ These shortcomings were somewhat addressed by Resolution 1989 (2011), which authorized the UN Member States to allow payments for the purpose of basic expenses of the listed individuals,¹⁶² and also decided that delisting recommendations of the Ombudsman would automatically take effect 60 days following its consideration by the Committee if not clearly objected to by the members of the Committee. Nevertheless, the modifications made to the sanctions regime¹⁶³ failed to satisfactorily address the due process-related concerns previously expressed.¹⁶⁴ The Special

¹⁵⁸ See, Identical letters dated 23 June 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the President of the General Assembly and the President of the Security Council. UNGAOR, 62nd sess, UN Doc A/62/891 (2008); UNSCOR, 63rd Year, UN Doc S/2008/428 (2008).

¹⁵⁹ Established by the UN Commission on Human Rights, Resolution 2005/80, O. P. 6.

¹⁶⁰ *Ibid* at para 28.

¹⁶¹ *Ibid* at para 29.

¹⁶² 1989, *supra* note 105, at para 9.

¹⁶³ According to the modifications made, a delisting recommendation by the Ombudsperson automatically takes effect 60 days after the Committee's consideration of the comprehensive report of the Ombudsman, unless the Committee decides otherwise by consensus. In the absence of a consensus, any member of the Committee may refer the delisting request to the Security Council (the "trigger mechanism" procedure). 1989, *supra* note 110 at para 23. The same procedure is now to be followed where the designating State submits a delisting request at para 27.

¹⁶⁴ Prior to the amendments made by Resolution 1989 (2011), the mandate of the Ombudsperson had been assessed for compatibility with minimum standards of due process by the United Nations High Commissioner for Human Rights, the former Special Rapporteur, the General Court of the European Union, and the Supreme Court of the United Kingdom. While welcoming the introduction of an independent element to the procedure, they each concluded that the mandate of the Ombudsperson under Resolution 1904 (2009) failed adequately to address the due process-related concerns previously expressed about the regime, identifying 10 key objections: (i) the mandate of the Ombudsperson did not confer a power to overturn decisions of the Committee; (ii) the Committee therefore continued to act as judge in its own cause; (iii) delisting required a consensus within the Committee; (iv) the Ombudsperson lacked a power of recommendation; (v) disclosure of information to the Ombudsperson or the Committee was subject to the unfettered discretion of States; (vi) the Ombudsperson's authority to disclose sensitive information to the petitioner was similarly at the discretion of States; (vii) there was no requirement that the petitioner be informed of the identity of the designating State; (viii) neither the comprehensive report, nor the Ombudsperson's conclusions, could be disclosed to the petitioner; (ix) the Committee was

Rapporteur, therefore, endorsed the recommendation of the UN High Commissioner for Human Rights (OHCHR) that the Security Council must explore “every avenue” for establishing “an independent quasi-judicial procedure for review of listing and delisting decisions.”¹⁶⁵ To reflect this modification, the Special Rapporteur invited the Security Council to consider renaming the Office of the Ombudsperson as the Office of the Independent Designations Adjudicator.¹⁶⁶

The UK Supreme Court reacted to the introduction of the Ombudsperson and opined that it was not an adequate step towards addressing the flaws of the sanctions regime. In its decision of 27 January 2010, the Court, while acknowledging the establishment of the Office of the Ombudsman, observed that “the Law Lords still considered that the 1267 regime does not offer any access to effective judicial remedies.”¹⁶⁷ It is clear, that the Court confirms the view that it is problematic for a political organ to exercise a judicial function. Nevertheless, it is also clear that the Security Council is unwilling to permit the creation of an independent body to give advice to it or review its decisions of a quasi-judicial nature, on the grounds that it is the highest political body of the United Nations and its authority should not be questioned.

E. Law-Making or Judicial Function

The aim of this subsection was to find out whether the Security Council, in its resolutions relating to the imposition of sanctions against individuals, is exercising a law-making task, making judicial decisions, or conducting both functions. As discussed, the Security Council through its resolutions has provided a number of legal definitions that bind States due to the fact that they are adopted under Chapter VII. For instance, the definition of “financial and economic resources” is an example of a

under no obligation to provide reasons for its decision; and (x) the office of the Ombudsperson lacked the authority to grant appropriate relief where human rights were violated. A/67/396, *supra* note 120 at para 31.

¹⁶⁵ See A/HRC/16/50 at paras 27 and 44.

¹⁶⁶ A/67/396, *supra* note 120 at paras 35 and 59 (a)(i).

¹⁶⁷ Antonios Tzanakopoulos, “United Nations Sanctions in Domestic Courts: From Interpretation to Defiance in *Abdelrazik v. Canada*” (2010) 8:1 J Int’l Crim Justice at 267. See also Chapters Four and Five.

purported law-making exercise by the Security Council.¹⁶⁸ The definition of the term “associated with” Al-Qaida, Usama bin Laden, or the Taliban is another example of law-making by the Council.¹⁶⁹

Moreover, the Security Council demanded that all States “take immediate steps to enforce and strengthen through legislative enactments or administrative measures,” to prevent and punish violators of the measures imposed under the resolutions pertaining to the Taliban/Al-Qaida regime.¹⁷⁰ By this provision, obviously the Security Council is setting law-making goals for States that should be achieved by way of national legislation.

Besides, by making decisions to include individuals on the blacklist, against whom sanctions should be imposed, the Security Council is exercising a function like those of judicial bodies. As indicated in earlier pages, the resolutions under scrutiny are multi-faceted and create different types of obligations to States, which in turn are at the root cause of several problems that prevent the proper implementation of the resolutions by States. This aspect will be the subject of detailed discussion in Chapter Five.

V. Conclusion

From the discussion of the normative resolutions in this Chapter, two general and some specific conclusions can be drawn. The general conclusions are applicable to all three regimes under scrutiny, while the specific conclusions are exclusive to each one of the regimes discussed.

First turning to the general conclusions, there exist complex international legal regimes in both areas of counterterrorism and non-proliferation of weapons of mass-destruction. These regimes are established through multilaterally negotiated treaties, which provide for modalities of amending or complementing the treaties. In the absence of such provisions, the rules provided for in the *Vienna Convention on the Law of Treaties* are applicable. Therefore, the intervention by the Security Council

¹⁶⁸ 58/290, *supra* note 105 at para 4; 1904, *supra* note 105 at para 4; 1988, *supra* note 111 at para 6; 2161, *supra* note 105 at para 5.

¹⁶⁹ 1617, *supra* note 105 at para 2.

¹⁷⁰ 1363, *supra* note 116 at para 8.

in areas that are highly regulated creates more confusion regarding the status of applicable law. As discussed, there are discrepancies between the normative resolutions and the treaties in force. Attempting to fill gaps in the legal regimes already in force by way of Chapter VII resolutions contradicts the calls on States to ratify existing international instruments.

Due to these difficulties, the Security Council is moving away from direct law-making towards setting States' legislative goals. While this move by the Council will certainly alleviate some of the problems related to the implementation of the normative resolutions, determining States' legislative goals causes other types of deficiencies. This practice may persuade States in adopting legislative measures, but it will not result in a harmonized set of rules applying in a given area.

Second, it is evident that the influence of the United States was instrumental in the preparation and adoption of the Security Council's normative resolutions. For instance, Security Council Resolution 1373 was drafted by the United States and swiftly adopted just a few days after its circulation. Similarly, draft Resolution 1540 was prepared by the United States. Though it was the subject of consultation and open debate, the entire UN membership did not have an opportunity to participate on equal footing in the negotiations among Security Council members. Unlike the usual practice in multilateral treaty-making, the Permanent Members of the Council had the discretion of accepting or ignoring the views and proposals of the other Member States. Despite India and Pakistan's strong objections to the Security Council's interference in the field of the NPT regime, the Security Council adopted Resolution 1540 unanimously. Pakistan, a non-permanent member of the Security Council, chose to vote in favour of the resolution, despite being opposed to it, merely for political considerations. On the other hand, India, not a member of the Council, chose a low-profile format for placing its objection on record. It circulated its position in the form of a letter.

Turning now to the specific conclusions, the regime established under Resolution 1373 has evolved significantly since its inception and has been expanded to include, in addition to suppressing the financing of terrorism, combatting the incitement to terrorist acts, kidnapping for ransom, and

foreign terrorist fighters. The complexity of this regime, with the many revisions made to it, has generated practical difficulties for many States that do not have problems related to terrorism but are under obligation to implement commitments emanating from this resolution. For this reason, making technical assistance available to States has become so important for the success of the regime, and has been emphasized in almost all of the resolutions adopted under this category.

The main concern about the adoption of Resolution 1540 is that the Security Council's approach is selective and unbalanced. Non-proliferation and disarmament issues are linked and need to be addressed in parallel. The establishment of the 1540 Committee was criticized because each one of the non-proliferation regimes cited in this Chapter has its own monitoring mechanisms, and interference by the Security Council is counterproductive and unjustified. The 1540 Committee remains active because the resolution's scope is broader than simply gap filling in the non-proliferation regime, but rather extends to suppressing access and use of WMD by terrorists.

The Security Council's decisions to include individuals and entities in the sanctions list followed by severe restrictions on their liberties, is similar to judicial decisions, in which due process is essential. However, contrary to judicial decisions, there is no mechanism in the Security Council practice to apply due process. The Council's clarification that these measures "are preventative in nature and are not reliant upon criminal standards set out under national law"¹⁷¹ does not seem to properly address concerns raised by States and scholars regarding the lack of due process when the Council exercises quasi-judicial functions. As Hilpod points out, it is highly unlikely that the continuing reference to the fact that "the measures . . . are preventive in nature and are not reliant upon criminal standards set out under international law" will convince national courts.¹⁷²

¹⁷¹ 2161, *supra* note 105 at para 31.

¹⁷² Peter Hilpod, "UN Sanctions Before the ICJ: the *Kadi* Case" in *Challenging acts of international organizations before national courts*, ed, Reinisch, August, (Oxford, New York: Oxford University Press, 2010) at 53.

Chapter Three
Imperial Security Council
TWAIL Perspectives on Security Council Law-Making

Abstract

Third World Approaches to International Law (TWAIL) scholars view the Security Council as a body set up and operating in the framework of the prevailing international legal system—a legacy of the former colonial powers to sustain their control over the rest of the world. Today, big Western powers continue on the same path as former colonizers, maintaining control through the creation of international organizations (IO). Through this lens, the Security Council is not the proper organ to exercise a law-making function as it is an underrepresented body, its decision-making is undemocratic, its practice is selective, and it lacks legitimacy. Accordingly, law-making by such a body can only be justified by the imperial intentions of those who use it as a tool of foreign policy, a situation that should be changed and remedied.

I. Introduction

This Chapter is devoted to exploring perspectives of the Third World Approaches in International Law (“TWAIL”) on law-making by the Security Council. It should be clarified at the outset that TWAIL is a relatively new school of thought, originating in the decolonization era.¹ It consists of a network of scholars from developing and developed countries who criticize mainstream international law for having contributed to Western nations’ domination over developing countries and the economic divide between the rich North and the poor South.²

¹ Origins of TWAIL stretch back to the decolonization movements that swept the globe after World War II. The Bandung Conference of 1955 was its symbolic birthplace, where TWAIL was originally set up to support the struggle of colonized territories and to end direct European colonial rule over non-Europeans. See, Makau W. Mutua, “What is TWAIL?” (2000) American Society of Int’l Law Proceedings at 38.

² See, Antony Anghie & B.S. Chimni, “Third World Approaches to International Law and Individual Responsibility in Internal Conflicts” (2003) 2:1 Chinese JIL at 79; Madhav Khosla, “The TWAIL Discourse: The Emergence of New Phase” (2007) 9:3 ICLR at 279; Antony Anghie and B.S. Chimni, “Third World Approaches to International Law and Individual Responsibility in Internal Conflict” in Steven R. Ratner & Anne-Marie Slaughter, eds, *The Methods of International Law*

The primary goal of TWAIL is to shape international law in a manner that offers dignity for the poor and oppressed people of the Third World—an attempt to “transform international law of subjugation into the law of emancipation.”³ Under the TWAIL scheme, all factors that create, foster, legitimize, and maintain harmful hierarchies and oppression in international relations must be revisited and reformed.⁴ Thus, TWAIL is basically a reconstructive movement that seeks a new compact of international law. Primarily a response to current conditions, it is both reactive and proactive—reactive in the sense that it responds to international law as an imperial project, and proactive because it seeks the transformation of internal conditions in the Third World, by making necessary modifications to international law.⁵

Although TWAIL is a critical approach to international law, it does not reject international law in its entirety.⁶ This approach calls for the reform of international law and international institutions in order to promote global justice and reject the West and the North’s domination.⁷ As a critic of mainstream international law, TWAIL has constructive interaction with other critical disciplines of international law,⁸ including the New Approaches to International Law (“NAIL”), which applies critical theory to international law. Third World Approaches to International Law is interested in forming coalitions with like-minded movements in all societies, including in the West, to forge a

(2004) at 185-210; Karin Mickelson, “Rhetoric and Rage: Third World Voices in International Legal Discourse” (1998) 16:2 *Wisconsin ILJ* at 356.

³ B.S. Chimni, “The Past, Present and Future of International Law: A Critical Third World Approach” (2007) 8:2 *Melbourne JIL* at 499.

⁴ Mutua, *supra* note 1 at 38.

⁵ *Ibid.*

⁶ R.P. Anand, “Attitude of the Asian-African States Towards Certain Problems of International Law” in Frederick E. Snyder & Surakiart Sathirathai, eds, *Third World Attitudes Towards International Law* (Dordrecht-Boston-Lancaster: Martinus Nijhoff Publishers, 1987) at 15.

⁷ Ibrónke T. Odumosu, “Challenges for the (Present/) Future of Third World Approaches to International Law” (2008) 10:4 *ICLR* at 469.

⁸ Critical legal theory challenges accepted norms and standards in a society. Followers of this theory argue that the law grow out of the power relationship in a society and is projected to preserve interests of a class of people who play a key role in producing it. The law is used as an instrument by the wealthy and the powerful to safeguard their hierarchy in a society. Though the theory is largely a US movement, European philosophers and social theorists have inspired it to a great deal. See, James Boyle, “The Politics of Reason: Critical Legal Theory and Local Social Thought” (1985) 13:4 *U Pa LR* at 685-780.

common strategy to combat the powerlessness and victimization of Third World countries around the globe, and marginalized communities in the West.⁹

While TWAIL scholars have not discussed Security Council's law-making in detail, their views on this question may be inferred from their basic positions on international law and international institutions. They view the Security Council's law-making as an attempt to protect the vital interests of Western powers—endeavours that have lost legitimacy and thus should be opposed. Mainstream lawyers share TWAIL scholars' viewpoints in a number of areas such as under-represented composition and undemocratic procedure of decision-making of the Security Council, and its selective approach in treating issues relating to international peace and security. Thus, discussion of mainstream lawyers' viewpoints, in Chapter Four, will supplement those of the TWAIL scholars that are discussed in this Chapter.

The TWAIL's perspectives will be expounded in this Chapter, starting with Section II which summarizes the main tenets of TWAIL scholars with respect to international law. Section III, examines TWAIL viewpoints regarding the unequal composition and undemocratic procedure of the Security Council which makes it unfit to engage in law-making. Section IV, scrutinizes the selective approach of the Security Council, when dealing with the threats posed to international peace and security by terrorism—an approach that resulted in the loss of legitimacy of the Security Council. Mainstream lawyers share the concern of TWAIL scholars over the Security Council's legitimacy, which is covered in Section V.

II. The Main Tenets of TWAIL Scholars on the Making of International Law

This section is devoted to examining the main tenets of TWAIL scholars concerning the making of international law. To this end, analyzing the TWAIL Vision Statement circulated at the first

⁹ For instance, both feminist theory and Third World scholarship address the question of exclusion by international law. Chimni favours the collaboration of TWAIL with feminist approaches in order to reconstruct international law and address concerns of women and other marginalized and oppressed groups. B. S. Chimni, "Third World Approaches to International Law: A Manifesto" 2006 8 ICLR at 22.

conference on the “New Approaches to the Third World Legal Studies,” convened in 1997 at Harvard Law School, would be a good point of departure. The statement reads as follows:

1997 TWAIL Vision Statement¹⁰

We are a network of scholars engaged in international legal studies, and particularly interested in the challenges and opportunities facing ‘third world’ peoples in the new world order. We understand the historical scope and agenda of the dominant voice of international law scholarship as having participated in, and legitimated global processes of marginalization and domination that impact on the lives and struggles of third world peoples.

Members of this network may not agree on the content, direction and strategies of third world approaches to international law. Our network, however, is grounded in the united recognition that we need democratization of international legal scholarship in at least two senses: (i) we need to context international law’s privileging of European and North American voices by providing institutional and imaginative opportunities for participation from the third world; and (ii) we need to formulate a substantive critique of the politics and scholarship of mainstream international law to the extent that it has helped reproduce structures that marginalize and dominate third world peoples.

Thus we are crucially interested in formulating and disseminating critical approaches to the relationships of power that constitute, and are constituted by, the current world order. In addition, we appreciate the need to understand and engage previous and prevailing trends in third world scholarship in international law.

A number of points featured in the vision statement demonstrate the approach of these scholars to international law. First, it is clear that they do not wish to break their links with the first generation of Third World scholars. Consequently, the statement does not endorse the partition that some scholars have made between the first generation of TWAIL scholars (TWAIL I) and second generation of TWAIL scholars (TWAIL II). The vision statement is, therefore, perceived to be the continuation of earlier thoughts by Third World scholars on international law.

¹⁰ The Vision Statement was drafted by a group of Harvard University students and was circulated in 1997 during the first TWAIL conference. David Kennedy, the head of Harvard’s graduate program in law provided moral and institutional support to this group of students. See, Mickelson, *supra* note 2 at 356.

Second, the Third World's *people* have a central role in the statement. TWAIL II scholars are mainly "*people-centric*."¹¹ This approach is a departure from the first generation of TWAIL scholars, who championed full and equal sovereignty for decolonized States.

Third, these scholars identify themselves as a network that is interested in international legal studies from a Third World's perspective. Dissatisfaction with mainstream international law is a unifying element of TWAIL scholars.¹² Mutua observes that TWAIL is a response to the unfavorable conditions of international law and contains both "reactive" and "proactive" elements.¹³

Fourth, TWAIL scholars acknowledge the diversity within the network, both in terms of the diversity of disciplines and the diversity of scholars from different regions. Accordingly, the statement emphasizes the need to promote a constructive dialogue among Third World scholars from various disciplines and regions.

In an attempt to identify the basic principles shared by TWAIL scholars, reference should be made to Mohammed Bedjaoui, a pioneer TWAIL scholar and renowned Third World jurist, who has summarized the views of TWAIL first generation scholars with respect to international law and states that "it is premised on Europe as the center, Christianity as the basis for civilization, capitalism as inborn in humans, and imperialism as a necessity."¹⁴

Chimni, a second generation TWAIL scholar, has added a number of elements to the main areas of TWAIL analysis. These include, *inter alia*, a focus on colonization and how it legitimized the oppression of the Third World, emphasis on the familiarity of the Third World with international law, despite the fact that some nations were not sovereign in the past, the argument that Third World culture did not inhibit its active participation in the international legal processes, an aim to reform

¹¹ Opeoluwa Adetoro Badaru, "Examining the Utility of Third World Approaches to International Law for International Human Rights Law" (2008) 10:4 ICLR at 381.

¹² *Ibid* at 380.

¹³ Mutua, *supra* note 1 at 31.

¹⁴ Mohamed Bedjaoui, "Poverty of the International Order: A Contemporary Perspective" in R. Falk, F. Kratochwil & S. Mendlovitz, eds, *International Law: A Comparative Perspective* (Boulder: Westview Press, 1985) at 153.

international law rather than reject it, a strong focus on the sovereignty and equality of States, a greater amount of faith, hope, and belief in the United Nations system, a goal to increase the scope of international law to cover various facets of human life, and finally, a belief in the global coalition strategy that would bring about necessary changes in international law.¹⁵ Other TWAIL scholars have also contributed to the elaboration of these elements. The main tenets of TWAIL are briefly discussed in the following sub-sections.

A. The Euro-Centricity of International Law

TWAIL scholars claim that international law was developed by powerful European States to regulate their relationship with each other and the rest of the world.¹⁶ The concept of sovereignty was the key element in justifying, managing, and legitimizing colonialism, a process through which a number of European States occupied and ruled most parts of Asia, Africa, and the Americas. The following passage from Anghie illustrates TWAIL views on this point:

The colonial confrontation was not a confrontation between two sovereign States, but between a sovereign European State and a non-European State that, according to the positivist jurisprudence of the time, was lacking in sovereignty. Such a confrontation poses no conceptual difficulties for the positivist jurist who basically resolves the issue by arguing that the sovereign State can do as it wishes with regard to the non-sovereign entity, which lacks the legal personality to assert any legal opposition.¹⁷

As mentioned earlier, Bedjaoui also believes that “international law was simply a European law, arising from the combination of regional facts with material power and transposed as a law dominating all international relations.” In his view, the international law that developed among European nations “could not be an international law established by common accord, but an international law given to

¹⁵ B. S. Chimni, “Towards a Radical Third World approach to Contemporary International Law” (2002) 5:2 Int’l Center for Comparative Law and Politics Review at 15.

¹⁶ Anand, *supra* note 6 at 6; S. Parkash Sinha, “Perspectives of the Newly Independent States on the Binding Quality of International Law” in Frederick E. Snyder & Surakiart Sathirathai, eds, *Third World Attitudes Towards International Law* (Dordrecht-Boston-Lancaster: Martinus Nijhoff Publishers, 1987) at 46.

¹⁷ Antony Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law” (1999) 40:1 Harvard ILJ at 3.

the whole world by one or two dominant groups.” This international law served as a legal basis for the various political and economic aspects of imperialism.¹⁸

Mutua identifies a “European hegemonic pattern” in the past five centuries that is characterized by a “long queue of colonial administrators” and the “Bible-carrying missionaries” who came to rescue the heathens, merchants, exporters of political democracy, and now the human rights crusaders. In his view, international law has been the most important tool in the spread of Eurocentrism.¹⁹ Even human rights law, which seems a benign discipline of international law, is rooted in “Eurocentric rhetoric and corpus.”²⁰

B. The Colonial Nature of International Law

TWAIL scholars refer to international law as a tool that has served the colonial and imperial objectives of the colonizers. For instance, Chimni observes that since the 16th century the development of international law has been linked to colonialism and the basic rules of international law were developed by its necessities—“laws relating to the acquisition of territory, recognition, State responsibility and State successions”—and were adjusted to legitimize colonial aspirations.²¹ In the very first line of his manifesto, Chimni warns that the “the threat of re-colonization is haunting the [T]hird [W]orld,” and that the process of globalization “has had deleterious effect[s] on the welfare of [T]hird [W]orld peoples.” In his view, international law has played an unfortunate but crucial role in accelerating globalization. Chimni claims that the first generation of Third World scholars failed to capture the “intimate relationship between colonialism and international law,” which continues to prevail in the post-colonial era. In the post-colonial era, the newly independent States play the role of

¹⁸ Mohammed Bedaoui, *Towards a New International Economic Order* (UNESCO, Paris-London-New York: Holmes & Meier Publishers, 1979) at 50.

¹⁹ Mutua, *supra* note 1 at 36.

²⁰ Mutua, *supra* note 1 at 37.

²¹ Chimni, *supra* note 3 at 499.

“compradors,”²² acting as agents to safeguard colonial interests in trade and economics and political exploitation.

Anghie emphasizes that the colonial project was at the very heart of international law.²³ Since colonization was a part of the “manifest destiny of Europeans” and “good” for non-Europeans, any method employed in the pursuit of colonization was “morally and legally just.” Positivists provided an elaborate legal language to legitimize the domination of non-Europeans by Europeans, all in the furtherance of missions to civilize the Third World.²⁴

TWAIL scholars subscribe to the post-colonial theory,²⁵ according to which the consequences of European territorial conquest and empire-building did not end after the independence of the colonized territories. Under this theory, an empire is not confined to the expansion of power through military might; it also embraces the conquest and occupation of mind, selves, and culture, and institutes “enduring hierarchies of subjects and knowledge.”²⁶ Anghie argues that the exploitation of Third World countries in the colonial era created a set of conditions favorable to the colonizers, which continued to prevail even after decolonization. These relationships were embodied and perpetuated by a system of international norms that continued to function after the independence of Third World States.²⁷

TWAIL scholars strive to identify and break down these “enduring hierarchies” that were inherited as the legacy of centuries of colonialism. They are convinced that understanding and exposing colonial techniques and devices of international law are crucial to comprehending the nature

²² A comprador is a native manager of European business houses in East and South East Asia, and, by extension, social groups that play broadly similar roles in other parts of the world.

²³ Chimni, *supra* note 3 at 502.

²⁴ Anghie, *supra* note 17 at 7.

²⁵ The “post” in postcolonial does not mean after colonialism or overcoming colonialism. It rather refers to the continuation of colonialism in consciousness of formerly colonized peoples, and in institutions imposed in the process of colonization.

²⁶ Gyan Parkash, *After Colonialism: Imperial Histories and Postcolonial Displacements* (Princeton University Press, 1995) at 3.

²⁷ Antony Anghie, *Imperialism, Sovereignty and the Making of International Laws* (Cambridge: Cambridge University Press, 2005) at 208.

of the dominant international legal regime.²⁸ Consequently, these scholars seek to unpack the colonial history of most of the Third World, to emphasize the continued influence of colonialism on the international system and on Third World peoples, and try to bring about some form of justice for the peoples of the Third World.²⁹

C. The Imperial Character of International law

TWAIL scholars pay particular attention to the role that power plays in international order, both for historical reasons and contemporary relevance. TWAIL scholars believe that the origins of international law lie in the power relationship between colonizers and colonized, and that international law has served as a means of perpetuating this relationship for centuries. In TWAIL's historical analysis, international law was a product of "legitimizing forces." As Gathii notes, "the relations between colonial peoples and their dominators cannot be understood outside the prism of power"—military as well as economic power within a neocolonial prism.³⁰

For many TWAIL scholars, imperialism³¹ describes the actual status of the relationship between Western powers and Third World countries.³² For instance, Sinha describes international law "as being a product of relations among imperialist States and of relations of imperial character between imperialist States and colonial people."³³ Rajagopal points out that imperialism is not only about powerful nations expanding their domination to the rest of the world, but it also embraces those countries that are dominated by the West through the expansion of international law.³⁴ In his seminal work *Imperialism, Sovereignty and International Law*, Anghie demonstrates how international law

²⁸ O.C. Okafor, "Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective" (2005) 43:1/2 Osgoode Hall LJ at 177.

²⁹ Odumonsu, *supra* note 7 at 178.

³⁰ James Thuo Gathii, "Imperialism, Colonialism, and International Law" (2007) 54 Buffalo LR at 1016.

³¹ Imperialism has also been used in the following meanings: despotic methods of government; the search for markets and investment opportunities as a condition for expansion of capitalism; the employment of military power for economic advantages.

³² See for instance, Sinha, *supra* note 16 at 23.

³³ *Ibid* at 22.

³⁴ Rajagopal Balakrishnan, "Locating the Third World in Cultural Geography" (1999) 15:2 Third World Legal Studies at 18.

continuously reproduces the structure of the "civilizing missions" that served the colonial project. In his view, it is currently impossible to create an international norm to the detriment of imperial interests.³⁵

By the end of the nineteenth century, international law was universalized through the imperial conquests and the subjugation of African, Asian, and Pacific territories by European powers. North, Central, and South America had been claimed by various European powers in the preceding four centuries. Thus, international law was expanded to cover non-European peoples in an attempt to impose a regime of global governance that originated from European thought, history, culture, and experience. There is no doubt that imperial expansion was driven by the economic exploitation of non-Europeans and their resources, for the advantage of Europeans.³⁶

Immediately after World War II, many colonial territories overthrew the yoke of direct colonial rule. However, these countries quickly realized that political independence was largely illusory. Although formally free, Third World States were still bonded politically, legally, and economically to the West. Non-European powers were recognized as having the right to self-determination, which was a repudiation of direct colonialism yet at the same time, they had to be governed by human rights standards set out by Europeans.

Chimni rejects the claim by the West that Third World countries are incapable of governing themselves and in need of assistance. In his view, the idea of "good governance" as presented by the dominant West, was not a genuine idea but an attempt by the West to restore the practice of imperialism.³⁷

D. TWAIL Challenges to the Universality of International Law

³⁵ Anghie, *supra* note 27 at 317.

³⁶ *Ibid.*

³⁷ Chimni, *supra* note 9 at 16.

TWAIL scholars are generally cautious about claims of the universal character of international law. They look at this phenomenon through three different lenses: power politics, cultural differences, and opposing interests.

The universalization of international law is a process in which economic and military powers impose their values on the rest of the world and make them more or less eternal.³⁸ According to one viewpoint, the “superficial” claims of the universality of international law tend to ignore the underlying politics of domination. Mutua, for instance, points out that “[n]either universality nor its promise of global order and stability” make international law a just, equitable, and legitimate code of global governance for the Third World. The construction and universalization of international law was essential to the imperial expansion that subordinated non-European peoples and societies to European conquest and domination.³⁹

According to another view, non-Western cultures are completely different from the Western culture upon which international law is based. Consequently, bringing non-Western societies under the realm of international law undermines that very law. Scholars who subscribe to this view demand a discourse among various cultures to establish, where necessary, the content of universally acceptable norms. In particular, these scholars oppose the universality of human rights law on two grounds. First, they oppose attempts to promote a universal culture of human rights without meaningful input from Third World countries.⁴⁰ Mutua, for instance, observes that international law, and particularly international human rights law, is rooted in “Eurocentric rhetoric and corpus.”⁴¹ Second, TWAIL scholars also express their doubts about the viability of employing human rights law to address human needs, especially the particular needs of Third World peoples.⁴²

³⁸ See for instance, Sinha, *supra* note 16 at 23.

³⁹ Mutua, *supra* note 1 at 31.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Badaru, *supra* note 11 at 381.

According to a third view, challenges to universality are based on interest. For instance, Anand argues that it was the conflict of interests between new States and Western powers that affected the universality of international law. Elaborating on this point, Anand refers to the two conferences on the law of the sea where no agreement was reached about the breadth of the territorial waters, “not because of different cultural traditions of Asian-African countries, but due to the conflicting interests of the maritime Powers and the weak and underdeveloped States.”⁴³ Confirming this viewpoint, Friedmann observes that “[j]ust as in the Western world, the relative positions of Britain, France, the United States, and other countries have changed, with the change in their political and economic status, so the positions of the presently underdeveloped countries will be affected by their development.”⁴⁴

Notwithstanding the viewpoints above, other TWAIL scholars do not deny the fact that the universalization of certain values might be desirable. They do not find cultural differences to be an insurmountable problem facing the universality of international law. According to this view, it is possible to formulate “a consensus of general principles” from various legal systems.⁴⁵ Anand, for instance, argues that non-Western societies have developed a number of legal principles relating to treaties and the laws of war, which correspond to the relevant norms of international law.⁴⁶ This view was confirmed by International Court of Justice Judge Tarazi in reference to the principle of inviolability of diplomatic and consular missions in Islamic jurisprudence.⁴⁷

E. Emphasis on Third World’s Peoples

In an attempt to strengthen the statehood status of newly decolonized countries, the first generation of TWAIL scholars promoted the basic principles of international law such as sovereign equality of States and non-intervention in the internal affairs of other States. However, TWAIL II scholars

⁴³ Anand, *supra* note 6 at 72.

⁴⁴ Wolfgang Friedmann, "The Position of Underdeveloped Countries and the Universality of International Law" (1963) 2 Int'l Law Bulletin 9-10 (Colombia Society of International Law, Spring 1963).

⁴⁵ Anghie, *supra* note 27 at 200.

⁴⁶ Anand, *supra* note 6 at 7.

⁴⁷ See separate opinion of Judge Tarazi in the case concerning the *United States Diplomatic and Consular Mission in Tehran (United States v. Iran)*, (1980) ICJ Rep at 59.

criticized the original TWAIL scholars for their excessive emphasis on these principles, which in their view, contributed to the persistence of injustices against Third World peoples. Consequently, TWAIL II scholars shifted their attention from Third World States to Third World peoples.

For TWAIL II scholars, the equality of Third World peoples with all other peoples, including peoples in developed countries, is highly important. They insist that all thoughts and actions concerning international law and relations should proceed on the assumption that Third World peoples “deserve no less dignity, no less security, and no less rights or benefits” than citizens of developed States.⁴⁸ For instance, claims of the right to intervene on humanitarian considerations are viewed by TWAIL scholars with suspicion. In their assessment, such a right can only be exercised by developed countries against developing countries, and humanitarian intervention by countries from the South in countries of the North is practically impossible. As a result, doctrines such as humanitarian intervention endorse the continuation of injustices against the Third World’s peoples and are, therefore, rejected by TWAIL scholars.⁴⁹

TWAIL II scholars focus their attention on the perceived “suffering” of the Third World peoples and criticize human rights law for its inadequacy to remedy their grievances.⁵⁰ They endeavour to identify and support the marginalized peoples in Third World States – women, poor farmers, workers and minorities – whom they believe have generally eluded the attention of TWAIL I scholars.

F. The Role of International Law in Creating An Unjust and Unequal World

TWAIL scholars criticize international law for its partial or complete role in creating an unjust and unequal world, where the gap between rich and poor countries is constantly widening. These scholars agree with Nelson Mandela’s assessment that global poverty and inequality have become scourges

⁴⁸ Okafor, *supra* note 28 at 179.

⁴⁹ Chimni, *supra* note 9 at 16.

⁵⁰ Badaru, *supra* note 11 at 381.

“alongside slavery and apartheid.”⁵¹ The following passage from Julius Nyerere best illustrates the view of TWAIL scholars on the role of international law in creating an unjust and unequal world:

[T]he Third World consists of the victims and the powerless in the international economy Together we constitute a majority of the world's population, and possess the largest part of certain important raw materials, but we have no control and hardly any influence over the manner in which the nations of the world arrange their economic affairs. In international rule-making we are recipients not participants.⁵²

Mickelson emphasizes that the Third World approach is mainly concerned about the inequality between rich and poor nations, as manifested by the New International Economic Order ("NIEO") proposal in the 1970s.⁵³ “A Third World approach to international law is perhaps most visible in the context of international economic law, and particularly in the debates surrounding the proposals for the NIEO.” The *Charter of Economic Rights and Duties of States*, passed by the General Assembly in 1974, provides that “it is a fundamental purpose of the present Charter to promote the establishment of a new international economic order, based on equity, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems.”⁵⁴

In Chimni’s view, international law has helped “legitimize and sustain the unequal structures and processes that manifest themselves in the growing north-south divide.” The world is dominated by the capitalist forces of the North, which have employed international legal instruments to subdue the peoples of the South and to keep them under tight economic and political control.⁵⁵ In this process, an “emerging transnational capitalist class” has played a prominent role and is contributing to what Chimni believes is a transition from “a sovereign State system to a global system of governance.” The

⁵¹ B.S. Chimni, “A Just World Under Law: A View from the South” (2007) 22:2 American U ILR at 200.

⁵² Julius K. Nyerere, “South-South Option” in Altaf Gauhar, ed, *The Third World Strategy: Economic and Political Cohesion in the South* (USA: Praeger Publishers Inc., 1983).

⁵³ Mickelson, *supra* note 2 at 355.

⁵⁴ Charter of Economic Rights and Duties of States. GA Res 3281 (XXIX), UNGAOR, 29th sess, UN Doc A/Res/3281 (1974) at the preamble.

⁵⁵ Chimni, *supra* note 9 at 3.

nascent Global State overlaps the North-South divide and creates a “complex map of global fractures,”⁵⁶ in which the gap between “Global Rich” and “Global Poor” is evident.

In the final analysis, the world is today coming to be divided into two worlds, that of the Global Rich and that of the Global Poor. Ironically, the population that lives on less than a dollar a day is nearly entirely present in the [T]hird [W]orld, injecting a strong North-South dimension to the divide between the Global Rich and the Global Poor.⁵⁷

In his detailed discussion of recent developments in international law, Chimni focuses on the two fundamental areas of international economic law and international human rights law. Developments in these two areas interact with the emerging non-territorial Global State and pull it in opposite directions. Whereas changes in international economic law postulate the imperial Global Capital State’s desire for global economic standards, international human rights law, contributes to the emergence of the Global State through uniting global peoples in their struggle to secure global laws of welfare.⁵⁸

Nonetheless, Chimni foresees that the transition process will be gradual, and for the foreseeable future, the Territorial State will coexist with the emerging Global State as they compete over social forces and interests. In the transitional period, the role of the Territorial State is to facilitate interaction between “transnational capital, national capital hurt by globalization, and subaltern classes.”⁵⁹

Chimni rejects the contention that the creation of a “just world” is not the task of international law. He advances the argument that dominant forces have always had an interest in international law to justify their control in world affairs. In the colonial era, the lack of autonomy for the colonized territories was justified under international law. Similarly, Chimni rejects the idea that the role of international law should be confined to ensuring a “world under law,” because this concept lays the

⁵⁶ Chimni, *supra* note 51 at 200-201.

⁵⁷ *Ibid* at 212.

⁵⁸ *Ibid* at 204.

⁵⁹ *Ibid* at 212.

foundation for the “*justice in one country*” approach. Justice within the boundaries of a single country is no longer sustainable as the destinies of all societies in the contemporary world are so intertwined that no State can postulate and implement “a domestic theory of justice.”⁶⁰

Under the rubric of international justice, Chimni discusses the concepts of redistribution, recognition, and representation. He argues that the redistribution of justice in the contemporary world cannot be limited to territorial boundaries, and that there must be justice for all at the global level.⁶¹ Concerning the concept of recognition, he favors the “struggle for . . . recognition of collective identities within the community of peoples.” Chimni emphasizes that all peoples and cultures deserve an identity within the confines of evolving international human rights law.⁶² Regarding the concept of representation, he criticizes the “democracy deficit” in international institutions, clearly exemplified by the weighted voting method in international financial institutions and the veto power in the Security Council. This situation is suitable for and serves the interests of the Global Capitalist State.⁶³

Nevertheless, Chimni acknowledges that contemporary international law also offers a protective shield to less powerful States. An example of this is human rights law. The essence of the expanding human rights domain is the creation of a global human rights space that parallels the global *economic* space. Theoretically, when these two spheres of law interact they should complement each other to create a global law of welfare. However, international human rights law currently fails to deliver on its promises as the global economy is controlled by States and social forces that do not care about human suffering and the language of rights seriously, in particular the implementation of economic, social, and cultural rights. The result is a growing worldwide resistance to realizing the potential of human rights. By using modern means of communication, social movements have

⁶⁰ *Ibid.*

⁶¹ Chimni, *supra* note 51 at 217.

⁶² *Ibid* at 214.

⁶³ *Ibid.*

stimulated a global human rights consciousness that treats poverty and oppression anywhere in the world as its own concern.

G. Counter-Hegemony

Rajagopal suggests that the “Third World” category should be decentered from its geographical moorings and reimagined as a counter-hegemonic discursive tool in order to challenge the various ways in which power is used. Relying on Gramsci's notion of counter-hegemony,⁶⁴ Rajagopal maintains that counter-hegemony is not a pure oppositional project that seeks to overthrow everything that is in place. It is rather a discourse that focuses on issues such as class, gender, sexuality, region, language and so on. This theory foresees transnational linkages among oppressed peoples as a possibility. Therefore, this discourse would have important implications when imagining the world order; it would compel the dominant discourse to rethink the relationship between the local and the global.

Chimni believes that each historical epoch produces its own agents of resistance. In the contemporary era, the forces of resistance consist of the old and new social movements within the Third and First Worlds. What is currently emerging is a complex internationalism that combines local, regional, and international social movements forging what Castells calls a "global movement for global justice."⁶⁵

The "Third World" is sometimes conceptualized as a form of "social movement" –an international protest of the weak against the strong, or the poor against the rich.⁶⁶ In some instances, an analogy has been drawn with a particular form of social movement, that of trade unionism. Nyerere,

⁶⁴ Gramsci defines hegemony as the process which generates "the 'spontaneous' consent given by the great mass of the population to the general direction imposed on social life by the dominant fundamental group (historical bloc)". Hegemony to him is an active process involving the production, reproduction and mobilization of popular consent, which can be constructed by any 'historical bloc' that takes hold of it and uses it. Of course, being a Marxist, he favours the working class to do this, but there is no reason why this analysis cannot be extended to any oppressed group.

⁶⁵ Chimni, *supra* note 51 at 219.

⁶⁶ See, Robert L. Rothstein, “Limits and Possibilities of Weak Theory: Interpreting North-South” (1990) 44:1 J Int’l Affairs at 159.

has argued, for example, that the “Third World, in its relations with the North, is like a trade union in its relations with employers. It is trying to make unity serve as a compensating strength so as to create a greater balance in negotiations.”⁶⁷

Mickelson considers the Third World a social movement and observes that, while in many ways it is appealing because of its emphasis on justice, it loses sight of differences both between and within Third World countries. She speaks of the Third World not as a bloc but as a distinctive voice, though not always a harmonious one, which attempts to make a set of common concerns be heard.⁶⁸

H. Historical Analysis

Contrary to postmodernist theory which insists on the death of history,⁶⁹ TWAIL scholars have faith in the connection between historical memory and political objectives. They believe that erasing historical memories renders the struggle of Third World people without an objective and makes their mobilization difficult. Anghie, for instance, emphasizes that the Third World must challenge the history of international law, a history which continuously disempowers the non-European world.⁷⁰

Along the same lines, Bedjaoui underlines the need to understand Third World approaches in a historical context. He is concerned about the tendency to interpret the "interdependence" of the international community as requiring Third World States to give up the sovereignty they never really had an opportunity to enjoy:

“Clarifying these concepts and determining their present and future role seems all the more necessary because they are readily being used as weapons to fight the idea of national sovereignty as it is being claimed by the Third World, particularly in respect of lasting sovereignty over the national wealth and resources of each State. For example, an attempt is being made to set "international cooperation" in opposition to

⁶⁷ Nyerere, *supra* note 52 at 12.

⁶⁸ Mickelson, *supra* note 2 at 360.

⁶⁹ See, *See* R.B.J. Walker, *Space/Time/Sovereignty*, in M.E. Denham and M.O. Lombardi (Eds.), *Perspectives on Third World Sovereignty: The Postmodern Paradox* 13, at 15 (1996). See also Karin Mickelson, “Taking Stock of TWAIL Histories,” *International Community Law Review*, 10 (2008) 355-362. For general discussions of the implications of the end of the Cold War for the Third World; see Guy Arnold, *The End of the Third World* (1993); *The New World Order and the Third World* (Dave Broad & Lori Foster eds. 1992).

⁷⁰ Anghie, *supra* note 27 at 312.

"sovereignty" until they become irreconcilable, by offering the Third World a drastic choice between sovereignty which excludes it from the benefits of co-operation and co-operation which is conceived of as an alienation of its sovereignty, and by denying the opportunities for fruitful reconciliation which this opposition between the two concepts conceals."⁷¹

Bedjaoui appears to be pointing to the need to understand Third World concerns, with notions such as sovereignty over natural resources, as being historically based and formulated.

I. The United Nations is Controlled by the Big Powers

From TWAIL scholars' perspectives, the United Nations is an institution through which the West attempts to legitimize its worldwide ambitions.⁷² However, in their view, the United Nations was mainly founded to be a "neutral, universal and fair guardian" of the new world order after the Second World War. The fact of the matter is that European control over global affairs was simply shifted to the big powers, which were granted permanent seats in the Security Council with veto powers. Thus, the big powers' use of the United Nations to safeguard their own interests "simply changed the form of European hegemony, not its substance."⁷³

Mutua accuses the Western powers of advancing their foreign policy interests through UN bodies "in direct contradiction of the high-sounding ideals of the world body."⁷⁴ The most common criticism levelled against the UN and its Security Council is that they are dominated by the United States and its allies.⁷⁵ In particular, Mutua points out that the United States brings topics of its own interest to the United Nations while preserving its right to avoid the Security Council when it deems fit.⁷⁶ For instance, under its "war on terror" policy, the United States used the Security Council as an

⁷¹ Mohammad Bedjaoui, *Towards a New International Economic Order* (UNESCO, Paris-London-New York: Holmes & Meier Publishers, 1979) at 50.

⁷² Mutua, *supra* note 1 at 34.

⁷³ *Ibid* at 35.

⁷⁴ *Ibid* at 37.

⁷⁵ Benjamin Macqueen, "Muslim States and the Reform of the United Nations Security Council" (2010) 4:3 J Middle Eastern and Islamic Studies (in Asia) at 47-64.

⁷⁶ Mutua, *supra* note 1 at 37.

international legislative body⁷⁷ to produce international norms in the areas of counterterrorism and non-proliferation of weapons of mass destruction (WMDs).⁷⁸ Anghie warns that this ongoing trend of the Security Council runs the risk of transforming the United Nations into another World Bank or International Monetary Fund, that is, an international institution by which “certain powerful States can impose on the rest of the international community a law by which they do not regard themselves as bound.”⁷⁹

Third World States express views similar to those of TWAIL scholars regarding law-making by the Security Council. The *Final Communiqué of the Sixteenth Summit Meeting of the Non-Aligned Movement* (NAM) addressed the new law-making approach of the Security Council under Chapter VII, and called upon the Security Council to respect international law in the exercise of its functions:

While noting the adoption of resolution 1540 (2004), resolution 1673 (2006), resolution 1810 (2008) and resolution 1977 (2011) by the Security Council, the Heads of State or Government underlined the need to ensure that any action by the Security Council does not undermine the UN Charter and existing multilateral treaties on weapons of mass destruction and of international organizations established in this regard, as well as the role of the General Assembly.”⁸⁰

The NAM document also referred to possible encroachments by the Security Council on spheres of responsibilities of the General Assembly. As an example, NAM proposes that issues such as “non-State actors acquiring weapons of mass destruction” should be addressed by the General Assembly, where the views of all Member States can be taken into consideration.⁸¹

III. The Security Council: An Under-Represented and Undemocratic Organ

⁷⁷ As Nichols Burns, Department of State Undersecretary for Political Affairs, declared in 2005, “UN Reform is one of the most important issues facing the United States. It is an essential tool for the successful management and implementation of United States foreign policy.”

⁷⁸ See, Chapter Two, p. 58.

⁷⁹ Anghie, *supra* note 27 at 305.

⁸⁰ See, *Final Document of the 16th Summit of Heads of State or Government of the Non-Aligned Movement, Tehran, Islamic Republic of Iran*. 26 - 31 August 2012, NAM 2012/Doc.1/Rev.2 at para 208 [16th Summit].

⁸¹ *Ibid.*

From the general views of TWAIL scholars discussed in the previous section, it is clear that they do not have a positive view of the Security Council, as it was established in accordance with and under the influence of the prevailing legal system, which perpetuates the present unjust legal order. The Council's composition is inequitable and its procedures are undemocratic. The approach of the Security Council in dealing with questions of international peace and security is selective, as it intervenes in areas of interest of the dominant powers. With this in mind, it is obvious why TWAIL scholars oppose the exercise of Security Council law-making. In their view, the Security Council has been manipulated by world powers to bypass the sovereign will of other States, which is an essential factor in law-making at the international level. This viewpoint is held by many Member States of the United Nations, especially those from the developing world, who also view the Security Council as an undemocratic and neo-colonial institution. They criticize the right of veto held by the Council's five Permanent Members.⁸² Hence, the views of TWAIL scholars on Security Council law-making are centered on three elements: the inequitable composition and undemocratic procedure of the Security Council, the selective approach of the Security Council in the fight against terrorism, and its loss of legitimacy.

A. Inequitable Representation in the Security Council

The main concern of Third World countries is that the United Nations has not been responsive to the fundamental changes that have taken place in the international community since the Organization's inception in 1945. The United Nations' membership has tripled in the past seventy years with new members mainly from ex-colonial and developing countries. These countries have brought their own set of priorities and concerns, thereby altering the Organization's work agenda. These new States view

⁸² Osita G. Afoaku and Okechukwu Ukaga, "United Nations Security Council Reform: A Critical Analysis of Enlargement Options" (2001) 18:2 *Journal of Third World Studies* at 149-169.

the Security Council as inattentive to their priorities, mainly due to the imbalanced composition of the Council, which remains unaltered since 1965.⁸³

Thakur points out that the United Nations has adapted itself to new circumstances in certain areas,⁸⁴ but that reform of the Security Council is hostage to the vested interests of key Member States.⁸⁵ Clearly, the major challenge with respect to the Security Council's reform is the absence of adequate representation for Asia, Africa, and Latin America in this body. Asia, comprised of 56 countries, is indeed underrepresented in the Security Council.⁸⁶ It is the most populated continent, with three major economic powers, China, India and Japan, and a number of other rising powers such as Indonesia and Malaysia. Similarly, Africa, with 56 countries, does not have a permanent seat in the Security Council, nor does Latin America with 26 countries. For these reasons, the Non-Aligned Movement, which is comprised of two-thirds of the United Nations' membership, mainly from Third World States, seeks a substantial increase in the membership of the Security Council, with a view toward gaining equitable representation and voting power in the Security Council.⁸⁷

Okumu argues that increased membership for African States in the Security Council is now more important than ever on the grounds that, *inter alia*, a great number of issues on the Security Council's agenda are African problems. In his view, with increased membership the Security Council's decisions will become "more legitimate" and easily implemented if they are made through "democratic processes."⁸⁸ This is why the African Union demands four non-permanent seats as well as two permanent seats, with all the prerogatives and privileges of the Permanent Members. In implementing this policy, the African Union rejected two official proposals on reform of the Security

⁸³ The first increase in the membership of the Security Council from 11 to 15 came into effect in 1965.

⁸⁴ Reform of the United Nations in other areas includes the expansion of the ECOSOC, decision of the General Assembly to delete Chapter XIII of the Charter, creation of the Human Rights Council.

⁸⁵ Ramesh Thakur, "United Nations Security Council Reform" (2004) 13:3 Africa Security Review at 4.

⁸⁶ Currently Asia has one permanent and two non-permanent seats in the Security Council. One of its non-permanent seats has always been reserved for India or Japan. There remains only one non-permanent seat to be occupied by other 53 countries of Asia and the Pacific Regions.

⁸⁷ 16th Summit, *supra* note 80 at 91.

⁸⁸ Wafula Okumu, "Africa and the UN Security Council Permanent Seats" (2005) Africa Focus Bulletin, Global Policy Forum.

Council in 2005, because they either did not include the addition of permanent seats for African States or the proposed permanent seats would not have veto power.⁸⁹

Member States of the Organization of Islamic Cooperation (OIC) have also made demands similar to those of the African Union. The OIC claims that between January 1946 and July 2010 the Security Council adopted 1,783 resolutions, not including its procedural decisions. Out of these resolutions and decisions, 842 resolutions (47%) were related to questions on Middle Eastern and Muslim States.⁹⁰ In the OIC's view, while non-Permanent Members are permitted to participate in Security Council debates and cast votes on its resolutions, Muslim States are deprived of their powers if one of the P5 uses its veto power.⁹¹

In the course of discussions on reform, besides an emphasis on the necessity of applying regional representation, it has been argued that the composition of the Security Council should reflect the world's population distribution. India claims that it has more population than the entire African continent and, therefore, deserves to have a permanent seat in the Security Council.⁹²

Other countries with strong economies, such as Japan and Germany, claim the right to a permanent seat because of their major contributions to the United Nations' budget. Brazil, too, invokes its rising economic power as a criterion, along with being a country in an underrepresented continent. Other countries invoke cultural, religious, and civilizational criteria to warrant representation in the Security Council. As mentioned above, Muslim States claim that there is no permanent seat for

⁸⁹ Model A provides for six new permanent seats, with no veto being created, and three new two-year term non-permanent seats – bringing the total to 24. Africa would have 2 non-veto permanent seats and 4 two year non-renewable seats. The balance of power would still tip in Europe's favor as the UK, France and Russia would retain their veto powers as would the US and China. Africa would still be the only region without veto power; see, UN Doc. 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. All the regions would get 2 four-year renewable-term seats. Although Africa would get most (4) of the two-year non-permanent seats, Europe and the Americas gain most, as they each get two four-year renewable-term seats. See, Report of the Secretary-General: In larger freedom: towards development, security and human rights for all, UN Doc. A/59/2005 at para 70.

⁹⁰ Macqueen, *supra* note 75 at 50.

⁹¹ *Ibid* at 52.

⁹² Thakur, *supra* note 85 at 5.

Muslims in general or Muslim nations in particular. Egypt and Nigeria are major contenders in this category.

Mikhailtchenko raises doubts about the argument advanced by world powers that the enlargement of the Security Council would hamper its “speedier decision-making.” In her view, the effectiveness of decision-making has often been used as a justification by authoritarian regimes at the national level, which is not and should not be applied at the international level. Therefore, such a line of reasoning is hardly acceptable for international institutions.⁹³

Afoaku and Ukaga urge those countries who pursue democratization at the national level to follow the same policy with regard to international institutions, including the Security Council. Democratization would imply that all Permanent Members are democratic States and that the proceedings of the Security Council should be transparent at all stages. Neither of these conditions is satisfied at present.⁹⁴

The abovementioned points have been endorsed by the Non-Aligned Movement which states that “[t]he enlargement of the Council, as a body primarily responsible for the maintenance of international peace and security, and the reform of its working methods should lead to a democratic, more representative, more accountable and more effective Council.”⁹⁵ Despite protracted negotiations and lack of agreement on the subject, NAM continues its push for Security Council reform. The latest document adopted by NAM at the Summit level repeats its call for the reform of the Security Council and emphasizes that “[r]eform . . . should be comprehensive, addressing all substantive issues relating, *inter alia*, [to] the question of the membership, regional representation, the Council’s agenda, its working methods and decision-making process, including the veto.”⁹⁶ In the same document, the NAM acknowledged “the historical injustices against Africa with regard to its representation in the

⁹³ Maria Mikhailtchenko, “Reform of the Security Council and Its Implementations for Global Peace and Security” (2004) 7:1 J Military and Strategic Studies at 158.

⁹⁴ Afoaku, *supra* note 82 at 158.

⁹⁵ 16th Summit, *supra* note 80 at para 91.8.

⁹⁶ *Ibid* at 91.3.

Security Council and expressed support for increased and enhanced representation for Africa in the reformed Security Council.”⁹⁷

(i) Permanent Seats

The privileged status of the Permanent Members of the Security Council (P5) is seen by TWAIL scholars as a remnant of the Western-centric world of the past. Thakur, for instance, observes that the permanent membership remains restricted to “essentially a self-appointed oligarchy [of five] who wrote their own exalted status into the Charter.”⁹⁸ Macqueen observes that the power disparity in the United Nations, most notably represented by the veto power of the P5, impacts all Member States from the South. The decades-long negotiations on Security Council reform are a clear manifestation of the growing discontent with the lack of proportionate representation of southern countries in Security Council decision-making.⁹⁹

The Permanent Members of the Security Council are also accused of using their privileged position to limit the influence of other States in world affairs. Under the UN Charter, any change to the composition of the Security Council requires the approval of the P5.¹⁰⁰ These countries have constantly made it clear that they will not relinquish their superior status.¹⁰¹ It must be noted, further, that if the Security Council were opened up to one or more non-nuclear weapon States, the great-power status would be divorced from the possession of nuclear weapons, a situation that might not be desirable to the P5, or at least to some of its members.

⁹⁷ *Ibid.*

⁹⁸ Thakur, *supra* note 85 at 4.

⁹⁹ Macqueen, *supra* note 75 at 54.

¹⁰⁰ *See*, Charter Article 108, which provides that any changes to the Charter, either recommended by the General Assembly or decided by a General Conference, shall not enter into force unless ratified by the two thirds majority of Members of the United Nations, *including* the Five Permanent Members of the Security Council.

¹⁰¹ Okumu, *supra* note 88 at 3.

Although TWAIL scholars argue for a substantial increase in the membership of the Security Council, along with the elimination of the veto power or a limiting of its use,¹⁰² there is no agreement among Third World States on the specific changes to be made. Some countries believe that the addition of permanent seats with the same privileges accorded to the P5 is the only way to open up the privileged States club to other States. Thinking along these lines, the African Union is adamant in seeking two permanent seats with all the prerogatives and privileges of permanent membership.¹⁰³

Other Third World States, however, view the addition of permanent seats with veto power to the Security Council as strengthening the undemocratic organ, which is in contradiction to the principle of sovereign equality of States enshrined in the Charter.¹⁰⁴ Therefore, a number of States, including many from the Third World, have presented an official proposal in accordance with which only 10 non-Permanent Members would be added to the membership of the Council.¹⁰⁵ In their view, the addition of renewable non-permanent seats would guarantee the accountability of members to the international community through the General Assembly's voting process. However, this proposal fails to meet the African Union's concerns, as well as those Third World States that have long sought permanent seats in the Security Council.¹⁰⁶

There has been a third proposal to add six permanent and four non-permanent seats to the membership in the Security Council. Under this proposal, the new Permanent Members would not

¹⁰² Adam Groves, "The Failure of Reform: Crisis at the UNSC?" (2008) E-International Relations Students, online <<http://www.e-ir.info/2008/02/28/the-failure-of-reform-crisis-at-the-uns/>>.

¹⁰³ Okumu, *supra* note 88 at 3; *Question of equitable representation on and increase in the membership of the Security Council and related matters*. UNGAOR, 59th sess, UN Doc A/59/L. 67 (2005) at paras 1(b)(i) and 1(b)(ii) [A/59/L.].

¹⁰⁴ The Charter of the United Nations, Article 2 at para 1.

¹⁰⁵ UNGAOR, 59th sess, UN Doc A/59/L. 68 (2005) at para 1.

¹⁰⁶ Yasuaki Onuma, "A Transnational Perspective on Global Order in the Twenty-first Century: A Way to Overcome West-centric and Judiciary-centric Deficits in International Legal Thought" (2006) 8 ICLR at 30.

exercise the veto power.¹⁰⁷ Nevertheless, the African Union turned down this proposal too, on the grounds that Africa would not have the veto power under the proposal, among other concerns.¹⁰⁸

(ii) Veto power

The Non-Aligned Movement calls for measures to eliminate or at least curtail the use of the Security Council's veto power. In its view, the veto right provides a position to the Permanent Members of the Security Council "to exercise undue influence over the Security Council, which is contrary to the aim of democratizing the United Nations."¹⁰⁹ Similarly, African States oppose the veto power in principle but have opted for a pragmatic approach and maintain that as long as this privilege is not abolished, it should be extended to new Permanent Members as well.¹¹⁰

IV. TWAIL Perspectives on the "War on Terror"

Discussion of the TWAIL perspective on the "War on Terror" is essential to this research, as the majority of the Security Council's normative resolutions have been adopted in the area of counterterrorism. TWAIL scholars in particular criticize the special treatment accorded by the Security Council to the war on terror following the September 11th attacks on the United States. In their view, the Security Council has treated similar situations in different parts of the world unequally. This fact points to the Council's bias in producing normative resolutions and the need for opposition to it.

In the aftermath of the September 11, 2001 terrorist attacks on the United States (the "9/11 Attacks"),¹¹¹ President Bush's administration declared terrorism as a new threat to international peace

¹⁰⁷ This proposal submitted by Afghanistan, Belgium, Bhutan, Brazil, Czech Republic, Denmark, Fiji, France, Georgia, Germany, Greece, Haiti, Honduras, Iceland, India, Japan, Kiribati, Latvia, Maldives, Nauru, Palau, Paraguay, Poland, Portugal, Solomon Islands, Tuvalu and Ukraine. See, UNGAOR, 59th sess, UN Doc A/59/L.64 (2005) para 1(a).

¹⁰⁸ Onuma, *supra* note 106 at 30. p. 4.

¹⁰⁹ William R. Long, "Nonaligned Nations Seek Democratic Reform of U.N.: Summit: Members want more voting power in world body, three new seats on Security Council", *Los Angeles Times* (20 October 1995).

¹¹⁰ Okumu, *supra* note 88 at 3.

¹¹¹ The September 11, 2001 attacks refer to a series of airline hijackings and suicide attacks committed by 19 militants associated with the Islamic extremist group of Al-Qaeda against targets in the United States, specifically in New York

and security which was “different from any other war” in history.¹¹² Bush referred to the terrorist attacks as “an act of war” that justified a response in self-defence.¹¹³ From the US perspective, the 9/11 Attacks provided indisputable evidence that the existing legal regime was inadequate to suppress international terrorism and that a new approach was required to combat it.¹¹⁴ Thus, pre-emptive self-defence was presented as an appropriate doctrine in response to the new threat facing the international community.

During the United States’ Operation Enduring Freedom in Afghanistan, the US chose to act alone in confronting the threat of terrorism. Pointedly, the 2002 National Security Strategy of the US made no mention of the UN in the fight against terrorism. However, in the course of preparing for the invasion of Iraq in 2003, the US openly questioned the effectiveness of the UN in facing the threat posed by international terrorism. The US President challenged the UN “to prove to the world whether it is going to be relevant” or it is going to be irrelevant like the League of Nations.¹¹⁵

Persuaded by the US new policy on international terrorism, some mainstream lawyers have attempted to revive the doctrine of pre-emptive strike and pre-emptive self-defence. Although this doctrine has not been accepted as a binding norm in contemporary international law,¹¹⁶ it has been argued that the doctrine has its origin in customary international law and that it could be revived if prevailing norms proved inefficient.¹¹⁷ According to this argument, States are not obliged to wait for

City and Washington, D.C., causing extensive death and destruction and triggering a vigorous U.S. action to combat terrorism.

¹¹² The National Security Strategy of the United States of America, September 2002, Section III, online: <<http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>>.

¹¹³ President Bush’s address to the joint session of the Congress and American people, 20 September 2001, online: <<http://www.september11news.com/PresidentBushSpeech.htm>>.

¹¹⁴ In his statement on 17 March 2003, President Bush stated that “The United Nations Security Council has not lived up to its responsibilities, so we will rise to ours.” In his 2004 State of the Union Address, President Bush stated that “[a]fter the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States. And war is what they got.” See the text of “President Bush’s State of the Union Address”, *Washington Post* (Jan 20, 2004) online: *Washington Post* <washingtonpost.com>.

¹¹⁵ See, Remarks by the US President after visit with employees of the Home Land Security Complex, Washington D.C. 19 September 2002.

¹¹⁶ By its Resolution 573 (1985), the Security Council strongly condemned the act of aggression perpetrated by Israel against Tunisia on 1 October 1985, which was claimed to be a pre-emptive self-defence.

¹¹⁷ Ruth Wedgewood, “The Fall of Saddam Hossein: Security Council mandates and Pre-Emptive Self-Defence” (2003) 97:3 *AJIL* at 576, 581.

the Security Council's authorization before taking military action but instead reserve the right to act unilaterally or in *ad hoc* coalitions.¹¹⁸ It has also been argued that intervention to promote democracy and human rights is widely accepted in the post-Cold War era. Reisman, for instance, maintains that a "jurist rooted in the late twentieth century can hardly say that an invasion by outside forces to remove [an unpopular government] and install the elected government is a violation of national sovereignty."¹¹⁹

As United Nations Secretary-General, Ban Ki-moon, rightly pointed out that this logic represents a fundamental challenge to "the principles on which, however imperfectly, world peace and stability have rested" since the foundation of the United Nations in 1945. Ban was concerned that the unilateral use of force may set precedents leading to "a proliferation of the unilateral and lawless use of force, with or without justification."¹²⁰

TWAIL scholars share the concerns raised by the UN Secretary-General and several mainstream lawyers, who oppose placing the United States' National Security Strategy above international law. These scholars rely on the well-established principle of international law that States should not invoke national laws to violate international norms.¹²¹ The main arguments advanced by TWAIL scholars in criticizing the "war on terror" are summarized as below:

A. TWAIL Scholars Challenge the Uniqueness of the 9/11 Terrorist Attacks

TWAIL scholars challenge the claim of "uniqueness" of the 9/11 Attacks on the United States and also the Western powers' purported innocence in the matter. The scholars strongly object to the dominant school of thought that claims a distinctiveness of the 9/11 Attacks and that the "attacks in

¹¹⁸ Abraham D Sofaer, "On the Necessity of Pre-emption" (2003) 14:2 EJIL at 209-216.

¹¹⁹ W. Michael Reisman, "Sovereignty and Human Rights in the Contemporary International Law" (1990) 84:4 AJIL at 871.

¹²⁰ The Secretary-General's Address to the General Assembly, 23 September 2003, New York.

¹²¹ See, *Vienna Convention on the Law of Treaties* (1969), Article 27, which stipulates that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

New York and Washington signaled an era of *profoundly* different terrorism.”¹²² TWAIL scholars believe that the claim of uniqueness was an overstatement, as it neither was new terrorist attacks nor were the Western powers innocent in this regard. In these scholars’ view, powerful Western States, in particular the United States, had supported many terrorist attacks in different corners of the world.¹²³ Baxi and Anghie, for instance, point to the colonial era to illustrate the historical continuity of the terror and horrors inflicted on Third World peoples by some of the most powerful countries of the North.¹²⁴

Okafor reacts to the claim of “uniqueness” by analyzing the distinctive features of “mega-terrorism” presented by Falk, namely the magnitude of the attacks, their scope, ideology, and the focus on transforming the world order as a whole.¹²⁵ Okafor employs a generic definition of terrorism—“the deliberate use of violence against civilians for the purpose of causing fear in order to achieve political goals”—and maintains that the 9/11 Attacks were not the first time an entity launched terrorist attacks for political gains, including changing the world order. He accuses the United States of sponsoring violence against civilian populations in Third World States through non-State proxies in an attempt to transform the world order in the Cold War era.¹²⁶

Reacting to the magnitude of the attacks, Okafor refers to the United States’ use of the atomic bomb against Hiroshima and Nagasaki in 1945, which inflicted a greater number of civilian casualties than the 9/11 Attacks. He also refers to a number of recent situations in which Western powers,

¹²² Kent Roach, “Book Review: September 11: Consequences for Canada” (2005) 43:1/2 Osgoode Hall LJ at 195-197.

¹²³ Mgbeoji’s article suggests that many “powerful [S]tates, especially the United States, are some of the leading proponents of terrorism.” Ikechi Mgbeoji, “The Bearded Bandit, the Outlaw Cop, and the Naked Emperor: Towards a North-South (De)Construction of the Texts and Contexts of International Law’s (Dis)Engagement with Terrorism” (2005) 43:1/2 Osgoode Hall LJ at 106-135.

¹²⁴ Anthony Anghie, “The War on Terror and Iraq in Historical Perspective” (2005) 43:1 Osgoode Hall LJ 45at 60-64; Anthony Anghie, “The ‘War on Terror’ and the ‘War of Terror’: Nomadic Multitudes, Aggressive Incumbents, and the ‘New’ International Law” (2005) 43 Osgoode Hall LJ at 24.

¹²⁵ In the view of Falk, “Magnitude” refers to the fact that approximately three thousand people were killed in one of these attacks. “Scope” points to the global *network* character of Al-Qaeda, the organization that planned and carried out these attacks, the “elusive” non-State character of these actors, and the fact that they have “no distinct territorial locus” of their own and operate in secretive cells in many countries. Concerning the focus of the incident, Falk notes that this attack was directed against the U.S. homeland, the very heart of the mightiest global power, which was intended to change the world order. Richard A. Falk, *The Great Terror War* (New York: Olive Branch Press, 2003) at 39.

¹²⁶ Okafor, *supra* note 28 at 183.

through proxy wars, have subjected Third World peoples to massive terrorist fighting, such as the US led¹²⁷ and sponsored, and U.S.-supported conflicts in Angola, El Salvador, and Mozambique.¹²⁸

Okafor opposes Falk's viewpoint that the commission of terrorist acts by a "non-State actor" qualifies the attacks to be labeled as a *new* phenomenon. In his view, the generally accepted definition of the crime of terrorism, referred to above, was based on the victims but not the culprits. He suggests that in analyzing a terrorist attack the main concern should be "the civilians killed, the terror inflicted, and the political ends the attacks sought to achieve," irrespective of the formal political status or character of the culprit.¹²⁹ He agrees with the argument that "the inherent elusiveness of the culprit--the network character of Al-Qaeda and its lack of geographical moorings," makes it difficult to combat the phenomenon with conventional means. However, he questions the contention that Al-Qaeda was de-coupled from a territory, since the United States itself insisted that Al-Qaeda was based in Afghanistan at the time of the terrorist attacks. Okafor goes on to say that the network structure of Al-Qaeda, which is spread around the world, is not unique. There are numerous similar groups that have committed terrorist attacks.¹³⁰

Okafor concludes that the so-called post-9/11 world was not so significantly different as to justify the "retrenchment or severe weakening" of the fundamental rules of international law via attempts to provide legal legitimacy to the pre-emptive strikes by powerful States against weaker Third World countries. In his view, the attacks were not essentially new, but rather were "successfully *sold* as new." This success was mainly achieved due to the fact that the attacks happened to the United States, a country that had the power to sell that kind of event as a novel occurrence. It was the United

¹²⁷ *Ibid* at 187-87.

¹²⁸ In Angola, over twenty thousand civilians were killed due to a U.S.-sponsored war against the elected but socialist Movement for the Popular Liberation of Angola (MPLA) regime. In El Salvador, over sixty thousand civilians lost their lives in similar circumstances. In Mozambique, Human Rights Watch has estimated the civilian death toll at over three hundred thousand. *Ibid* at 185.

¹²⁹ *Ibid*.

¹³⁰ *Ibid*.

States' vastly dominant global status that promoted the "exceptionalist" version of the attacks, which served "the global imperial ambitions of some in that country."¹³¹

Baxi discusses the cause-and-effect theory with respect to terrorism by employing different terminology, the "war of terror" rather than "war on terror," and raises the question which comes first and which is the effect of the other.¹³² He concludes that "terrorism is an effect, not a cause." Baxi bases his argument on Angelica Nuzzo's conclusion that "[t]errorism (as well as its symbol, 9/11) is . . . the *true effect* or the *real consequence* of the war against terrorism that the United States has been waging for decades in numerous parts of the world."¹³³

On the whole, Baxi believes that both wars constitute a war on international law, including human rights and humanitarian law, which destroys the basic foundations of comity among nations. The war on international law attempts to re-write the prohibition of aggression and erodes the distinction between civilians and combatants.¹³⁴ He emphasizes that "politics aimed at opposing" the war on terror will "have to look to reasons that lead to the exercise of violence and will have to fight the effect along with the causes that produce it."¹³⁵

B. TWAIL Scholars Oppose the Revival of Pre-Emptive Self-Defence

TWAIL scholars reject the proposed reformation of international law in the wake of the 9/11 Attacks. In their view, invoking the pre-emptive self-defence¹³⁶ is contrary to the UN Charter, constitutes a

¹³¹ *Ibid* at 187.

¹³² Upendra Baxi, "The War on Terror and the War of Terror: Nomadic Multitudes, Aggressive Incumbents, and the New International Law - Prefatory Remarks on Two Wars." (2005) 43.1/2 *Osgoode Hall LJ* at 8.

¹³³ *Ibid* at 11.

¹³⁴ *Ibid* at 28.

¹³⁵ *Ibid* at 11.

¹³⁶ The concept of pre-emptive self-defence, articulated by President George W. Bush in his 2002 *National Security Strategy* reads, *inter alia*: "For centuries international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. . . . The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by its adversaries, the State will, if necessary, act preemptively. The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext of aggression. Yet in an age where the

threat to international peace and security, entails grave consequences for the Third World, and resembles the imperial intentions of big powers.

Baxi, for instance, emphasizes that “the invention of the doctrine of ‘preemptive’ self-defence” should be distinguished from the individual and collective right of self-defence, as enshrined in Article 51 of the UN Charter. He believes that “the claimed right to pre-emptive self-defence is a recent, unique but wholly dubious, innovation in international law.”¹³⁷ For Mgbeoji, the US-led initiatives regarding unilateral invasions and pre-emptive strikes signify an “excessive reliance upon military might and self-righteousness portend grave dangers for global security.”¹³⁸

In Anghie’s view, pre-emptive self-defence is contrary to the generally accepted limitation on the use of force as contained in Articles 2(4) and 51 of the Charter of the United Nations. As clarified in the General Assembly resolution on the definition of aggression, self-defence is permitted subsequent to an armed attack.¹³⁹ It is this fundamental premise of self-defence that is being challenged by what might be termed the “Bush Doctrine.” Self-defence is a right that predates the UN Charter, as it refers to self-defence as an “inherent right.” However, the Charter limits the exercise of self-defence to situations where a State has suffered an armed attack.¹⁴⁰

In his analysis of Security Council Resolution 1373, Byers argues that the United States did not rely on the resolution but rather justified its invasion on the basis of self-defence, which then permitted it to take action against States harboring terrorists.¹⁴¹ He argues that this has now become part of customary international law.

enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.”

¹³⁷ Baxi, *supra* note 132 at 36.

¹³⁸ Mgbeoji, *supra* note 123 at 133-134.

¹³⁹ *Definition of Aggression*. GA Res 3314, UNGAOR, 2319 plen mtg, UN Doc A/Res/3314 (1974) at para 2 [3314].

¹⁴⁰ Anghie, *supra* note 124 at 60-64. This view is based on the General Assembly Declaration on the Definition of Aggression. 3314 (XXIX), *supra* note 139 at para 2.

¹⁴¹ Michael Byers, “Terrorism, the Use of Force and International Law After 11 September” (2002) 51:2 ICLQ at 408-409.

Anghie opposes this view and observes that it has not been clearly established in international law that a State that has been victim of terrorism can then use force against a State which simply harbors terrorists. Indeed, the rules of State responsibility provide for a number of conditions that must be satisfied in order to attribute acts of a private actor to a State.¹⁴²

In the absence of any authorization from the Security Council, the United States and the United Kingdom justified their aggression against Iraq on the grounds that Saddam Hussein possessed weapons of mass destruction. The fact that WMDs were not found in Iraq suggests that democratic States cannot claim to be perfect. Nor can a democratic State excuse itself for violations of international law, even if its conduct is inspired by higher motivations.¹⁴³

Third World leaders endorsed the misgivings of TWAIL scholars at the highest level. The final document of the NAM Summit in 2003 is a clear manifestation of Third World sentiments on this question, which in part reads:

The Heads of States or Government rejected the use, or threat of the use of the armed forces against any NAM country under the pretext of combating terrorism, and rejected all attempts by certain countries to use the issue of combatting terrorism as a pretext to pursue their political aims against non-aligned and other developing countries and understood the need to exercise solidarity with those affected. They affirmed the pivotal role of the United Nations in the international campaign against terrorism.¹⁴⁴

TWAIL scholars share the view that the new doctrines relied upon by the dominant power is, indeed, a new technique through which the US seeks to renew and sustain its imperial project of control and subjugation of the Third World peoples. Anghie maintains that pre-emptive self-defence, as articulated and enforced in the case of the invasion of Iraq, “resurrects a very old set of ideas that were articulated

¹⁴² Anghie, *supra* note 27 at 300. According to a general rule in international law, only the conduct of government organs, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of are attributable to the State. See Draft Articles on the Responsibility of States for Internationally Wrongful Acts, and commentaries thereto, Chapter Two, *Report of the International Law Commission*. UNGAOR, 56th sess, supp 10, UN Doc A/56/10 (2001) at 80-120.

¹⁴³ Anghie, *supra* note 27 at 308.

¹⁴⁴ See, Final Document, *XIII Conference of Heads of State or Government of the Non-Aligned Movement Held 24-25 February 2003*, Kuala Lumpur, Malaysia, UNGAOR-UNSCOR, 57th sess-58th Year, UN Doc A/57/759-S/2003/332 (2003) at para 119.

at the beginning of the modern discipline of international law.” The re-emergence of these themes disturbingly illuminates the imperial dimensions of international law and the enduring impact of imperialism in the international system.

[W]hat is evident is the resemblance between the new initiatives that are being proposed by the pre-emption doctrine and much earlier imperial themes. A UN that is transformed to accommodate pre-emption doctrine will simply become a vehicle of this “new” imperialism, and [T]hird [W]orld countries [and scholars] have not been slow to recognize this reality.¹⁴⁵

Anghie warns that if pre-emptive self-defence is accepted as a part of contemporary international law, then the international order will resemble the system that existed among European States in the late nineteenth century, when it was legal for States to launch wars of aggression in the exercise of their sovereign will.¹⁴⁶ In his view, if this doctrine is applied properly, other countries such as Iran should be able to resort to self-defence in response to the United States’ threats of force against the “Axis of evils.”¹⁴⁷ In reality, however, it would be almost impossible for Third World States to exercise such a self-defence right against the big powers.¹⁴⁸ In Gathii’s view, if the doctrine of pre-emptive self-defence is accepted it would provide the US and about four other States with “the exceptional authority to police the world *without restraint*, and at the expense of States not meeting the approval of this band of States.”¹⁴⁹

As Anghie puts it, a United Nations that is transformed to accommodate the pre-emptive self-defence doctrine will simply become a vehicle of this “new” imperialism. For this reason, Third World

¹⁴⁵ Anghie, *supra* note 124 “The War on Terror and Iraq in Historical Perspective” at 64.

¹⁴⁶ Anghie, *supra* note 124 “The War on Terror and Iraq in Historical Perspective” at 60.

¹⁴⁷ George W. Bush, in his State of the Union delivered to the United States Congress on 29 January 2002, pointed to three countries—Iraq, North Korea and Iran—which he accused of arming themselves with weapons of mass destruction and forming that soon-to-be-famous ‘axis of evil’. See, “George Bush and the axis of evil”, *The Economist Magazine* (31 January 2002).

¹⁴⁸ Anghie, *supra* note 124 “The War on Terror and Iraq in Historical Perspective” at 52.

¹⁴⁹ Gathii, “Assessing Claims of a New Doctrine of Pre-Emptive War under the Doctrine of Sources,” (2005) 43:1/2 Osgoode Hall LJ 67 at 100.

countries have been quick to react to these trends. In their view, it is disconcerting that Western powers are attempting to return to the colonial origins of discipline so rapidly.¹⁵⁰

In fact, many Third World States have suffered terrorist attacks long before the 9/11 Attacks, and are seeking to address the dangers of terrorism in coordination with other nations. But the US approach has divided an international community that had previously been far more unified with regard to international terrorism.¹⁵¹ However, Third World States and peoples, irrespective of their difficulties and problems, are not likely to acquiesce to the return of obvious imperialism. And the question remains open as to whether international law—an international law that has ostensibly repudiated the imperialism of the past—will now resist these attempts to reinstate this new imperial order.

C. TWAIL Criticizes the Application of Double Standards in the Fight Against Terrorism

TWAIL scholars criticize the Security Council for applying double standards in dealing with cases threatening peace and security and state that the Council “has been too quick to threaten or authorize enforcement action in some cases while being silent and inactive in others.”¹⁵² NAM countries complain that the Security Council has increasingly used Chapter VII while paying lip service to mechanisms provided for in Chapters VI and VIII of the Charter.¹⁵³ Non-aligned States also express their concern about the increasing number of sanctions imposed against developing countries.¹⁵⁴ For instance, they question the appropriateness of interpreting the Non-Proliferation Treaty (NPT) regime by the Security Council under Chapter VII of the Charter and imposing sanctions on Iran to stop its uranium enrichment, contrary to the letter and the spirit of the NPT.¹⁵⁵ This is why many Muslim

¹⁵⁰ Anghie, *supra* note 124, “The War on Terror and Iraq in Historical Perspective” at 64.

¹⁵¹ *Ibid* at 65-66.

¹⁵² 16th Summit, *supra* note 80 at para 91.4.

¹⁵³ *Ibid* at para 91.4.

¹⁵⁴ *Ibid* at para 91.5.

¹⁵⁵ Iran-Deal has been treated extensively in Chapter Six; see, pp. 296-301.

nations are convinced that they are being subjected to a neo-colonial agenda of domination.¹⁵⁶ The following sub-sections are examples of the increasing resentment among developing countries concerning the preferential treatment of issues that fall within the purview of the Security Council's mandate.

(i) Rogue States

TWAIL scholars criticize the employment of the term “rogue States” about certain Third World States that allegedly harbour terrorists. The most prominent example of this policy is the pronouncement by the Bush administration of three States—Iran, Iraq and North Korea—as an *Axis of Evil*. The identification of rogue States is particularly problematic for TWAIL scholars because, unlike “just wars,” rogue States have always been identified from among Third World States.¹⁵⁷

President Bush made it clear in his speech at the Republican National Convention in 2004, and other subsequent speeches, that the most effective way to combat terrorism is to transform rogue States into democratic ones.¹⁵⁸ Under this approach, the resort to self-defence is no longer confined to a response against an armed attack or threat of an armed attack, but also extended to attacks against such States whose very existence is considered a threat.¹⁵⁹

In this regard, reference should be made to the final document of the Heads of States and Governments of NAM, in which “[t]hey totally rejected the term ‘axis of evils’ voiced by a certain State to target other countries under the pretext of combatting terrorism, as well as its unilateral preparation of lists accusing countries of allegedly supporting terrorism, which are inconsistent with

¹⁵⁶ Macqueen, *supra* note 75 at 48.

¹⁵⁷ Baxi, *supra* note 132 at 9. In this regard, a comparison has been made with the reasoning of the Just Wars, which sometimes were justified on a Christian/Non-Christian basis and sometimes on civilized and non-civilized foundation. The US president paraphrased a phrase from the Holy Bible: “He that is not with me is against me,” in his address to the Congress on 20 September 2001: “you are either with us or you are with the terrorists”.

¹⁵⁸ The National Security Strategy of the United States of America; Text: President Bush's Acceptance Speech to the Republican National Convention, (September 2, 2004) online: Washington Post <<http://www.washingtonpost.com/wp-dyn/articles/A57466-2004Sep2.html>>.

¹⁵⁹ Anghe, *supra* note 27 at 296 ; Baxi, *supra* note 132 at 35.

international law and the purposes and principles of the United Nations Charter. These actions constitute, on their part, a form of psychological and political terrorism.”¹⁶⁰

Anghie argues that the Bush doctrine of identifying and then transforming rogue States into democratic States is essentially an imperial strategy. It is another version of the “civilizing missions” that have been employed for centuries to subjugate the Third World.¹⁶¹ The doctrine of pre-emptive self-defence and the example of Iraq correspond to the arguments made by a number of scholars, that the threat of terrorism can be addressed only by the reconstruction of a new imperial order.¹⁶² It must be clarified, however, that this kind of reasoning belongs to the pre-Charter era. Under the UN Charter regime, all States are formally equal and the so called “pre-emptive self-defence” should be enjoyed equally by all States. Without a doubt, revival of pre-emptive self-defence would deprive small States from exercising their inherent right of self-defence, when they are threatened by big powers¹⁶³ and that only certain powerful States would be able to enjoy such a right.¹⁶⁴

(ii) State Terrorism

Third World representatives at the United Nations and human rights activists have argued that States commit acts of terrorism if they commit one or more of the acts that are outlawed under contemporary international law on combating terrorism. They believe that fighting terrorism does not justify “some inhumane measures of counter-terrorism,” committed by certain States.¹⁶⁵

In the course of negotiations on the *Draft Comprehensive Convention on International Terrorism*, a number of proposals were submitted to the Ad Hoc Committee on International

¹⁶⁰ 16th Summit, *supra* note 80 at para 119.

¹⁶¹ Anghie, *supra* note 124 “The War on Terror and Iraq in Historical Perspective” at 61.

¹⁶² Anghie, *supra* note 27 at 279.

¹⁶³ See the *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion, (1996) ICJ Rep at 222 and 526-527 (Dissenting Opinion of Judge Weeramantry).

¹⁶⁴ Anghie, *supra* note 27 at 305.

¹⁶⁵ Baxi, *supra* note 132 at 20.

Terrorism that aimed to hold States responsible for terrorist crimes.¹⁶⁶ Although it is unlikely that these proposals will find their place in the Draft Convention, they reflect the position of Third World States that certain States' acts are also terrorist acts and that in the definition of terrorism, no distinction should be made between acts committed by *States*, non-State actors and individuals. Representatives from Third World States continue to emphasize during negotiations that the acts prohibited under counterterrorism conventions are terrorist acts, irrespective of their culprits.

V. Challenges to the Security Council's Legitimacy

To summarize the preceding sections, TWAIL scholars challenge the legitimacy of the Security Council on the grounds that it has inequitable representation, permanent and privileged status accorded to the P5, preferential treatment accorded to Western countries' issues of interest, and it encroaches on the functions of the General Assembly. Thakur argues that the legitimacy of the Security Council has become "increasingly clouded" because it is less representative despite the growing membership of the United Nations. Consequently, the capacity of the Security Council to manage various crises around the world and regulate the behavior of Member States has weakened enormously. As such, those who no longer perceive the UN as an authoritative voice of the international community are unlikely to follow its edicts. In Thakur's view, only reformation of the Security Council that realigns its composition with contemporary realities will make the Council an efficient and legitimate body.¹⁶⁷

TWAIL scholars also advance the argument that in current circumstances, the Security Council is not held accountable for its actions and omissions before the General Assembly and the international community as a whole.

¹⁶⁶ For instance, Cuban delegation has submitted a proposal to the Ad Hoc Committee established by General Assembly Resolution 51/120 of 17 December 1996, in accordance with which leaders of States would be held accountable if they commit the same crimes that are prohibited for individuals under the draft comprehensive convention on international terrorism. See, *Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996*. UNGAOR, 60th sess, supp 37, UN Doc A/60/37 at 30. See also, the amendment submitted by the OIC Group, UNGAOR, 57th sess, supp 37, UN Doc A/57/37 (1996) at 17.

¹⁶⁷ Thakur, *supra* note 85 at 4.

It is noteworthy that some mainstream lawyers support the claim of TWAIL scholars concerning the diminishing legitimacy of the Security Council. Consent has often been cited by some mainstream lawyers as the basis for the decisions of the Security Council under Chapter VII of the Charter. It is argued that United Nations Member States have consented to being bound by the obligations emanating from the Charter, including decisions of the Security Council under Chapter VII. Reference has also been made to Article 103 of the Charter, under which States' Charter obligations, including those under Chapter VII, prevail over any other obligations under international law.¹⁶⁸

This argument, however, does not address the complexities in applying the principle of consent in inter-State relations. A member State's consent to becoming party to the UN Charter does not result in the State's consent extending to all actions of the Organization in the future, especially those that may transgress the mandate of the Security Council or violate the fundamental norms of international law. Bowett rightly argues that being a party to the Charter is not tantamount to giving the Security Council a blank cheque to "modify their legal rights." In his view, the Council's resolutions may "spell out or particularize" States' obligations emanating from the Charter, but they cannot establish "totally new obligations" that have no basis in the Charter, for the "Council is an executive organ, not a legislative [one]."¹⁶⁹

A. Consent Versus Legitimacy

It is unquestionable that a State's consent given when ratifying an international organization's constitutive instruments does not legitimize the IO's future actions that violate its mandate or the fundamental principles of international law.¹⁷⁰ Although consent continues to play a key role in States

¹⁶⁸ Anthony Aust, "Kadi: Ignoring International Legal Obligations" (2009) 6:1 IOLR at 297.

¹⁶⁹ Derek Bowett, "The Impact of Security Council Decisions on Dispute Settlement Procedures" (1994) 5:1 EJIL at 93.

¹⁷⁰ In the Namibia case, the ICJ noted that the international instrument [i. e. the Charter] should be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation." See, *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 at 16 [Namibia].

accepting international obligations, the application of initial State consent to an IO's future actions poses a number of challenges. First, while international law traditionally regulates States' conduct, it now also tends to regulate, directly or indirectly, the conduct of individuals. Therefore, States' consent may not be sufficient to give legality to certain actions of international organizations, which increasingly regulate the conduct of individuals. Christiano highlights the importance of consent for democratic States and suggests that the addition of democracy as a condition for the validity of State consent would greatly strengthen the consent basis of legitimacy.¹⁷¹

Second, States' consent often compromises the principle of fairness in the decision-making processes of international organizations. Powerful and wealthy nations often influence the decisions of IOs to the detriment of smaller and poorer countries. In the course of establishing the World Trade Organization (WTO), for instance, the United States and the European Union promoted the *Agreement on Trade-Related Aspects of Intellectual Property Rights* as part of the package on the liberalized trade regime of the General Agreement on Tariffs and Trade. At the same time, powerful States did not fully honor their commitments to lower barriers to agricultural trade, but instead championed the establishment of a strong WTO dispute settlement mechanism with decentralized enforcement procedures that strongly safeguarded the powerful States' trade interests.¹⁷²

Third, international institutions have a certain degree of independence from the States that create them. Some legal regimes, such as the *Montreal Protocol*, include modest rule-making committees that can bind States.¹⁷³ Likewise, the United Nations Security Council has the power to authorize the use of military force and impose economic sanctions in order to maintain or restore international peace and security. Indeed, the Security Council, with its limited membership, sets the agenda and delineates enforcement measures that should be carried out by the Member States of the

¹⁷¹ Thomas Christiano, *The Legitimacy of International Institutions* (For *Routledge Companion to the Philosophy of Law*), at 10. Available online: https://law.utexas.edu/.../11-17-11_The%20Legitimacy%20of%20International%20In

¹⁷² *Ibid.*

¹⁷³ Benedict Kingsbury, "Global Environmental Governance as Administration: Implications for International Law," (2007) in *The Oxford Handbook of International Environmental Law* ed. Daniel Bodansky, Jutta Brunnee, and Ellen Hey (Oxford: Oxford University Press) at 64-84.

United Nations who may not have any role in the decisions-making process. Thus, the independent decisions of IOs, including those of the Security Council, are not always consent-based. Under Article 25 of the UN Charter, Member States have consented to carry out the decisions of the Security Council that are adopted *in accordance with the Charter of the United Nations*. Thus, the decisions of the Council that are contrary to the Charter purposes and principles cannot be claimed to be consent based.

Thus, Christiano suggests that major modifications should be made to the State-consent approach in order to justify the legitimacy of international institutions.¹⁷⁴ He proposes that legitimate international institutions be created through a “constitutionally constrained” State-consent approach and that IOs must apply certain internal checks and balances to enable them to pursue institutional goals in an “egalitarian way.”¹⁷⁵

In the context of the Security Council, modifications need to be made to both the composition and the procedure of the Security Council in order to salvage its declining legitimacy. It is obvious that the consent given by the founding members of the United Nations in 1945, or at later stages by new members, does not extend to any action that the Security Council might take under Chapter VII that violates either the mandate of the Council in accordance with the Charter, the peremptory norms of international law, or international human rights and humanitarian laws.

The ongoing reform process of the Security Council should include establishing further checks and balances in order to improve its legitimacy. The process should move toward increasing the membership of the Council, transforming it into a relatively representative organ, improving the transparency of the Security Council’s work, curtailing the influence of the global powers in its

¹⁷⁴ Christiano, *supra* note 171 at 27.

¹⁷⁵ In this regard, Christiano recalls the “complex standard” of legitimacy for global governance institutions, offered by Allen Buchanan and Robert Keohane. Under this scheme, three elements are required for the legitimacy of international organizations: consent of democratic States, minimal moral acceptability (in the sense of non-violation of basic human rights), comparative benefit (relative to other feasible institutions) and institutional integrity (the institution is pursuing the goals to which it is committed), and three, epistemic virtues that enable the participants in the institutions and the stakeholders to determine whether the standards are being met and enable them to contest and revise the standards and goals of the institutions.

decision-making, eliminating or restraining the use of the veto-power, and ensuring accountability of the Security Council before the General Assembly.

B. Lack of Democratic Legitimacy

In democratic systems of governance, the exercise of political authority must be justified in each particular case, in order to avoid the arbitrary exercise of power.¹⁷⁶ In cases where a political body fails to provide satisfactory reasons for a particular decision or regulation, or if it does not “fit” within existing norms and practices, the decision must be regarded as arbitrary, lacking democratic and political legitimacy.¹⁷⁷

If these standards were applied to the United Nations system, Member States’ consent to abide by the authority of the Security Council does not therefore release the Council from its obligation of providing sufficient justification for the actual exercise of its political authority in cases before it.¹⁷⁸ Equally, complying with proper procedures in the adoption of Security Council resolutions does not necessarily create political legitimacy for the Council.

Commenting on the exercise of law-making functions by the Security Council, Thomas Franck cautions that “the shortcut of legislation by Council Resolution is a tantalizing short-cut to law.” He suggests that the temptations to legislate by Council authorization must be balanced, due to the fact that ultimate implementation depends on the compliance of Member States. And if the effectiveness of Council determinations depends on participation by Member States, then the legitimacy of those determinations will increasingly depend on participation in the process that makes those determinations.¹⁷⁹

¹⁷⁶ Steven Wheatley, “The Security Council, Democratic Legitimacy and Regime Change in Iraq” (2006) 17:3 EJIL at 547.

¹⁷⁷ *Ibid* at 544.

¹⁷⁸ *Ibid* at 542.

¹⁷⁹ T. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995) at 218–220.

Wheatley argues that consent is not the only condition for the application of laws and regulations in the practice of deliberative democracies.¹⁸⁰ A democratic law-making process requires an inclusive process of democratic decision-making with the full participation of those who will be subject to law.¹⁸¹ There must be a reasoned basis for the introduction of laws and regulations, and participants must be able to put forward reasons that others may accept or reject.¹⁸²

In Wheatley's view, the political legitimacy of the Security Council's resolutions should be checked against three general basic criteria: conformity with the constitutional framework provided for in the UN Charter, consistency with general international law, and equal treatment of cases brought before the Council.¹⁸³ Applying double standards to issues before the Council has a deleterious effect on the Security Council's legitimacy.¹⁸⁴ If a resolution does not meet these conditions, the Council should provide "sufficient justification for the exercise of political authority in the particular case."¹⁸⁵ In a democratic system of governance, it remains for a constitutional court to determine whether there exists sufficient justification in a particular case for a denial of individual rights in the interest of public good.

Wheatley refers to the Security Council resolutions that were adopted in 2003, following the invasion and occupation of Iraq by allied forces, and maintains that although these resolutions were adopted in accordance with the Council's rules of procedure, they lack political legitimacy because

¹⁸⁰ Wheatley, *supra* note 176 at 546.

¹⁸¹ *Ibid* at 545.

¹⁸² In *An agenda for peace*, UN Secretary-General Boutros Boutros-Ghali argued that '[d]emocracy within the family of nations . . . requires the fullest consultation, participation and engagement of all States, large and small, in the work of the Organization'. Moreover, the principles of the Charter 'must be applied consistently, not selectively'.

¹⁸³ Some authors also invoke the principle of "equitable estoppel" to assert that the UN has an obligation to be consistent with its prior words and practices. As Franck and Sughrue describe, "equitable estoppel imposes a duty . . . to refrain from engaging in inconsistent conduct vis-à-vis other States. See, Thomas M. Franck and Dennis M Sughrue, "The International Role of Equity-as-Fairness" (1992/1993) 81 Georgetown LJ at 566.

¹⁸⁴ This view confirmed by many States in the course of an open debate of the Security Council devoted to the question of rule of law, and supported by scholars. See, Verbatim Record of the Security Council of its 5474th meeting on the topic "Strengthening International Law: Rule of Law and Maintenance of International Peace and Security," UNSCOR, 61st Year, 5474th mtg, UN Doc. S/PV. 5474 (2006) [provisional]. See also, Sufyan Droubi *Resisting United Nations Security Council Resolutions* (London-New York: Routledge, 2014) at 43.

¹⁸⁵ Wheatley, *supra* note 176 at 532.

they violate two of the peremptory norms embedded in the Charter: the non-use or threat of use of force,¹⁸⁶ and the self-determination of peoples.¹⁸⁷

In the aftermath of the invasion of Iraq and the overthrow of its government, the Security Council recognized the installation of “the Coalition Provisional Authority” by the allied forces in accordance with its Resolution 1511 (2003). The legitimacy of this resolution has been questioned because it tacitly justifies the use of force, in violation of the “cardinal” principle of international law as enshrined in the UN Charter.¹⁸⁸ Moreover, in its Resolution 1546 (2004),¹⁸⁹ the Security Council endorsed the establishment of a system of government involving the sharing of power between the three main ethno-cultural groups and expressed its support for the establishment of a “federal, democratic, pluralist, and unified Iraq.”¹⁹⁰

Wheatley argues that these resolutions are not defensible when applying the principle of public reasoning, as no reasons were provided for the regime change. The question then remains whether the negation of the right of the Iraqi people to political self-determination was necessary for the sake of restoring international peace and security. Naturally, an answer to this question would be subjective and politically judgmental.

A political judgment would obviously be unreasonable where no reasons are provided or no reasoned justification exists for the introduction of a disputed measure. A regulation introduced through an arbitrary resolution has no legal effect. This is particularly true where the norm in question is one of *jus cogens* standing. Given that the Security Council increasingly exercises its political

¹⁸⁶ Charter Article 2(4).

¹⁸⁷ Charter Article 1(1).

¹⁸⁸ Paragraph 1 of Resolution 1511 (2003) acknowledges “the exercise by the Coalition of Provisional Authority (Authority) of the specific responsibilities, authorities, and obligations under applicable international law” The applicable international law is meant to refer to obligations of occupying powers under international humanitarian law. Hence, this Resolution disregards the prohibition of use of force and occupation under the Charter. It must be noted that in accordance with paragraph 3 (a) General Assembly Resolution 3314 (XXIX) on the definition of aggression “[t]he invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such attack . . .” is qualified as an act of aggression.

¹⁸⁹ See, SC Res 1546, UNSCOR, 4987th mtg, UN Doc S/Res/1546 (2004) at para 1.

¹⁹⁰ Wheatley, *supra* note 176 at 549.

authority beyond the areas accepted and recognized as being relevant to international peace and security, the articulation of public reasoning is necessary to avoid arriving at situations where the authority of the Council would constantly be challenged by the international legal community.

The relatively small size of the Security Council and its expanding powers are undoubtedly among the contributing factors to its democratic deficiency. States that are not represented in the Council must nevertheless accept and carry out the decisions of this small but powerful body. The past three decades have provided the Security Council with opportunities to both function swiftly and also expose its shortcomings. In this period, the Council succeeded in taking swift action in the management of several international crises, while broadly interpreting its powers under the UN Charter. On the other hand, prolonged negotiations on the reform of the Security Council have contributed to its legitimacy deficit.¹⁹¹

In discussing the legitimacy of the Security Council's actions, much emphasis has been placed on the structure of the Council. Although a varied representation is an important factor in removing its legitimacy deficiency, it is far from clear that expanding the Council to twenty-four or twenty-five members, under the proposals on the table, would remedy this problem. It is equally unclear that the Council's expansion would make it more efficient.¹⁹²

In an attempt to improve the image of the Council, Thomas Franck proposes that the Council itself should revise its rules of procedure to allow for broader consultation when purportedly adopting resolutions of general application. These broader consultations could be carried out by way of representation of regional groups and groups with special interests before the Security Council.¹⁹³

C. Legalizing Hegemonic Policies in and Outside the Security Council

¹⁹¹ Sufyan Droubi, *supra* note 184 at xvi.

¹⁹² Simon Chesterman, "The Security Council as World Legislator? Theoretical and Practical Aspects of Law-Making by the Security Council" Discussion Paper Based on Panel 1 of the series "The Role of the Security Council in Strengthening a Rules-Based International System" (NYU School of Law: Institute for International Law and Justice, 2004) at 4.

¹⁹³ *Ibid.*

The exercise of law-making functions by the Security Council is both viewed as a departure from the principle of “legislative equality” of States and a success for the major powers¹⁹⁴ in their efforts to consolidate “legalized hegemony” or “hegemonic international law” through the Security Council.¹⁹⁵ The world’s big powers also use other methods outside of the UN framework to expand their “legalized hegemony.” The unilateral use of force based on various justifications is an attempt by some of these powers to legitimize their hegemonic foreign policies.

The law-making functions exercised by the Security Council are the outcome of seventy years of vacillation between the “sovereign equality of States” and “legalized hegemony,” two fundamental elements of the compromise reached at the San Francisco Conference in 1945. The special power given to the Permanent Members in the field of international security had to be countervailed by the role of the General Assembly as a strictly egalitarian Assembly.¹⁹⁶ During the Cold War era, the General Assembly expanded its powers *vis-a-vis* the Security Council, as manifested, *inter alia*, by the General Assembly’s *Uniting for Peace Resolution*.¹⁹⁷ Since the end of the Cold War, however, the Security Council has expanded its powers by broad interpretation of the concept of peace and security, as well as by grasping vast executive, quasi-judicial, and law-making functions, culminating in the adoption of normative resolutions labeled as “legalized hegemony.”¹⁹⁸

¹⁹⁴ In his book, Simpson shows that the equality of States in modern international law always has been qualified in two dimensions, one of which is “legalized hegemony”, the fact that there have always been “Great Powers” that have claimed, and been granted, some sort of privilege over other States. Simpson shows the development of this phenomenon through almost two centuries, starting with the Concert of Europe beginning in 1815 and ending with the bombing of Afghanistan in 2001. Of this period, that starting with the founding of the United Nations in 1945 is the most relevant for situating the Council’s role as world legislature. See, Geny Simpson, *Great Powers and Outlaw States Unequal Sovereigns in the International Legal Order* (Cambridge, Cambridge University Press, 2004), at 122,

¹⁹⁵ Bjorn Elberling, “The *Ultra Vires* Character of Legislative Action by the Security Council” (2005) 2:2 IOLR at 356.

¹⁹⁶ Under Article 18 of the Charter, each Member State has one vote, irrespective of its size and contribution to the budget of the United Nations.

¹⁹⁷ *Uniting for Peace*. GA Res 377 (V), UNGAOR, 302nd plen mtg, UN Doc A/Res/377 (1950).

¹⁹⁸ Akram and Shah observe that “The predominantly political character of the Security Council coupled with its discretionary powers, lack of accountability, and inconsistent and selective practice makes its legislative powers a source of concern, particularly if these powers are not subjected to clear limitation. These constitutional weaknesses make the Council vulnerable to the hegemony of a small group of States.” Munir Akram and Seyyed Haider Shah, “The Legislative Powers of the United Nations Security Council” in Ronald St. John Macdonald & Douglas M. Johnston, eds, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden-Boston: Martinus Nijhoff Publishers, 2005) at 438.

Elberling argues that the exercise of legislative functions by the Security Council violates the UN Charter, it calls into question the sovereign equality of States, one of the basic foundations of international law, and it marks a big step towards the realization of “legalized hegemony.” He endorses the warning issued by Sir Gerald Fitzmaurice in 1971 that “[i]t was to *keep the peace, not to change the world* order that the Security Council was set up.” [Emphasis added]¹⁹⁹

The Western powers’ endeavours are not confined to the UN system as they also use opportunities outside the United Nations to solidify their “legalized hegemony.” Instances of such activities are the use of military force against Yugoslavia, Afghanistan, and Iraq, all justified through legal arguments to legitimize the unilateral use of force against other States. NATO’s intervention in Yugoslavia in 1999 was justified under the “humanitarian intervention” doctrine.²⁰⁰ The invasion of Afghanistan in the aftermath of the September 11th attacks was defended under a broad interpretation of the right of self-defence. Contrary to the text and spirit of Charter Article 51, the invasion of Afghanistan was neither an “immediate” reaction to the attacks nor “proportionate.” The invasion of Iraq, in 2003, purported to be justified under Security Council Resolution 1441, which did not even implicitly authorize the use of force.²⁰¹ The application of these doctrines by the big Western powers was aimed at further strengthening the concept of “legalized hegemony.” While using force

¹⁹⁹ Namibia, *supra* 170 note at 16 and Dissenting Opinion of Judge Sir Gerald Fitzmaurice at 294.

²⁰⁰ Elberling, *supra* note 195 at 357. Humanitarian intervention is a doctrine which justifies the unilateral use of force against States for humanitarian purposes.

²⁰¹ Michael Woods, the former legal advisor of the UK foreign Office, stated before the parliamentary inquiry on 26 January 2010, that he had rejected the government's argument that Security Council Resolution 1441 (2002), requiring Saddam Hussein to disarm, was a sufficient basis for the military action. In his view, the use of force against Iraq in March 2003 "was contrary to international law," because the "use of force had not been authorized by the Security Council, nor was there any "other basis in international law" for the invasion. See, *The Guardian* (26 January 2010) online: The Guardian <<http://www.theguardian.com/uk/2010/jan/26/iraq-war-illegal-chilcot-inquiry>>.

unilaterally, the Western powers also revert to the United Nations whenever they deem it appropriate, either seeking legitimacy or post-conflict rebuilding.²⁰²

By gaining a foothold of hegemony outside the United Nations, the major Western powers have managed to circumvent the Security Council and the requirement of ensuring the consent of other Permanent Members. However, measures taken outside of the UN framework still lack political and legal legitimacy of the UN system as a whole, and the prerogatives of the big powers under Chapter VII of the Charter.

In sum, the Western powers have followed two paths toward achieving their foreign policy objectives. Whenever their proposed actions do not meet the approval of the other Permanent Members of the Council, they act unilaterally by invoking the expanded doctrines allowing unilateral use of force. Alternatively, whenever they succeed in convincing the other Permanent Members of the Council, they easily bring on board four of the remaining ten non-Permanent Members of the Council, thus both benefit from the enforcement powers provided for in Chapter VII, and bypass other norms of international law by invoking Charter Article 103. Hence, “a new level of legalized hegemony is becoming firmly entrenched in the UN system.”²⁰³

VI. Conclusion

Unlike mainstream lawyers,²⁰⁴ most TWAIL scholars do not enter into detailed discussion of the Security Council’s law-making. However, their views on this question may be inferred from their basic positions on international law and international institutions, unreasonably represented and

²⁰²Elberling, *supra* note 195 at 358. See, also, the letter dated *Letter dated 8 May 2003 from the Permanent Representatives of 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*, in which the two governments called for the contribution of the United Nations and other organizations “in providing humanitarian relief, in supporting the reconstruction of Iraq, and in helping in the formation of an Iraqi interim authority.” *Letter dated 8 May 2003 from the Permanent Representatives of 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*. UNSCOR, UN Doc S/2003/538 (2003).

²⁰³ Elberling, *supra* note 195 at 359.

²⁰⁴ See, Chapter Three, pp 142-145.

undemocratic Security Council, and its selective approach on the war on terror. TWAIL scholars view international law as an instrument produced by former colonizers with the aim of sustaining their control all over the world. The large Western powers continue to follow the path of former colonizers by producing international law that accelerates the increasing gap between the rich North and the poor South.

Similarly, TWAIL scholars look at international organizations as institutions created and controlled by Western countries that maintain the West's grip on countries all over the world. It is clear from this basic position that TWAIL scholars view the Security Council's law-making activities as an effort to serve vital interests of Western powers—efforts that lack legitimacy and thus should be opposed.

The TWAIL scholars' concerns regarding the war on terror, the structure of the Security Council, and the procedure that applies to its decision-making, confirm the conclusion that the Security Council is not the proper organ to exercise a law-making role. It is unequally represented, its decision-making is undemocratic, and its practice is selective. Therefore, it has lost its legitimacy—a position that is also shared by many mainstream lawyers. Law-making by a body such as the Security Council can only be justified by the imperial intentions of those who use it as a tool of foreign policy, a situation that should be changed and remedied by reforming the composition and procedures of the Security Council, as well as by unbiased treatment of questions before the Council.

Chapter Four

Security Council is Bound by International Law

Mainstream Lawyers' Perspectives on the Law-Making by the Security Council

Abstract

Although mainstream lawyers have expressed divergent views on the authority of the Security Council to exercise law-making functions, they generally agree that if the Security Council exercises these types of functions then it must be with due diligence and only in exceptional cases. Moreover, there is little controversy that the United Nations, as a subject of international law, is bound by the purposes and principles of the Charter of the United Nations, the peremptory norms of international law, and international human rights and humanitarian law, all of which apply equally to the Security Council, a Principal Organ of the Organization. While it is unlikely that the Security Council would adopt resolutions intentionally violating peremptory norms, certain international norms might be violated as consequence of Council decisions. Violations of the non-use of force, the self-determination of peoples, as well as certain human rights in blacklisting individuals are examples of consequences of the Security Council's decisions.

I. Introduction

The law-making activities of the Security Council have generated extensive discussions among lawyers who have influence on the formation, interpretation, and implementation of international law ("mainstream lawyers"). Contrary to Third World Approaches to International Law (TWAIL), mainstream lawyers have discussed this new development in the context of the prevailing international legal system and have attempted to justify or criticize the Security Council's law-making by relying on standards and checks and balances of the international legal system.

A glimpse at mainstream lawyers' writings demonstrates that their views on the new developments are divergent and cover a spectrum of opinions between two extreme positions. According to one extreme position, law-making by the Security Council is legitimate and justified under the Charter of the United Nations (UN Charter) and international law, and States are bound under the Charter's express language to carry out the decisions of the Council, including those with law-making effects. Conversely, other mainstream lawyers view the Security Council's law-making as *ultra-vires* and thus it should simply be disregarded by States.

Between these two extreme positions, lie several other arguments in support of or against the Security Council's law-making activities. The areas covered in these discussions include whether there are limits to Charter interpretation by the Principal Organs of the United Nations; which organs are competent to conduct law-making activities; whether the Security Council, contrary to its past practice of addressing specific situations, can make international laws of general application; whether the Security Council can directly impose sanctions against individuals; whether the Security Council, by relying on Article 103 of the UN Charter, can modify provisions of treaties already in force; what are the legal effects of the Security Council's normative resolutions; and whether the Security Council, by setting law-making goals for States, violates the principle of non-intervention in matters that are essentially within a State's domestic jurisdiction, as enshrined in Article 2 (7) of the Charter.

Taken in the context of the Charter's articles, discussions on this development in the Security Council's functions demonstrates that the provisions relating to the Council's mandate are broad enough to accommodate law-making functions. Furthermore, encroachments by the Security Council in areas that fall under the General Assembly's jurisdiction are treated as internal irregularities, but not *ultra vires* conduct on the part of the United Nations.¹ Nevertheless, mainstream lawyers are

¹ See, *Certain Expenses of the United Nations*, Advisory Opinion, [1962] ICJ Rep 151 at 168 [Expenses].

consistent in advising the Security Council to exercise this function with due diligence and only in exceptional circumstances.

Those lawyers, who analyze this development in the wider context of international law, agree that the United Nations, as a subject of international law, is bound by the Charter and general international law. *A priori*, as a Principal Organ of the Organization, the Security Council should respect the Charter's purposes and principles, the peremptory norms of international law,² and international human rights and humanitarian law.

This forthcoming chapter will assess various scholarly writings on the Security Council's normative resolutions, in particular the questions raised earlier. Section II will consider this subject matter in comparison with legislation at the national level, where State constitutions define the modalities for the separation of powers among branches of governments. In this regard, an attempt is made to answer the primary question of whether the doctrine of separation of powers applies at the international level in the absence of an international constitution. Section II, examines the applicability of the subsidiarity doctrine to the United Nations. In Section III, various provisions of the UN Charter are analyzed to determine whether the Security Council's law-making capacity is inherent in the constitutive instrument of the United Nations. Section IV then examines the applicability of certain limits on the Security Council's activities.

II. Comparing International Law-Making with National Legislation

Mainstream lawyers' analysis of the Security Council's law-making activities has often made the comparison with legislation at the national level, where a national constitution defines the functions of the different branches of government and regulates the relationships between them. The main issue in this comparison is how compatible the doctrine of separation of powers is to the activities of international organizations (IOs). The comparison of law-making at the national and international

² See, Sufyan Droubi, *Resisting United Nations Security Council Resolutions* (London-New York: Routledge, 2014) at 43.

levels also raises a interrelated question of the relevance of “a constitution” or an “international constitution” at the global level. Although a number of studies are underway on this question, they have not arrived at a generally agreed conclusion regarding the relevance of a global constitution. A brief summary of the studies conducted thus far will pave the way for discussions on the applicability of the doctrine of separation of powers to international organizations.

A. Relevance of an International Constitution

As mentioned above, some mainstream lawyers have discussed the Security Council’s normative resolutions in the context of the separation of powers doctrine, which is entrenched in the constitutions of most States. Naturally, these references have generated discussions about the possibility of a world constitution. Kennedy refers to these as constitutionalism debates which are “efforts to describe the legal order beyond the nation-States.”³ Such discussions include, *inter alia*, whether the international legal system could be considered a constitution of the world or whether the UN Charter is a form of world constitution.

Inspired by the role of national constitutions, proponents of the international legal system as a world constitution believe that international law has the potential to unify the international community in a single coherent constitutional structure. By contrast, opponents of this approach criticize it on several grounds.⁴ First, unlike the domestic level, there are two levels of subjects at the global level: States and individual human beings. Currently, there is no single comprehensive and coherent world legal system to embrace these two subjects of international law.⁵ Second, the fragmentation of international law⁶ as a result of the proliferation of international institutions is challenging world constitutionalism. The increase in international standards, developed in a decentralized manner, does

³ David Kennedy, “The Mystery of Global Governance” in Jeffrey L. Dunoff and Joel P. Trachman, eds, *Ruling the World? Constitutionalism, Internationalism and Global Governance* (New York: Cambridge University Press, 2009) at 37.

⁴ Andrea L. Paulus, “The International Legal System as a Constitution” in Jeffrey L. Dunoff & Joel P. Trachman, eds, *Ruling the World? Constitutionalism, Internationalism and Global Governance* (New York: Cambridge University Press, 2009) at 70.

⁵ *Ibid* at 71.

⁶ See, the study compiled by the ILC’s study group entitled, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682, dated 13 April 2006.

not seem to have served the purpose of unifying the international legal regime under a single system.⁷ Third, a constitution is a comprehensive order of a whole system, and is the supreme law of the land, superior to all other legal rules. In this sense, it is far from clear that all nations regard international law as such. Although both the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) have repeated the obligation of States contained in Article 27 of the VCOLT that States shall not invoke domestic laws to evade the implementation of international obligations,⁸ the diverse sources of and different treatments accorded to international law in various countries⁹ are not conducive to strengthening the supremacy of international law over national law.

Similarly, opponents of the idea of international law as a constitution reject the proposition that the peremptory norms of international law could be regarded as constitutional principles. In their view, there is no general agreement on the status of these principles, except for a few such as genocide and the non-use of force in international relations. These principles could serve as “principles in a constitution,” but they do not constitute a constitution. These opponents rightly conclude that international law can be considered a system that contains a number of international norms and procedures to apply them, but it can hardly be argued that international law is a constitution.¹⁰

Other scholars view the UN Charter as a constitution in the form of a treaty, the only format imaginable in 1945.¹¹ For instance, Fassbender believes that the Charter was meant to be a constitution and references US President Harry Truman, who compared the UN Charter with the American Constitution.¹² Fassbender has a number of arguments to support his idea of the Charter as a constitution. First, he argues that almost all States have become parties to the Charter, which has now gained the trust of the international community as a whole. Second, the Charter contains, *inter alia*,

⁷ Andrea L. Paulus, *supra* note 4, at 82-87.

⁸ Hersch Lauterpacht, *The Development of International Law by the International Court* (Cambridge: Cambridge University Press, 1982) at 264.

⁹ As for monist and dualist methods of application of international law at the national level, see, Chapter Five, Section II, p. 205.

¹⁰ Paulus, *supra* note 4 at 88-90.

¹¹ Bardo Fassbender, “Reconsidering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order” in Jeffrey L. Dunoff and Joel P. Trachtman, eds, *Constitutionalism, International Law, and Global Governance* (New York: Cambridge University Press, 2009) at 133-149.

¹² “The Charter, like our own Constitution, will be expanded and improved as time goes on” *Ibid* at 134.

several customary rules of international law that are universally applicable. Third, several provisions of the Charter are unique and not usually included in treaties. These principles include “we the people” in the preamble, the principle of sovereign equality of States in Article 2(1), and obligations of non-member States in Article 2(6) to carry out decisions of the Security Council relating to the maintenance of international peace and security. Fourth, Fassbender states that the Charter contains all of the necessary features of a constitution: it defines the rights and obligations of its members; it establishes several organs, defining their mandates, and regulates their relationship with each other; and it claims supremacy over other rules of international law and is projected to continuously function for generations to come. Furthermore, there are several treaties that recognize the special place of the United Nations Charter in the international legal system.¹³

In Fassbender’s view, it would be irrelevant to compare the UN Charter to national constitutions or regional arrangements.¹⁴ The Charter should be seen as a constitution, which together with customary norms and treaty law provides direction for a multi-level international community and cannot be viewed in isolation and separated from human rights instruments. In this sense, Fassbender views the Charter as a “framework constitution.”¹⁵

Doyle, on the other hand, compares the UN Charter to the US Constitution but concludes that the Charter is not a constitution.¹⁶ He refers to the records of the San Francisco Conference, where there is no evidence to demonstrate that the founders of the Organization intended to establish a State

¹³ See, Article 103 of the UN Charter, (supremacy of Charter obligations over any other obligation); Article 102 of the Charter OAS (which accepts the principle that these provisions cannot impede the implementation of UN Charter articles); Article 1(c) of the Statute of the Council of Europe (which stipulates that it shall not affect the cooperation of Member States under the UN Charter). Among treaties concluded in recent years, a reference should be made to the Rome Statute of the ICC, Article 5, which stipulates that the definition of the crime of aggression and conditions under which the Court shall exercise its jurisdiction with regard to this crime shall be consistent with the UN Charter provisions. These examples and many more similar instances indicate that States accord high place to the Charter among international treaties. See, also, Kennedy, *supra* note 3, at 63.

¹⁴ Kennedy, too, criticizes those who compare international constitutionalism with national constitutions, and believes that national constitutions do not provide much information about the real structure of power, like political parties and the role of the private sector. Moreover, it is far from clear that these constitutional ideas are useful at the global level. He also criticizes global constitutional projects, for being selective in providing models such as UN or WTO. Kennedy, *supra* note 3 at 60-65.

¹⁵ Fassbender, *supra* note 11 at 145-146.

¹⁶ Michael W. Doyle, “The UN Charter – A Global Constitution?” in Jeffrey L. Dunoff and Joel P. Trachtman, eds, *Constitutionalism, International Law, and Global Governance* (New York: Cambridge University Press, 2009) at 113-133.

or super-State. In addition, a comparison between the purposes and principles of the US Constitution and the Charter demonstrate that they are aimed at achieving different goals.¹⁷

By referring to the ruling of the South African Constitutional Court, Doyle emphasizes that constitutions have a unifying factor: “There is only one system of law. It is shaped by the Constitution which is supreme law, including the common law, derives its force from the constitution and is subject to constitutional control.”¹⁸ In his view, all international law is neither subject to the UN Charter, nor is the Charter the totality of international law. Even UN-generated conventions like the *Genocide Convention*¹⁹ require separate formalities for States to become bound by them. Thus, Doyle concludes that the Charter is not a comprehensive legal text and lacks the unifying element of a constitution, but it is a special treaty with some constitutional elements embedded in it which delineate the authorities and mandates of various organs of the Organization.²⁰

B. Applicability of Doctrine of Separation of Powers to IOs

Despite differences between national constitutions and international organizations’ constitutive instruments, a number of scholars believe that the latter can be regarded as a kind of constitution for IOs. For instance, Powell shares the view that IOs’ constitutive instruments should be regarded as constitutions and their exercise of public authority should be subject to administrative law.²¹ Accordingly, she suggests that the public law structure,²² and, in particular, the separation of powers, should also apply to the international system of governance.²³

Wessel expresses a similar view by specifying that international law-making is no longer the “exclusive preserve of States.” Global Governance Organizations (GGOs) are increasingly engaged

¹⁷ *Ibid* at 144.

¹⁸ *Ibid*.

¹⁹ The Convention on the Prevention and Punishment of the Crime of Genocide adopted by General Assembly on 9 December 1948. See, GA Resolution 260 (III) A.

²⁰ Michael W. Doyle, *supra* note 16 at 144.

²¹ Cathleen Powell, “The Legal Authority of the United Nations Security Council” in Nicolle LaViolette & Craig Forcece, eds, *The Human Rights of Anti-terrorism* (Toronto: Irwin Law, 2008) at 171.

²² In distinguishing between public law and private law, she points out that the subjects of private law are equals, whereas subjects of public law are not equals.

²³ Powell, *supra* note 21 at 170

in “the crafting of rules for worldwide application.”²⁴ The increasing numbers of GGOs is an indication of the emerging shift from “government to governance” in the international community.²⁵ Wessel refers to the international standards produced by GGOs as informal law-making.²⁶ Since a large portion of the rules created by GGOs are “merely affecting the private legal relationship between actors,” they have effects similar to those of domestic legislation.²⁷

Moreover, Wessel examines the public authority dimension of international legislation and addresses the question as to whether public authority could be exercised by non-State actors. He borrows the definition of public authority from Bogdandy and Goldman that “any kind of governance activity by international institutions, be it administrative or intergovernmental, should be considered as an exercise of public authority if it determines [the relationship between] individuals, private associations, enterprises States, or other public institutions.” Authority is defined as “the legal capacity to determine others’ [behaviour] and to reduce their freedom, i. e. to unilaterally shape their legal or factual situation.”²⁸ Wessel concludes that “international public authority” is exercised by various participants in the global society and that “true international public law” is emerging, which is different from “public international law”—a product of sovereign States.²⁹

Wessel’s conclusion supports Powell’s assumption that the separation of powers doctrine should be respected in the exercise of law-making functions.³⁰ The doctrine requires governmental powers to be divided and separated from each other in order to prevent the abuse of power by any one of governmental branches and to protect the individuals’ liberty. The predominant feature of the separation of powers is that the legislative and executive powers should not be combined and the executive should not make law that it is also enforcing. When the executive both creates laws and

²⁴Ramses A. Wessel, “Informal Law-Making as a New Form of World Legislation” (2011) 8 IOLR at 254.

²⁵ *Ibid* at 257.

²⁶ Alvarez in his book advocates similar view about the law-making activities by IOs. See, Jose E. Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2005). [Alvarez]

²⁷ Wessel, *supra* note 24, at 265.

²⁸ J. Von Bernsdorff, Ph. Dann & M Goldman, eds, *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer-Verlag Berlin Heidelberg, 2010) at 575-605.

²⁹ *Ibid* at 265.

³⁰ Powell, *supra* note 21 at 171.

enforces them, these laws are not made in the common interest of society and responsible officials are not being held accountable for their actions. It is the integration of these powers that defeats liberty. The doctrine of separation of powers provides the minimum institutional guarantees that are essential for accountability.³¹

Powell argues that public law concepts are applicable to an increasingly integrated international system that captures both “a normative unity and political hierarchy.” The normative unity is evidenced by “a universal value system with commonly held norms” which includes obligations that are owed to the international community as a whole.³² Politically, integration takes place at both regional and international levels, which are deeply hierarchical and characterized by two types of uneven relationships: that between the Security Council and nation-States; and that between the Security Council and individuals. Security Council powers have been growing to the detriment of States’ authority, as the Council uses its powers under Chapter VII of the Charter to impose binding measures against States which severely restrict individual rights. Nevertheless, individuals have no right of access to the Council before or after decisions are made, and there is no credible procedure to appeal the Council’s decisions.³³ Accordingly, it is this type of use of power that has attracted the public law paradigm of human rights and administrative law and the notion of the rule of law, as States and commentators attempt to find a suitable theoretical framework to analyze the international governmental system.

Powell acknowledges that the limited membership of the Security Council and its increasing powers are justified by the need to take quick action in the case of threats to international peace and security. At the same time, she calls for the Council’s powers to be curtailed, taking into consideration developments in the international arena such as the protection of human rights and application of the

³¹Powell, *supra* note 21 at 175-76.

³² Concerning the obligations to the international community as a whole, see, the ICJ judgment in the *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, [1970] ICJ Rep 3 at paras 32-33.

³³ For more information on the judicial review of the Security Council decisions, see, Chapter Six, Section V, pp 304-307.

rule of law to both national and international levels.³⁴ Powell views “a rights-based conception of the rule of law” as a way of protecting human rights “without affecting the institutional design.” Even in these circumstances, however, the rule of law requires a particular place for the judiciary. The judiciary has long been an essential element in the protection of rights by preventing the executive from applying laws of its own creation. Thus, the separation of powers provides a special place to the judiciary and prevents the concentration of power in one government branch to the detriment of liberty.³⁵ Nonetheless, as will be discussed in Chapter Six, in the absence of a compulsory mechanism at the international level, it is not clear how the separation of powers can actually function at the international level. Hence, some scholars argue that the principle of subsidiarity, which is hidden in the UN Charter, applies to the relationship among UN organs.

C. Applicability of the Subsidiarity Principle

In the view of some scholars, UN organs, except for the ICJ, do not operate under the principle of separation of powers. UN political organs, in particular the Security Council and the General Assembly, do take a variety of actions that can be considered legislative, executive, or even quasi-judicial functions, depending on the nature of the issues at hand and objectives to be achieved. Hence, the law-making activities of the Security Council can best be explained in light of the principle of subsidiarity, enshrined in Article 2(7) of the Charter.³⁶

The principle of subsidiarity determines which level of authority will achieve the objectives of a political order most efficiently; it justifies actions by a higher level of authority only “if the proposed

³⁴ The Rule of Law at the National and International Levels was included on agenda of the General Assembly upon request of Liechtenstein and Mexico; see UN Doc. A/61/142. At its sixty-seventh session, the Assembly adopted the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, in which the Heads of State and Government, *inter alia*, decided to develop further the linkage between the rule of law and the three main pillars of the United Nations, namely peace and security, human rights and development, and requested the Secretary-General to propose ways and means of developing, with wide stakeholder participation, further such linkages. See, GA Resolution 67/1.

³⁵ Powell, *supra* note 21 at 181. For further analysis of the role of the Judiciary in democratic societies, see Chapter Six, Section IV (A), pp 270-278.

³⁶ Nicholas Tsagourias, “Security Council Legislation, Article 2(7) of the UN Charter and the Principle of Subsidiarity” (2011) 24:3 Leiden JIL 539.

objectives cannot be achieved equally well by the lower levels of authority,” and ensures that the action does not interfere unnecessarily with the authority of lower levels.³⁷ Within political orders, the principle of subsidiarity assists in regulating the relationships between “different power holders” to achieve the common goal more “effectively and less intrusively.”³⁸

Tsagourias argues that the Council’s activities have modified international law-making processes by “introducing a vertical, uniform and global law-making mechanism.” This new trend in international law creation, nevertheless disturbs the balance of power between the UN and its Member States. The Security Council is gradually increasing its powers to the detriment of the jurisdictional authority of the Member States, and is imposing obligations to which the Member States have not consented.³⁹

It is noteworthy that the principle of subsidiarity has long been applied in the European Union, in particular in relation to legislation at various levels of the EU institutions. Therefore, a comparative examination of this principle will shed further light on the applicability of this principle in the United Nations.

(i) Subsidiarity Principle and the United Nations Practice

Although States have conferred on the United Nations’ specified competences, the Organization’s powers have not been enumerated in detail. The UN Charter formulates lofty objectives for the Organization, including the maintenance of international peace and security. In order to achieve these objectives, the Principal Organs of the United Nations have acquired powers additional to those provided for in the Charter. These Organs independently determine the scope of their competencies,

³⁷ Tsagourias, *supra* note 36, p. 5.

³⁸ In Catholic teachings, the concept of subsidiarity tries to reconcile the individual and social aspects of human existence; it encourages intervention by larger units only when the individual unit cannot attain its objective without such assistance. Thus the main values underpinning subsidiarity principle are autonomy, mutual assistance and the fulfilment of each unit and of the referent order as a whole. See, Isabel Feichtner, “Subsidiarity,” (2008) Max Planck *Encyclopedia of Public International Law*, R Wolfrum (ed), (New York, Oxford University Press), at 1, 3 and 5.

³⁹ Tsagourias, *supra* note 36 at 3.

and in so doing, they broadly interpret Charter provisions relating to their competencies.⁴⁰ For these reasons, Tsagourias concludes that the “principle of subsidiarity” best illustrates the law-making activities of the Security Council.⁴¹

In the view of Tsagourias, the UN Charter contains the principle of subsidiarity even though it is not expressly specified therein. For example, Article 12 of the Charter, which regulates the relationship between the General Assembly and the Security Council, contains the subsidiarity principle.⁴² Under this Article, the General Assembly cannot make recommendations in cases that are on the agenda of the Security Council. However, the General Assembly’s *Uniting for Peace* resolution modified the relationship between the two organs. The Resolution provides that, in situations of threat to international peace and security, if the Security Council is unable to make a recommendation due to the repeated use of veto, the General Assembly is authorized to convene special emergency sessions and make appropriate recommendations regarding the issue at hand.⁴³ It seems that the uniting for peace resolution was a step taken to confirm the application of the principle in relationship between the General Assembly and the Security Council.

Again, the relationship between the UN and its Member States is regulated on the basis of the subsidiarity principle, which is implicit in Article 2(7) of the UN Charter. According to this Article, the UN should not intervene in matters falling within States’ domestic jurisdiction. However, under the doctrine of responsibility to protect, the Security Council may intervene in matters that were traditionally reserved for national jurisdiction. Under this doctrine, in cases where national authorities fail to protect their population, the Security Council may take measures, including under Chapter VII of the Charter, to protect populations from genocide, war crimes, ethnic cleansing, and crimes against

⁴⁰ Tsagourias, *supra* note 36 at 5.

⁴¹ *Ibid* at 5.

⁴² Though Article 12 of the Charter regulates the relationship between the General Assembly and the Security Council, it must be clarified, however, that there is no hierarchy among the Political Organs of the United Nations, as confirmed by the ICJ. Expenses, *supra* note 1 at 163.

⁴³ *Uniting for Peace*. GA Res 377 (V), UNGAOR, 5th sess, sup. 20, UN Doc A/Res/377 (1950) at para 1 [377].

humanity.⁴⁴ Again, it appears that the recognition of the right to protect doctrine was another step to recognize a limited application of the principle of subsidiarity in relations between the Security Council and Member States of the United Nations.

(ii) The Application of Principle of Subsidiarity in the EU Context

The principle of subsidiarity has long been applied in the European Community⁴⁵ and has been regulated under Article 5(3) of the *Treaty on European Union* (TEU) and the Protocol (No 2)⁴⁶ on the application of the principles of subsidiarity and proportionality.⁴⁷ The principle points to the need to ensure that political decisions are taken at an appropriate level of government, and not a higher or lower level than necessary.⁴⁸ Under this principle, the European Union (EU) only acts in areas that fall outside of its exclusive jurisdiction, in exceptional circumstances. That is, if “the objectives of the proposed action” cannot be satisfactorily achieved by the Member States, the Union takes action.⁴⁹ It is thus presumed that action outside the exclusive competency of the Union will be taken by Member States at the central, regional or local levels. However, this principle does not apply to areas within the exclusive competency of the European Union.⁵⁰

⁴⁴ *World Summit Outcome Document*. GA Res 60/1, UNGAOR, 60th sess, UN Doc A/Res/60/1 (2005) at para 139 [World Summit Outcome Document].

⁴⁵ The Principle of subsidiarity was first included in The Maastricht Treaty (formally, the *Treaty on European Union* or TEU) signed by the Members of the European Community on 7 February 1992, in Maastricht, Netherlands. Regarding the history of the application of the principle in the European Union, see, Peter Critchley, “The European Union and the Principle of Subsidiarity” in *Europe and Industry Vol 1: The Integration of the European Union* (Academia, 1995) online: <<http://mmu.academia.edu/PeterCritchley/Papers>>.

⁴⁶ The Lisbon Treaty replaced the 1997 protocol on the application of the principles of subsidiarity and proportionality by a new protocol with the same name (Protocol No. 2), the main difference being the new role of the national parliaments in ensuring compliance with the principle of subsidiarity.

⁴⁷ Though closely related in practice, a distinction should be made between the two principles of subsidiarity and proportionality. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. While subsidiarity is about who should take action, proportionality is about the nature of an action to be taken.

⁴⁸ Critchley, *supra* note 45 at 4.

⁴⁹ See, the Treaty of Lisbon, Amending the Treaty on European Union and the Treaty Establishing the European Community, entered into force on 1 December 2009, Article 5 (3).

⁵⁰ The five areas of exclusive jurisdiction of the EU are defined in broad terms in Article 3 of *Treaty on the Functioning of the European Union*: customs union – the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the euro; the conservation of marine biological resources under the common fisheries policy; and the common commercial policy. The EU also has exclusive competence in relation to the making of international agreements in certain circumstances.

The principle of subsidiarity applies to all kinds of action by the EU and is not limited to legislation. Nevertheless, “the reasoned opinion procedure” applies only to legislation. Under this procedure, national parliaments scrutinize draft legislation proposed by the European Commission or any other institution against the principle of subsidiarity, and provide a “reasoned opinion” in cases where a proposal does not conform to subsidiarity.⁵¹ If one third of the Member States’ parliaments conclude that the draft legislation does not comply with the principle of subsidiarity, the European Commission or the institution from which the draft legislative act originates must review its proposal and decide whether to maintain, adjust or withdraw it. When the proposal concerns the areas of freedom, security and justice, the required majority is lower, only one quarter of the Members’ parliaments.⁵²

(iii) Comparison of the Application of the Principle of Subsidiarity in the UN and EU

A comparison of the application of the principle of subsidiarity in the United Nations with that of the European Union helps to identify differences in the application of the principle by the two organizations. While the principle is expressly regulated at the EU level, it is hidden in the United Nations Charter. Moreover, there are different levels of governance in the European Union, while the United Nations’ Organs are all the same level and, as confirmed by the ICJ, there is no hierarchy among them. Additionally, whereas the EU has exclusive competency in specific areas, the Security Council has primary responsibility within the UN with respect to the maintenance of international peace and security. Evidently, primary responsibility is not equal to exclusive responsibility. Despite the express language of Article 12 of the UN Charter, the General Assembly can discuss and make recommendations in matters concerning international peace and security under the *Uniting for Peace*

⁵¹ Under the Protocol, the Commission must simultaneously send all of its draft legislative acts and its amended drafts to the Union legislator and to the Member States’ national parliaments. Also, for the purpose of compliance with the principles of subsidiarity and proportionality, any draft European legislative act must contain a detailed statement, facilitating the appraisal by the national legislator. See, *Protocol on the Application of the Principles of Subsidiarity and Proportionality* (Protocol No. 2), Article 6.

⁵² *Ibid.*

Resolution.⁵³ And, finally, while the Charter expressly authorizes the General Assembly to conduct studies and make recommendation regarding the progressive development of international law and its codification, it does not have parallel provision with regard to the mandate of the Security Council. Thus, the law-making activities of the Security Council needs to be assessed against this backdrop.

(iv) Applicability of the Subsidiarity Principle to the Security Council's Normative Resolutions

In applying the subsidiarity principle to the Security Council's law-making activities, Tsagourias suggest three tests to be satisfied. First, the proposed legislation should be within the mandate of the Security Council and within Member States' jurisdictional authority. Second, the legislation must be related to international peace and security, where law-making by the Security Council is swifter and more effective than that of States. Finally, the legislative act must be proportionate to the ends sought.⁵⁴

Regarding the first point, although it is generally acknowledged the law-making at the international level rests with sovereign States, a joint reading of Charter Articles 39 and 41 confirms the view that the Security Council has not expressly been barred from making law. Under these Articles, the Security Council is authorized to take measures to maintain or restore peace if it determines there is a threat to peace, a breach of the peace, or an act of aggression. The list of measures available to the Council and provided for under Article 41 is not exhaustive but rather indicative. Thus, depending on the circumstances, the Security Council may adopt a variety of measures under Article 41, including legislative measures.⁵⁵ Tsagourias does not consider Security Council Resolutions 1373 (2001) and 1540 (2004) "intrusive" because they set out a number of legislative targets for States to fulfill in accordance with their specific national procedures.⁵⁶ Nevertheless, as discussed in Chapter

⁵³ See, the Uniting for Peace Resolution, *supra* note 43.

⁵⁴ Tsagourias, *supra* note 36 at 6.

⁵⁵ *Ibid.*

⁵⁶ *Ibid* at 7.

Two, in addition to setting legislative goals for States, these resolutions purport to create direct obligations to States, which are intrusive and contravene the letter and spirit of Article 2(7).⁵⁷

Concerning the second point, Tsagourias advances the argument that while States hold the “inherent power of legislation” at the international level, the Security Council is better suited to make laws in areas related to the maintenance of peace and security.⁵⁸ In other words, law-making remains within the competencies of the Member States in so far as they are able to effectively achieve the common objective of maintaining peace and security. As to the subject matter under discussion, he argues that prior to the adoption of SC Resolution 1373, there were more than a dozen conventions dealing with different aspects of terrorism. However, these conventions suffered from low participation,⁵⁹ too many reservations, and weak monitoring mechanisms. So, the Security Council only intervened in the area of counterterrorism when it spread beyond national borders and due to the gaps in the existing legal framework.

It should be pointed out, however, that the General Assembly and the international community reacted relatively quickly in developing additional international instruments in the areas of counterterrorism and the non-proliferation of weapons of mass-destruction following the September 11th attacks, sending a clear signal to the Security Council that it should not continue the law-making practice.⁶⁰ Additionally, the Security Council’s normative resolutions have had little effect on the universal application of other international instruments⁶¹ and are facing serious challenges at the implementation stage.⁶² For example, these normative resolutions have not succeeded in meeting the objective of stopping the financing of terrorism. The resurgence of terrorist groups in the Middle East is being financed by the flow of money from countries of the region and beyond.

⁵⁷ See, Chapter Two, Sections II A (i), p. 57; III (B), p. 69; and IV A, (B), pp. 81-83.

⁵⁸ Expenses, *supra* note 1 at 163.

⁵⁹ Tsagourias, *supra* note 36 at 7. For further information regarding the status of multilateral instruments in the areas of counterterrorism and the non-proliferation of weapons of mass-destruction, see, Chapter Five, Table No. 1, p. 252.

⁶⁰ See, Chapter Two, Section III (D), p. 80.

⁶¹ For further information regarding the status of multilateral instruments in the areas of counter-terrorism and non-proliferation of weapons of mass-destruction, see, Chapter Five, Table No. 2, p. 254.

⁶² See, Chapter Five, Sections III, IV and V; pp. 206, 216 and 223, respectively.

Concerning proportionality, Tsagourias argues that the normative resolutions are comparable with “framework legislation,” whereby the SC determines objectives to be achieved but leaves it to Member States to decide how to achieve them. In this way, States retain a meaningful degree of jurisdictional authority, as they enjoy flexibility in implementing the legislation and participate in the law-making process together with the Security Council. Consequently, he concludes that the proportionality test has been met.

Nevertheless, it should be recalled that Security Council Resolutions 1373 and 1540 set out a number of mandatory legislative obligations for States, which are bound to implement them in conformity with the relevant standards of national or international law.⁶³ Yet, Tsagourias fails to refer to the two monitoring committees established pursuant to Resolutions 1373 and 1540, which continue to be active and push States to implement the law-making provisions of these resolutions. As discussed in Chapter Two, the mandates of these committees have extended beyond 2020. Certainly, putting pressure on all States to implement the Council’s normative resolutions clearly contradicts the Security Council’s claim of setting goals but allowing them to be achieved by States. The continued pressure from the Council on Member States of United Nations to do more indicates that the decisions relating to the normative resolutions have not been taken at the appropriate level, and thus cannot be justified by invoking the principle of subsidiarity. Thus, it is far from clear that law-making by the Security Council in the areas mentioned was necessary and proportionate reaction to the issue at hand.

III. International Law-Making Under the UN Charter

The Charter of the United Nations contains a single reference to law-making in the context of the General Assembly’s responsibilities. In accordance with Article 13(1), the General Assembly has been mandated to “initiate studies and make recommendations,” *inter alia*, for the purpose of the progressive development of international law and its codification. This provision should in no way be

⁶³ Tsagourias, *supra* note 36 at 7.

construed as having authorized the General Assembly to legislate for the international community as whole. As explained in Chapter One, law-making recommendations of the General Assembly, which are usually made in the form of draft treaties, must be ratified by a specified number of States in order to enter into force as binding instruments in inter-State relations.⁶⁴ Moreover, General Assembly resolutions are generally considered to be recommendations, but may have binding effects in situations where they declare existing customary norms or interpret the Charter provisions. Other Principal Organs of the United Nations, including the Security Council, interpret those Charter provisions that are relevant to their mandates.

A. Interpretation of the Charter by United Nations' Organs

There is no provision in the UN Charter concerning its interpretation. However, in practice, the Principal Organs of the United Nations have broadly interpreted the Charter provisions relevant to their mandates. For instance, the creation of peacekeeping operations by the United Nations has been endorsed by the ICJ as a measure compatible with the mandate of the United Nations relating to the maintenance of international peace and security.⁶⁵ Similarly, the *Uniting for Peace Resolution* has enabled the General Assembly to consider and make recommendations concerning issues that are stalled in the Security Council because of the repeated use of the Permanent Members' veto-power.⁶⁶ Proponents of a constitutional interpretation of the Charter—that is, to interpret Charter provisions in light of its purposes and principles—argue that the UN Charter, as the founding instrument of an international organization and “the *de facto* constitution of the international system,” must be considered a “living instrument” and interpreted in an evolving manner.⁶⁷

⁶⁴ See, Chapter One, Section IV E (i), p. 46.

⁶⁵ ICJ Rep, 1962 at 164.

⁶⁶ GA Resolution 377 (V), *supra* note 43.

⁶⁷ Bjorn Elberling, “The *Ultra Vires* Character of Legislative Action by the Security Council” (2005) 2:2 IOLR 337 at 344.

The practice of the UN organs in the interpretation of Charter provisions is based on the statement made by the San Francisco Conference in 1945, which in part stipulates that “[i]n the course of their operations . . . it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions.”⁶⁸ This view was confirmed by the ICJ in its advisory opinion on *Certain Expenses of the United Nations*. The Court observed that each organ of the United Nations must determine the validity of its act in the first place.⁶⁹ International Court of Justice Judge Fitzmaurice draws two conclusions from this opinion. First, an act of a United Nations organ is presumed valid unless it is objected to and found to be *ultra vires* by a third party. Second, any objection to an organ’s decision must be made to the organ concerned and the organ is entitled to make final and binding decision on the *ultra vires* objections.⁷⁰

Scholars argue, however, that there are limits to the broad interpretation of the Charter and interpretation should not lead to radical changes to “the whole system to be interpreted.” Bowett confirms this view by stating that the implied powers doctrine cannot extend to powers that are not provided for in the Charter.⁷¹ Tzanakopoulos argues that the Security Council has discretion in adopting the means to address threats to peace, provided they do not exceed the “interpretative radius of the provision.”⁷²

The adoption by the Security Council of normative resolutions like 1373 (2001) and 1540 (2004), changes the UN system, which does not have a true legislative organ.⁷³ In the absence of a central law-making organ, international norms are created by States’ consent, and no State can be bound by a rule of international law if it did not have the opportunity to influence the development of

⁶⁸ Alvarez, *supra* note 26, at 79.

⁶⁹ ICJ reports, 1962 at 168.

⁷⁰ C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (Cambridge-New York: Cambridge University Press, 2005) at 203.

⁷¹ Dereck William Bowett, “Crimes of States and the 1996 Report of the International Law Commission” (1998) 9 EJIL at 166.

⁷² Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford-New York: Oxford University Press, 2011) at 62.

⁷³ Elberling, *supra* note 67 at 351.

that norm. It must be noted that the informal consultations⁷⁴ conducted prior to the adoption of Security Council Resolution 1540 “fall far short of the requirement of State consent that international law requires.”⁷⁵ Thus, creating norms of international law by any method other than engaging States in the process on an equal basis runs the risk of compromising the sovereign equality of States, the basic principle of the international system,⁷⁶ and that the power of interpreting relevant Charter provisions does not justify purported law-making attempts.

B. Competent Organ: General Assembly or Security Council

The adoption of normative resolutions by the Security Council has generated extensive debate over which organ of the United Nations, if any, is competent to perform law-making functions. It is generally held that “there is no machinery of international legislation” and that States are the legislators of the international legal system. As recently as 1995, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) held in the *Tadic* case that “there is . . . no legislature, in the technical sense of the term, in the United Nations system That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.”⁷⁷ But the Appeals Chamber also noted that the Council is a body that “has a limited power to take binding decisions . . . when, acting under Chapter VII of the United Nations Charter, it makes decisions binding by virtue of Article 25 of the Charter.”⁷⁸

Evidently, while there is “no true legislative organ” within the UN system, the organ that could possibly exercise such a function with any legitimacy is the General Assembly. As discussed

⁷⁴ Informal consultations are a usual practice in the Security Council, in which members of the Security Council discuss draft resolutions in an informal manner. This practice is not comparable in way to multilateral negotiations in which draft multilateral instruments are prepared. Contrary to informal consultations at the Security Council, in multilateral negotiations each participating State enjoys an equal right of proposing any drafts or amendments to be decided by required majority of participants.

⁷⁵ Elberling, *supra* note 67 at 351.

⁷⁶ *Ibid* at 352.

⁷⁷ *Prosecutor v Tadic*, [1996] 35 ILM 32, ICL 36 (ICTY 1995) at para 43 [Tadic]; Stefan Talmon, “The Security Council as World Legislature” (2005) 99:1 AJIL at 175.

⁷⁸ *Tadic*, *Ibid* at 44.

earlier, under Article 13(1)(a) of the Charter, the Assembly is entrusted with the mandate of “progressive development of international law and its codification,” a task that it discharges with the assistance of the Sixth Committee, the International Law Commission, and a number of other subsidiary bodies.⁷⁹ The Charter does not confer a comparable function on the Security Council.⁸⁰ This view was confirmed by many States in the course of an open debate of the Security Council devoted to the question of the rule of law.⁸¹ The founders of the UN restricted the role of the Security Council to deal only with concrete situations.⁸² Bianchi endorses this view by stating that “the SC is prevented from sailing the uncharted waters of international law-making.”⁸³ Similarly, the *Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, in reference to the SC measures under Resolution 1333 (2000), categorically stated that these measures were *ultra vires* because the Security Council lacked the power to legislate, and that by so doing it did not observe the separation of powers between the Security Council and the General Assembly.⁸⁴

Elberling argues that the Security Council is neither a transparent nor democratic organ and, therefore is not suitable to be entrusted with law-making functions. As the processes leading to the adoption of Resolutions 1373 and 1540 demonstrated, the texts of these resolutions were prepared in secret negotiations among the Permanent Members of the Security Council. Moreover, the Council which is comprised 15 members is neither a representative organ nor a democratic body, as evidenced

⁷⁹ For instance, the United Nations Commission on International Trade Law (UNCITRAL) is entrusted with the modernization and harmonization of rules on international business.

⁸⁰ The responsibility conferred on the Security Council under Article 26 of the Charter regarding the “establishment of a system for the regulation of armaments,” is not considered as comparable to the function of the General Assembly under Charter Article (13)(1)(a), because it is limited to specific sphere of disarmament.

⁸¹ See, *Strengthening International Law: Rule of Law and Maintenance of International Peace and Security*. UNSCOR, 61st Year, 5474th mtg, UN Doc S/PV. 5474 (2006) [provisional] [Rule of Law].

⁸² Elberling, *supra* note 67 at 344. Marschick observes that “there is no provision [in the Charter] conferring the right to the Council to enact general legislation or to adopt a decision that could be understood as general law-making.” See, Marschick, Axel. “Legislative Powers of the Security Council” in Ronald St. John Macdonald & Douglas M. Johnston, eds, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden-Boston: Martinus Nijhoff Publishers, 2005) at 461.

⁸³ A Bianchi, “Assessing the Effectiveness of the UN Security Council’s Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion” (2006) 17:5 EJIL at 888.

⁸⁴ Martin Scheinin, *Report of the Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, UN Doc A/65/528 (2010) at paras 38-39.

by the veto-power of the five Permanent Members.⁸⁵ While the General Assembly, a fully representative body, does not have true legislative authority, it is inconceivable that the Security Council, a far less representative organ with no transparency, should enjoy such power. Still, the composition and procedure of the Council is suitable for an executive organ that needs to react quickly and forcefully in dealing with emerging crises.⁸⁶

Elberling also criticizes the selective approach of the Security Council under the influence of its Permanent Members and believes that it is highly unlikely that the Council would abandon this selective practice in exercising legislative functions. Indeed, he argues that most of the normative resolutions passed by the Council “are clearly in furtherance of U.S. foreign policy.”⁸⁷

By contrast, Rosand⁸⁸ expresses the view that the Security Council, by adopting Resolutions 1373 and 1540, took necessary actions to address urgent global threats and filled a gap in international law regarding the fight against terrorism.⁸⁹ The Council’s action in adopting Resolution 1373 was justified in the light of the stalled negotiations in the General Assembly on a draft comprehensive convention against international terrorism.⁹⁰ At the time, only two States were parties to all twelve counterterrorism instruments concluded under the auspices of the United Nations.⁹¹

⁸⁵ Elberling, *supra* note 67 at 348.

⁸⁶ *Ibid.*

⁸⁷ *Ibid* at 350.

⁸⁸ Eric Rosand was the deputy legal counsel of the Permanent Mission of the United States to the United Nations in New York.

⁸⁹ Bianchi endorses this view, by raising the point that the traditional international machinery, namely, treaty-making, is incapable of producing international norms in a short period of time. Moreover, arriving to a general consensus in treaty-making most of the time leads to an ineffective treaty. Additionally, ratification and entering into force of a treaty is a lengthy process. The process of development of customary law is even longer. See, Bianchi, *supra* note 83 at 888.

⁹⁰ The negotiations on a draft comprehensive convention to combat international terrorism still continue in the General Assembly without being finalized. See UN document: A/69/37.

⁹¹ Eric Rosand, “Security Council as Global Legislator: Ultra Vires or Ultra Innovative” (2005) 28:3 Fordham ILJ 542 at 549.

Similarly, by adopting Resolution 1540, the Security Council filled the gap in the existing non-proliferation regimes: the *Chemical Weapons Convention*,⁹² the *Non-Proliferation Treaty*,⁹³ and the *Biological Weapons Conventions*,⁹⁴ which do not cover the situations of non-State actors acquiring WMD in detail.⁹⁵ Had the Security Council not adopted Resolution 1540 imposing a series of obligations on all States under Chapter VII, the General Assembly would have adopted multilateral instruments to be ratified by States and entered into force. Such a process would have been time-consuming and lasted many years. From this viewpoint, the Security Council action in adopting Resolution 1540 is a “welcome practical response to a pressing problem.”⁹⁶

Rosand’s argument goes on to say that the Security Council has broad discretionary powers in determining threats to peace under Article 39 of the Charter. Over the years, the Council has interpreted the threat to peace and security to include inter-State hostilities in addition to intra-State conflicts. In the post-September 11th era, the Council, by adopting Resolution 1373 and 1540, further broadened the concept of peace and security to encompass “global threats posed by non-State actors such as terrorists and terrorist organizations.”⁹⁷

According to Rosand, the text of Charter Article 41 covers any type of action not involving the use of force, which is addressed in Article 42. It provides for a negative definition, “measures not involving the use of armed force,” which is broad enough to enable the Council to choose the proper course of action.⁹⁸ The Council can, *inter alia*, impose obligations that prevail over States’ other international obligations, under the terms of Article 103 of the Charter. In so doing, the Council may

⁹² The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction was adopted by the General Assembly in December 1992. See, General Assembly Resolution 47/39.

⁹³ The Treaty on the Non-proliferation of Nuclear Weapons was opened for signature at London, Moscow and Washington D.C. on 1st July 1968 and entered into force on 7 March 1970.

⁹⁴ The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction was opened for signature on 7 April 1972 and entered into force on 26 March 1976.

⁹⁵ Rosand, *supra* note 91 at 551.

⁹⁶ *Ibid.*

⁹⁷ *Ibid* at 555.

⁹⁸ *Ibid.*

rely on existing rules, depart from them, or override such rules. This is equal to imposing “binding obligations of a legislative character on all States.”⁹⁹

Rosand concludes that by adhering to the Charter, Members of the United Nations have accepted the system wherein the Security Council acts on their behalf in discharging its functions with respect to the maintenance of international peace and security. Their consent is extended to each and every action that the Council may take for the maintenance of international peace and security, including “a formal lawmaking role via the adoption of binding resolutions.”¹⁰⁰

Proponents of the Security Council’s law-making functions rely on the ICJ’s opinion in the *Certain Expenses* case and advance the argument that the United Nations’ organs may take measures that are not explicitly provided for in the Charter in fulfillment of the purposes of the Organization, as enumerated in Article 1 of the Charter.¹⁰¹ It is also established that encroachments by an organ on the mandate of any other organ is not considered an *ultra vires* act on the part of the Organization.¹⁰²

Hulsroj advances a different argument in favour of Security Council law-making competency. He refers to Chapter VI of the Charter, which provides several mechanisms to be used by the Council in the pacific settlement of disputes. In his view, the Council can exercise these Chapter VII powers in situations where international peace and security is threatened. The Security Council can elevate any dispute resolution recommendations that it makes under Chapter VI “to become mandatory under Chapter VII.”¹⁰³

⁹⁹ *Ibid* at 559-60.

¹⁰⁰ *Ibid* at 574.

¹⁰¹ The ICJ confirmed this point in its advisory opinion on *Certain Expenses of UN*, in which the Court observed: "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. This principle of law was applied by the Permanent Court of International Justice to the International Labour Organization in its Advisory Opinion No. 13 of July 23rd, 1926 (Series B, No. 13 at 18), and must be applied to the United Nations." See, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Rep. at 182-183.

¹⁰² Expenses, *supra* note 1 at 168.

¹⁰³ Peter Hulsroj, “The Legal Function of the Security Council” (2002) 1:1 Chinese JIL at 67.

The above reasoning is based on the interrelationship between Articles 37 and 39 of the UN Charter. In cases where there is a threat to international peace and security, Article 37 empowers the Council with the capacity to both recommend terms of a settlement of disputes and make such requirements binding on the parties by its decision under Article 39.¹⁰⁴ This authority is extended to all disputes, irrespective of whether there exists an international norm covering a disputed area or not. Thus, Hulsroj concludes that “[t]he Security Council has been given legislative authority regarding settlement of conflicts in unregulated areas.”¹⁰⁵

Hulsroj opines that the Security Council can create “judge-made law,” and that the terms of settlement decided by the Council must not only be appropriate, but must also be in accordance with international law and justice. He writes that “[i]n the exercise of its political discretion in the making of new case law, the Security Council must remain within the boundaries of justice—must remain within the boundaries of ‘*ex aequo et bono*.’”¹⁰⁶ Hulsroj disagrees with the view that the authors of the Charter believed that “[p]eace was more important than progress and more important than justice.”¹⁰⁷ For him, the Charter has placed peace above the positive law but not above justice.¹⁰⁸

Although the Charter’s flexible language concerning the Security Council’s mandate does not bar the Council from making legal determinations, there are other factors that should be considered in analyzing the competency of this Organ to exercise abstract and general law-making. These factors are the subject of discussions in the following subsections.

¹⁰⁴ Charter Article 37, Paragraph 2 provides: “If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.”

¹⁰⁵ Hulsroj, *supra* note 103 at 61.

¹⁰⁶ *Ibid* at 63. The *ex aequo et bono* authorization, provided for in paragraph 2 of Article 38, has been interpreted to have empowered the Court to decide a case by a fair balancing of the interests of the parties. The ICJ in two cases concerning delimitation of maritime boundaries relied on the principle of equity (North Sea Continental Shelf case (1969) and Tunisia-Libya Continental Shelf case (1982). These judgments have been the subject of controversial analysis. Some authors have labeled these rulings as *ex aequo et bono*, but without authorization and have accused the Court to transgress its powers. Others have praised the Court for its application of the principles of equity (Encyclopedia of Public International Law, volume 7 at 76).

¹⁰⁷ Louis Henkin, Jeane Kirkpatrick & Stanley Hoffman, *Right V. Might: International Law and the Use of Force*, 2nd ed (Council on Foreign Relations, 1989) at 38.

¹⁰⁸ Hulsroj, *supra* note 103 at 62.

C. Specific Situations V. General Law-Making

Based on the past practice of the Security Council which was confined to consider specific situations threatening international peace and security, some scholars argue that the Council can only take up particular situations and make time-bound decisions relating to the question at hand. Accordingly, the Council may take legislative measures in response to a specific situation,¹⁰⁹ but it does not have the authority to legislate on a global basis. These scholars argue that Charter Article 41 does not cover obligations emanating from the Security Council's normative resolutions because they differ substantially from the measures listed in the Article. The obligations imposed on States in accordance with Resolutions 1373 and 1540 are similar to the "obligations entered into by States in international agreements."¹¹⁰

Elberling, for instance, opposes the arguments brought forward in support of the Security Council's legislative functions which are based on the interpretation of Articles 39 and 41.¹¹¹ In his view, Article 39 provides a clear indication that the Security Council is mandated to only deal with concrete situations, on the grounds that both of the terms "breach of the peace" and "act of aggression," refer to concrete situations.¹¹²

A similar conclusion can also be made from the text of Article 41. While the list of non-coercive measures in this Article is not exhaustive, it should not be construed as permitting all types of non-coercive measures as the list only contains measures that might be taken in dealing with concrete situations. The list does not include the creation of norms of general and abstract applicability. Other measures not specified in this Article should be similar to the measures listed therein. The establishment of the *ad hoc* Tribunals for Rwanda and the former Yugoslavia confirm

¹⁰⁹ The establishment of ICTY and ICTR by the Security Council are considered as law-making in specific situation, because the territorial and temporal scopes of these tribunals have been specified by the Security Council.

¹¹⁰ Talmon, *supra* note 77 at 181.

¹¹¹ Elberling, *supra* note 67 at 342.

¹¹² *Ibid.*

this viewpoint. These tribunals were mandated to try alleged criminals of defined crimes within a specified period of time in specified territories.¹¹³

Elberling observes that the exercise of legislative functions by the Security Council is a broad interpretation of the UN Charter that requires State acceptance. He distinguishes between States' *support* while adopting the Council's legislative measures, and States' *practice*, as defined in the *Vienna Convention on the Law of Treaties* (VCLT).¹¹⁴ Despite the unanimous adoption of Security Council Resolutions 1373 and 1540, Eberling questions the claims of widespread acceptance of the Council's legislative resolutions on the multiple grounds.¹¹⁵ First, the vote on Resolution 1373 took place at a time and in the political environment that prevailed following the September 11th attacks. The text of the resolution was circulated only one day before its adoption; virtually no time was left for deliberation before its adoption. Conversely, the text of SC Resolution 1540 was the subject of informal consultation, which led many delegations to express their doubts about the Council's legislative competencies.¹¹⁶ Second, States' reports to the Committees established under Resolutions 1373 and 1540 cannot necessarily be interpreted as implicit acceptance of the Council's competence to adopt these resolutions. "Such reports might be an acceptance only of the *goal* of combating terrorism, not of the *means* by which the Council has tried to reach this goal." Finally, actual State support for the Council's normative resolutions may not be realized without technical assistance to

¹¹³ The ICTY was mandated to prosecute persons responsible for serious violation of international humanitarian law committed in the territory of the former Yugoslavia since 1991; see, Security Council Resolution 808 (1993), para. 1. The ICTR was mandated to prosecute "persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994." e, SC Resolution 955 (1994) at para 1.

¹¹⁴ Article 31 (3)(b) of the VCLT provides in the interpretation of a treaty that "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into consideration.

¹¹⁵ State practice following the adoption of the normative resolutions of the Security Council is extensively dealt with in Chapter Five.

¹¹⁶ Marschik, *supra* note 82 at 475-480. For instance, Indonesia speaking on behalf of Non-Aligned Movement stated that "...legal obligations can only be created and assumed on a voluntary basis. Any far-reaching assumption of authority of the Security Council to enact global legislation is not consistent with the provisions of the United Nations Charter. It is therefore, imperative to involve all States in the negotiating process towards the establishment of international norms on the issue." See UN Doc: S/PV. 4950 at 30.

implement the obligations emanating from the normative resolutions.¹¹⁷ Thus, it is questionable how States can accept obligations that they cannot fulfill without assistance.

Rosand responds to the above arguments with the view that such a limitation does not appear in the text of the Charter, and applying such restriction would prevent the Council from taking “prompt and effective action” at a time of imminent threat to international peace and security that may neither be time-bound nor geographically limited.¹¹⁸

With reference to Article 1(1), Talmon adds that maintaining international peace and security includes both the removal and the prevention of threats to peace and security.¹¹⁹ In order to prevent such threats, the Council should employ “proactive” measures in addition to taking “reactive and remedial” steps. Proactive measures encompass both abstract and specific situations posing threats to peace and security.¹²⁰ While abstract threats require general measures, specific threats require measures commensurate with the particular circumstances creating them.

Talmon agrees with the view that the list of measures contained in Article 41 is not exhaustive and does not limit the Council’s ability to adopt measures not specified therein. Moreover, the term “measures” is wide enough to include specific, general and abstract measures. The appeals chamber of the ICTY confirmed this interpretation in the *Tadic* case:

It is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve “the use of force.” It is a negative definition.¹²¹

¹¹⁷This point has been endorsed by World Summit Outcome, *supra* note 44 at para 88, which provides “We urge the international community, including the United Nations, to assist States in building national and regional capacity to combat terrorism. We invite the Secretary-General to submit proposals to the General Assembly and the Security Council, within their respective mandates, to strengthen the capacity of the United Nations system to assist States in combating terrorism and to enhance the coordination of United Nations activities in this regard.”

¹¹⁸ Rosand, *supra* note 91 at 545.

¹¹⁹ Talmon, *supra* note 77 at 181.

¹²⁰ *Ibid.*

¹²¹ *Tadic*, *supra* note 77.

The ICTY also considered the relationship between UN Charter Articles 39 and 41 and observed that:

Article 39 [which provides that the Security Council shall decide what measures shall be taken in accordance with Article 41 to maintain or restore international peace and security] leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations.¹²²

In sum, though mainstream lawyers express divergent views on the exercise of law-making function by the Security Council, they advise that the Council should exercise such a function with due diligence, taking into considerations the obligations of the United Nations as a subject of international Law.

D. The Security Council and Individuals

As pointed out in Subsection C, the law-making activities of the Security Council are mainly discussed under Article 41 of the Charter, which does not specify against whom the measures therein should be directed. Based on the past practice of the Council, it is presumed that measures taken under Article 41 should be directed against a State or States whose conduct has been determined to be a threat to international peace and security under Article 39.¹²³ Security Council Resolution 748 (1992) is a clear example in this regard. The sanctions imposed under this resolution were directed against the Libyan Arab Jamahiriya.¹²⁴

The Security Council established two *ad hoc* tribunals in the 1990s and mandated them to try individuals accused of the commission of crimes of international concern.¹²⁵ In the same period, the Council also began to employ "targeted" or "smart" sanctions against persons or groups of persons deemed to be a threat to peace and security. In its fight against terrorism and for the non-proliferation

¹²² *Ibid* at para 39.

¹²³ Roberto Lavallo, "A Novel, If Awkward, Exercise in International Law-Making: Security Council Resolution 1540 (2004)" (2004) 51:3 Netherlands ILR at 413.

¹²⁴ Lavallo, *supra* note 123 at 413.

¹²⁵ ICTY and ICTR.

of weapons of mass-destruction, the Council progressively imposed sanctions against designated individuals, including financial restrictions and travel bans.¹²⁶

The application of sanctions against individuals which directly affect individuals' rights and obligations marks a shift in the practice of the Security Council, which has been elaborated on by many scholars.¹²⁷ The lack of transparency in making proposals for listing designated individuals and entities, and problems relating to due process, in particular the right to be heard and the right of review by an independent body,¹²⁸ remain unresolved to date.¹²⁹

In an attempt to address these problems, Nicolas Michel¹³⁰ presented four basic elements to serve as minimum standards in the imposition of sanctions against individuals. First, a person against whom measures have been taken by the Council has the right to be informed of the measures as soon as possible. Second, such a person has the right to have his or her defence heard by the relevant decision-making body within a reasonable time. This right should include direct access to the decision-making body, as well as the right to be assisted or represented by counsel. Time limits should be set for consideration of the case. Third, such a person must have the right of access to an effective review mechanism. This mechanism should be independent and impartial and have the ability to provide effective remedies, including the lifting of sanctions and the awarding of compensation. Fourth, the Security Council should periodically review sanctions targeted at individuals, especially the freezing of assets and those related to human rights.¹³¹

The 2005 World Summit Outcome sought similar improvements to the Security Council's procedures relating to the imposition, review, and lifting of sanctions against individuals. World

¹²⁶ Talmon, *supra* note 77 at 176.

¹²⁷ *Ibid* at 414.

¹²⁸ Droubi, *supra* note 2 at 43.

¹²⁹ As late as December 2015, Security Council Resolution 2253 (2015) identified additional category of individuals for blacklisting in relation to its fight against ISIS.

¹³⁰ Nicolas Michel was Under-Secretary-General and the Legal Counsel of the United Nations from 2004 until 2008.

¹³¹ See, Statement by Under-Secretary-General for Legal Affairs, Nicolas Michel, in 5474th meeting of the Security Council, 22 June 2006. Rule of Law, *supra* note 81 at 5.

leaders called upon the Security Council to ensure that "fair and clear" procedures would apply to listing and de-listing of individuals and entities while imposing targeted sanctions.¹³²

Thereafter, the Security Council adopted several resolutions taking into consideration the recommendations of the 2005 World Summit Outcome. Resolution 1730 (2006) focused on strengthening procedural safeguards to protect the rights of individuals by establishing a focal point to receive de-listing requests and also by adopting specific procedures to govern the handling of de-listing requests.¹³³ Resolution 1735 (2006) further amended procedures for listing and de-listing, including a provision for informing persons of their designation on a list and outlining criteria to be considered in a de-listing request. These are clear indications that the Security Council's earlier decisions had shortcomings and thus the Council has implicitly acknowledged that its earlier decisions were somewhat flawed.¹³⁴ Nonetheless, improvements made by the Council to the listing and de-listing procedures have not been convincing to a number of States who have presented proposals for further enhancement to the procedures.¹³⁵

E. Legal Value of the Normative Resolutions

It is noteworthy to recall that the Security Council's normative resolutions generally refer to those resolutions that create or modify norms of international law. The normative resolutions are usually adopted under Chapter VII of the Charter and are widely considered to bind all States, irrespective of their involvement in the cases before the Council. However, a close look at these normative resolutions demonstrates that they are not drafted in a uniform format and the diverse language employed carries

¹³² World Summit Outcome Document, *supra* note 44 at para 109.

¹³³ In a letter dated 29 March 2007, Secretary-General Ban Ki-Moon confirmed that the focal point to receive de-listing requests had been created. UNSCOR, UN Doc S/2007/178 (2007).

¹³⁴ See the report of Informal Working Group of Security Council on General Issues of Sanctions. *Note by the President of the Security Council*. UNSCOR, UN Doc S/2006/997 (2006) at Annex. This report contains several recommendations to improve the imposition, monitoring and implementation of sanctions.

¹³⁵ In a letter dated 27 May 2008 addressed to the president of the Security Council, Denmark, Germany, Liechtenstein, the Netherlands, Sweden and Switzerland proposed that "an expert panel" be established to assist the sanctions Committees in the consideration of de-listing requests. See, *Identical letters dated 23 June 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the President of the General Assembly and the President of the Security Council*. UNGAOR, 62nd sess, UN Doc A/62/891 (2008); UNSCOR, 63rd Year, UN Doc S/2008/428 (2008).

different legal weight. Some of these resolutions create new international standards that directly bind States while others use language extracted from treaties, thereby purporting to extend the obligations arising out of these instruments to non-party States. Further still, some resolutions call on all States to ratify specified treaties. Views of some of scholars concerning legal value of the normative resolutions are discussed below.

(i) Normative Resolutions Are Not General Principles of International Law

Hulsorj discusses the precedential effects of the Security Council's decisions. In his view, though the Council's decisions in making new law apply only to the specific case before the Council, they nevertheless have precedential effects. In some respects, the value of the normative resolutions is "much stronger than that of judgments of the ICJ."¹³⁶ He argues that the Security Council's law-making decisions are "the most efficient and powerful manifestation of the legal orientation of the international community," which would be "certified" through the formal sources of international law as laid down in Article 38 of the ICJ Statute. In cases where the Council decides on a settlement of disputes in an unregulated area of international law and without the complications of the veto-power, the solution provided by the Council is likely to be regarded as a "general principle of law."¹³⁷

The above view also applies to the decisions of the Security Council in areas regulated by international law, where the Council deviates from existing norms. "The deviation becomes new law, as a customary rule or "general principle of law,"¹³⁸ or at least provides a "strong indication" that the existing norm is "weakening, and very likely [is] in a process of change."¹³⁹

¹³⁶ Hulsorj, *supra* note 103 at 69.

¹³⁷ *Ibid.*

¹³⁸ There are different interpretations of "general principles of law," referred to in Article 38 (1)(c) of the ICJ Statute. Some scholars interpret it as general principles of *international law*, others define it as general principles of *national law*. It has also been suggested that these principles should cover, both, national and international principles, as some of them, like sovereign equality of States is not certainly derived from national law. See, Karl Zemanek, "Basic Principles of UN Charter Law" in Ronald St. John Macdonald & Douglas M. Johnston, eds, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden-Boston: Martinus Nijhoff Publishers, 2005) at 402.

¹³⁹ Hulsorj, *supra* note 103 at 69

However, the situation becomes more complex when a settlement is made under “the usual Great Power tug-of-war.” Under these conditions, even if a solution provided by the Council fits within the parameters of justice, there is no guarantee that in similar circumstances the Council would arrive at the same conclusion. In these situations, the solution provided by the Council would have the effect of law-making on an *ad hoc* basis, which would apply only to the specific dispute before the Council.¹⁴⁰

Hulsorj refers to the Security Council’s decisions on *The Situation between Iraq and Kuwait*, in which the Council adopted more than 50 resolutions, acting as both judge and legislator. By condemning Iraq for its invasion of Kuwait and demanding the withdrawal of Iraqi forces from Kuwait, the Council acted as judge in the conflict.¹⁴¹ It also acted as judge by establishing Iraq’s responsibility “under international law,”¹⁴² and deciding upon the “comprehensive remedies scheme.”¹⁴³ Hulsorj concludes that, when the Security Council decides to act, its action becomes the equivalent of a judicial decision.¹⁴⁴

In this case, the Security Council also acted as legislator when it determined that Iraq was responsible for all harm caused in the conflict, including environmental damage. The Council’s determination that Iraq was responsible for the conflict’s environmental damage was novel, in the sense that “the Security Council expanded the generally valid principle of restitution” to an area that this principle had not been previously applied.¹⁴⁵ Under Resolution 687 (1991), the Security Council reaffirmed that Iraq “is liable under international law for any direct loss, harm—including environmental damage and depletion of natural resource”¹⁴⁶

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid* at 71; See, SC Res 660, UNSCOR, 2932nd mtg, UN Doc S/Res/660 (1990) at paras 1-2.

¹⁴² See, SC Res 687, UNSCOR, 2981st mtg, UN Doc S/Res/687 (1991) at para 16 [687].

¹⁴³ Hulsorj, *supra* note 103 at 73. *See also*, 687, *supra* note 142 at para 18. Hulsorj describes the opposition by Yemen and Cuba in the course of adoption of Security Council resolutions as purely political move. The argument advanced by the two States was that the Security Council did not act in all incidents of unlawful use of force.

¹⁴⁴ Hulsorj, *supra* note 103 at 74.

¹⁴⁵ *Ibid*, at 76.

¹⁴⁶ See, 687, *supra* note 142 at para 16.

The compensation fund established by the Security Council in this case also purported to establish new international standards with respect to the settlement of disputes.¹⁴⁷ The Governing Council of the fund has been given the authority to determine a large number of issues related to the treatment of claims. It has determined that a State can submit claims on behalf of its residents, in addition to its citizens. This is a departure from classical norms applicable in the case of diplomatic protection.¹⁴⁸

The main shortcoming of Hulsorj's discussion is that he focuses on the Council's legal determinations in the specific case of Iraq-Kuwait. As discussed in earlier pages, however, mainstream lawyers make the distinction between decisions that apply only to specific situations and those that have abstract and general language. Additionally, legal determinations by the Security Council cannot be labeled as "general principles of law," as these principles have their origins in national laws and have been recognized as "general Principles." Thus, describing a decision of the Security Council with legal implication as "general principles," is misleading.

(ii) Normative Resolutions Are Not Derivative Treaties

Talmon rejects the contention that the Statute of the International Court of Justice (the "Statute") does not recognize legislative resolutions as a source of international law. In his view, the Security Council's resolutions are based on the United Nations Charter which is an international convention in the sense of Article 38(1)(a) of the ICJ Statute. He thus classifies Security Council's normative resolutions as "secondary treaty (or Charter) law."¹⁴⁹

It seems, however, imprudent to compare the concept of derivative treaties with Chapter VII resolutions because the Charter does not have any provisions on derivative treaties. It is important to recall that some treaties contain provisions concerning additional norm-making within the framework

¹⁴⁷ *Ibid* at para 18.

¹⁴⁸ Hulsorj, *supra* note 103 at 79.

¹⁴⁹ Talmon, *supra* note 77 at 179.

of the treaty or otherwise provide for modalities of amending the treaty in question. In most cases, additional or altered provisions require the consent of States' parties. In some cases, however, additional norms created in accordance with the provisions of the original treaty directly bind the parties, for which separate consent is not required.¹⁵⁰ From the legal point of view, the term "derivative treaty obligations" is based on the consent of parties that have agreed to be bound by the obligations created by the original treaty provisions.¹⁵¹

However, as discussed earlier, the UN Charter does not have provisions similar to those in other international instruments that provide for derivative treaties, nor has it a provision concerning its interpretation. Any amendment to the Charter requires ratification by two-thirds of the Members States of the Organization, including ratification by the Permanent Members of the Security Council. Thus, labelling the normative resolutions as derivative treaties lacks legal justification.

(iii) Normative Resolutions Under Certain Circumstances Are *Ultra Vires* Acts

Elberling argues that the Security Council, in producing norms of general and abstract character, acts *ultra vires*¹⁵² on a number of grounds.¹⁵³ First, the United Nations does not have a true legislative body despite the fact that all Member States are represented in the General Assembly, and even with the Assembly's clear mandate concerning the progressive development of international law and its codification¹⁵⁴. Even if the Assembly adopts draft treaties, they are recommendations of a nature which require States' ratification to enter into force. *A priori*, the Security Council with its limited membership is not a law-making organ.

¹⁵⁰ For instance, the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (1994) has provided for a simplified procedure of becoming bound by the agreement. Under Article 5 of the agreement, States parties to Convention on the Law of the Sea, which had signed the agreement, were presumed to have accepted to be bound by the agreement, unless they notify the depositary to the contrary (Article 5).

¹⁵¹ Paul Szasz, "General Law-Making Process," in Oscar Schachter & Christopher C. Joyner, eds, *United Nations Legal Order*, vol II (Cambridge: Cambridge University Press, 1995) at 41.

¹⁵² The *Ultra vires* concept at the national level refers to acts or decisions that are adopted "outside or beyond the scope of the powers" of a decision making body. It is mainly used in domains of constitutional, administrative and corporate laws, and national legal systems have produced substantive rules and procedures to address questions relating to the "nullity and validity" of *ultra vires* acts at the national level. See, C. F. Amerasinghe, *supra* note 70, at 193.

¹⁵³ Elberling, *supra* note 67 at 340.

¹⁵⁴ See, Charter Article 13(1)(a).

Second, while the Security Council possesses a large margin of discretion in the application and interpretation of Chapter VII, its powers are not unlimited. The Council must respect the boundaries of its powers as prescribed in the UN Charter and must comply with norms of general international law.¹⁵⁵

Elberling opposes the arguments brought forward in support of the legislative functions of the Security Council based on the interpretation of Articles 39 and 41. In his view, Article 39 provides a clear indication that the Security Council is mandated to deal only with concrete situations.¹⁵⁶ Elberling makes a similar interpretation of the text of Article 41. While the list of non-coercive measures in this Article is not exhaustive, it should not be construed as permitting any type of non-coercive measure. The Article's list is limited to measures that could be taken in dealing with concrete situations, but it does not cover producing norms of general and abstract applicability.¹⁵⁷

As a follow-up to his argument of the *ultra vires* nature of normative resolutions, Elberling questions the validity of the presumption-of-legality theory. According to this theory as articulated by the ICJ in the *Certain Expenses* case, the acts of UN organs are presumed valid until proven *ultra vires*.¹⁵⁸ Elberling argues that while there is no consensus on this question available in literature, it seems that "minor procedural defects" are not sufficient for invalidating the actions of the United Nations' Organs. However, in cases where the measure in question falls outside the competence of the organization in question, the theory of validity of the organizations' acts cannot be defended.¹⁵⁹

¹⁵⁵ Limits to the powers of the Security Council are discussed extensively in the next section.

¹⁵⁶ Elberling, *supra* note 67 at 342.

¹⁵⁷ *Ibid.*

¹⁵⁸ See, *Expenses*, *supra* note 1 at p. 168.

¹⁵⁹ In its advisory opinion delivered on the question of "Legality of the Use by a State of Nuclear Weapons in Armed Conflict,"¹⁵⁹ requested by the Assembly of the World Health Organization,¹⁵⁹ the Court did not give an advisory opinion and observed that "the question raised in the request for an advisory opinion submitted to it by the WHO does not arise within the scope of [the] activities of that Organization as defined by its Constitution."¹⁵⁹ Though it did not explicitly declared that the resolution was an *ultra vires* act, but referred to the likelihood of the adoption of the resolution beyond the authority of the Assembly, and observed that, "The mere fact that a majority of States, in voting on a resolution, have complied with all the relevant rules of form cannot in itself suffice to remedy any fundamental defects, such as acting *ultra vires*, with which the resolution might be afflicted."

¹⁵⁹ *ICJ reports*, 1996 at 81-82.

Similarly, Security Council' resolutions that violate the principles contained in its constitutive instrument or peremptory norms of international law are *ultra vires*. This aspect is clarified below

IV. Limits on Security Council Decision-Making

International organizations are founded through constitutive instruments usually composed in the form of agreements among States. Accordingly, IOs are bound by their constitutive instruments as well as by general international law.¹⁶⁰ As Reinisch observes, the “functionalist” conceptual framework of international organizations has gradually been supplemented by a “constitutional approach” in international organizations scholarship. Under the latter concept, international organizations are no longer considered convenient forums which facilitate inter-States cooperation. Rather, they have become powerful actors in international relations whose acts need to be checked by the rule of law.¹⁶¹ Therefore, IOs must make every effort to secure the lawfulness of their decisions and actions, which must be in conformity with their constitutive instruments and international law standards.¹⁶²

Despite the general rules above which apply to the activities of all IOs, some scholars have argued that powers of the Security Council are political in nature, and provide the Council with a considerable amount of discretion in its decision-making.¹⁶³ Kelson, for instance, argues that the Security Council's mandate is to preserve the peace and not to enforce the law.¹⁶⁴ However, this view has been rejected by the ICJ, which has repeatedly maintained that the political nature of an organ

¹⁶⁰ T. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995) at 218–220; Reinisch, “Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions” (2001) 95:4 AJIL at 858; E. Lauterpacht, *The Legal Effect of Illegal Acts of International Organizations* (1965) at 89; Gerhard Hafner, “Accountability of International Organizations—A Critical View” in Ronald St. John Macdonald & Douglas M. Johnston, eds, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden-Boston: Martinus Nijhoff Publishers, 2005) at 585–630; Tzanakopoulos, *supra* note 72 at 57. The International Court affirmed that international organizations are bound by general international law in *WHO Regional Office* [1980] ICJ Rep 90. See also, M. Shaw and K. Wellens, *Third ILA Report on Accountability of International Organizations* (2002) at 11–13.

¹⁶¹ August Reinisch, *Challenging Acts of International Organizations Before National Courts* (Oxford-New York: Oxford University Press, 2010) at 273.

¹⁶² Alexander Orakhelashvili, “The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions” (2005) 16:1 EJIL at 60.

¹⁶³ Tzanakopoulos, *supra* note 72 at 54.

¹⁶⁴ K. Kelsen, *The Law of the United Nations* (New York-Washington: Frederick A. Praeger Publishers, 1950) at 294.

does not exempt it from observing international standards that limit its powers or should be the basis for its decisions.¹⁶⁵ The International Criminal Tribunal for the former Yugoslavia also endorsed this view in the *Tadic* case by observing that the Security Council was not “*legibus solutes*.” In accordance with the ICTY judgment, “neither the text nor the spirit of the Charter conceives of the Security Council as unbound by law.”¹⁶⁶

In his separate opinion in the *Lockerbie* case, Judge Jennings of the ICJ, elaborates on this point by affirming that both inputs and outputs of the Security Council activities should be based on international law:

[A]ll discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law, and at the same time, claim to be above the law.¹⁶⁷

The President of the Security Council, in the process of adopting Resolution 1483 (2003), acknowledged that the powers of the Security Council should be exercised in conformity with the principles of justice and international law:

Council’s powers are not open-ended or unqualified. They should be exercised in ways that conform with ‘the principles of justice and international law’ mentioned in Article 1 of the Charter, and especially in conformity with the Geneva Conventions and the Hague Regulations, besides the Charter itself.¹⁶⁸

Based on the premise that the Security Council is bound by law, scholars have elaborated on the margins of the Security Council’s powers, including its law-making competencies. As discussed below, the limitations of the Security Council’s powers include the purposes and principles of the

¹⁶⁵ Admission case, *ICJ Reports*, 1947-1948 at 64. In its advisory opinion on *Namibia* case, though the ICJ interpreted the Council’s powers in a broad sense, it reiterated that the Council was subject to legal standards. Again in its advisory opinion on the *Legality of the use by a State of nuclear weapons in armed conflicts*, the Court observed that “international organizations . . . do not, unlike States, possess a general competence. International organizations are governed by the ‘principle of specialty’, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.” See, *ICJ Reports*, 1996 at para 25. See, also, Hafner, *supra* note 160 at 606.

¹⁶⁶ *Tadic*, *supra* note 75 at paras 20–28.

¹⁶⁷ *ICJ Reports*, 1998 at 110.

¹⁶⁸ UNSCOR, 58th Year, 4761st mtg, UN Doc S/PV.4761 (2003) [provisional] at 11–12.

Charter, general international law,¹⁶⁹ in particular the peremptory norms of international law,¹⁷⁰ and human rights and international humanitarian law.

A. Purposes and Principles of the Charter

The Security Council is bound by the Charter,¹⁷¹ which as the constitutive instrument of the Organization, serves as a “constitutional framework” for the operations of the UN Principal Organs, including the Security Council.¹⁷² Most notably, the Council is obligated pursuant to the express language of paragraph 2 of Article 24 to observe the purposes and principles of the Charter as defined in Article 1, which include both the maintenance of international peace and security and the promotion of respect for human rights. The General Assembly and the Council have frequently emphasized that these imperatives do not pull in opposite directions.¹⁷³ In the *Certain Expenses* case, the ICJ observed that the purposes of the United Nations as set forth in Article 1 of the Charter are broad, but at the same time the Court clarified that the purposes were not unlimited, nor were the powers conferred on the Organization to effectuate these purposes limitless.¹⁷⁴

Nowadays, the notion that Article 25’s phrase “in accordance with the present Charter” also applies to Security Council decisions is gaining momentum, in particular with those scholars who view the Charter as the constitution of the United Nations. Under this view point, States are not bound by resolutions contravening the Charter—resolutions that are adopted in violation of the principles and purposes of the Charter.¹⁷⁵

¹⁶⁹ Hafner, *supra* note 160 at 602.

¹⁷⁰ Droubi, *supra* note 2 at xvii.

¹⁷¹ See, *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)*, Advisory Opinion, [1948] ICJ Rep at 57; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the Former Yugoslavia Appeals Chamber, 2 October 1995, IT-94-1-AR72 at para 28.

¹⁷² Steven Wheatley, “The Security Council, Democratic Legitimacy and Regime Change in Iraq” (2006) 17:3 EJIL at 538.

¹⁷³ See, GA Resolution 60/288.

¹⁷⁴ *Expenses*, *supra* note 1 at paras 167-168.

¹⁷⁵ Droubi, *supra* note 2 at 10. As for the question, who reviews the Security Council resolutions consult Chapter Six of the thesis.

B. Peremptory Norms of International Law

Peremptory norms of general international law (*jus cogens*) are the norms that have been accepted and recognized as such by the international community and from which no derogation is permitted.¹⁷⁶ It is a well-established principle of the law of treaties that a treaty concluded in violation of a peremptory norm is invalid at the time of its conclusion.¹⁷⁷ Thus, treaties, including the constitutive instruments of international organizations, cannot override international norms that have been recognized as *jus cogens*. It follows from this principle that international organizations, including the Security Council, that have been established in accordance with and deriving their powers from international treaties, cannot make decisions in contravention of peremptory norms.¹⁷⁸ Orakhelashvili is assertive in stating that “*jus cogens* is an inherent limitation on any organization’s powers.”¹⁷⁹

Article 25 of the *Draft Articles on the Responsibility of International Organizations* confirms that peremptory norms of international law bind international organizations as they do States.¹⁸⁰ The commentary on Article 26 on the *Responsibility of States for Internationally Wrongful Acts* identifies the following norms as clearly accepted and recognized as peremptory norms: the prohibition of

¹⁷⁶Peremptory norms are explained in doctrine by their links to morality. These norms safeguard the international community’s interests as opposed to individual States, and they possess absolute value. See, Black’s Law Dictionary, Eighth Edition, at 876. As for the meaning and operation of *jus cogens*, see *Oppenheim’s International Law*, 8th ed, (New York: Longmans, Green, 1955) at 8-9.

¹⁷⁷ Articles 53 of the 1969 *Vienna Convention on the Law of Treaties* and 1986 *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*. By virtue of Article 64 of these Conventions, an existing treaty that conflicts with an emergent peremptory norm terminates from the date of emergence of the rule.

¹⁷⁸ Pellet believes that the Council is bound by the purposes and principles of the Charter, as well as with the peremptory norms of international law. Imaging other limitations to the Council is not appropriate, because it would have the effect of rendering the Council’s decisions “wishful thinking.” See, Simon Chesterman & David A. Jordan, “The Security Council as World Legislator? Theoretical and Practical Aspects of Law-Making by the Security Council” Discussion Paper Based on Panel 1 of the series “The Role of the Security Council in Strengthening a Rules-Based International System” (NYU School of Law: Institute for International Law and Justice, 2004) at 3.

¹⁷⁹ Orakhelashvili, *supra* note 162 at 60. This view has also been endorsed by Peter Hilpold, “UN Sanctions before the ECJ: The Kadi Case” in Reinisch, *supra* note 161 at 28; see also, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, [2007] ICJ Rep. at 325, Separate Opinion of Judge Lauterpacht at para 100 [Bosnia]; A/CN.4/L.778, International Law Commission, *Draft Articles on the Responsibility of International Organizations*, article 26 (30 May 2011); Talmon, *supra* note 77 at 68; Tadic, *supra* note 77 at para 296; *Abdullah Kadi and Al Barakaat Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 at para 230; *Al-Jedda v. United Kingdom*, Application no. 27021/08, Judgement, 7 July 2011 (Grand Chamber) and *Her Majesty’s Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants)* [2010] UKSC 2.

¹⁸⁰ This Article replicates Article 26 of draft articles on the “Responsibility of States for Internationally wrongful Acts.”

aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.¹⁸¹

Orakhelashvili discusses reasons as to why peremptory norms are binding on the Security Council. First, some of the peremptory norms such as the prohibition of the threat or use of force, and the right to self-determination and respect for human rights, are cited among the purposes and principles of the United Nations' Charter. These norms are binding on the Security Council because the Council, as a Principal Organ of the United Nations, cannot violate the purposes and principles of the organization.¹⁸² Though not all human rights norms are considered peremptory norms of international law, Orakhelashvili has a point to make by indicating that the Security Council should respect human rights, as they are cited among the purposes and principles of the Charter and are binding to the Security Council, as stipulated by the ICJ. Second, peremptory norms directly bind the United Nations including the Security Council because, international organizations, like States, are subjects of international law. Peremptory norms are non-derogable by any subject of international law, be it a State or an international organization. The *Vienna Convention on the Law of Treaties* of 1986 confirms this point.¹⁸³ Third, peremptory norms are binding on the Security Council by way of the interplay between the Charter and the VCLT (1969). Under the Vienna Convention, States are obligated to not conclude treaties which violate peremptory norms. Treaties violating peremptory norms are null and void.¹⁸⁴ As a consequence, the Charter,¹⁸⁵ or its operation by any Organ of the United Nations, should in no way lead to the violation of a peremptory norm.

(i) Inapplicability of UN Charter Article 103 to *Jus Cogens* Norms

¹⁸¹ *Yearbook of the International Law Commission*, 2001, Vol II (Part Two) at 84.

¹⁸² Orakhelashvili, *supra* note 162 at 67.

¹⁸³ See, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986, Articles 53 and 64.

¹⁸⁴ *Ibid* at Article 53.

¹⁸⁵ The UN Charter is a multilateral treaty in the sense of Article 38 (1)(a) of the ICJ Statute.

Based on Article 103 of the UN Charter, which provides that States' Charter obligations prevail over their obligations under any other international agreement, some commentators argue that Security Council resolutions adopted under Chapter VII, including its normative resolutions, prevail over *any other international obligation* of States. This question has been brought before international tribunals, where obligations emanating from Article 103 have been interpreted differently.

In the *Lockerbie* case,¹⁸⁶ Libya regarded Security Council Resolution 748 as “contrary to international law” and attested that the Council had employed Chapter VII powers as an excuse not to apply the provisions of the Montreal Convention relating to the prosecution of crimes committed against safety of civil aviation.¹⁸⁷ In Libya's view, Article 14 of the Convention was applicable in the case, under which the parties were committed to refer their disputes concerning interpretation and application of the Convention to an arbitration tribunal.¹⁸⁸ Moreover, Libya argued that the prosecute or extradite¹⁸⁹ principle had been accepted under the Convention and it was prepared to proceed with the trial of the alleged criminals. However, the Court accepted the United Kingdom and the United States' arguments that Resolution 748 was binding on all parties and that in accordance with Charter Article 103, prevailed over States' other international obligations.¹⁹⁰

The Court also considered, in the *Lockerbie* case, the question whether “any other international obligations of States,” cited in Article 103, also extended to obligations arising from, *customary obligations and States' rights*. However, the Court did not express any opinion on the matter.

In the case above, Bedjaoui argued that it was a *right* under Article 7 of the Montreal Convention to “extradite or prosecute” and that Security Council resolutions cannot surpass this.¹⁹¹

¹⁸⁶ *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)*, [1998] ICJ Rep [Lockerbie].

¹⁸⁷ ICJ Reports, 1992 at para 36.

¹⁸⁸ *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 23 September 1971, Montreal, Canada, UNTS at Article 14.

¹⁸⁹ *Ibid* at Article 7.

¹⁹⁰ *Ibid* at 39. The ICJ, without addressing the Libyan argument, declared that it was inappropriate to issue interim measures of protection as requested by Libya. The Court did not find an opportunity to examine the Libyan contention at a later stage, because the cases were withdrawn from the Court by the agreement of the parties. [2003] ICJ Rep, orders dated 10 September 2003.

¹⁹¹ *Lockerbie*, *supra* note 186 at 148.

However, the International Court of Justice with reference to the Torture Convention observed that “extradite or prosecute” was an *obligation* under the treaty, which could be superseded by Security Council resolutions.¹⁹² Consequently, Bedjaoui in his dissenting opinion argued that Article 103 neither applies to *rights* nor prevails over *customary law*.¹⁹³ However, other scholars have questioned the view that Article 103 applies only to treaties on the grounds that treaties and customary law have the same status under the doctrine of sources. Thus, they conclude that Article 103 also supersedes customary obligations.¹⁹⁴

Despite divergent views among scholars over the application of Charter Article 103 to customary obligations and rights, the inapplicability of Article 103 to peremptory norms is widely accepted. International Court of Justice Judge Lauterpacht, in the *Bosnia* case, opined that the prevalence of States’ Charter obligations over any other obligation, embedded in Article 103, was not absolute and did not apply to all circumstances. In his view, the relief that Article 103 may give to the Security Council in case of a conflict between one of its decisions and an operative treaty obligation, cannot be extended to a conflict between a Security Council resolution and norms of *jus cogens* nature. This is a matter of simple hierarchy of norms.¹⁹⁵ It must be noted further that Article 103 accords precedence to States’ Charter obligations, but is silent on the Security Council’s obligations under international law. It is thus argued that the operation of Article 103 is limited to situations where the Security Council is interpreting obligations of Member States, and does not exempt the Security Council from following general international law.¹⁹⁶

It must be added in this regard that a human rights clause has been embedded in the constitutions of many countries, and that the prevalence of Charter obligations to any other

¹⁹² *Question Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, [2012] ICJ Rep at 94.

¹⁹³ Lockerbie, *supra* note 186 at 3.

¹⁹⁴ D. Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (The Hague-Boston: Kluwer, 2001) at 195-196.

¹⁹⁵ See, [1993] ICJ Rep at 325 and 440.

¹⁹⁶ Tzanakopoulos, *supra* note 72 at 75.

international obligation is not extended to constitutions of States.¹⁹⁷ In *A, K, M, Q and G v H.M. Treasury* case, for instance, applicants claimed that the right to be heard and the right to effective judicial review were rights under UK and European Community laws, and thus Charter Article 103 obligations could not supersede these rights. The UK's High Court accepted the applicants' argument and observed that "[t]hese fundamental rights are not conferred only by Article 6 of the ECHR but are rights which have for long existed under Common Law."¹⁹⁸

(ii) Possibility of Conflict between Normative Resolutions and *Jus Cogens* Norms

Orakhelashvili examines the practice of the Security Council with a view toward determining whether there has actually been a normative conflict between a Security Council resolution and peremptory norms. He explains that a conflict may arise from the wording of a resolution or from its effects and results, creating conflicting rights and obligations for States. His findings confirm that normative conflict between Security Council resolutions and *jus cogens* norms is a possibility, and it may arise, *inter alia*, in the following scenarios.

First, there are a number of cases where action or inaction by the Council has been interpreted as condoning a State's use of force which infringes a peremptory norm of international law.¹⁹⁹ A clear example is the adoption of Resolutions 731 (1992) and 748 (1992), which demanded that Libya extradite two suspects in the *Lockerbie* case to the United States or the United Kingdom. Under these resolutions, the Security Council imposed air and arms embargo on Libya to induce it to comply with its demands. Simultaneously, the US and the UK threatened to use force against Libya if it failed to meet the extradition demands.

¹⁹⁷ Finnur Magnusson, "Targeted Sanctions and Accountability of the United Nations' Security Council" (2008) 13:1 *Austrian Rev Int'l & EL Online* at 20

¹⁹⁸ *A, K, M, Q & G v HM Treasury*, [2008] EWHC 869 (Admin), [2008] EWCA Civ 1187 at para 33.

¹⁹⁹ *Ibid* at 59-88.

In the course of oral hearings before the ICJ, Brownlie, Libya's counsel, argued that there has been "a pattern of threats" by US and UK officials to use force against Libya, and that the terminology employed by them was "repetitive and consistent" and antedated the adoption of the Security Council resolutions. It remains to be determined whether these resolutions "were retroactive in effect or could have the effect of validating the threats in any case."²⁰⁰

It is important to note that Security Council Resolution 748 (1992) while referring to Charter Article 2, paragraph 4, selectively highlights the duty of States "to refrain from organizing, instigating, assisting or participating in terrorist acts in another State" but avoids referring to the prohibition of the use or threat of force in general, to avoid opposing the threats by the US and UK. Similarly, by its Resolution 1546 (2004), the Security Council endorsed an ethnic power-sharing government in Iraq under the authority of the occupying powers, without any active participation by the Iraqi people or their freely elected representatives, and in contravention of Iraq's right to political self-determination²⁰¹—a peremptory norm of international law.²⁰²

Second, the Security Council's inaction when breach of a *jus cogens* norm occurs has been the subject of controversial discussion. Orakhelashvili refers to NATO military action against the Federal Republic of Yugoslavia in 1999, when the Council did not take action on the draft resolution presented by Russia, China, and India condemning the armed attack against Yugoslavia.²⁰³ Moreover, the Security Council has been blamed for being passive in the case of commission of the Rwandan

²⁰⁰Statement by Ian Brownlie, Council for the Libyan Arab Jamahiriya in the *Lockerbie* Case, Doc: LUK/LUS/CR9721 at para 92. This document is online and available on the website of the ICJ.

²⁰¹Wheatley, *supra* note 172 at 541.

²⁰²In *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, the International Court of Justice reaffirmed its position that the principle of self-determination of peoples is now clearly recognized as a 'right' of peoples: 'a right *erga omnes*.' See, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep at para 88. The right of peoples to self-determination is also recognized as a norm of *jus cogens*. See, Commentary on Art. 26(5) of the International Law Commission's Draft Articles on State Responsibility, with Commentaries, *Report of the International Law Commission*. UNGAOR, 53rd sess, supp 10, UN Doc A/56/10 (2001) at 59.

²⁰³Orakhelashvili, *supra* note 162 at 73.

genocide in 1994. It is true that the decisions of the Council are taken under the influence of major powers; however, acquiescence by the Council to violations of a peremptory norm seems unjustifiable.

Third, as the following two examples illustrate, breaches of a peremptory norm have been subsequently endorsed by the Security Council. In 1998, under “the military threat of the US and NATO,” the Federal Republic of Yugoslavia signed agreements providing for the return of refugees from Kosovo and a verification role for the Organization for Security and Co-operation in Europe. Subsequently, the Security Council endorsed these treaties in accordance with Resolution 1203 (1998).²⁰⁴ By doing so, the Security Council endorsed agreements that had been signed under threat, and they were void treaties under Article 52 the VCLT. Furthermore, the Security Council, under its Resolution 1483 (2003) relating to the status of the occupying powers in Iraq, implicitly acknowledged the invasion and occupation of Iraq by the coalition of allied forces, thus violating an unquestionable norm of *jus cogens* character.²⁰⁵

As Lauterpacht explained in the *Bosnia* case, it must be presumed that the Security Council does not intend to violate *jus cogens* norms. Rather, a violation would likely be “an unintended or unforeseen consequence” of the application of a resolution. Nevertheless, he warns about the potential incompatibility of the Security Council resolution with the peremptory norm of prohibition of genocide.²⁰⁶

In reference to inaction by the Security Council *vis-a-vis* conduct contrary to peremptory norms, Orakhelashvili maintains that inaction should not be equated with acquiescence, because tribunals apply a very high standard of proof to ascertain acquiescence. In the practice of tribunals, acquiescence can never be presumed but must be inferred from convincing evidence, including clarity of attitude and the factor of time. It would be almost impossible to find these elements in the Security

²⁰⁴ See, SC Res 1203, UNSCOR, UN Doc S/Res/1203 (1998) at para 1.

²⁰⁵ Preamble of SC Resolution 1483 (2003) provides: “Noting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these States as *occupying powers* under unified command (the “Authority”)”.

²⁰⁶ *Bosnia*, *supra* note 179 at 325 and 441.

Council's practice. Moreover, non-condemnation of an act is not tantamount to its approval, as confirmed by the ICJ in the *Namibia* Advisory Opinion.²⁰⁷ Evidently, no act contrary to a *jus cogens* norm "can be legitimated by means of consent, acquiescence or recognition; nor [is] protest necessary to preserve rights affected by such acts."²⁰⁸

C. The Security Council Is Bound by Human Rights and Humanitarian Law

The General Assembly²⁰⁹ and the Security Council²¹⁰ have repeatedly emphasized that respect for human rights is necessary in all circumstances, including when taking measures against terrorism. The Council itself has acknowledged that human rights and international law should guide counterterrorism initiatives.²¹¹ Pertinently, since 2008, the Council has included a statement to this effect in the preamble to each of its resolutions on the 1267/1989 sanctions regime.²¹²

UN treaty bodies have continually called upon States to ensure that "any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights law, refugee and humanitarian law."²¹³ Moreover, it has been argued by scholars that international organizations must respect human rights in so far as they stem from customary international law.²¹⁴ This argument is relevant, in particular, with respect to peremptory norms since they are recognized as such under customary international law.²¹⁵ The question remains, however, as

²⁰⁷ Orakhelashvili, *supra* note 162 at 78.

²⁰⁸ *Ibid* at 83.

²⁰⁹ The General Assembly by its Resolution 64/168, entitled "Protection of human rights and fundamental freedoms while countering terrorism," reaffirmed that "counter-terrorism measures should be implemented in accordance with international law, including international human rights, refugee and humanitarian law, thereby taking into full consideration the human rights of all, including persons belonging to national or ethnic, religious and linguistic minorities, and in this regard must not be discriminatory on grounds such as race, color, sex, language, religion or social origin." See GA Res 64/168, UNGAOR, 64th sess, UN Doc A/Res/64/168 (2010) at para 4 [64/168].

²¹⁰ For instance, Security Council in its Resolution 2178 (2014) reaffirmed that "Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law"

²¹¹ Security Council Resolution 1456 (2003).

²¹² See, UNGAOR, 67th sess, UN Doc A/67/396 (2012) at para 19.

²¹³ 64/168, *supra* note 209 at para 1.

²¹⁴ Hafner, *supra* note 160 at 609.

²¹⁵ *Ibid*.

to what extent the Security Council itself is bound by human rights norms in discharging its function of maintaining international peace and security, including its law-making activities.

In this regard, it has been argued that human rights norms embedded in international instruments, in particular the *Universal Declaration on Human Rights* and the Two Covenants,²¹⁶ are based on Articles 1(3), 55 and 56 of the UN Charter, and therefore any violations of human rights also amount to a violation of Charter provisions. The argument goes on to say that the United Nations Organs, including the Security Council, are bound by said instruments as they are based on and elaborate the principles enshrined in the constitutive instrument of the Organization.²¹⁷

This view is confirmed through the High Level Review of the United Nations Sanctions by a number of Member States,²¹⁸ which was completed in November 2015.²¹⁹ The Compendium of High Level Review of United Nations Sanctions contains 150 recommendations including, *inter alia*, respect for human rights and due process in the imposition of targeted sanctions and their implementation.

Undoubtedly, the Council is bound by the human rights norms of peremptory character, such as the right to self-determination of peoples and the prohibition of torture. However, beyond that point, views on the applicability of human rights norms to Security Council decisions is controversial. Some scholars make a distinction between derogable and non-derogable human rights norms, claiming that the Security Council is only bound by non-derogable rights.²²⁰ Other scholars believe that human

²¹⁶ International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.

²¹⁷ Droubi, *supra* note 2 at 167.

²¹⁸ The High Level Review of the United Nation's sanctions is a process supported by the Governments of Australia, Finland, Germany, Greece and Sweden. The project was conducted by the Watson Institute for International Studies of the Brown University in the United States.

²¹⁹ See, Compendium of High Level Review of United Nations Sanctions, UNGAOR, 69th sess, UN Doc A/69/941 (2015); UNSCOR, 70th Year, UN Doc S/2015/432 (2015).

²²⁰ For instance, Droubi observes that "the applicability of international human rights law to the Council remains a work in progress." See, Droubi, *supra* note 2 at 33.

rights as a whole must be respected by the Security Council, as these rights are *erga omnes* and the international community thus has an interest in their application.²²¹

For instance, in Pellet's view, the only limitation that applies to the Security Council's activities other than the purposes and principles of the Charter is *jus cogens* norms.²²² Similarly, Aust argues that Chapter VII resolutions are legally binding on all UN Members and Security Council resolutions cannot be challenged directly or indirectly,²²³ even for human rights violations. He confirms Pellet's view that there is only one exception to the general rule: possible conflicts of a Security Council resolution with a *jus cogens* norm.²²⁴

From Aust's perspective, some human rights norms are absolute and non-derogable.²²⁵ However, rights to property and due process are not considered absolute rights in both the *European Convention on the Protection of Human Rights* of 1950 and the *International Covenant on Civil and Political Rights* of 1966 (ICCPR). These norms are derogable whenever there is a threat to peace and security, such as the menace posed by international terrorism.²²⁶ Though lists of non-derogable rights contained in international instruments do not match, rights to property and due process are not among non-derogable rights.²²⁷

²²¹ Tzanakopoulos, *supra* note 72 at 80-81.

²²² Simon Chesterman & David A. Jordan, "The Security Council as World Legislator? Theoretical and Practical Aspects of Law-Making by the Security Council" Discussion Paper Based on Panel 1 of the series "The Role of the Security Council in Strengthening a Rules-Based International System" (NYU School of Law: Institute for International Law and Justice, 2004).

²²³ Aust considers that nullifying by the ECJ of the EU regulations implementing the Security Council resolution is an indirect challenge to the Security Council decision.

²²⁴ Anthony Aust, "Kadi: Ignoring International Legal Obligations" (2009) 6:1 IOLR at 297.

²²⁵ This view is confirmed by General Assembly by urging States to fully comply with their obligations under international law while countering terrorism, "in particular international human rights, refugee and humanitarian law, with regard to the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment." See 64/168, *supra* note 209 at para 6(a).

²²⁶ Aust, *supra* note 224 at 297.

²²⁷ ICCPR provides that fundamental human rights are non-derogable, which include: right to life, torture, slavery, no imprisonment for failure to fulfill contractual obligations, cannot be punished for doing something that is not prohibited by law no person will be responsible for an act which was not a crime under the law at the time of its commission, no punishment without law, every individual has the right of recognition before the law as a person. See, International Covenant on Civil and Political Rights (1966), Articles: 6, 7, 8 (1&2), 11, 15 and 18. The list of non-derogable rights provided for in the European Convention on the Protection of Human Rights include: right to life, torture, slavery, and no punishment without law. See Articles: 2, 3, 4 (1) and 7.

Tzanakopoulos disagrees with the above view and advances the argument that human rights obligations directly apply to the Security Council under general international law since respect for human rights is one of the primary goals of the United Nations under Articles 1(2) and 55 of its Charter. These rights are directly applicable to the Security Council sanctions against States and individuals, and their violation would entail the responsibility of the UN.²²⁸

While endorsing the view that the Security Council is bound by *jus cogens* norms, Orakhelashvili observes that “a norm is not *jus cogens* merely because the parties [to a treaty] stipulate that no derogation is permitted.”²²⁹ He suggests that violations of human rights norms are only permitted in exceptional circumstance and in cases where the international community as a whole does not have an interest. A violation would not be permitted if it goes beyond the individual State interest and touches upon interests of the international community as a whole. From this perspective, personal liberty,²³⁰ a fair trial and due process, private and family life, freedom of expression and religion, though derogable under certain treaty instruments, are “peremptory norms” because the international community as a whole has interest in their proper implementation.²³¹ Looking at human rights from this lens, Orakhelashvili claims that “all human rights would be peremptory.” He bases his argument on the ICTY Appeals Chamber’s ruling in the *Tadic* case, in which the Tribunal observed that “the right to a fair trial” is an unconditional limitation on the Council’s powers and that its observance was essential for the validity of the Council’s decisions such as the establishment of that Tribunal.²³²

²²⁸ Tzanakopoulos, *supra* note 72 at 81.

²²⁹ Orakhelashvili, *supra* note 162 at 60.

²³⁰ GA Resolution 64/168 urges all States “To take all necessary steps to ensure that persons deprived of liberty, regardless of the place of arrest or detention, benefit from the guarantees to which they are entitled under international law, including the review of the detention and other fundamental judicial guarantees; para 6(b).

²³¹ It appears that Orakhelashvili is not making distinction between peremptory norms, from which no derogation is permitted and norms of *erga omnes* character, on which the international community as whole has interest.

²³² *Tadic*, *supra* note 77 at paras 44–47; de Wet and Nollkaemper, “Review of Security Council Decisions by National Courts” (2002) 45 German YIL at 182–184.

Similarly, Orakhelashvili argues that international humanitarian law “protects not State interests but human beings as such.” In this regard, he refers to the ICTY ruling in the *Kupreskic* case, in which the Court observed that the objective and non-reciprocal nature of “humanitarian law obligations stem from their *erga omnes* character in the sense of [the] *Barcelona Traction* [case].”²³³ The relevant rules are embodied in the Geneva Conventions, such as the rules protecting civilians and their property and those distinguishing between military and non-military objectives.

Despite the fact that the United Nations is not able to become a party to the Geneva Conventions and Protocols,²³⁴ the Secretary-General of the United Nations has repeatedly declared that the Organization must comply with international humanitarian law,²³⁵ a position that has been confirmed by the General Assembly.²³⁶ In order to remove any doubt on the applicability of humanitarian law to the United Nations peace keeping operations, the UN Secretary-General has identified certain principles and rules of international humanitarian law applicable to United Nations forces conducting operations under the United Nations’ command and control.²³⁷ The question has been discussed by scholars whether the Secretary-General’s bulletin limits the application of humanitarian law to the UN operations. However, it seems that the argument pertaining to the customary nature of international humanitarian law prevails and thus obligates the United Nations to

²³³ *Prosecutor v Kupreskic et al*, [2000] IT-95-16-T at paras 518–519.

²³⁴ Certain provisions of the Conventions and Protocols do not apply or cannot be applied by the United Nations. For instance, those relating to occupation (Articles 27-28 of the Fourth Convention) and grave breaches (Articles 49, 50, 129 and 146 of the Fourth Convention and Article 85 (1) of Protocol I). Moreover, since in the IHL instruments no definition is provided for peace keeping forces, if the United Nations becomes a party to these instruments, forces deployed in the guise of peace keeping forces might appear as combatants. See, Umesh Palwankar, “Applicability of International Humanitarian Law to United Nations Peace-Keeping Forces” (1993) *International Review of the Red Cross*, No. 294, online: <<https://www.icrc.org/eng/resources/documents/misc/57jmbh.htm>>.

²³⁵ In a letter dated 23 October 1978 addressed to the President of ICRC, the Secretary-General of United Nations stressed that “the principles of humanitarian law . . . must . . . be applied within the framework of the operations carried out by United Nations forces;” In a letter also dated 23 October 1978, addressed to the troop contributing countries to the United Nations Interim Forces in Lebanon (UNIFIL), Secretary-General pointed out that in situations where members of such forces have to use their weapons in self-defence, the principles and spirit of IHL as contained, *inter alia*, in Geneva Conventions, and the protocols of 8 June 1977 . . . shall apply.

²³⁶ Several General Assembly resolutions reconfirm in their preambles “the continuing value of established humanitarian rules relating to armed conflicts and the need to respect and ensure respect for these rule in all circumstances” See, for instance, GA Resolution 47/30 and 69/120.

²³⁷ These include fundamental principles and rules of international humanitarian law relating to the protection of civilian population, means and methods of combat, treatment of civilians and *hors de combat*, the treatment of detained persons as well as the protection of wounded, sick and medical relief personnel. See, Secretary-General’s Bulletin on the *Observance by the United Nations forces of international humanitarian law*. UN Doc ST/SGB/1999/13 (1999).

ensure that forces under its command and control respect humanitarian law.²³⁸ Therefore, the UN must comply with international humanitarian norms in every circumstance where its forces are engaged in hostilities. Thus, economic sanctions imposed under Chapter VII are subject to peremptory norms, particularly fundamental humanitarian rules such as the principles of proportionality and necessity.²³⁹ All this implies that an occupying power is under an obligation not to deprive civilians of access to the goods necessary for their survival, i.e. supply of food, water, shelter, medicines and medical care.²⁴⁰ *A priori*, these norms should not be violated in the peace time as a consequence of Security Council decisions.

Amidst disagreement among scholars concerning the applicability of human rights in its entirety to the Security Council's functions with respect to peace and security, it seems that the General Assembly has provided practical guidelines regarding respect for human rights, which should be followed by all subjects of international law, including the Security Council. By its Resolution 64/168, the General Assembly confirms the difference between derogable and non-derogable rights as contained in international human rights law instruments. However, it rightly emphasizes the exceptional and temporary nature of measures taken in violation of derogable human rights norms. Paragraph 5 of the resolution reads in part:

“Also reaffirms the obligation of States, in accordance with Article 4 of the International Covenant on Civil and Political Rights, to respect certain rights as non-derogable in any circumstances, recalls, in regard to all other Covenant rights, that any measures derogating from the provisions of the Covenant must be in accordance with that article in all cases, and underlines the exceptional and temporary nature of any such derogations” [Emphasis added]

D. The UN Special Rapporteur Finds Al-Qaida Sanctions Regime Lacking Due Process

²³⁸ Hafner, *supra* note 160 at 617.

²³⁹ Shaw and Wellens, *supra* note 160 at 11, 15.

²⁴⁰ Reinisch, *supra* note 161 at 860–861.

In his second report to the General Assembly, Ben Emerson, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (the “Special Rapporteur”),²⁴¹ examined the compatibility of the Security Council’s Al-Qaida sanctions regime with international human rights norms, assessing in particular its impact on due process. Emerson writes:

“These sanctions typically result in a denial of access by listed individuals to their own property, a refusal of social security benefits, limitations on their ability to work and restrictions on their ability to travel domestically and internationally. They significantly interfere with the right to freedom of movement, property rights and the right to privacy in all its manifestations. The impact on both the designated person and his or her family can be severe, leading one domestic court to characterize designated individuals as “effectively prisoners of the State.” The reputational cost is incalculable. Moreover, as individual listings under the current regime are open-ended in duration, they may result in effective permanent designation.”²⁴²

In his view, by adopting decisions enabling it to make listing decisions on the basis of nominations by Member States, the Security Council provides “a ready means” for States to make executive decisions with far-reaching consequences—decisions that cannot be constrained even by domestic judicial review, or the international human rights treaties by which they are bound.²⁴³

In the Special Rapporteur’s view, since the Security Council is a political organ its traditional decision-making structures lack the procedural mechanisms necessary to protect the due process rights of the individual. These rights are enshrined in international human rights treaties and are broadly reflected in national and regional legal systems. Some “core” due process rights are today recognized

²⁴¹ In 2005, the UN Commission on Human Rights established a Special Rapporteur position with the responsibility of making concrete recommendations on the promotion and protection of human rights and fundamental freedoms while countering terrorism. (UN Commission on Human Rights, Resolution 2005/80, O. P. 6). Following its establishment in 2006 (GA Resolution 60/251 at para 6), the Human Rights Council renewed the mandate of the Special Rapporteur (UNHRC decision 1/102 (2006). Martin Scheinin was the first Special Rapporteur. Ben Emmerson, the Second Special Rapporteur continues to function in that capacity, and has presented several reports to the Human Rights Council and to the General Assembly. See, *Protection of human rights and fundamental freedoms while countering terrorism*. UNGAOR, 60th sess, UN Doc A/60/370 (2005); UNGAOR, 61st sess, UN Doc A/61/267 (2006); *Financing the United Nations mission in Liberia*. UNGAOR, 62nd sess, UN Doc A/62/263 (2008); UNGAOR, 63rd sess, UN Doc A/63/223 (2008); UNGAOR, 64th sess, UN Doc A/64/211 (2009); UNGAOR, 65th sess, UN Doc A/65/528 (2010); UNGAOR, 66th sess, UN Doc A/66/310 (2011); 67/396 *supra* note 212; UNGAOR, 68th sess, UN Doc A/68/389 (2013); UNGAOR, 69th sess, UN Doc A/69/397 (2014); and UNGAOR, 70th sess, UN Doc A/70/371 (2015).

²⁴² See, 67/396, *supra* note 212 at para 13.

²⁴³ *Ibid* at para 14.

as rules of customary international law, including the maxim “no one may be a judge in his own cause.”²⁴⁴

Through its Sanctions Committee, the Security Council is responsible for designating individuals and entities on the Al-Qaida sanctions regime’s Consolidated List and for adjudicating applications for their removal. This practice is inconsistent with any “reasonable conception of due process,” and is viewed by many as the Council acting above and beyond the law.²⁴⁵

In the view of the Special Rapporteur, although the Security Council is primarily a political body, it exercises both “quasi-legislative” and “quasi-judicial functions” and States are required to comply with its decisions adopted under Chapter VII, even if by so doing they would violate their obligations under another international treaty.²⁴⁶

Recognizing that there is no judicial body to review Council’s decisions,²⁴⁷ national and regional courts and treaty bodies have focused their attention on domestic implementation of these measures, assessing their compatibility with the fundamental norms of due process. As discussed in Chapter Five, a series of successful legal proceedings have dealt with the problem by quashing the implementing legislation, or declaring it unlawful, precisely for the lack of due process.²⁴⁸

²⁴⁴ *Ibid* at para 15.

²⁴⁵ *Ibid* at para 14.

²⁴⁶ See, 67/396, *supra* note 212 at para 17.

²⁴⁷ See, Chapter Six, Section IV (A), pp 270-278. Joined Cases C-402/05 P and C-415/05 P, *Abdullah Kadi and Al Barakaat Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 at para 287; CCPR/C/94/D/1472/2006 (*Sayadi and Vinck v. Belgium*) at para 7.2; *Al-Jedda v. United Kingdom*, Application no. 27021/08, Judgement, 7 July 2011 (Grand Chamber) at para 76; *Nada v. Switzerland*, Case No. 10593/08, European Court of Human Rights, 10 September 2012, Concurring Opinion of Judge Malinverni, para 20; and *Her Majesty’s Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants)* [2010] UKSC 2, [2010] 2 AC 534 at para 151.

²⁴⁸ See, Joined Cases C-402/05 P and C-415/05 P, *Kadi*, *supra* note; *Abdelrazak v. The Minister of Foreign Affairs* [2009] FC 580; *Her Majesty’s Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants)* [2010] UKSC 2, [2010] 2 AC 534; Case T-85/09 *Yassin Abdullah Kadi v. European Commission*, General Court (Seventh Chamber), 30 September 2010 [2011] CMLR 24.

Therefore, the Special Rapporteur endorses the proposal that in order to enhance the effectiveness of the regime the Security Council should establish an independent adjudicator at the United Nations, with the power to review and overturn a designation by the Sanctions Committee. He clarifies the point that review by an independent body should be directed at decisions of a subordinate body exercising delegated executive powers, but not those of the Security Council.²⁴⁹

V. Conclusion

An overview of mainstream lawyers' perspectives on the Security Council's law-making activities sheds further light on the complexities of law-making at the international level in general, and by the Security Council in particular. From the discussion of mainstream lawyers' perspectives, the following conclusions can be drawn:

Scholars who compare law-making by the Security Council with legislation at the national level propose that the doctrine of separation of powers should also apply in international organizations, as these organizations increasingly function in the exercise of public authority. Accordingly, legislative, executive, and judicial powers should not be exercised together by the Security Council, as they culminate in an abuse of power.

Although the language of UN Charter articles relating to the Security Council's mandate are broad enough to accommodate law-making functions, some mainstream lawyers suggest that the Security Council should exercise these types of functions with due diligence and only in exceptional cases. Moreover, they agree that the United Nations, as a subject of international law, is bound by the purposes and principles of the Charter, the peremptory norms of international law, and international human rights and humanitarian law, all of which apply to the activities of the Security Council as a Principal Organ of the Organization.

²⁴⁹ See, 67/396, *supra* note 212 at para 23.

Chapter Five

Assessing State Practice in the Implementation of Normative Resolutions

Abstract

In this Chapter it is argued that the State practice of implementing normative resolutions has been widespread but inconsistent. Although various reports by monitoring committees attempt to portray a rosy picture of the implementation of normative resolutions, these reports mainly serve a political purpose, namely depicting the Security Council as the leader in the fight against terrorism. However, in reality, the Security Council's normative resolutions face serious challenges at the implementing stage. Non-reporting by some States continues to be problematic despite several persuasive methods employed by the monitoring bodies. Repeated calls by the Security Council for universal adherence to international instruments on counterterrorism and non-proliferation of weapons of mass-destruction has had limited impact on their universalization. Finally, as a result of several national and regional courts' rulings, declaring either the Council's sanctions regime was illegal or their execution violated human rights law, States are reluctant to comply with the sanctions. Thus, with variations of State practice regarding the Security Council's normative resolutions, it is far from clear that State practice confirms the Council's general law-making capacity.

I. Introduction

This Chapter is devoted to examining State practice regarding the implementation of the Security Council's normative resolutions. As noted in Chapter Four, scholars who have expressed reservations about the law-making capacity of the Security Council consider State practice to be essential in confirming the purported law-making activities of the Security Council. Accordingly, relevant State practice is examined with a view toward drawing a conclusion as to whether current State practice shows an acceptance of the Security Council's law-making.

It is argued that State practice concerning the implementation of the Security Council's law-making resolutions has been widespread yet inconsistent. As a matter of fact, compliance with these resolutions is lower than might be expected for the reasons discussed in the following sections.¹ Section II, briefly discusses what "State practice" actually means in the context of international law, as it is not always easy to ascertain in its various forms. Section III, deals with the execution of normative resolutions in the area of counterterrorism and the challenges that exist at the implementation stage. Section IV, examines the implementation of normative resolutions in the area of non-proliferation of weapons of mass-destruction. This is a highly regulated area with several monitoring bodies already in place with overlapping functions, and thus the existence of conflicting obligations for States has become troublesome. Section V, scrutinizes the implementation of the Security Council's resolutions that impose sanctions on entities and individuals and the corresponding human rights violations emanating from the implementing measures. Section VI, covers several rulings of regional and national courts which have questioned the legality of sanctions in a number of cases, and have found several implementing measures to have violated the international fundamental human rights.

II. Definition of State Practice

State practice is usually discussed in the context of customary international law formation, where State practice is a crucial element in the development of customary norms. Under a generic definition, "State practice" is a conduct that is attributable to States.² Still, scholars have expressed divergent views regarding the definition and elements of State practice. Some writers emphasize that concrete action is the best manifestation of State practice.³ In their view, oral or written claims by States cannot be

¹ Sufyan Droubi, *Resisting United Nations Security Council Resolutions* (London and New York: Routledge, 2014) at 167. See, *Letter dated 18 January 2016 from the Chair of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council*. UNSCOR, UN Doc S/2016/49 (2016) at para 496 [2016/49].

² See, *Second Report on identification of customary international law*. UNGAOR, 66th sess, UN Doc A/CN. 4/672 (2014) at para 33.

³ For Brierly, as an example, State practice is "what [S]tates *do* in their relations with one another." See, *Brierly's Law of Nations* (Oxford: Oxford University Press, 1978) at 59. In the opinion of McDougal, the "process of continuous

considered States practice as such claims are usually based on national interests and do not necessarily reflect the conviction of States regarding the binding nature of international norms. This argument goes on to say that States' conduct is sometimes based on political consideration or comity,⁴ which does not amount to State practice as it does not contain the requisite State belief that the behavior in question is required by the law.⁵

Other writers, by contrast, see more merit in qualifying verbal statements by State officials as State practice. In their view, speeches by State representatives refer to actual practice of their respective States in most cases. Their statements may also refer to applicable laws in the fields under discussion. As Villiger put it, "[t]he most striking asset of verbal statements is that they may shed light on the *opinio juris* of States."⁶

For the reasons mentioned above, some writers suggest a definition of State practice that includes both the actual conduct of States and their verbal statements. In the view of Villiger, for instance, "State practice includes any act, articulation or other behavior of a State, as long as the behavior in question discloses the State's conscious attitude with respect to—in recognition of—a customary rule."⁷ Shaw provides a similar definition in a concise manner, claiming that "State practice covers any act or statements by a State from which views about customary law may be inferred." The latter definition covers both omission and silence by States.⁸ In its recent study on customary international humanitarian law, the International Committee of the Red Cross (ICRC) has relied on both the physical and verbal elements of State conduct. In accordance with the study, physical acts

interaction, of continuous demand and response" in the inter-State relationship constitutes State practice. See, Myres S. McDougal, "The Hydrogen Bomb Tests and the International Law of the Sea" (1955) 49:3AJIL at 357.

⁴ In the course of interaction with one another, States, in addition to legally binding norms, also observe other rules such as usages and rules of politeness, convenience and good will. These are not rules of international law but of comity. Exemption from custom duties accorded to diplomatic agents in most States, is not a binding norm of international law, but a comity, usually observed on the basis of reciprocity. See, Robert Jennings & Arthur Watts, eds, *Oppenheim's International Law*, 9th ed, vol I and II (Oxford: Oxford University Press, 1992) at 51.

⁵ *Encyclopedia of Public International Law* (North Holland, Amsterdam, New York, Oxford, Tokyo: Elsevier Science Publishers B. V., 1986) at 62.

⁶ Mark E. Villiger, *Customary International Law and Treaties* (The Hague, Martinus Nijhoff Publishers, 1985) at 7.

⁷ *Ibid* at 4.

⁸ Michael Akehurst has opined that, "there is a clear inference that omissions accompanied by *opinio juris* can give rise to a rule of customary law." Michael Akehurst, "Custom as a Source of International Law" (1975) 47:1 British YIL at 10.

include conduct on the battlefield, the use of certain weapons, and the treatment rendered to various categories of persons. Verbal statements can be found in military manuals, national legislation, national case law, and so on.⁹

One way of discovering State practice is to study the States' voting records in the course of International Organizations' decision-making.¹⁰ Affirmative or negative votes for Security Council normative resolutions may provide evidence of State practice as votes are usually cast in consultation with governments, reflecting a State's position. It should be noted, however, that votes on their own cannot be considered concrete action as delegates usually explain their positions before or after the vote, and these explanations should also be taken into account.

One should recall that States are committed under international law to perform their obligations in good faith.¹¹ At the same time, they have the liberty to choose the ways and means of implementing their obligations within their domestic legal systems.¹² Generally, there are two approaches regarding the implementation of international obligations at the national level: monist and dualist systems. In a monist system, international law, including resolutions of the United Nations Security Council, is applied directly at the national level, without taking additional measures.¹³ In this system, for example, the list of sanctioned individuals published by the 1267 Sanctions Committee and a State's national lists have no discrepancies. In a dualist system,¹⁴ by contrast, international law is not applicable directly but must be incorporated into the domestic legal system by way of legislation. Usually, a high ranking official, like a president, is directed by national legislation to designate specific

⁹ Henckaerts, Jean-Marie & Louise Doswald-Beck. *Customary International Humanitarian Law*, vol 1 (Cambridge: Cambridge University Press, 2005).

¹⁰ Malcom N. Shaw, *International Law*, 6th ed (New York: Cambridge University Press, 2008) at 82.

¹¹ This principle is enshrined in a number of instruments, such as Art. 2(2) of the UN Charter, as well as in the 1970 *Declaration on Principles of International Law Concerning the Friendly Relations and Co-operation Among States*. GA Res 25/2625, UNGAOR, 25th sess, UN Doc A/RES/25/2625 (1970) and 1969 *Vienna Convention on the Law of Treaties*, Article 26.

¹² Finnur Magnusson, "Targeted Sanctions and Accountability of the United Nations' Security Council" (2008) 13:1 *Austrian Rev Int'l & EL Online* 35 at 69.

¹³ This category includes States such as Argentina, Australia, the Russian Federation and the United Kingdom, which automatically incorporate the names published by the 1267 Sanctions Committee into their national black list. See, Magnusson, *supra* note 12 at 69.

¹⁴ New Zealand and the United States are in this category of States. See, *Ibid* at 70.

individuals for inclusion on a blacklist and freeze their assets during periods of national emergencies. Hence, there may be discrepancies between the 1267 Sanctions Committee's blacklist and lists prepared at the national level in this group of States.¹⁵

Consequently, State practice relating to the implementation of normative resolutions may be exercised in various forms such as ratification of international instruments, enacting implementing legislation, court rulings, diplomatic communications, administrative decisions and so forth. While it is impractical to cover all forms of State practice in a single chapter, it is sensible to examine reports submitted by various monitoring committees to the Security Council, as States are obligated to report to the monitoring committees on the implementing measures they adopt at the national level. Based on States' submissions, monitoring committees regularly report to the Security Council on States' practice pertaining to the implementation of normative resolutions. These reports are examined in the following Sections

III. Implementing Normative Resolutions in the Area of Counterterrorism

The Counterterrorism Committee (CTC) established pursuant to Resolution 1373, has presented four reports on the implementation of this resolution.¹⁶ These reports were prepared by experts of the CTC Executive Directorate, based on their professional judgment on the information provided by States, and collected during CTC officials' visits to States,¹⁷ as well as the information provided by international and regional organizations.¹⁸ The information extracted from these reports is summarized

¹⁵ *Ibid.*

¹⁶ See, *Letter dated 10 June 2008 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council*. UNSCOR, UN Doc S/2008/379 (2008) [2008/379]; *Letter dated 3 December 2009 from the Chairman of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council*. UNSCOR, UN Doc S/2009/620 (2009) [2009/620]; *Letter dated 17 August 2011 from the Chair of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the Secretary-General*. UNSCOR, UN Doc S/2011/463 (2011) [2011/463]; and 2016/49, *supra* note 1.

¹⁷ Until 2011 there have been more than 60 State visits by CTC officials. See, 2011/463, *supra* note 16 at 5.

¹⁸ 2008/379, *supra* note 16 at para 3.

in the following subsections. In addition, this section reflects various challenges that States face in implementing Security Council Resolution 1373 and its supplementing resolutions.¹⁹

A. The Limited Impact of Resolution 1373 on the Ratification of Counterterrorism Instruments

As discussed in Chapter Two, most of the resolutions adopted by the Security Council in the area of counterterrorism call upon States to become parties to international counterterrorism instruments,²⁰ of which there were about a dozen concluded prior to the adoption of Security Council Resolution 1373. Whereas some of these instruments were widely ratified, others have received a limited number of ratifications. However, since the adoption of Resolution 1373, there have been an increased number of ratifications, likely resulting from 1373's adoption (see Table 1, Annex).

The normative resolutions have also triggered revision processes of some of the existing counterterrorism instruments, which have led to the adoption of revised and updated instruments in the area of civil aviation safety. For example, the Beijing Convention and Beijing Protocol of 2010, broaden and strengthen the global civil aviation anti-terrorism framework. Parties to these instruments are required to criminalize a number of new acts that are considered threats to the safety of civil aviation, including using aircraft as a weapon and organizing, directing, and financing acts of terrorism. These new treaties reflect the international community's joint effort to prevent acts of terrorism against civil aviation and to prosecute and punish those who commit such crimes. The treaties promote cooperation between States while emphasizing respect for human rights and fair treatment of terrorist suspects.²¹

¹⁹ *Ibid* at para 9.

²⁰ See, SC Res 1373, UNSCOR, 4385th sess, UN Doc S/Res/1373 (2001) at para 3(d) [1373]; SC Res 1456, UNSCOR, 4688th mtg, UN Doc S/Res/1456 (2003) at annex, para (a) [1456]; SC Res 1624, UNSCOR, 5261 mtg, UN Doc S/Res/1624 (2005) at the preamble [1624]; SC Res 2178, UNSCOR, 7272nd mtg, UN Doc 2178 (2014) at the preamble [2178].

²¹ As table No.1 demonstrates, at the time of the adoption of Security Council Resolution 1373, international instruments covering the safety of civil aviation were widely ratified. Nonetheless, following the adoption of the Security Council's resolutions, the number of parties to counterterrorism instruments has increased, making them almost universally applicable. Moreover, two conventions relating to the prevention of crimes against internationally protected persons and

Despite an increase in the number of instruments ratified, not all have become universally accepted instruments and there remain regional imbalances in their implementation. In order to make these instruments fully effective, States should adopt domestic legislation that specifically criminalizes the offences set forth in the international instruments, set appropriate penalties, and establish jurisdiction over the defined offences in order to ensure that suspects are either extradited or prosecuted.²²

B. Impediments to the Enactment of Counter-Financing Legislation

States are under an obligation, in accordance with Resolution 1373, to criminalize the financing of terrorism in their territories or by their nationals, as defined in the Resolution. Under the Resolution, the financing of terrorism is “the willful provision or collection, by any means, directly or indirectly, of funds . . . with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.”²³ In order to implement this obligation, States should enact domestic legislation which makes the financing of terrorism as a criminal offence, penalizes the act, and brings offenders to justice.

The CTC, in its reports to the Security Council,²⁴ acknowledges that “significant steps” have been taken by States toward developing “a counterterrorism legal framework.”²⁵ However, the CTC’s assessment is not independently verifiable because the information is directly provided by States or is collected by CTC officials in their country visits. Moreover, these reports are not intended to come up with concrete conclusion on State practice; rather, they aim to demonstrate

hostage-taking became universally accepted instruments following the adoption of the Security Council’s counterterrorism instruments. International instruments dealing with the safety of maritime navigation had a limited number of ratifications, but their parties increased significantly after the adoption of Security Council counterterrorism resolutions, though they have not yet achieved universal acceptance. Two international conventions dealing with the suppression of terrorist bombings and the financing of terrorism, which were newly adopted instruments at the time of adoption of Resolution 1373, have received wide acceptance, and the Convention for the Suppression of the Financing of Terrorism has almost become a universally accepted international instrument.

²² 1373, *supra* note 20 at 47.

²³ *Ibid* at para 1(b).

²⁴ Presented in 2008, 2009, 2011 and 2016. See, 2008/379, *supra* note 16; 2009/620, *supra* note 16; 2011/463, *supra* note 16; and 2016/49, *supra* note 1.

²⁵ 1373, *supra* note 20 at para 1(b).

that States are making every effort to implement their obligations under the Resolution. Nevertheless, CTC reports depict the various challenges that States face in the full implementation of Resolution 1373, which justifies the Counterterrorism Committee's continued relevance. The CTC reports show that States face (i) different interpretations of Resolution 1373's provisions, (ii) a lack of a precise definition of terrorist acts, (iii) incompatibility of some provisions of the Resolution with accepted criminal law standards, (iv) regional imbalances in implementation, and (v) human rights concerns.

(i) Different Interpretations of Resolution 1373

As the Counterterrorism Committee's 2011 report demonstrates, the CTC's broad interpretation of Resolution 1373's relevant provisions is not conducive to the full implementation of States' obligation to enact legislation in the fight against the financing of terrorism.²⁶ The CTC relies on its self-interpretation of "[t]he intent of the resolution" and expects States to "establish a clear, complete and consistent legal framework that specifies terrorist acts as serious criminal offences, penalizes such acts according to their seriousness," and bring terrorists to justice, by enacting a detailed counterterrorism legislation.²⁷ Based on this broad interpretation, States are also expected to criminalize the act of providing safe havens to, and harboring of, terrorists²⁸ and to prevent those who finance, plan, facilitate or commit terrorist acts. Additional measures required of States include passing laws criminalizing preparatory acts, including planning, aiding, and abetting of terrorist offences against other States or their citizens.²⁹

Despite the broad interpretation of Resolution 1373 by the CTC, legislative measures adopted by States concerning the financing of terrorism are not uniform. Some States have come up with a single and all-inclusive piece of counterterrorism legislation³⁰ while others have relied

²⁶ 2011/463, *supra* note 16 at 86.

²⁷ 2008/379, *supra* note 16 at para 141; 2009/620, *supra* note 16 at 43; 2011/463, *supra* note at 71.

²⁸ 1373, *supra* note 20 at para 2(c).

²⁹ 2011/463, *supra* note 16 at 71.

³⁰ 2016/49, *supra* note 1 at 118.

on their existing criminal codes and modified them where appropriate. Yet, a third group of States has confined their action to executing their existing implementing legislation for international counterterrorism instruments to which they are parties. Without doubt, the adoption by States of diverse methods of implementing measures is not leading to harmonized implementation of the Resolution, and there is a high possibility for gaps and ambiguities in the various types of legislation enacted by States. This situation is not conducive to making concrete conclusions about State practice pertaining to States' obligations under Resolution 1373. The CTC's 2016 report specifies that most UN Member States do not have comprehensive criminal legislation in place to prosecute "preparatory or accessory acts" conducted in the State with the aim of committing terrorist acts outside the State's territory.³¹ This is why the report concludes that "[a]verage compliance with the criminalization requirements of the resolution is 'partial'."³²

(ii) The Lack of a Precise Definition of "Terrorism"

In the absence of a universally accepted definition of terrorism,³³ State practice concerning the definition of terrorist acts in their national legislation varies. In the opinion of many States, importing the vague definitions contained in Security Council resolutions into national laws violates "the principle of legality" and opens the avenue for abuse, including "suppressing the freedom of opinion, expression and association."³⁴

States' obligations regarding criminalizing terrorist financing is provided for in Resolution 1373 (2001) and in the International Convention on the Suppression of the Financing of Terrorism. However, the definition of the financing of terrorism provided for in the Resolution and the Convention are inconsistent. Whereas the Convention *only* prohibits the financing of acts outlawed

³¹ *Ibid* at para 496.

³² *Ibid*.

³³ See, Chapter Two, p. 56.

³⁴ 2008/379, *supra* note 16 at para 163.

by the treaties in force,³⁵ the definition of the financing of terrorism contained in the Resolution is broad that covers the financing of *all* acts of terrorism. States are obligated under Resolution 1373 to “[p]revent and suppress the financing of terrorist acts.”³⁶ This discrepancy has been the main cause of a number of problems identified in the 2009 survey of the Security Council’s implementation of Resolution 1373.³⁷ The survey reveals that “although most States are parties to the Convention, a significant number have either not yet criminalized the terrorist financing offence or have introduced a terrorist financing offence that does not reflect the offences set forth in the Convention or the resolution.”³⁸ The 2016 report of the CTC attests that the legal definition of “terrorist acts” remains an issue, even 14 years since the adoption of Resolution 1373. According to the report, “national laws of a number of States criminalize terrorist acts in vague or overbroad terms that could lead to abuse.”³⁹

(iii) The Incompatibility of the Preventive Measures with Criminal Law Standards

The freezing of terrorists’ assets is a key element of Resolution 1373 (2001), and is seen by the Counterterrorism Committee as a “preventive measure.”⁴⁰ The CTC expects States to take

³⁵ *Convention for the Suppression of Unlawful Seizure of Aircraft*, done at The Hague on 16 December 1970; *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, done at Montreal on 23 September 1971; *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, adopted by the General Assembly of the United Nations on 14 December 1973; *International Convention against the Taking of Hostages*, adopted by the General Assembly of the United Nations on 17 December 1979; *Convention on the Physical Protection of Nuclear Material*, adopted at Vienna on 3 March 1980. *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, done at Montreal on 24 February 1988; *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, done at Rome on 10 March 1988; *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf*, done at Rome on 10 March 1988. *International Convention for the Suppression of Terrorist Bombings*, adopted by the General Assembly of the United Nations on 15 December 1997.

³⁶ 1373, *supra* note 20 at 1(a).

³⁷ Survey of the implementation of Security Council Resolution 1373 (2001) by Member States, annex to the letter dated 3 December 2009 from the Chairman of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council (2009/620, *supra* note 16).

³⁸ 2009/620, *supra* note 16 at 44. The shortcomings identified in the survey include the following: “the financing of terrorism is criminalized as an accessory offence or States rely on ancillary offences, such as aiding and abetting; the definition includes the provision and not the collection of funds; the offence is not included as a predicate offence to money-laundering; the jurisdiction of the courts does not generally extend to acts committed outside the State’s territory by foreign nationals currently within the State, except where the offence aims at undermining State security or counterfeiting the legal tender. Moreover, the degree to which the investigation and prosecution of terrorist financing offences functions as a *modus operandi* varies considerably, and most States lack sufficient expertise and experience in this area.”

³⁹ 2016/49, *supra* note 1 at para 437.

⁴⁰ 2011/463, *supra* note 16 at 73.

“immediate action” to identify designated individuals and entities, as well as all of their associated funds and assets, and to freeze them without prior notice.⁴¹ In addition, States must freeze funds and other financial assets or economic resources of persons and entities “who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts.”⁴²

Yet, effective implementation of this obligation remains elusive. Very few States have introduced mechanisms to fully implement paragraph 1(c) of the Resolution which requires States to freeze the funds and assets of terrorists, without delay. Most States rely on criminal procedure codes to implement the Resolution, which may be insufficient to meet the requirement of “freez[ing] without delay” as criminal provisions can only be triggered after a criminal procedure has begun.⁴³ As the CTC’s 2008 report suggests, States and human rights bodies have expressed concerns about implementing this obligation, which is in contrast to the principle of “innocent until proven guilty.”⁴⁴

The CTC’s 2016 report confirms the view that States’ compliance with international standards of due process and fair treatment remains a matter of concern, in particular wherever counterterrorism measures are applied in a preventive manner. That is, persons subject to such measures are usually not informed of the reasons for their blacklisting in advance and, in most cases, they are not able to contest such measures before a competent public tribunal.⁴⁵

(iv) Regional Imbalances in Resolution 1373 Implementation

All four reports by the Counterterrorism Committee refer to the unequitable implementation of Resolutions 1373 (2001) and 2178 (2014) by various regional groups.⁴⁶ For instance, the 2016

⁴¹ *Ibid.*

⁴² 1373, *supra* note 20 at para 1(c).

⁴³ 2011/463, *supra* note 16 at 73.

⁴⁴ 2008/379, *supra* note 16 at para 164.

⁴⁵ 2016/49, *supra* note 1 at para 438.

⁴⁶ See, 2008/379, *supra* note 16 at 30; 2009/620, *supra* note 16 at 43; 2011/463, *supra* note 16 at 71; and 2016/49, *supra* note 1 at 112.

report acknowledges that significant progress has been made in the implementation of the Resolution in the Western European, Eastern European, Central Asian and the Caucasus sub-regions, and most States in these sub-regions have introduced comprehensive counterterrorism legislation.⁴⁷ In other regions, however, several problems prevent States from fully implementing their obligations under the Resolution. The CTC's 2008 report specifies that in East Africa, "[no] State has the capacity to freeze without delay funds and assets linked to terrorism, although some States have made progress on this issue."⁴⁸ Similarly, in the Central Asia and the Caucasus regions "[t]he capacity to freeze funds and assets linked to terrorism is mostly inadequate and limited in all States."⁴⁹

The global survey of Member States also confirms the regional discrepancy in implementing Security Council Resolution 1624 (2005).⁵⁰ Under this Resolution, the Security Council has called upon all States to take a number of measures, including steps toward prohibiting, and preventing the incitement to commit terrorist acts.⁵¹

Several elements might have contributed to the limited progress in certain regions toward implementing obligations emanating from this Resolution, including "competing development priorities, limited training opportunities, and continuing pressure on government budgets."⁵² The CTC reports acknowledge that bringing terrorists to justice, as required by Resolution 1373, "poses a major challenge for States' criminal justice systems" and "[m]any States continue to face challenges in their efforts to staff prosecution services and the judiciary with skilled prosecutors and judges and to provide them with the necessary technical resources and training."⁵³

⁴⁷ 2016/49, *supra* note 1 at 112.

⁴⁸ 2008/379, *supra* note 16 at para 19.

⁴⁹ *Ibid* at para 29.

⁵⁰ *Statement by the President of the Security Council*. UNSCOR, 6760th mtg, UN Doc S/2012/16 at 6-18.

⁵¹ 1624, *supra* note 20 at para 1.

⁵² 2011/463, *supra* note 16 at 7.

⁵³ 2011/463, *supra* note 16 at 72; 2016/49, *supra* note 1 at 127.

(v) **Human Rights Concerns**

The Security Council has emphasized on a number of occasions that UN Member States, in taking any counterterrorism measures, must ensure that such measures are adopted in accordance with international law, in particular with international human rights, refugee, and humanitarian law.⁵⁴ Elaborating on this point, the CTC's 2011 report specifies that States must observe certain core principles at all times, including during the fight against terrorism, and that States are under an obligation to respect "the principles of necessity, proportionality, legality and non-discrimination."⁵⁵ Moreover, States must respect non-derogable human rights law and the rights that have attained *jus cogens* status, such as the right of all people to be free from torture.⁵⁶

Nonetheless, it is evident from the four reports submitted by the CTC that human rights concerns are among the problems that hamper full implementation of Resolution 1373. This is important not only in the context of States' legal obligations, but also because, as the Council noted in its Resolution 2178 (2014), failure to comply with these and other international obligations is one of the factors contributing to increased radicalization and fostering a sense of impunity.⁵⁷ United Nations human rights bodies continue to express their concern about human rights violations in the fight against terrorism. Moreover, debate in many States continues over how to reconcile the commitment to the fight against terrorism with other obligations under international law, in particular, under human rights and humanitarian law.⁵⁸ Some of these concerns are covered in the CTC's reports, which are summarized below.

⁵⁴ 1624, *supra* note 20 at para 3; 1963 (2010) at para 9.

⁵⁵ 2011/463, *supra* note 16 at 7 and 85.

⁵⁶ *Ibid* at 85.

⁵⁷ SC Res 2174, UNSCOR, 7251st mtg, S/Res/2174 (2004) at preamble para 7. The 2016 report of the CTC refers to a number of shortcomings in States' efforts to respect human rights, including "vague and overly broad definitions of terrorism offences, the use of counterterrorism laws to repress human rights defenders, excessive restrictions on the right to freedom of expression, torture and ill-treatment, and lack of law enforcement oversight." See, 2016/49, *supra* note 1 at 112.

⁵⁸ 2011/463, *supra* note 16 at 85.

(a) The Increasing Risk of Non-Compliance with the Non-Refoulement Obligation

United Nations human rights bodies have expressed concern over the extradition of suspected terrorists to countries other than the country of detention, where such transfer would be in violation of States' *non-refoulement* obligations under international law.⁵⁹ Under Article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*⁶⁰ States are required not to expel, return, or extradite a person to another State where he or she would be in danger of being subjected to torture.

The CTC's 2016 report confirms that compliance with the non-refoulement obligation is a complex matter, which places "considerable burdens" on States, in particular, when considering refugee camps.⁶¹

(b) The Perils of Imposing a State of Emergency when Fighting Terrorism

When States impose a State of emergency in the fight against terrorism it has often been criticized by human rights bodies on the ground that it creates conditions under which the principles of necessity and proportionality and respect for non-derogable rights can be compromised.⁶² States party to the *International Covenant on Civil and Political Rights* are under an obligation pursuant to Article 4 of the Convention to not infringe the non-derogable rights in any circumstances, including in cases of emergencies.

(c) Discrepancies in Implementing the Prohibition of Incitement to Terrorism

The global survey on the implementation of Security Council Resolution 1624 (2005), relating to the counter-incitement of terrorism, reflects the concerns raised by human rights

⁵⁹ 2008/379, *supra* note 16 at para 165; 2009/620, *supra* note 16 at 48-49.

⁶⁰ The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* was adopted on 10 December 1984 in New York, and entered into force on 26 June 1987.

⁶¹ 2016/49, *supra* note 1 at para 442.

⁶² 2009/620, *supra* note 16 at 48-49.

bodies regarding the different interpretations given by States to the concept of “incitement to terrorism.” As an offence based upon acts of expression rather than violence *per se*, incitement presents an unusual challenge for States. Legislation enacted by some States provides “vague or overbroad” definitions, covering non-violent political expression or other forms of advocacy and creating the risk of infringing the right to freedom of expression. This situation is further complicated by divergent views over the definition of terrorism itself.⁶³

Article 19 of the *International Covenant on Civil and Political Rights* specifies that restrictions on fundamental human rights “shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; [or] (b) for the protection of national security or of public order . . . or of public health or morals.” However, these principles have been applied differently with respect to incitement to terrorism. While some States criminalize speech that justifies, “glorifies,” or encourages acts of terrorism, others criminalize expressive conduct using other terms and concepts that are provided by law and necessary for safeguarding national security or public order.⁶⁴

Another relevant concern in this respect is the right to freedom of association. United Nations human rights bodies have expressed concern over pressures placed upon civil society in some States that threaten the rights to freedom of expression and association.⁶⁵

IV. Implementing Normative Resolutions in the Area of Non-Proliferation of Weapons of Mass Destruction

Resolution 1540 of the Security Council and its subsequent resolutions, call upon all States to report to the Security Council on measures adopted to implement the various obligations emanating from several provisions of these resolutions. It also requires States to ratify international instruments that

⁶³ 2012/16, *supra* note 50 at para 89. See, also, Chapter Two, pp. 55-56.

⁶⁴ 2012/16, *supra* note 50 at para 91.

⁶⁵ Letter dated 18 January 2016 from the Chair of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council. UNSCOR, S/2016/50 (2016) at para 66.

are in force in the area of non-proliferation of weapons of mass destruction. Furthermore, the Security Council obligates States to adopt and enforce effective laws that prohibit any non-State actor from developing, acquiring, manufacturing, possessing, transporting, transferring or using nuclear, chemical or biological weapons and their means of delivery. Additionally, the Council requires States to take effective measures to establish domestic controls to prevent the proliferation of such weapons, related materials, and their means of delivery.⁶⁶

Since its inception, the Committee established pursuant to Resolution 1540 (2004) (1540 Committee) has presented three reports⁶⁷ to the Security Council summarizing steps taken by States in implementing the obligations referred to above, and many necessary recommendations. An examination of the replies to the Committee shows that although the number of reporting States is on the rise, some States have either not responded to the Security Council's requests at all, or have not taken the required measures under these resolutions, or both. Some States' replies contain explanations concerning obstacles that prevent them from implementing their obligations.

A. States' Failure to Report to the 1540 Committee

In studying State practice as it relates to the implementation of Security Council resolutions relating to the non-proliferation of weapons of mass destruction, a reference should first be made to the number of States that have reported to the 1540 Committee. A comparison of the reports received by the 1540 Committee in the period between 2006 and 2011, demonstrates an upward trend. The total number of States that have submitted at least one report increased

⁶⁶ See, Chapter Two, Section III, p. 69.

⁶⁷ See, *Letter dated 25 April 2006 from the Chairman of the Security Council Committee established pursuant to resolution 1540 (2004) addressed to the President of the Security Council*. UNSCOR, UN Doc S/2006/257 (2006) [2006/257]; *Letter dated 8 July 2008 from the Chairman of the Security Council Committee established pursuant to Resolution 1540 (2004) addressed to the President of the Security Council*. UNGAOR, UN Doc A/2008/493 (2008) [2008/493]; and *Letter dated 12 September 2011 from the Chair of the Security Council Committee established pursuant to Resolution 1540 (2004) addressed to the President of the Security Council*. UNSCOR, UN Doc S/2011/579 (2011) [2011/579]. The 1540 Committee will conduct a comprehensive review on the status of implementation of Resolution 1540 (2004), and will submit to the Security Council a report on the conclusions of those reviews. The next report of the Committee is expected to be issued in December 2016. See, SC Res 1977, UNSCOR, 6518th mtg, UN Doc S/Res/1977 (2011) at O. P. 3.

from 129⁶⁸ in 2006, to 155⁶⁹ in 2008, to 168⁷⁰ in 2011. While there is an upward trend in reporting by States, 24 States had not yet submitted their first report to the Committee as of 30 April 2011.⁷¹

Except for the Democratic People's Republic of Korea (North Korea), which is unwilling to report under the 1540 regime because it has withdrawn from the *Treaty on the Non-Proliferation of Nuclear Weapons* (NPT),⁷² other non-reporting States are unable to implement the normative resolutions of the Security Council due to lack of capacity to adopt the complicated legislative and executive measures demanded by the Council.

B. Multilateral Instruments in the Area of Non-Proliferation of Weapons of Mass Destruction Are Not Yet Universally Accepted

Contrary to the counterterrorism resolutions,⁷³ Security Council Resolution 1540 uses indirect language in demanding that States ratify multilateral treaties in the area of non-proliferation of weapons of mass destruction. It calls upon all States to “promote the universal adoption and full implementation, and, where necessary to strengthen multilateral treaties to which they are parties, whose aim is to prevent the proliferation of nuclear, biological or chemical weapons.”⁷⁴ It also demands that all States “adopt national rules and regulations . . . to ensure compliance with their commitments under the key multilateral non-proliferation treaties.”⁷⁵

This provision is ambiguous, because on the one hand it addresses all States, but then simultaneously refers to the parties to such instruments. It must be noted that not all States are parties

⁶⁸ 2006/257, *supra* note 67 at 2.

⁶⁹ 2008/493, *supra* note 67 at 6.

⁷⁰ 2011/579, *supra* note 67 at 8. As for the list of reporting States, see, the same document at 36.

⁷¹ Cape Verde, Central African Republic, Chad, Comoros, Congo, Democratic People's Republic of Korea, Equatorial Guinea, Gambia, Guinea, Guinea-Bissau, Haiti, Lesotho, Liberia, Malawi, Mali, Mauritania, Mozambique, Sao Tome and Principe, Solomon Islands, Somalia, Swaziland, Timor-Leste, Zambia and Zimbabwe. See, *Ibid* at 37.

⁷² SC Res 2094, UNSCOR, 6932nd mtg, UN Doc S/Res/2094 (2013) at para 3.

⁷³ See, Section III of this Chapter, pp. 207-208.

⁷⁴ SC Res 1540, UNSCOR, 4956th mtg, UN Doc S/Res/1540 (2004) at para 8(a) [1540].

⁷⁵ 1540, *supra* note 74 at para 8(b).

to the NPT. However, this ambiguous language has been used by the Security Council to pave the way for the unanimous adoption of the Resolution, and to satisfy India and Pakistan, which argued in the course of adoption that they are not parties to the NPT.⁷⁶ Despite the vagueness of the Resolution, it is still comparable to the language employed in counterterrorism resolutions that require all States to ratify relevant multilateral instruments. The report presented by the 1540 Committee in 2011 confirms this viewpoint. The report confirms that “all Member States have become parties to at least one international or multilateral instrument of particular relevance to Resolution 1540 (2004).”⁷⁷ The following paragraphs consider the impact of Resolution 1540 in requiring States to “promote the universal adoption and full implementation . . . of multilateral treaties . . . whose aim is to prevent the proliferation of nuclear, biological or chemical weapons.”

(i) Accelerating Negotiation Processes

It is widely acknowledged that Security Council Resolution 1540 stimulated negotiation processes for three relevant international instruments. Following the adoption of the Resolution, stalled negotiations on the *Draft International Convention for the Suppression of Acts of Nuclear Terrorism* were revived in the General Assembly.⁷⁸ Subsequently, the General Assembly approved the text of this Convention on 13 April 2005, which was then opened for signature three months later⁷⁹ and entered into force on 7 July 2007. The Convention has 115 signatories and 99 parties.⁸⁰

In the same vein, a diplomatic conference was convened in July 2005 in Vienna, to amend the *Convention on the Physical Protection of Nuclear Material* of 1980.⁸¹ The amended Convention

⁷⁶ The two countries had argued in the course of debate of the Security Council on the matter that this resolution could be used as an instrument to bind them to NPT. Pakistan, a member of the Security Council, opposed the adoption of the resolution in the course of the debate, but it voted in favor of the resolution. See, UNSCOR, 59th Year, 4956th mtg, UN Doc S/PV. 4956 (2004) [provisional] at 2.

⁷⁷ 2011/579, *supra* note 67 at para 34.

⁷⁸ *Draft International Convention for the Suppression of Acts of Nuclear Terrorism* was initially submitted by the Russian Federation in 1998. UNGAOR, UN Doc A/53/37 (1998) at 6.

⁷⁹ See, GA Res 58/290 UNGAOR, 58th sess, UN Doc A/Res/58/290 (2004).

⁸⁰ Checked on 27 January 2015. For the latest information see UN website, online: <<https://treaties.un.org/pages/UNTSONline.aspx?id=2>>.

⁸¹ The Convention has 151 parties, online: <https://www.iaea.org/sites/default/files/cppnm_status.pdf>.

binds States Parties to protect nuclear facilities and material in peaceful domestic use and storage, as well as while transporting nuclear material. It also provides for expanded cooperation between and among States regarding rapid measures to locate and recover stolen or smuggled nuclear material, mitigate any radiological consequences of sabotage, and prevent any combat-related offences. The amendments to the Convention have been ratified by 83 States.⁸²

The Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (the Beijing Convention)⁸³ and the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (the Beijing Protocol)⁸⁴ of 2010 have broadened and strengthened the global civil aviation counterterrorism framework. The Beijing Convention of 2010 requires States, *inter alia*, to criminalize the transport of biological, chemical, and nuclear weapons and related material.⁸⁵ These provisions confirm the nexus between non-proliferation and terrorism, and ensure that the international community will act to combat both. This treaty is intended to enhance global efforts to ensure that these extraordinarily dangerous materials will not be transported by civil aircrafts for illicit purposes, and, if such attempts are made, those responsible will be held accountable under law.

(ii) Limited Impact of Resolution 1540 on Increasing Parties to WMD Instruments

It becomes clear from the figures provided in Table 2 (Annex), that international instruments relating to non-proliferation of weapons of mass destruction were widely accepted by the community of States at the time of adoption of Security Council Resolution 1540. Although this resolution prompted an increase in the number of ratifications of these instruments, it has

⁸² Online: <https://www.iaea.org/sites/default/files/cppnm_amend_status_1.pdf>.

⁸³ *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*, done at Beijing on 10 September 2010.

⁸⁴ *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*, done at Beijing on 10 September 2010.

⁸⁵ *Ibid* at Article 1(i).

not led to their universal acceptance. Thus, the question remains: what is the added value of calling upon all States under Chapter VII to ratify international instruments? If demands by the Security Council under Chapter VII do not lead to the universal acceptance of international instruments, the conclusion may be made that despite the fact that these resolutions are adopted under Chapter VII, they are really no more than recommendations. Language employed in these resolutions confirms this conclusion. Thus, arguments suggesting that all States are bound to ratify international instruments in particular areas run the risk of undermining the credibility of Security Council decisions, as they are not implemented by the entire United Nations membership.

C. Implementing Paragraphs 1 and 2 of Resolution 1540

Under Paragraph 1 of Resolution 1540, all States are required to “refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery.” The 2011 report of the 1540 Committee indicates that the number of States which have expressed their commitment not to provide support to non-State actors for such activities increased from 105 States, in 2008, to 129, in 2011.⁸⁶

Under Paragraph 2 of the Resolution, all States are required to “adopt and enforce appropriate effective laws which prohibit any non-State actor” from manufacturing, acquiring, possessing, developing, transporting, transferring or using nuclear, chemical or biological weapons and their means of delivery, in particular, for terrorist purposes. The Resolution also bans, non-State actors from attempting to engage in any of the foregoing activities, participating in them as an accomplice, assisting or financing them.

⁸⁶ 2011/579, *supra* note 67 at para 31.

According to the 2011 report of the 1540 Committee, 140 States have adopted legislative measures to prohibit the proliferation of nuclear, chemical, and biological weapons, as compared to 65 States in 2006. The number of countries reporting national legal frameworks regarding the manufacture and production of nuclear materials has increased from 32 in 2006, to 71 in 2009, and to more than 120 in 2011. Per the same report, 135 States have adopted national legislation to prohibit non-State actors from manufacturing or producing chemical weapons, compared to 105 States in 2008. Moreover, 123 States have put provisions in place to penalize the manufacture or production of chemical weapons by non-State actors, compared to 96 in 2008.⁸⁷

However, as the 2011 report of the 1540 Committee also concluded, not all prohibitions concerning nuclear, chemical, and biological weapons and their means of delivery, as outlined in Paragraph 2 of the resolution, are reflected in the existing legislation of States. This conclusion is based on the premise that some States' constitutions have general clauses that view relevant international non-proliferation treaty obligations as self-executing laws. The report rightly clarifies that these international instruments deal primarily with State-to-State obligations and do not cover non-State actors, as required by Resolution 1540. Extending the obligations emanating from non-proliferation instruments to cover non-State actors naturally requires specific, supplementary legislation, in particular, to provide penalties for the commission of prohibited activities by non-State actors.

In addition, although the criminal codes of many States provide for penalties for terrorist acts, under these laws the existence of a requisite mental element (*mens rea*) constitutes an essential component of the crime. However, the scope of Resolution 1540 is broader than most States' criminal codes as they apply to terrorist acts. Under this Resolution, the "terrorist intent" element is not required, and States are under the obligation to prohibit

⁸⁷ *Ibid* at para 43.

and prevent access by non-States actors to weapons of mass destruction irrespective of the existence of a terrorist intent.⁸⁸ Therefore, preventing non-State actors from acquiring such weapons and their means of delivery is an obligation for all States, one that may require additional legislation.

D. Problems Relating to Implementation

Despite the reported progress in the implementation of Paragraphs 1 and 2 of Security Council Resolution 1540, many States continue to demand assistance to meet their obligations. However, the 1540 Committee itself is not in a position to meet the growing demand for technical assistance for the implementation of the Resolution⁸⁹ although it strives to match offers of, and requests for, assistance. In order to streamline and accelerate the assistance process, the Committee adopted a revised procedure in October 2010 and brought it to the attention of Member States.⁹⁰

In addition, the Committee interacts with international organizations such as the European Union, as well as with intergovernmental mechanisms such as the Group of Eight, to encourage greater involvement in providing assistance to those States that request it.⁹¹ To this end, States that need assistance are encouraged to convey a request to the Committee and to use the Committee's assistance template. States and international, regional, and sub-regional organizations are encouraged to inform the Committee of areas in which they are able to provide assistance. The Committee acknowledges that full implementation, including the adoption of national legal measures, is a long-term task that requires additional effort at the national, regional, and international levels.

⁸⁸ *Ibid* at para 35.

⁸⁹ Formal requests were submitted to the Committee by Armenia, Azerbaijan, Colombia, Côte d'Ivoire, Congo, the Democratic Republic of the Congo, Guatemala, Iraq, Madagascar, Mexico, Mongolia, Qatar, Serbia and Uganda. Additionally, formal requests were also submitted to the Committee by two regional organizations, the Caribbean Community (CARICOM) and the Central American Integration System (SICA). *Ibid* at para 110.

⁹⁰ *Ibid* at 20.

⁹¹ *Ibid*.

V. Obstacles in Implementing the Security Council's Resolutions Which Impose Sanctions on Individuals and Entities

As discussed in Chapter Two,⁹² under the sanctions regime imposed against individuals and entities pursuant to Security Council Resolution 1267 (1999) and modified by its Resolutions 1989 (2011) and 2253 (2015), all States must freeze without delay the funds and other financial assets of ISIL (Da'esh), Al-Qaida and other individuals, groups, undertakings and entities associated with them, as designated on the *ISIL (Da'esh) and Al-Qaida Sanctions List* (hereafter “ISIL & Al-Qaida Sanctions List”).⁹³ Also, the Security Council demands all States to report to the “1267/1989/2253 ISIL (Da'esh) and Al-Qaida Sanctions Committee”⁹⁴ (the “ISIL & Al-Qaida Committee”) on the measures taken with respect to ISIL (Da'esh), members of Al-Qaida organization, members of the former Taliban regime, and individuals, groups, undertakings and entities associated with these organizations and whose names appear on the Committee's list.⁹⁵

However, annual reports presented to the Security Council⁹⁶ by the former 1267 Committee and its successor, the ISIL (Da'esh), Al-Qaida Committee, and an additional four written analytical assessments⁹⁷ on the implementation of the measures adopted under this regime, refer to the obstacles and shortcomings that prevent States from discharging their responsibilities *vis-a-vis* the Security Council resolutions. Primarily, the difficulty lies in

⁹² See, Chapter Two, Section IV, pp 81-94.

⁹³ SC Res 1267, UNSCOR, UN Doc S/Res/1267(1999) at para 4(b); SC Res 1333, UNSCOR, 4251st mtg, UN Doc S/Res/1333 (2000) at para 8(c); SC Res 1989, UNSCOR, 6557th mtg, UN Doc S/Res/1989 (2011) at para 1(a); and SC Res 2253, UNSCOR, 7587th mtg, UN Doc S/Res/2253 (2015) at para 2(a).

⁹⁴ In accordance with its Resolution 2253 (2015), the Security Council decided “that, from the date of adoption of this resolution, the 1267/1989 Al-Qaida Sanctions Committee shall henceforth be known as the “1267/1989/2253 ISIL (Da'esh) and Al-Qaida Sanctions Committee” and the Al-Qaida Sanctions List shall henceforth be known as the “ISIL (Da'esh) and Al-Qaida Sanctions List.” 2253, *supra* note 95 at para 1.

⁹⁵ SC Res 1390, UNSCOR, UN Doc S/Res/1390 (2002) at para 6; and SC Res 2253, UNSCOR, UN Doc S/Res/2253 (2015).

⁹⁶ See, UN Docs S/2000/1254, S/2002/101, S/2002/1423, S/2004/281, S/2204/1039, S/2206/22, S/2207/59, S/2008/25, S/2008/848, S/2009/676, S/2010/685, S/2012/305, S/2012/930, S/2013/792, S/2014/923, and S/2015/976.

⁹⁷ See, UN Docs S/2004/349; S/2004/1037; 2005/761; *infra* note 101; and *Letter dated 20 December 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*. UNSCOR, UN Doc S/2006/1046 (2006).

implementing the targeted sanctions in a uniform manner across States' different legal systems.⁹⁸ Non-reporting is also a problem on the part of some States, which also prevents proper assessment of the reasons for lack of cooperation. On the other hand, States which do report to the Committee complain about problems faced in executing these resolutions.

A. Non-Reporting

The number of States that submit reports to the Committee is lower than expected.⁹⁹ In addition to a possible lack of political will, the Committee has identified the following factors as the cause behind States' failure to report: (a) reporting fatigue; (b) a lack of resources and technical capacity; and (c) coordination difficulties at the national level. Furthermore, some States face difficulties in spotting the possible presence of Al-Qaida members or those associated with the network in their territories.¹⁰⁰ These findings were later confirmed by the analytical summary of reasons for non-reporting put forward by Member States, prepared by the Analytical Support and Sanctions Monitoring Team.¹⁰¹

B. Problems Relating to Non-Implementation

The problems identified in this sub-section are different from the non-reporting issues discussed above. Issues described here are those that have been reported by States and summarized in the Secretary-General's reports. They are as follows:

(i) Lack of Sufficient Information

⁹⁸ Magnusson, *supra* note 12 at 54.

⁹⁹ As at 31 December 2003, 101 Member States of the United Nations had not yet submitted a report as required by para 6 of SC Res 1455, UNSCOR, UN Doc S/Res/1455 (2003). See, UNSCOR, UN Doc S/2004/281 at para 18. By 31 March 2004, the Committee had received 123 reports from Member States pursuant to paragraph 6 of Resolution 1455 (2003). By 31 March 2004, 53 Member States had neither reported nor explained in writing their reasons for non-reporting. See, UNSCOR, UN Doc S/2004/349 at 4.

¹⁰⁰ *Ibid* at para 19.

¹⁰¹ As at 31 December 2003, 101 Member States (53 per cent) had not submitted a report. See, UN Doc UNSCOR, S/2004/349 at para 18. As at 6 December 2005, 47 States had not yet reported to the Committee. See, *Report of the 1267th Committee*. UNSCOR, UN Doc S/2005/761 at 3 [2005/761]. As at 28 December 2006, 44 States had not yet submitted reports to the Committee. See, S/2006/1046, *supra* note 97, at 6.

The lack of sufficient information about listed individuals and entities has been mentioned by many UN Member States as a reason for not implementing sanctions against certain entities that are included in the consolidated sanctions list.¹⁰² The Counterterrorism Committee acknowledged in its 2005 report that implementing the travel ban causes a great deal of difficulty for some States, either because of a lack of details about some of the names on the Committee's list, or due to a lack of technical equipment at their borders.¹⁰³

(ii) Disagreement on Modalities of Asset-Freezes and Travel-Bans

The Committee's 2005 report discloses the disagreement that exists between the 1540 Committee and some Member States concerning asset freezing and travel bans. Whereas the Committee expects Member States to freeze assets or impose travel bans as soon as an individual or entity is added to the blacklist, in some States, initiating national criminal proceedings is a prerequisite to these actions. The Committee also insists that criminal conviction or indictment is not necessary for the inclusion of individuals or entities on the blacklist, and that Member States should not wait until the finalization of national administrative, civil, or criminal proceedings against an individual or entity before proposing their names for inclusion on the blacklist.¹⁰⁴ As discussed in Chapter Two, many States are unable to meet this expectation due to its incompatibility with their criminal procedures.

(iii) Modifying Sanctions

As discussed in Chapter Two,¹⁰⁵ several modifications made to the sanctions regime created additional problems for Member States in implementing the regime's obligations. Frequent changes to the Committee's mandate and its sanctions lists are among the major factors that contributed to some States' non-compliance. In accordance with the Committee's 2005 report, only "34 States had frozen about US \$91.2 million in financial assets, of which 74.2 per cent

¹⁰² 2005/761, *supra* note 101 at 2.

¹⁰³ 2006/1046, *supra* note 97 at para 13.

¹⁰⁴ 2005/761, *supra* note 101 at 3.

¹⁰⁵ See, Chapter Two, Section IV, pp 81-93.

was frozen by three States.” The Committee expressed its concern that not all States had fully complied with the requirements of relevant Security Council resolutions to freeze the assets of listed individuals and entities.¹⁰⁶

In fact, the reports revealed a more dramatic situation. First, the Monitoring Team noted that “reporting fatigue” had hampered efforts to engage with States.¹⁰⁷ Second, and more importantly, the monitoring team concluded that noncompliance was the result of a “lack of capacity to introduce and enforce the measures,” as well as States’ beliefs “in the ineffectiveness and illegitimacy of the sanctions.”¹⁰⁸ These reports underlined the fact that the findings and rulings of national and regional courts resulted in a fundamental flaw in the sanctions regime. As will be discussed in the next section, these courts have questioned the legitimacy of the sanctions regime and thus adversely affected the States’ willingness to comply.¹⁰⁹

VI. Adverse Effects of National and Regional Courts’ Judgments on the Implementation of Normative Resolutions

Owing to the unavailability of judicial remedies under the 1267 sanctions regime, national and regional courts have been increasingly engaged by individuals and entities who seek to remove restrictions imposed on their liberties. In their pleadings, affected persons are not directly challenging the normative resolutions *per se*, but are rather opposing the domestic measures adopted to give effect to the normative resolutions of the Security Council.

It is worth recalling that although the Security Council’s normative resolutions were adopted under Chapter VII, they are not directly enforceable in most national legal systems. The resolutions will have to be implemented by States through the adoption of domestic implementing legislation or

¹⁰⁶UNSCOR, UN Doc S/2005/1046 at para 11.

¹⁰⁷ *Ibid* at para 36.

¹⁰⁸ See, *Report of the 1267th Committee, Ninth Report*. UN Doc S/2009/245 (2009) at 9 [2009/245].

¹⁰⁹ Droubi, *supra* note 1 at 182.

administrative measures. These acts, like any other domestic act, are open to be challenged before domestic courts and have been before several national and regional courts, notably the Swiss Federal Tribunal,¹¹⁰ the Turkish Council of State,¹¹¹ the English High Court and Court of Appeal,¹¹² Pakistani and Italian courts,¹¹³ and, most prominently, the courts of the European Communities.¹¹⁴

From court proceedings thus far, it appears that a distinction has been made between States' international obligations to abide by the binding resolutions of the Security Council, and the constitutional law implications of giving effect to the Council's resolutions.¹¹⁵ Another factor to consider is that domestic and regional courts in different States have varied sources of power and jurisdiction, and this can impact their assessment of the legal rights of targeted individuals. While regional courts mainly focus on international human rights law and the respective rules of the legal system they belong to, national courts not only take into account a State's legal obligations under international law, but also the fundamental human rights often embedded in constitutions.¹¹⁶

A. The *Kadi* Case

In 1999 and 2000, the United Nations' Taliban and Al-Qaida Sanctions Committee included Yassin Abdullah Kadi and the Al-Barakaat Foundation on the list of persons associated with

¹¹⁰ *Youssef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, BGE 133 II 450, ILDC 461 (CH 2007), online: <<http://www.oxfordlawreports.com/>>; see also Case No. 1A.48/ 2007 (Swiss Federal Tribunal), decision of 22 April 2008, online: <<http://www.bger.ch/de/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm>>.

¹¹¹ *Al-Qadi v The State*. This is a claim before the Turkish Council of State (Danis, tay) by Yassin Kadi. The first instance judgment by the Tenth Division of the Council of State is unreported but is mentioned in UN Doc. S/2006/750 at 49; UN Doc. S/2007/132 at 39; and UN Doc. S/2007/677 at 41. The Board of Administrative Affairs of the Council of State reversed the decision of the Tenth Division: UN Doc S/2006/677 at 41 x 6. The latter judgment is reported as *Kadi v The State* (TK 2007) ILDC 311.

¹¹² *A, K, M, Q & G v HM Treasury*, [2008] EWHC 869 (Admin), [2008] EWCA Civ 1187; *Hay v HM Treasury*, [2009] EWHC 1677 (Admin), [2009] Lloyd's Rep FC 547, ILDC 1367 (UK 2009).

¹¹³ See generally on challenges against the 1267 regime the reports of the Analytical Support and Sanctions Monitoring Team to the 1267 Committee, see, 2009/245, *supra* note 108 at 36-39; UN Doc S/2008/324 at 36-37; UN Doc S/2007/677 at 40-42; UN Doc S/2007/132 at 38-40; UN Doc S/2006/750 at 47-50; UN Doc S/2006/154 at 45-47; UN Doc S/2005/572 at 48-51; UN Doc S/2005/83 at 52-55.

¹¹⁴ Joined C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351; T-318/01 *Omar Mohammed Othman v. Council of the European Union and Commission of the European Communities* [2009] ECR II-0000 (11 June 2009).

¹¹⁵ August Reinisch, "Should Judges Second-Guess the UN Security Council?" (2009) 6 Int'l Org LR at 270.

¹¹⁶ Magnusson, *supra* note 12 at 70.

Osama bin Ladin, Al-Qaida, or the Taliban.¹¹⁷ In order to implement this Security Council decision, the European Union Council (EUC) adopted Regulation No. 88 I/2002, which also listed these individuals as associates of Osama bin Laden, Al-Qaida, or the Taliban. Consequently, the EU Council froze these individuals' bank accounts.¹¹⁸

In complaints submitted to the EU Court of First Instance ("CFI"), these individuals argued, among other things, that by citing their names in the Council's regulation, their fundamental human rights, including the right to due process and property, had been violated. Accordingly, they sought an annulment of the EUC's regulation.¹¹⁹

In its judgment of 21 September 2005 (*Kadi I*), the CFI ruled that it did not have jurisdiction to review the legality of the EU Regulation because it had been adopted to give effect to the mandatory Security Council resolution. The CFI observed that under the UN Charter provisions, the obligation to implement Security Council resolutions prevailed over any other international commitment, including those of the European Community. In the view of the CFI, there existed one exception to this general rule of judicial "abstention"—the Court may indirectly review "the lawfulness of the resolutions of the Security Council with regard to *jus cogens*."¹²⁰ The CFI ruled that human rights, including the right to property, the right to be heard, and the right of access to the court, were among the peremptory norms of international law. Nevertheless, the CFI concluded that the individuals' rights had not been violated,¹²¹ and therefore dismissed the case.¹²²

¹¹⁷ The blacklisting was based on Security Council Resolutions 1267 and 1333.

¹¹⁸ Reinisch, *supra* note 115 at 272.

¹¹⁹ *Ibid* at 273.

¹²⁰ See, the Judgements of the CFI of September 21, 2005 in *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the EU and Commission of the EC* (Al Barakaat CFI Judgement), Case T-306/01, and *Yassin Abdullah Kadi v Council of the EU and the Commission of the EC* (Kadi CFI Judgement), Case T-315/01 (OJ 2005 C 281, at 17), at para 226.

¹²¹ The Court considered that in the case before it the deprivation of property was not arbitrary but pursued an objective of fundamental public interest of the international community. Moreover, the deprivation was temporary in nature and there was a procedure in place for those who wished their names to be removed from the list. See, Kadi CFI Judgement, *supra* note 120 at paras 242-247.

¹²² *Ibid*.

Subsequent to the CFI's ruling, the complainants submitted an appeal to the European Court of Justice ("ECJ"), which rendered its judgment on 3 September 2008 (*Kadi II*). The ECJ confirmed the CFI's view that the European Court of Justice did not have jurisdiction to review decisions of the Security Council, but took a different approach concerning the judicial review of Security Council resolutions. The ECJ held that all acts of the European Community, including acts relating to the implementation of Security Council resolutions, were reviewable by the European Court of Justice. The court of appeal also confirmed the power of the Court to fully "review the lawfulness of all community acts . . . like the contested regulations [that] are designed to give effect to the resolutions adopted by the Security Council under the Chapter VII of the United Nations Charter."¹²³

The ECJ elaborated on its ruling by clarifying three points. First, the Court stressed that its jurisdiction was limited to the Community's acts and did not extend to the review of Security Council resolutions.¹²⁴ Second, in the Court's view, members of the United Nations are entitled to freely decide on the ways and means of implementing the Security Council's resolutions:

"...the Charter of the United Nations does not impose the choice of a particular model for the implementation of resolution adopted by the Security Council under [C]hapter VII The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of these resolutions into their legal order."¹²⁵

Third, the Court emphasized that the European Community's acts must conform to "the higher rule of law in the Community legal order."¹²⁶ The Court argued that Article 307 of the

¹²³ Joint Cases C-402/05 P and C-415/05P *Kadi and Al Barakaat v Council of European Union and the Commission of the European Communities*, *European Court of Justice* [2008] ECR I6351 at para 326 [Kadi ECJ Judgement].

¹²⁴ *Ibid* at para 287.

¹²⁵ *Ibid* at para 298.

¹²⁶ Hilpold discusses the concept of "foundation of the Community legal order," articulating that it is not a substitute for or equivalent to fundamental rights, but a much broader concept that embraces the fundamental rights. In his view, introducing this concept was an attempt by the ECJ to shed light on the hierarchical relationship between the EU law and international law. According to this view, the "Community law does not automatically take precedence over international law but Community is in itself hierarchical" for two reasons. First, according to Article 300 (7) EC, international agreements are binding on the institutions of the Community and Member States. They have primacy over acts of secondary law, but not over primary law. In

European Convention does not “permit any challenge to the principles that form part of the very foundation of the Community legal order, one of which is the protection of human rights.”¹²⁷ Thus, the Court concluded that UN law cannot prevail over the European Community’s primary law, in particular over the general principles, of which fundamental rights form a part.¹²⁸ In the view of the Court, this approach would not “entail any challenge to the primacy of that resolution in international law.”¹²⁹

In this judgment, the ECJ escaped addressing the highly controversial issue of the *jus cogens* status of fundamental human rights. Instead, the Court reaffirmed that “all community acts must respect human rights.”¹³⁰ On this basis, the ECJ examined the consistency of the blacklisting mechanism and asset freezing with human rights standards. The Court found that the EU, by “inclusion of the appellants’ names in the list of persons and entities covered by the restrictive measures,” had violated “the right of defence, in particular the right to be heard, and the right to effective judicial review of those rights.”¹³¹ The Court also observed that the regulation in question did not provide for any kind of procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in the annex I of the regulation. In the Court’s view, the fact that the appellants had never been informed of the evidence that led to their inclusion in the list attests to the fact that their right of defence and right to an effective legal remedy had been violated.¹³²

The European Court of Justice also ruled that the “actual freezing of the assets” of Mr. Kadi constituted an unwarranted limitation of his right to property, though it acknowledged that the right to property was not absolute and was subject to restriction in the public interest. In this context, the

particular, primacy is excluded over general principles, of which fundamental rights form a part. Second, the very foundations of the Community’s legal order are absolutely non-derogable. Without referring to the UN Charter Article 103, the Court categorically stated that “no norm should overcome the barrier of the very foundation of the Community legal order.” See, Peter Hilpod, “UN Sanctions Before the ICJ: the *Kadi* Case” in August Reinisch, ed, *Challenging acts of international organizations before national courts* (Oxford, New York: Oxford University Press, 2010) at 35.

¹²⁷ *Kadi*, ECJ Judgement, *supra* note 123 at para 304.

¹²⁸ *Ibid* at para 308.

¹²⁹ *Ibid* at para 288.

¹³⁰ *Ibid* at para 285.

¹³¹ *Ibid* at para 334.

¹³² *Ibid* at para 319.

ECJ examined the applicants' challenges to their right to property and found that the freezing of assets had been undertaken in the general interest of combating terrorism. However, in view of the fact that the regulation in question did not contain any procedure to review the applicants' challenges to their right to property, the Court annulled the Council's Regulation No. 88 I/2002, in so far as it concerned Mr. Kadi and the Al-Barakaat International Foundation, and gave the European Council three months to remedy the breach of these human rights.

Shortly before the three months' deadline, the Commission adopted Regulation No. 1190/2008,¹³³ which again included Mr. Kadi and the Al-Barakaat Foundation as persons whose assets should be frozen. However, in an explanatory note to the new Regulation, the Commission clarified that it had communicated "the narrative summaries of reasons" provided by the UN sanctions committee to the interested persons, it had studied the viewpoints of the listed persons, and that it was convinced that their inclusion in the list was still justified.¹³⁴

As expected, on 26 February 2009, Kadi instituted new proceedings before the European General Court (EGC), challenging the re-entry of his name in Annex I of the new regulation, seeking its annulment. In the application, he argued, *inter alia*, that his rights to an effective hearing and judicial protection had been violated, that the Commission failed to provide compelling reason in keeping his assets frozen, and that the Commission erred in its assessment of the facts and circumstance in re-entering his name in Annex I.¹³⁵

¹³³ The new Regulation incorporated improvements made to the sanctions regime by SC Res 1452, UNSCOR, 4678th mtg, UN Doc S/Res/1452 (2002); SC Res 1730, UNSCOR, 5599th mtg, UN Doc S/Res/1730 (2006); and SC Res, UNSCOR, 5609th mtg, UN Doc S/Res/1735 (2006). The improvements included allowing individuals to keep necessary funds for their basic living expenses. The Council also introduced a notification procedure for listed persons and amended the de-listing procedure to enable affected persons to plea for removal of their names from the blacklist, either through their States of residency or citizenship, or directly through the focal points at the UN Secretariat. For details, see, Chapter Two, Section IV D, p. 88.

¹³⁴ Reinisch, *supra* note 115 at 277.

¹³⁵ Case T-85-09 *Yassin Abdulla Kadi v European Commission*, [2010] European General Court (Seventh Chamber) at para 63 [Kadi EGC Judgement].

In its judgement of 30 December 2010, the EGC ruled in favor of Kadi (*Kadi III*) and annulled Regulation 1190/2008.¹³⁶ As in *Kadi II*, the Court carried out a comprehensive review of the case before it and found that neither the Focal Point for De-listing (the Focal Point), established in the UN Secretariat¹³⁷ nor the Office of the Ombudsman provided a mechanism comparable to an effective judicial procedure.¹³⁸ It held that the Commission failed to disclose to both Kadi and the General Court the reasons for maintaining his name on the list, and that the allegations in the “Narrative Summaries” were imprecise and vague, and prevented Kadi from launching “an effective challenge to any of the allegations made against him” and prevented the EGC from “undertaking “a review of the lawfulness of the contested regulation.”¹³⁹ Consequently, the Court determined that the right to a defense and the right to effective judicial protection of the accused were violated, that the restrictions imposed on Kadi’s right to property was unjustified, and that the principle of proportionality had been infringed.¹⁴⁰

The European Commission and its supporters¹⁴¹ appealed the ECJ’s decision (*Kadi IV*) but once again the Court sided with Kadi, dismissing their appeal in July 2013.¹⁴² The main argument of the appellants was that the EGC erred in law in carrying out a full judicial review and also in finding that the regulation infringed the appellees’ right of defence and right to judicial protection, and in its application of the principle of proportionality. The appellants also argued that Resolution 1822 (2008) improved protection of fundamental rights, and that by establishing the Office of the Ombudsman under Resolution 1904, blacklisted individuals could argue their complaints before an “independent and impartial body.” Furthermore, Resolution 1989 (2011) provided a delisting procedure with which the consensus of the 1267 Committee was no longer required.¹⁴³

¹³⁶ *Ibid* at para 197.

¹³⁷ The Focal Point for De-Listing established pursuant to Resolution 1730 (2006) receives de-listing requests and performs the tasks described in the annex to that resolution.

¹³⁸ Kadi EGC Judgement, *supra* note 135 at para 128.

¹³⁹ *Ibid* at paras 173-188 and 192-194.

¹⁴⁰ *Ibid* at paras 179, 183 and 193-195.

¹⁴¹ The European Council, the UK and other States.

¹⁴² Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others v Yassin Abdullah Kadi*, Judgement of the Grand Chamber 18 July 2013 at para 168 [European Commission and Others v Kadi].

¹⁴³ *Ibid* at para 80.

The ECJ opined that the right of defence “include[s] the right to be heard and the right to have access to the file, subject to legitimate interests in maintaining confidentiality.”¹⁴⁴ The right to effective judicial protection requires that the person affected by an EU decision “must be able to ascertain the reason upon which the decision . . . is based,”¹⁴⁵ which can be accomplished either by reading the decision or by disclosure of such reasons. The EU courts have the power to require the EU authorities to disclose the reasons for its decisions affecting persons so as to enable an individual to defend its rights “with full knowledge of the relevant facts,” and whether there are grounds for bringing the case to the Court.¹⁴⁶ Finally, the Court must be able to review the lawfulness of the decision. The ECJ noted that while there are limitations to the exercise of these rights, such limitations must respect “the essence of the fundamental rights in question.”¹⁴⁷

The Court further observed that a balance must be struck between rights and limitations on a case-by-case basis. In the present case, the Court not only considered the EU norms relating to the maintenance of peace and security, but also took into account the UN Charter provisions. The European Court of Justice maintained that the Security Council must act “in accordance with the purposes and principles of the United Nations Charter, including respect for human rights.”¹⁴⁸

It is important to note that according to the Court, judicial review at the level of intensity carried out by the ECJ was “indispensable to ensure a fair balance between the maintenance of international peace and security and the protection of fundamental rights and freedoms of persons.”¹⁴⁹ The Court asserted that irrespective of their preventative nature, the sanctions have a “substantial negative impact” on the rights and freedoms at stake because of the “serious disruption of the working and family life of the person” Moreover, “due to [the] restrictions on the exercise of his rights to

¹⁴⁴ *Ibid* at paras. 98-99.

¹⁴⁵ *Ibid* at para. 100.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid* at para 101.

¹⁴⁸ *Ibid* at para 106.

¹⁴⁹ *Ibid* at para 116.

property [and] . . . the actual duration . . . [of] the public opprobrium and suspicion.”¹⁵⁰ Despite the improvements made to the delisting procedure at the UN level, the procedure still does not provide “the guarantee of effective judicial protection.”¹⁵¹

B. The *Nada* Case

After the Court of First Instance’s ruling in the *Kadi* case, the Federal Supreme Court of Switzerland rendered its judgment in the *Nada* case, on 14 November 2007. Youssef Nada’s name had been included in the Security Council’s blacklist¹⁵² and, subsequently, his assets were frozen by Swiss authorities implementing the resolutions in the fight against terrorism. In criminal investigations conducted by the Swiss authorities, no evidence was found against Nada and therefore the proceedings were terminated.¹⁵³ Nada then sought removal of the financial restrictions imposed against him, but this was denied by the Swiss authorities on the grounds that the restrictions on his assets had been imposed in the implementation of binding Security Council resolutions.¹⁵⁴

During the appeals phases of Nada’s case, the Supreme Court of Switzerland followed the approach of the CFI concerning the reviewability of the Security Council resolutions. Like the Court of First Instance, the Supreme Court recognized the limited powers of the Swiss courts to examine the compatibility of Security Council resolutions with the peremptory norms of international law. However, the Supreme Court did not agree with the CFI that the human rights in question were among the peremptory norms.¹⁵⁵ The Court thus refused to exercise its jurisdiction in the *Nada* case.¹⁵⁶

Although the Supreme Court of Switzerland found that the Security Council’s de-listing procedure was not compatible with the human rights standards of the Swiss Constitution and those of

¹⁵⁰ *Ibid* at para 132.

¹⁵¹ *Ibid* at para 133.

¹⁵² *Youssef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs, Administrative appeal judgment*, Case No 1A 45/2007; ILDC 461 (CH 2007); BGE 133 II 450, Decision 14 November 2007, at F4.

¹⁵³ *Ibid* at F6.

¹⁵⁴ *Ibid* at F5.

¹⁵⁵ *Ibid* at H5.

¹⁵⁶ *Ibid* at H6.

human rights treaties, it observed that a solution to this matter could only be found at the international level “by introducing an effective control mechanism within the UN.”¹⁵⁷

Nada brought a case against Switzerland before the European Court of Human Rights (ECtHR) in February 2008, claiming that the travel ban had infringed his right to liberty under Article 5 of the European Convention on Human Rights (ECHR), his right to a private and family life, and his honour and reputation under Article 8 of the Convention. He further argued that the travel ban had prevented him to consult his doctors, which was essential for his health due to his age. Finally, he claimed that there was no effective remedy available to him, which constituted a violation of Article 13 of the Convention.

The ECtHR found that the claimant’s rights had been violated under Articles 8 and 13 of the Convention.¹⁵⁸ With respect to the right to private life under Article 8, the Court observed that the provision also protects family life, which requires a State to “act in a manner calculated to allow those concerned to lead a normal family life”—the main criterion being “the existence of effective ties between the individuals concerned.”¹⁵⁹ The Court further determined that by preventing the applicant from leaving the confined area for several years, the travel bans had made it “difficult for him to exercise his right to maintain contacts with others—in particular his friends and family—living outside the enclave.”¹⁶⁰

When analyzing the implementation of the relevant binding resolution of the Security Council, the Court observed that Switzerland “enjoyed some latitude, which was admittedly limited but nevertheless real.” Specifically, the Court stated that:

[T]he respondent State could not validly confine itself to relying on the binding nature of Security Council resolutions, but should have persuaded the Court that it had

¹⁵⁷ *Ibid* at H7.

¹⁵⁸ *Nada v Switzerland* [GC] Case No 10593/08, [2012] European Court of Human Rights, Reports of Judgments and Decisions.

¹⁵⁹ *Ibid* at paras 151-152.

¹⁶⁰ *Ibid* at para 166.

taken—or at least attempted to take—all possible measures to adapt the sanctions regime to the applicant’s individual situation.¹⁶¹

Regarding Article 13, the ECtHR concurred with the Federal Supreme Court, emphasizing that “the delisting procedure at the United Nations level, even after its improvement . . . could not be regarded as an effective remedy within the meaning of Article 13 of the Convention.”¹⁶² Nevertheless, given that the Supreme Court of Switzerland asserted that “it could not lift the sanctions imposed on the applicant on the ground that they did not respect human rights,” the ECtHR found that “the applier did not have any effective means of obtaining the removal of his name from the list annexed to the Taliban Ordinance and therefore no remedy in respect of the Convention violations that he alleged.”¹⁶³ In sum, the European Court of Human Rights found that “there has been a violation of Article 13 taken together with Article 8” of ECHR.¹⁶⁴

The ECtHR concluded that in the absence of effective judicial review at the United Nations level, there was a duty on State parties to the Convention to provide an effective remedy under national law. This implied a full review of fact and law by an entity with jurisdiction to determine whether the national court’s measures were justified and proportionate in the individual case, and with the power to order the measures removal.¹⁶⁵ The *Nada* judgement thus echoes the approach of the European Court of Justice and the General Court in the *Kadi* case,¹⁶⁶ holding that regional implementing measures taken by the European Commission are to be judged against human rights standards binding on the European Community’s institutions.

C. The *Sayadi* Case

¹⁶¹ *Ibid* at paras 195-198.

¹⁶² *Ibid* at para 211.

¹⁶³ *Ibid* at para 213.

¹⁶⁴ *Ibid* at para 214.

¹⁶⁵ See *Nada v Switzerland*, Case No 10593/08, [2012] European Court of Human Rights, Concurring Opinion of Judge Malinverni at paras 23-25.

¹⁶⁶ *Kadi* ECJ Judgement, *supra* note 123; *Kadi* EGC Judgement, *supra* note 135.

The *Sayadi* case¹⁶⁷ concerns individuals whose assets were frozen pursuant to Security Council Resolution 1390 (2002). The applicants sought removal of the restrictions on their assets by obtaining a court order to this effect from the Brussels Court of First Instance, which was never actually executed.¹⁶⁸ As a result, the applicants brought a complaint before the Human Rights Committee,¹⁶⁹ which ultimately found that Belgium had violated its obligations under Articles 12 and 17 of the *International Covenant on Civil and Political Rights* and had assisted the Security Council in placing names of these persons on the Security Council's blacklist.¹⁷⁰

The Human Rights Committee found that even though Belgium was not competent to remove the applicants' names from the blacklists of the United Nations and the European Union, it was nevertheless responsible for the inclusion of their names on those lists and for the resulting travel bans.¹⁷¹ Moreover, the Human Rights Committee considered that the limitations placed on the applicants' right to leave the country were not justified under Article 12, paragraph 3 of the Covenant, which permits such limitations. The dismissal of the criminal case against the applicants and the Belgian authorities' subsequent requests for the removal of their names from the sanctions list testifies to this assertion. The Committee, thus, concluded that there had been a violation of Article 12 of the Covenant.¹⁷²

The Human Rights Committee also considered that the dissemination of personal information about the individuals through their inclusion on the blacklists constituted "an attack on their honour and reputation," and that Belgium was responsible for this. Hence, the Committee concluded that there had been a violation of Article 17 of the Covenant.¹⁷³

¹⁶⁷ See, *Nabil Sayadi and Patricia Vinc v Belgian State*, [2005] Tribunal de Première Instance de Bruxelles (4th Ch.), Third Report of the Analytical Support and Sanctions Monitoring Team, UNSCOR, UN Doc S/2005/572 (2005) at 48-49.

¹⁶⁸ See, Int'l HR Committee, 94th sess, UN Doc CCPR/C/94/D/1472/2006 (2008) at paras 2.5 and 2.6.

¹⁶⁹ See, Communication No 472/2006, from Nabil Sayadi and Patricia Vinc (represented by counsel, Georges-Henri Beauthier) addressed to the Human Rights Committee. The Committee has been established in accordance with Article 28 of the *International Covenant on Civil and Political Rights*. It considers complaints brought before it by individuals on violations the Covenants.

¹⁷⁰ *Nabil Sayadi and Patricia Vinc v. Belgium*, CCPR/C/94/D/1472/2006 (29 December 2008), para. 11 [*Sayadi*].

¹⁷¹ CCPR/C/94/D/1472/2006 at para 10.7.

¹⁷² *Ibid* at para 10.8.

¹⁷³ *Ibid* at para 10.13

Finally, on 20 July 2009, the Sanctions Committee removed Sayadi and his wife from the blacklist.¹⁷⁴

D. The *Abdelrazik* Case

Unlike previously discussed cases, in *Abdelrazik v. Canada*, the Government of Canada invoked the designation of Abdelrazik by the 1267 Committee¹⁷⁵ to justify the State's failure to lend assistance to one of its citizens returning to Canada.¹⁷⁶ The Federal Court of Canada seized this opportunity to express its opinion on the legality of the 1267 regime and interpret the Security Council's resolution on travel bans.

In the case brought before the Federal Court in Ottawa, Abdelrazik claimed that "the Government of Canada ha[d] engaged in a course of conduct designed to thwart his return to Canada, and, by so doing, it ha[d] breached his right as a citizen of Canada pursuant to section 6 of the *Canadian Charter of Rights and Freedoms* (the "Canadian Charter") to enter or return to Canada."¹⁷⁷

The Canadian Government challenged the claim, maintaining that "the impediment to Mr. Abdelrazik's return" was not attributable to Canadian conduct because the Security Council 1267 Committee had designated Abdelrazik as an associate of Al-Qaida, thus making him "the subject of a global asset freeze, arms embargo and travel ban."¹⁷⁸ According to the Canadian Government's interpretation, the Security Council resolution prohibited anyone from providing funds or economic resources for Abdelrazik's return to Canada. Moreover, under the resolution, Abdelrazik's transit through other States' territories, including their airspace, was banned, and therefore Canada could not

¹⁷⁴ See, "Security Council Al-Qaida and Taliban Sanctions Committee Removes Names of Two Individuals from Consolidated List", *UN Press Release* (21 July 2009) online: <<http://www.un.org/press/en/2009/sc9711.doc.htm>>.

¹⁷⁵ Abdelrazik was placed on the blacklist by 1267 Committee in July 2006 upon the initiative of the United States and, consequently, he was subjected to asset freeze and travel ban. His request to be removed from the list conveyed to the Sanctions committee by the Canadian Ministry of Foreign Affairs was denied by 1267 Committee in December 2007. See, *Abousfian Abdelrazik v Minister of Foreign Affairs and Attorney General of Canada*, 2009 FC 580, [2010] FCR 267 at paras 27-29 [Abdelrazik].

¹⁷⁶ *Ibid* at para 2.

¹⁷⁷ *Ibid*.

¹⁷⁸ *Ibid* at paras 3, 26, 49.

secure his return to the country.¹⁷⁹ The argument goes on to say that any action by the Canadian Government to accelerate Abdelrazik's return to Canada would be a violation of Canada's international obligations under the resolution and those of Article 25 of the UN Charter.¹⁸⁰

However, these arguments did not persuade Judge Zinn, who ruled that "Abdelrazik's Charter right to enter Canada had been breached by the respondents"¹⁸¹ and that he was "entitled to an appropriate remedy."¹⁸² Considering the unique circumstances of the case, the Court retained its jurisdiction until Abdelrazik's return to Canada and his appearance before the Court.¹⁸³

Although the Federal Court's judgment was based on Canadian Constitutional law, Justice Zinn seized the opportunity to both criticize the legality of the sanctions regime established pursuant to Resolution 1267 and interpret its provision relating to travel bans. Judge Zinn described the 1267 regime "as a denial of basic legal remedies and . . . untenable under the principles of international human rights" because the listing and de-listing procedures do not recognize the Canadian constitutional values of "the principles of natural justice," "basic procedural fairness," and "a limited right to hearing." Moreover, the sanctions procedure did not meet the requirement of "independence and impartiality," because the State that initiated Abdelrazik's listing is a member of the Committee and participates in the decision-making of that body. In other words, the accuser is also a judge.¹⁸⁴

¹⁷⁹ As Tzanakopoulos noted, Canada by advancing this argument implicitly claims that acts of Canadian State organs in implementing binding Security Council resolutions are not attributable to Canada, but they are attributable to the United Nations. Canada does not have the discretion to act differently because certain conduct is forced upon it by virtue of a binding decision of an international organization. This argument seems to indicate that a Canadian State organ is under the effective normative control of the international organization. As Tzanakopoulos noted such an approach does not seem to have been accepted by the ILC. According to the Draft Articles on the Responsibility of International Organizations, the conduct of an organ of a State can be attributed to an international organization only if the former is fully seconded to the latter, thus becoming the international organization's agent; or if the international organization exercises effective factual (but not normative) control upon the State organ with respect to the specific act. Otherwise, any conduct of an organ of a State is attributable to that State in accordance with Article 4 of the Draft Articles. See, Antonios Tzanakopoulos, "United Nations Sanctions in Domestic Courts: From Interpretation to Defiance in *Abdelrazik v. Canada*" (2010) 8:1 J Int'l Crim Jus at 256. For further information on the responsibility of States and the United Nations in implementing the normative resolutions, see Chapter Six.

¹⁸⁰ Abdelrazik *supra* note, 175.

¹⁸¹ *Ibid* at paras 7 and 157.

¹⁸² *Ibid* at para 157.

¹⁸³ *Ibid*.

¹⁸⁴ *Ibid* at para 52.

In his ruling, Judge Zinn additionally examined the new guidelines for listing and de-listing of individuals. Under the new guidelines, a petitioner seeking de-listing “should provide justification for the de-listing request by describing the basis for this request, explaining why designated individuals no longer meet the criteria described in paragraph 2 of Resolution 1617 (2005).” By relying on the fundamental principles of Canadian and international justice, Judge Zinn observed that the accused did not have the burden of proving his innocence. Rather, under these principles, it was the accuser that had the burden of proof.¹⁸⁵

In order to counter the Canadian Government’s argument that Canada could not facilitate Abdelrazik’s return to the country, Judge Zinn invoked paragraph 1(b) of Security Council Resolution 1822, which explicitly provides that it shall not “oblige any State to deny entry or require the departure from its territories of its own nationals,” and that it “shall not apply where entry or transit is necessary for the fulfilment of a judicial process.”¹⁸⁶ In addition, Judge Zinn interpreted the prohibition of “transit from the territory” and “judicial process” contained in the 1267 Resolution. The Government of Canada had argued that the travel ban applied to “transit through a State’s airspace in addition to travel on its land and waters.” Since Abdelrazik had to fly through foreign airspace while returning home, any assistance by Canada would breach Canada’s international obligations.¹⁸⁷ Relying on Canada’s submission to the Security Council as required by its Resolution 1455 (2003),¹⁸⁸ Judge Zinn found that “territory” does not include “airspace”¹⁸⁹ and that “the UN travel ban presents no impediment to Abdelrazik’s return to Canada.”¹⁹⁰

¹⁸⁵ In light of these shortcomings, Judge Zinn views the 1267 Committee regime similar to that of “Josef K. in Kafka’s *The Trial*,” where Josef K. awakens one morning and “for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime.” See, *Ibid* at para 53.

¹⁸⁶ SC Res 1822, UNSCOR, 5928th mtg, UN Doc S/Res/1822 (2008) at para 1(b).

¹⁸⁷ Abdelrazik, *supra* note 176 at para 122.

¹⁸⁸ Judge Zinn examined letter dated April 15, 2003 Canada’s Ambassador and Permanent Representative to the Security Council, in which it stated that Canada had implemented all of these measures through, *inter alia*, legislative and regulatory instruments, as described in the attached document. The attachment referred to the *Immigration and Refugee Protection Act*, which applies only to persons who “enter” Canada – it has no application to persons who are transiting through the airspace above Canadian territory. Thus, the judge concludes “that in stating that Canada had implemented all of the measures under the UN resolution, Canada must have been of the view that the resolution did not require it to prevent listed persons from travelling through Canadian airspace” *Ibid* at para 126.

¹⁸⁹ *Ibid* at paras 125-126.

¹⁹⁰ *Ibid* at para 129.

In addition, by invoking the exemption on travel ban on the grounds of the fulfilment of a judicial process,¹⁹¹ the federal court judge broadly interpreted the term “judicial process” to include measures of execution ordered by the Court. Thus, he ruled that Abdelrazik must be brought back to Canada, and if necessary, his travel costs must be covered by Canada. He also clarified that Canadian assistance to Abdelrazik would not constitute a violation, as it would be “in fulfilment of the judicial process.”¹⁹²

E. The Supreme Court of the United Kingdom’s 2010 Judgment

Like the European Court of Justice’s ruling in the *Kadi* case, the Supreme Court of the United Kingdom’s 2010 judgment did not engage itself with the UK’s obligations under the UN Charter.¹⁹³ Instead, the Court considered the compatibility of implementing measure with the *United Nations Act 1946* and found the domestic measure *ultra vires*. This was a combined judgment delivered in cases of *A, K, M, Q and G v. HM Treasury* and *Hay v. HM Treasury*.¹⁹⁴

In *Hay v. HM Treasury* in 2005, an Egyptian national who had been living in the United Kingdom since 1994 was designated as a person associated with Osama Bin Laden, Al-Qaida, and the Taliban, by the 1267 Committee.¹⁹⁵ As a consequence of this designation, the plaintiff Hay’s bank accounts and credit cards were frozen under the *Al-Qaida and Taliban Order* (“AQTO”),¹⁹⁶ a

¹⁹¹ SC Resolution 1452 (2002), paragraphs 1 and 2, as amended by SC Resolution 1735 (2006), para. 1(b).

¹⁹² *Ibid* at paras 163-165. The Judge decided to not close the case until the applicant appeared before the Court and ordered him to appear before the Court at 2:00 o’clock in the afternoon on Tuesday, July 7, 2009, at the Federal Court.

¹⁹³ When the Treasury raised the point that whatever rights Hay may have under the European Convention on Human Rights have been superseded by virtue of Articles 25 and 103 of the UN Charter, the High Court noted that Hay did not advance such a claim, and that the point was irrelevant.

¹⁹⁴ It should be noted that the A, K, M, Q and G case brought before the UK Supreme Court on appeal by the applicants, and the Hay case brought before the Court by the Treasury. The Supreme Court joined these cases and delivered a common decision: *HM Treasury v Mohammed Jabar Ahmed and others* (FC); *HM Treasury v Mohammed al-Ghabra* (FC); *R (on the application of Hani El Sayed Sabaei Youssef) v HM Treasury*, Appeal judgment [2010] UKSC 2, [2008] EWCA Civ 1187.

¹⁹⁵ *Hay v HM Treasury*, [2009] EWHC 1677 (Admin), [2009] Lloyd’s Rep FC 547, ILDC 1367 (UK 2009) at para 6 [Hay].

¹⁹⁶ The AQTO is an Order in Council made under powers conferred by section 1 of the United Nations Act 1946, which is in the following terms: (1) If, under Article 41 of the Charter of the United Nations . . . the Security Council . . . called upon His Majesty’s government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to him necessary or expedient for enabling those measures to be effectively applied, including (without

British domestic legal instrument that implements relevant Security Council decisions. Upon Hay's request, the UK initiated a de-listing process before the 1267 Committee but the State did not succeed in removing his name from the blacklist.¹⁹⁷

Subsequently, Hay challenged the AQTO before the United Kingdom High Court and sought the Order be quashed. The applicant claimed that the AQTO had resulted in a "fundamental and unjustified interference with his property and privacy rights," it had deprived him of "the right to effectively challenge such interference in the courts," and that the AQTO was "ultra vires Section 1 of the United Nations Act 1946,"¹⁹⁸ the piece of UK legislation on which the AQTO was based.

Hay's argument before the High Court and the reply by Her Majesty's Treasury focused on domestic law, in particular on the legality of the AQTO and the relationship between the case at hand and previous decisions of the Court of Appeals in *A, K, M, Q and G v. HM Treasury*.¹⁹⁹ Focusing on the domestic law relieved both the Court and the claimants from addressing the superseding effect of Article 103 of the UN Charter.

The High Court also considered the adverse effects of AQTO on the applicant and concluded that the right of access to a court, a constitutional right under British law, was effectively removed by the AQTO. The Court observed that "the practical effect of the AQTO is to preclude access to the court for protection against what the claimant contends to be wrongful interference with his basic rights."²⁰⁰ The AQTO was promulgated under Section 1 of the UN Act of 1946, which did not explicitly or implicitly empower the Executive Branch to remove the right of access of individuals

prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order."

¹⁹⁷ Hay, *supra* note 194 at paras 8-11.

¹⁹⁸ *Ibid* at para 4.

¹⁹⁹ *A, K, M, Q & G v HM Treasury*, [2008] EWHC 869 (Admin), [2008] EWCA Civ 1187.

²⁰⁰ *Ibid* at para. 45.

to the court. Therefore, the High Court ruled the AQTO *ultra vires* the UN Act of 1946 and that it should be quashed.²⁰¹

However, the High Court did clarify that the UK Government could issue freezing orders in compliance with Security Council resolutions if Parliament enacted enabling legislation, removing the claimant's right of access to a court. It emphasized, however, that "Parliament would have to do this explicitly by passing enabling legislation."²⁰²

In *A, K, M, Q and G v HM Treasury* case, the United Kingdom Court of Appeals did not quash the AQTO on the grounds that G, one of the applicants, had the right to request a "merits-based review" of his case before English courts. G had been proposed by the UK Government for designation by the 1267 Committee. In the view of the Court, if a merits-based review found that G should be de-listed, the UK would be bound to pursue such de-listing with "a high probability of success." Other applicants in this case were listed under the Terrorism (United Nations Measures) Order 2006 (Terrorism Order) in the implementation of sanctions regime, established pursuant to Security Council Resolution 1373.

It is interesting to note that by distinguishing the two regimes established by Resolutions 1267 and 1373, the Appeals Court clarified the differences between them. In the Court's view, challenges to designations under the 1373 regime are permitted, because designations are independently made by States and thus can be reviewed by domestic courts. However, challenges to the designations under the 1267 regime are out of question, as they are automatically made pursuant to a 1267 listing, with no opportunity for review.²⁰³ Nevertheless, the Court itself ignored this distinction by advancing the argument that if someone could challenge a measure implementing the 1373 regime through judicial review, this could also be done in the case of a measure implementing

²⁰¹ Hay, *supra* note 195 at para 47.

²⁰² *Ibid* at para 46.

²⁰³ *Ibid* at paras 107-110.

the 1267 regime. The Court thus proceeded with a review of the AQTO, finding that the order was lawful and that G was entitled to a merits-based review of his designation on the UN blacklist. Based on the outcome of this review, the State might be bound to pursue the de-listing process.²⁰⁴

The applicants appealed from this ruling before the Supreme Court of the United Kingdom, which, as mentioned earlier, quashed the order in its combined judgment of 2010.

F. Analysis of the Rulings of National Courts

In all of the cases where a domestic or regional court has annulled or quashed a domestic measure which was implementing a UN sanction, the national court has mainly relied on the incompatibility of the State's implementing measures with other domestic rules, invoking a dualist understanding of the relationship between international and domestic legal orders. The ECJ's ruling in *Kadi II*, provides clarification on its dualist approach. The Court specifies that its competence to review domestic measures does not extend to the review of international measures, nor does it challenge the primacy of international law.²⁰⁵ This conclusion is justified by the Court on two grounds. First, the national and international legal orders are separate from each other. Second, "the Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions [of] the Security Council under Chapter VII."²⁰⁶ These resolutions will have to be given effect in accordance with the procedure applicable in the domestic legal order of each UN Member State.²⁰⁷

Despite the above clarification, scholars have expressed mixed reactions to the outcome of ECJ proceedings. On the one hand, experts on European Union law and human rights lawyers have commended the ruling of the ECJ for subjecting all EU acts to reviewability, including the acts adopted

²⁰⁴ *Ibid* at paras 119-21.

²⁰⁵ *Ibid* at paras 286 and 288.

²⁰⁶ *Kadi* ECJ Judgement, *supra* note 123 at para 298.

²⁰⁷ *Ibid*.

to give effect to the Security Council's normative resolutions. In their view, the European Court of Justice should have taken a further step and followed the practice of other international courts in confirming its jurisdiction "to review the legality of Security Council resolutions."²⁰⁸ While acknowledging the differences between international courts and domestic courts, this group of lawyers believe that these bodies all enjoy independence, and none of them have been provided with the express competence to review Security Council resolutions. Since international courts exercise such jurisdiction, there is no convincing reason to bar national courts from extending their jurisdiction to review the Council's resolutions.²⁰⁹

On the other hand, some international lawyers and governmental practitioners have emphasized both the prevalence of UN Charter obligations over States' other obligations and the necessity to fully implement Security Council resolutions.²¹⁰ In their view, the Charter binds the EU, and the past practice of the European Community concerning the implementation of sanctions imposed by the Security Council testifies to this point.²¹¹ They argue that human rights in general—except for some absolute rights, like the prohibition of torture—can be derogated under public emergency, such as the continued threat posed by terrorism.²¹² However, these lawyers have yet to address the concerns surrounding the length of human rights suspensions. Human rights cannot be suspended indefinitely under the pretext of public emergency; but should be re-established once public order is restored.²¹³

²⁰⁸ Erika de Wet, "The Role of European Courts in Reviewing Conflicting Obligations under International Law", *International Organizations Law Review* 5 (2008), pp. 359-364. See also Grainne de Burca, "The European Courts and the Security Council: Between Dedoublement Fonctionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci", *EJIL*, Vol. 20, no. 3, p. 860.

²⁰⁹ *Ibid*, p. 365.

²¹⁰ Anthony Aust, "Kadi: Ignoring International Legal Obligations" (2009) 6:1 *IOLR* 293 at 295-296; Larissa Herik & Nico Schrijver, "Eroding the Primacy of the UN System of Collective Security: The Judgment of the European Court of Justice in Cases of Kadi and Al Barakaat" (2008) 5:2 *IOLR* at 329-338.

²¹¹ Luis M. Hinojosa Martinez, "Bad Law for Good Reasons: The Coordination of the *Kadi* Judgment" (2008) 5 *IOLR* 339.

²¹² *Ibid* at 297.

²¹³ Article 4 (3) of the *International Covenant on Civil and Political Rights* confirms the temporary nature of public emergencies by requiring States to notify the Secretary-General of the United of the termination of a public emergency.

Irrespective of the ongoing debate over these rulings, it is evident that the decentralized and indirect review of the Security Council's resolutions has its own merits and detriments. On the one hand, the danger of national courts having different interpretations of the Council's norms is highly likely, and thus may lead to the fragmentation of laws pertaining to the fight against terrorism. The decentralized review, on the other hand, tends to see national courts upholding human rights values and has the benefit of persuading the Security Council to further improve its procedures and take additional steps to align its decisions with the universally accepted norms of international human rights law.²¹⁴ Indeed, the indirect interaction between national courts and the Security Council has been effective in persuading the Council to take the initial steps towards ensuring respect for human rights. Statements of the Council members post *Kadi* testify to this point.²¹⁵

In accordance with the declaration adopted in the high-level meeting of the Security Council on 20 January 2003,²¹⁶ the Council shifted the responsibility for respect of human rights to Member States. Per this resolution, "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law."²¹⁷

²¹⁴ Droubi, *supra* note 1 at 167.

²¹⁵ For example, in 5928th meeting of the Council on 30 June 2008, The Representative of South Africa stated that "the ECJ decision "sent a clear message that a sanctions regime will fail if the concerns of Member States regarding the legal rights of individuals and fair and clear procedure are not taken into account." In the same meeting the representative of Indonesia noted "a growing perception that the current procedures have some deficiencies that may hinder effective implementation at the national level" and that "the increasing number of legal cases in national and regional courts, in particular following the ruling" in *Kadi II* "will potentially pose challenges to the efficacy and credibility of the 1267 sanctions regime." Also at the same meeting, the representative of Switzerland warned of the danger of the UN losing its legitimacy as a consequence of the *Kadi II* ruling, and urged "the 1267 Committee and the SC to take due account of reasoning of the ECJ. See, UNSCOR, 63rd Year, 5928 mtg, UN Doc S/PV. 5928 (2008) [provisional] at 22-25. Also, in 5599th meeting of the Security Council on 19 December 2006, the representative of Qatar stated that "international, national and regional courts must review Security Council resolutions to ensure that they comply fully with internationally recognized human rights norms and the principles and purposes of the United Nations." See, UNSCOR, 61st Year, 5599th mtg, UN Doc S/PV. 5599 (2006) [provisional] at 3. Furthermore, in 6557th meeting of the Council, on 17 June 2011, the representative of France referring to the improvements made to the listing and delisting procedure, in accordance with Security Council Resolution 1989 (2011) pointed out that the improvements were made in response to "the criticism that have been made, including by the judicial authorities in Europe and elsewhere." See, S/PV. 6557, p. 5.

²¹⁶ 1456, *supra* note 20.

²¹⁷ *Ibid* at annex para 6.

Also, before the Kadi IV ruling, the court's rulings in October 2012 resulted in Kadi's name being removed from the sanctions list, and consequently the sanctions imposed on him were lifted.²¹⁸ Similarly, Nada's name was deleted from the 1267 list before the 2012 decision of the ECtHR.²¹⁹

Finally, the impact of these and similar decisions on the general willingness of States to comply with the sanctions should by no means be underestimated.²²⁰ In its reports to the Security Council, the Monitoring Team concluded that challenges before national courts jeopardize the sanctions' implementation by States and that the judicial decisions "have the potential to damage the regime or to distract it from looking forward."²²¹

As Droubi rightly points out, the judicial decisions signaled to the Security Council the incompatibility of the 1267/1989 regime with human rights norms. These rulings also provided "shared interpretations of international human rights law, namely, respect to human rights law is an obligation under the UN Charter. Lastly, these judicial decisions emphasized the necessity of creating an independent mechanism with the power to review the decisions of the 1267/1989 Committee, as well as the need to exclude intelligence information from sources which cannot be disclosed from the process of listing individuals and entities."²²² As will be discussed in the next chapter, these court's decisions were among the factors that motivated certain States to resist implementing sanctions imposed against them by the Security Council.

VII. Conclusion

²¹⁸ See, "Security Council Al-Qaida Sanctions Committee Deletes Entry of Yasin Abdullah Ezzedine Qadi from Its List", *UN Press Release* (5 October 2012).

²¹⁹ Droubi, *supra* note 1 at 182.

²²⁰ In 2008, the Team asserted that given the opinion of the European Advocate General in Kadi III, the sanctions regime was at a crossroad." See, *Letter dated 28 September 2009 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*. UNSCOR, UN Doc S/2009/502 (2009) at paras 16-17.

²²¹ *Ibid* at paras 14-15; *Twelfth Report of the Analytical Support and Sanctions Monitoring Team*. UN Doc S/2012/729 at paras 12.

²²² Droubi, *supra* note 1 at 186-187.

The discussion of State practice concerning normative resolutions illustrates that States have generally expressed support for the Security Council in its counterterrorism endeavours. Nonetheless, it is also clear from the discussions throughout this Chapter that normative resolutions face serious challenges at the implementation stage.

As a sign of political support for the Security Council's initiatives, a number of international negotiations were convened or revived, leading to the adoption of international instruments in the areas of counterterrorism and the non-proliferation of weapons of mass destruction.²²³ These instruments have both broadened and strengthened the legal framework in the areas of counterterrorism and non-proliferation of weapons of mass destruction.

Non-reporting to the sanctions committee on the part of some States, however, is the initial sign of enduring problems hampering the implementation of normative resolutions. Despite several methods employed by the sanctions committees to persuade States to present the required national reports to the Security Council, not all States have submitted reports on the implementation of the normative resolutions. The Security Council is aware of the fact that non-reporting is mainly due to circumstances beyond the control of the non-reporting States and that this problem cannot be resolved without the UN providing a great deal of expertise and resources to the non-reporting States. It is not clear, however, that the end result of such assistance would have any meaningful contribution to the fight against terrorism. The question thus remains whether addressing all States or all UN Member States in the normative resolutions adversely affects the credibility of the Security Council.

Repeated calls by the Security Council upon all States to ratify the multilateral instruments in the areas of counterterrorism and non-proliferation of weapons of mass destruction has had limited impact on the process of ratifying these instruments. The instruments in the area of non-proliferation were almost universally adhered to prior to the adoption of the Security Council's normative

²²³ See, Section IV (B) (i) of this Chapter, p. 219.

resolutions. A limited number of States that were not parties to some of these instruments ratified them, probably upon the recommendations of the Security Council.

Most of the international counterterrorism instruments were not universally applicable prior to the adoption of the normative resolutions, but thereafter, parties to these instruments have considerably increased. Still, only a limited number of these instruments have achieved universal participation.

Thus, it is reasonable to conclude that the normative resolutions have had a limited impact on the universal application of the international instruments that were the subject of this study. Due to this limited impact, it can be deduced that in spite of the adoption of the normative resolutions under Chapter VII, the provisions that extend invitations to States to become parties to multilateral instruments have been interpreted as recommendations by those States. Therefore, the same question referred to above applies here: What is the added value of using the Chapter VII provisions to call on all States to join the international instruments in question?

A number of the normative resolutions set national legislation goals for States. Under these resolutions, the Security Council calls upon all States to criminalize specific acts, make them punishable under national legislation, and bring the perpetrators of these crimes to justice. The sanctions committees' reports do not confirm that all States have heeded the repeated calls of the Security Council. In addition, those States that have responded positively and have enacted national legislation have not done so in a uniform format. Some States have enacted a single piece of national counterterrorism legislation while other States have relied on their existing criminal codes or modifications to it. In yet other States, where international treaties automatically become the law of the land upon ratification, no further action has been taken. Thus, if the Security Council aims to harmonize national laws in the area of counterterrorism by setting legislative goals for States, it is far from being materialized.

Finally, the rulings of national courts concerning human rights violations of States' implementing measures have certainly contributed to revisions in the Security Council's procedures concerning listing and de-listing. Although revisions to the Security Council's procedures must be acknowledged, it must also be emphasized that the Security Council has so far resisted establishing an independent body to hear the grievances of those individuals who are affected by the sanctions. The establishment of the Office of the Ombudsman is in no way comparable to a fair judicial institution.

Table No. 1

Status of Multilateral Counterterrorism Instruments as of 20 May 2016

Titles of Counterterrorism instruments	Number of ratifications before September 2001	Number of ratifications after September 2001	Percentage of Increase	Total Number of Parties
Convention on Offences and certain other Acts Committed on Board Aircraft, signed at Tokyo, 14 September 1963	172	14	8.14%	186
Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970.	173	12	6.94%	185
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971.	176	12	6.82%	188
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.	102	76	74.50%	178
International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.	102	72	70.59%	174
Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988.	108	65	60.19%	173
Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.	46	120	260.87%	166
Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988.	41	114	278.05%	155
International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.	27	141	522.22%	168
International Convention for the Suppression of the Financing of Terrorism	4	183	4575.00%	187
Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, done at Beijing on 10 September 2010	-	14	-	14

Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, done at Beijing on 10 September 2010	-	15	-	15
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Table No. 2

Status of Multilateral Instruments in the Area of Non-Proliferation of Weapons of Mass Destruction as at 20 May 2016

Titles of Instruments in the Area of Non-Proliferation of Weapons of Mass-Destruction	Number of ratifications before the Adoption of Resolution 1540 (2004)	Number of ratifications after the Adoption of Resolution 1540 (2004)	Percentage of Increase	Total Number of Parties
1968 Treaty on the Non-Proliferation of Nuclear Weapons	189	1 ²²⁴	0.52%	190 ²²⁵
1980 Convention on the Physical Protection of Nuclear Material	106	47	44.34%	153
2005 Amendments to the Convention on the Physical Protection of Nuclear Material	-	-	-	103
2005 International Convention for the Suppression of Acts of Nuclear Terrorism	-	-	-	104
1992 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction	170	22	12.94%	192 ²²⁶
1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction	153	21	13.73%	174
1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare	136	-	-	136

²²⁴ Only Montenegro acceded to the treaty after the adoption of the resolution, because it declared its independence in 2006 and ratified the NPT in the same year.

²²⁵ Out of 193 State, Members of the United Nations, only India, Israel, and Pakistan are not parties to the NPT, which have not changed their positions subsequent to the adoption of the resolution.

²²⁶ Only Israel, who signed the Convention in 1993, in Paris, have not yet ratified it. The Democratic People's Republic of Korea is neither signatory nor party to the Convention.

Chapter Six

Accountability of the United Nations and Its Member States for Harm Incurred by Individuals

Abstract

In this Chapter, it is argued that in light of the increasing powers of international organizations in global affairs, such as the United Nations Security Council, there is also an increasing demand to hold them accountable for their wrongful acts, particularly when these acts harm individuals. In the absence of a compulsory judicial mechanism at the international level, and due to the immunity of international organizations before many States' national courts, the only viable way to challenge these organizations when they commit wrongful acts is through non-compliance with the organization's decisions. Yet, simple non-compliance by a State often results in the State being declared recalcitrant and may be subjected to Security Council sanctions. To avoid such a scenario, a non-complying State should clearly identify its actions as countermeasures and seek support from other likeminded States. Three successful examples of resisting the Security Council's wrongful decisions confirm the viability of this view point.

I. Introduction

Accountability of international organizations (IOs) for their wrongful acts has been the focus of many scholarly discussions in recent decades.¹ A number of factors are at the origin of concerns raised about the accountability of IOs. In particular, powers of IOs are rapidly growing in the international arena to the detriment of States' powers. It is argued that IOs consider themselves unbound by international law "*legibus solute*," as they have the liberty to interpret their own competencies and determine applicable laws in cases before them. In the meantime, international organizations evade any kind of

¹ Finnur Magnusson, "Targeted Sanctions and Accountability of the United Nations Security Council" (2008) 13:1 ARIEL Online 35 at 48; Gerhard Hafner, "Accountability of International Organizations – A Critical Review," in Ronald John Macdonald and Douglas M. Johnston, eds, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden: Brill Academic Publishers, 2005) at 602. See, also, the *Draft Articles on the Responsibility of International Organizations*, ILC, 63d session, No. 10, A/66/10 (2011) [DARIO]; and the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, ILC, 53d session, A/56/10 (2001) [DARSIWA].

judicial control, due either to the lack of appropriate judicial institutions at the international level or by invoking their immunity before national courts.²

It is also argued that powerful States influence IOs' decisions but escape accountability at the international level.³ This criticism of IOs' decision-making is relevant because many IOs suffer from democratic deficiencies.⁴ It is, therefore, suggested that accountability should define and eventually limit the ways in which these organizations exercise the powers vested in them by States, and address the consequences of their wrongful acts.

Additionally, international organizations frequently adopt decisions that directly affect the rights and obligations of individuals. This is particularly evident in the Security Council's practice of imposing targeted sanctions against individuals, which has led to an increased demand for accountability of the United Nations regarding actions taken by the Security Council.⁵ Despite the existence of clear procedures to be followed when one of the main players at the international incurs harm, namely States and IOs, there is no corresponding procedure in place for individuals harmed as a result of an international organization's wrongful acts. In particular, it is often unclear who should be held accountable for injuries inflicted upon individuals as a result of law-making by the Security Council—the United Nations, the Member States of the Organization, or both.

Concerns about IOs' accountability are a response to their actual, increasing, and potential role in international relations. However, it would be misleading to direct these concerns only at IOs. Obviously, Member States that create IOs and participate in, or contribute to, their decision-making processes have a supervisory role and must also be held accountable for the wrongful acts of IOs.⁶

² Hafner, *supra* note 1 at 602.

³ See, Chapter Two, pp 58 and 67.

⁴ See, Chapter Three, Section V, p. 138.

⁵ As European Court of Human Rights argued, "any means imposing sanctions has, by definition, consequences which affect right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions." Hafner, *supra* note 1 at 593.

⁶ Hafner argues that the appeal for more accountability should not only address the IOs but the Member States themselves, because IOs' acts are mainly the result of the conduct of States representatives, participating in decision making in the deliberative organs of IOs. See, Hafner, *supra* note 1 at 629.

Undoubtedly, scholarly discussions will promote awareness of the accountability of international organizations and would direct these institutions to strengthen their internal checks-and-balances mechanisms in order to better respect international law, and human rights law in particular.

Therefore, an attempt is made in this Chapter to depict the current status of international law concerning the United Nations' accountability for wrongful acts of the Security Council and to offer suggestions regarding issues that are not covered by current standards. This task will be carried out in the following order: Section II discusses general issues of accountability, including its origin, definitions, and models; Section III examines the accountability of the UN and its Member States for possible wrongful acts of the Security Council in light of the *Draft Articles on the Responsibility of International Organizations* (DARIO); Section IV addresses the question of how to challenge *ultra vires* resolutions of the Security Council; Section V illustrates remedies available to individuals for violations of human rights as a result of possible wrongful acts by the Security Council.

II. General Issues of Accountability

A. Concept of Accountability

The concept of accountability has been developed in domestic legal systems. For instance, under the concept of “public accountability” of government officials and civil servants of the United States, American civil servants are employees working in the interest of American citizens and are, therefore, accountable to them.⁷

Hafner depicts accountability “as a commitment of the State to act in the interest and for the benefit of citizens even without their concrete human rights being affected.” He argues that this understanding of accountability has been incorporated in the 2003 *United Nations Convention against Corruption* (UNCAC)—accountability being one of the purposes of the Convention.⁸ In this sense,

⁷ Hafner, *supra* note 1 at 586.

⁸ See, *United Nations Convention against Corruption*, GA Res. 58/4, GA, (2003) 1 at 7.

accountability could be used as a political device by a State populace when it expects a certain type of behavior and for State organs to act “in their interest and to their benefits.”⁹

Grant and Keohane distinguish between the “accountability” and “checks-and-balances” mechanisms that exist in the American system of governance—a useful exercise for understanding these terms. “Checks-and-balances” are procedures designed to ensure that the authoritative decisions of cooperating institutions do not result in “actions that might overstep pre-determined boundaries.”¹⁰ Whereas checks-and-balances function, prior to a decision being made, as a matter of principle, accountability mechanisms habitually operate after actions are taken. The executive veto power entrenched in the US Constitution is part of the system of checks-and-balances that operates before coming to effect of a legislation. Conversely, the impeachment power of the Senate, also contained in the Constitution, is an accountability mechanism which becomes operational after decisions are made.¹¹

B. Accountability at the International Level

Hafner submits that the American concept of accountability spread to the international level as a result of fundamental changes in international law in the second half of the 20th century. In this period, the “individual” entered the sphere of public international law, mainly due to the increasing number of human rights law instruments. These instruments made the individual a subject of international law and provided opportunities for natural and juridical persons to directly challenge States before international courts and tribunals. Moreover, the quest for democracy and the rule of law,¹² good

⁹ Hafner, *supra* note 1 at 592.

¹⁰ Ruth W. Grant and Robert O. Keohane, “Accountability and Abuses of Power in World Politics” (2005) 99:1 American Political Science Review at 30.

¹¹ *Ibid.*

¹² The Secretary-General of the United Nations, in his 2004 report, articulated that the concept of rule of law refers to “a principle of governance in which all persons ... are accountable to laws that are publically promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.” See, *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General*, Secretary-General, 2004, UN Doc. S/2004/616 (2004) 1 at 4.

governance and the increasing role of civil society,¹³ each helped strengthen the individual's status in international law.¹⁴

Despite developments relating to the individual's status in international law, including separation of the individual's criminal responsibility from his/her official position pursuant to the ICC Statute,¹⁵ as well as the imposition of targeted sanctions against the individual, clear standards on the accountability of international organizations *vis-a-vis* individuals have yet to be developed.

In view of the different categories of international actors and the standards that apply to their activities, scholars have attempted to draw a framework for discussion of the accountability of international actors. For instance, Grant and Keohane have created a scheme for accountability that is based on "a relationship between power wielders and those holding them accountable." Under this scheme, accountability means that some actors are entitled to hold other actors accountable for their performance by judging their behavior against a set of pre-determined standards, and when necessary, imposing sanctions against them in cases where the performance of power-wielders violates these standards. This relationship recognizes both "standards for accountability" and "the authority of the parties to the relationship"—one to exercise a particular power and the other to hold them to account.¹⁶

The International Law Association's (ILA) definition of "accountability" is similar to that above. In the view of the ILA, "power entails accountability, that is, the duty to account for its exercise."¹⁷ Under this scheme, accountability of international organizations arises at three separate levels. First, scrutiny conducted within or by an organization is a common and accepted practice to hold power holders accountable for their wrongdoings. Second, the principle of tortious liability for

¹³ The growing role of individuals in international relations benefited from the mounting role of NGO's in the elaboration and enforcement of international law, areas that were formerly reserved for States. By the end of Cold War era, NGOs intensified their activities in international conferences dedicated to the promotion of the environment, human rights and development. In particular, NGO's claimed to represent "civil society," unorganized people exterior the State structure. Hafner, *supra* note 1 at 591.

¹⁴ Hafner, *supra* note 1 at 588.

¹⁵ See, *The Rome Statute of the International Criminal Court*, 17 July 1998, Article 25 (entered into force on 1 July 2002).

¹⁶ Grant and Keohane, *supra* note 10 at 29.

¹⁷ International Law Association, *Accountability of International Organizations: Final Report Berlin 2004* (London: International Law Association, 2004) at 5.

injurious consequences arising out of acts or omissions, not involving any breach of international law, ensures that those affected by IOs' decisions are entitled to receive compensation for the harm incurred. Third, responsibility arising out of an IO's acts or omissions that constitute a breach of internal rules has been recognized and regulated at the international level.¹⁸ In other words, accountability represents a concept incorporating "legal, political, administrative and financial forms of internal and external scrutiny of acts and omissions of IOs of which liability and responsibility are important but separate components."¹⁹

Hence, the concept of accountability is broader than the term "responsibility" and comprises a number of ideas such as good governance, democracy, and the rule of law.²⁰ Responsibility, as defined in the ILC *Draft Articles on the Responsibility of International Organizations* (DARIO) and the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (DARSIWA), regulates the responsibility of the subjects of international law in relationship to each other. They do not cover the accountability of IOs towards individuals, nor do they discuss remedies available for individuals in cases of harm caused as a result of wrongful acts by international organizations.²¹ In particular, the lack of necessary accountability mechanisms to persuade the Security Council to act in accordance with the applicable law is problematic. Furthermore, it is alarming that individuals affected by Security Council resolutions of "questionable lawfulness" do not have access to international judicial institutions to directly address their complaints. As noted by Nollkaemper, accountability remains the most problematic element of the international rule of law, particularly given the modest role of judicial organs at the international level, which do not in "any realistic way function as a check on the political power of . . . international institutions."²²

C. Accountability Models

¹⁸ *Ibid.*

¹⁹ Magnusson, *supra* note 1 at 49.

²⁰ *Ibid* at 48.

²¹ Hafner, *supra* note 1 at 621.

²² Andre Nollkaemper, *National Courts and the International Rule of Law* (Oxford: Oxford University Press, 2011) at 4.

There are two classical models of accountability: the “delegation model” and the “participation model.” In the delegation model, performance of power-wielders is evaluated by those who assign them power. In the participation model, by contrast, performance of power-wielders is evaluated by those who are affected by their decisions.²³ Though these methods of constraining power work well in democratic systems of governance, their application is problematic at the international level where global democracy does not exist and there is no constitutional system to control power in an “institutionalized way.”²⁴

Moreover, except for international organizations established by States, other players at the international level, such as multilateral corporations and NGOs, do not depend on this delegation of authority by the main actors. Accordingly, referring to a delegation model at the international level is appropriate only with respect to IOs, in which States representatives play major roles in their decision making. At the same time, it is not clear whether it is preferable that international organizations such as the World Bank should be held accountable to their founders—member States—or to the people who are adversely affected by policies of these institutions. Also, the participation model is not an effective method of accountability at the global level, since there is no “large and representative global public.”²⁵ It might be argued that NGOs are representing world’s peoples. But, despite the mounting role of NGOs in international affairs, they are not equally developed in all States. In addition, it is not clear whether NGOs are representing peoples or interest groups. Consequently, there is no practical mechanism in place to hold IOs accountable for their wrongful acts before the “global public.”

Due to the complexities of extending delegation and participation modes of accountability to the international level, Grant and Keohane have identified seven alternative mechanisms of accountability that are applicable at the global level, specifically, hierarchical, supervisory, social,

²³ Grant and Keohane, *supra* note 10 at 31.

²⁴ See, Chapter Four, Section II A, p. 150.

²⁵ Grant and Keohane, *supra* note 10 at 34.

legal, market, peer, and public reputational.²⁶ While the first four mechanisms are based on the delegation model, the other three are based on the participation model. Within these models, Grant and Keohane suggest that supervisory and fiscal accountability work fairly well for international organizations. States, as the accountability-holders, participate in and supervise policy and decision-making processes of IOs. For example, according to Grant and Keohane, most IOs have both an executive board composed of States representatives that makes policies, and an inspection body which ensures that policies are actually followed within the IO. Similarly, fiscal accountability is also effective in the case of IOs, since they depend on budgetary contributions from States.²⁷

In reference to the accountability of international organizations, Hafner maintains that IOs are bound to comply with applicable rules of international law in “the widest sense” and that they are “answerable for their activities by assuming international responsibility.” In his view, it is not necessary to utilize a separate label such as accountability, as both the duty to comply and responsibility are traditional concepts of international law. IOs in their capacity as subjects of international law are thus automatically subject to these concepts.

It seems that Hafner is referring to the topic of State Responsibility under international law that has been on the agenda of the Legal Committee of the United Nations for many years,²⁸ resulting

²⁶ *Hierarchical accountability* applies where supervisors constrain subordinates’ performances and remove them from office in the case of wrongdoing. This type of accountability is applicable to IOs as well, where Secretary-General or Director General can take measures of constraint against those officers who abuse their powers. *Supervisory accountability* is applicable with respect to functions of IOs, where States supervise performances of IOs such as the United Nations and the World Bank. *Fiscal accountability* is referred to mechanisms through which funding agencies can demand reports from and ultimately sanction agencies that are recipients of funding. This form of accountability is particularly important for international organizations such as the UN and the World Bank that rely on government appropriations to fund their activities. *Legal accountability* denotes that public officials can be held accountable for their actions both through administrative and criminal law procedures. Several IOs, including the United Nations and ILO have administrative tribunals to hold international civil servants accountable for their wrongdoings. Also, International civil servants are not immune from prosecution in cases of commission of crimes, either by national or international courts. *Market accountability* refers to the fact that investors and consumers exercise their influence through the market. Investors do not invest in countries that their policies yield a low rate of interests. Consumers may refuse to buy from companies with bad reputations, as well as from companies which produce low quality or costly products. *Peer accountability* refers to mutual evaluation of organizations performances by their counterparts. *Reputational accountability* is defined as “the ability to shape the preferences of others.” The public reputational accountability applies to situations in which reputation provides a mechanism for accountability even in the absence of other mechanisms or in conjunction with them.

²⁷ Grant and Keohane, *supra* note 10 at 37.

²⁸ The topic of State Responsibility has been on the agenda of the ILC, since 1949. See, UN DOC. A/66/10, p. 29.

in the preparation by the ILC's of DARSIVA²⁹ and DARIO.³⁰ These draft articles represent international standards, some of which are customary international law, that aim to enhance the accountability of the two main players at the international level, States and international organizations. Though DARIO does not address accountability of IOs *vis-à-vis* individuals, it provides a number of criteria in determining who should be held accountable for harm inflicted on individuals as a consequence of the Security Council normative resolutions—the United Nations, Member States of the Organization, or both.

III. Reasonability of the United Nations and Its Member States for Possible Wrongful Acts of the Security Council

The *Draft Articles on the Responsibility of International Organizations* cover the responsibility of international organizations for international wrongful acts. Responsibility of IOs arises under two conditions: in situations where the act is wrongful under international law and in cases where the act in question is attributable to an international organization. The International Court of Justice (ICJ) has summarized the obligations of IOs under international law by stating that “any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”³¹ Chapter Four of this thesis discusses in detail the obligations of the United Nations under international law.

DARIO covers the secondary rules of international law, which address the breach of international obligations by IOs and the corresponding consequences for the responsible organization. Among the topics covered under the Draft Articles, the question of attributing conduct to an international organization is directly relevant to the question of this thesis—the normative resolutions of the Security Council. As discussed in Chapters Two and Five, States may or may not have discretion in implementing the normative resolutions, depending on their provisions, and as such, three different

²⁹ DARIO, *supra* note 1 at 54-171.

³⁰ DARSIVA, *supra* note 1 at 43-365.

³¹ See the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, [1980] ICJ Rep at 89-90.

scenarios will be discussed: the potential responsibility of the United Nations for wrongful acts of the Security Council; the responsibility of the United Nations for acts of its Member States in implementing normative resolutions; and the responsibility of Member States of the United Nations for possible wrongful acts of the Security Council.

Before doing so, however, it should be mentioned that DARIO distinguishes between attribution of conduct and attribution of responsibility. While the term “conduct” refers to both “acts and omissions” of an international organization,³² international “responsibility” arises when an IO breaches an international obligation, or depending on the substance of the primary obligation, even in the absence of any material breach.³³ Thus, international responsibility may arise from an activity that is not prohibited by international law but a breach of an obligation under international law occurs in relation to that activity. For instance, if an international organization fails to comply with an obligation to take preventive measures in relation to an activity that is not prohibited,³⁴ the organization in question would be responsible.

It is also important to recall that DARIO does not exclude “the existence of parallel responsibility” of an international organization, along with other subjects of international law, in cases where an internationally wrongful act is committed. For instance, wrongful conducts that are simultaneously attributed to an international organization and a State entail the international responsibility of both the organization and the State.³⁵

A. Potential Responsibility of the United Nations for Wrongful Acts of the Security Council

According to Article 6 of DARIO, if a branch of an international organization engages in certain conduct in fulfilling the functions of said organization, that conduct is attributable to the parent

³² DARIO, *supra* note 1 at 81.

³³ *Ibid* at 82.

³⁴ *Ibid* at 72.

³⁵ *Ibid* at 81.

organization. At a glance, it appears unquestionable that the normative resolutions adopted by the Security Council qualify as acts of the United Nations, as the Security Council is a principal organ of the Organization under the Charter. Nevertheless, two points should be noted in this regard. First, as noted in Chapter Four, Section III,³⁶ there are serious doubts about the relevance of some of the normative resolutions to the United Nations' functions. Critics object to the Security Council's law-making because the creation of international law rests with sovereign States, and that by making new law, the Council violates some of the fundamental norms of human rights law. Second, although normative resolutions are adopted by the Security Council in the form of Chapter VII decisions, they are implemented by States through the necessary legislative and administrative measures. DARIO covers two situations under which the acts of States' organs may be attributable to an international organization, as described below.

(i) State Organs as Agents of the United Nations

Pursuant to the express language of Article 6 of DARIO, conduct of the United Nations includes, apart from that of its principal and subsidiary organs, the acts or omissions of its "agents." This term not only refers to UN officials, but also to other persons acting on behalf of the United Nations charged with performing functions conferred by an organ of the organization.³⁷

It is, nevertheless, inconceivable that States organs act as agents of the Security Council when implementing normative resolutions, as these resolutions do not directly assign a specific function to a given State organ and the State organ does not act under direct instruction from the Security Council. Further, normative resolutions impose general administrative or legislative obligations on States, yet States enjoy some discretion in implementing these resolutions. Also in most cases, more than one State organ is involved in giving effect to the normative resolutions and these organs are not placed at

³⁶ See, page 166.

³⁷ The term "agent" has also been interpreted by the ICJ in a liberal sense, which includes "any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts." See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 ICJ, [1949] ICJ Report at 177.

the disposal of the United Nations. Thus, these organs cannot be considered “agents” of the Security Council or the United Nations, but only as organs functioning in the interest and framework of independent States.

(ii) State Organ Conduct When Placed at the Disposal of the United Nations

Article 7 of DARIO pertains to situations in which an organ of a State is placed at the disposal of an international organization. In these circumstances, the organ’s conduct would evidently be attributable to the relevant international organization if the organization exercises “effective control” over the State organ’s conduct. Commentary on Article 7 refers to a unique situation in which the seconded organ continues to act to a certain extent under its home State’s control. This occurs in the case of military contingents that are placed by a State at the disposal of the United Nations for peacekeeping operations (PKO). In these operations, States retain their disciplinary power and criminal jurisdiction over members of national contingents.³⁸

Evidently, State organs involved in implementing normative resolutions cannot be considered as placed at the disposal of the United Nations, on the ground that State organs do not receive direct instruction from the United Nations, nor are they under the “effective control” of the organization. The commentary on Article 7 of DARIO applies the “effective control” control in order a State’s organ conduct to be attributable to the United Nations.

It is important to note that the concept of “effective control” has evolved in the practice of the United Nations. In the early days of PKO deployment, the United Nations postulated that it must retain “exclusive command and control” over national contingents placed at its disposal for peacekeeping purposes for the sake of efficiency. It considered PKOs as subsidiary bodies of the Organization and accepted responsibility for their wrongful acts.³⁹ Nevertheless, since troop-contributing States

³⁸ This is generally specified in the Status of Force Agreements (SOFA) concluded between the United Nations and troop contributing States. The latest version of Model SOFA is found in UN DOC. A/C.5/66/8, pp. 183-192.

³⁹ The United Nations Legal Counsel has observed in this regard that “as a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international

preserved control over their national contingents, these contingents' conduct was also attributable to the States. At a later stage, the Secretary-General elaborated on the "effective control" criterion by stating that the "degree of effective control" was essential in determining the attribution of conduct in UN joint operations:

The international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations [. . .] In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation.⁴⁰

In determining what is intended by "the degree of effective control," two elements should be taken into consideration: "ultimate control," which the UN claims to have over peacekeeping operations, and "operational control," which national contingents retain in PKOs. It seems that operational control plays a more significant role in determining the degree of effective control than "ultimate control." The United Nations Secretary-General, in his report of June 2008 on the United Nations Interim Administration Mission in Kosovo, confirms that "[i]t is understood that the international responsibility of the United Nations will be limited in the extent of its effective operational control."⁴¹

By applying the elements of the "effective control" criterion to the conduct of State organs in implementing normative resolutions, it becomes evident that the United Nations does not have effective control over State organs, and thus, their conduct is not attributable to the United Nations.

B. United Nations Responsibility for Member States' Acts When Implementing Normative Resolutions

obligation entails the international responsibility of the Organization and its liability in compensation." See, *Letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division*, A/CN.4/545, (2004), Section II.G.

⁴⁰ *Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations: Report of the Secretary-General*, GA Res. 50/235, 51st session, A/51/389 (1996) 1 at 6.

⁴¹ *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, SC Res. 1244 (1999), S/2008/354 (2008)1 at para 16.

Article 15 of DARIO⁴² provides that international responsibility arises when an international organization “directs and controls a State . . . in the commission of an internationally wrongful act.”⁴³ Commentary on this Article states that the concept of “direction and control” in relations between an international organization and its Member States could possibly be extended to encompass cases in which an international organization takes *a decision binding its members*. While some international organizations are empowered to make decisions that bind their members—Chapter VII decisions of the Security Council being a clear example—other organizations may only influence their members’ conduct through non-binding resolutions. This type of relationship, which does not have a parallel between States, may entail an international organization’s responsibility.⁴⁴ It is usual practice in the Security Council to call upon specified international organization or IOs in general to assist the Council in implementing Chapter VII resolutions. The Council has done so in particular in its resolutions pertaining to the fight against terrorism and the non-proliferation of weapons of mass-destruction.⁴⁵

In view of the above, the adoption of a binding decision on the part of the Security Council may, under certain conditions, constitute a form of direction or control in the commission of an internationally wrongful act. First, normative resolutions that violate the United Nations Charter or general international law may also result in the United Nations being held responsible for actions taken by States implementing said resolutions. Second, the conduct of a State in complying with a normative

⁴² DARIO, *supra* note 1 at 105.

⁴³ Articles 17 of DARSIVA provides definitions for the concepts of directs and controls. The commentary on article 17 explains that “Article 17 is limited to cases where a dominant State actually directs and controls conduct which is a breach of an international obligation of the dependent State”, that “the term ‘controls’ refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern”, and that “the word ‘directs’ does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind”.

⁴⁴ DARIO, *supra* note 1 at 106.

⁴⁵ See, SC Resolutions 2178 (2014), para 13, which “Encourages Interpol to intensify its efforts with respect to the foreign terrorist fighter threat and to recommend or put in place additional resources to support and encourage national, regional and international measures to monitor and prevent the transit of foreign terrorist fighters, such as expanding the use of INTERPOL Special Notices to include foreign terrorist fighters.” See, also SC Resolution 1929 (2010), paras 33-34. Para 33 of this resolution, “Encourages the High Representative of the European Union for Foreign Affairs and Security Policy to continue communication with Iran in support of political and diplomatic efforts to find a negotiated solution . . . with a view to create necessary conditions for resuming talks, and encourages Iran to respond positively to such proposals.” Para 34 of the same resolution while commending “the Director General of the IAEA for his 21 October 2009 proposal . . . regrets that Iran has not responded constructively to the 21 October 2009 proposal, and encourages the IAEA to continue exploring such measures to build confidence . . .”

resolution would not constitute an internationally wrongful act of that State, if the latter does not have discretion in enforcing the decisions of the Security Council.⁴⁶ Consequently, the United Nations would logically be responsible for the conduct of the Security Council. Yet, it is not clear that the United Nations would be responsible for conduct of State organs executing normative resolutions. As mentioned earlier, these normative resolutions do not employ common and consistent language between resolutions, and must be interpreted in light of national standards and procedures.

C. Potential Responsibility of UN Member States for Wrongful Acts of the Security Council

A member State of an international organization may, in exceptional circumstances, be held responsible for the wrongful acts of an IO.⁴⁷ Nevertheless, mere membership in an IO does not mean that such State would automatically incur international responsibility for an unlawful act of an IO. This view has been defended by several States in contentious cases.⁴⁸ It is noteworthy to mention that the Institute of International Law (IIL) adopted a resolution in 1995, in which it took the following position:

“[T]here is no general rule of international law whereby States’ members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members.”⁴⁹

Nevertheless, the view that Member States are not generally responsible for conduct of an IO does not rule out the possibility that, in certain cases, a Member State could be held responsible for the internationally wrongful act of that organization. The least controversial case is the acceptance of

⁴⁶ DARIO, *supra* note 1 at 106.

⁴⁷ Article 62 of DARIO foresees responsibility for a State member of an IO only in two situations, that is, if a State has accepted responsibility for that act towards the injured party, and if a State has led the injured party to rely on its responsibility. See, DARIO, *supra* note 1 at 163.

⁴⁸ *Ibid* at 164.

⁴⁹ See, Institute of International Law, *Annuaire de l’Institut de Droit International*, Vol. 66-II (1996) at 445.

international responsibility by the States concerned.⁵⁰ The acceptance may be expressly stated or implied and may occur either before or after the time when responsibility arises for the organization.⁵¹

In view of the exceptional character of cases in which responsibility of Member States for wrongful acts of international organizations arises, it is presumed that when Member States accept responsibility, only subsidiary responsibility, which has a supplementary character, is intended.⁵²

IV. State Challenges to *Ultra Vires* Resolutions of the Security Council

In this section it is contended that only in exceptional circumstances may Security Council decisions be reviewed by judicial bodies, and it is unlikely that such a review would have a binding effect. Under a limited number of treaties, arbitral tribunals are empowered to make binding decisions in disputes between States and IOs, but these treaties do not cover Chapter VII decisions of the Security Council.⁵³ Further, the ICJ may incidentally review and pass a judgment on the legality of the Council's actions, but this would be neither binding nor systematic.

A. Judicial Review of the Security Council Resolutions

Judicial review is a method of appraisal of conduct of political organs employed in different ways in various national legal systems. Simply put, it refers to a review of the legality of political organs' decision by an independent appellate court of law.⁵⁴ The US Supreme Court, in the renowned *Marbury v. Madison* case,⁵⁵ identified the basic elements of judicial review as the internal nature of review, the compatibility of acts of organs with higher laws, and the inherent power of the Court to conduct a review. The binding and systematic nature of the review is implicit in this decision and should be added to the list of elements of judicial review. In this subsection, an attempt is made to explore the possibility of judicial review of Security Council decisions by an independent court of law. In so

⁵⁰ DARIO, *supra* note 1 at Article 62 (a).

⁵¹ DARIO, *supra* note 1 at 165.

⁵² *Ibid* at 167.

⁵³ Hafner, *supra* note 1 at 621.

⁵⁴ *Ibid* at 88.

⁵⁵ *Marbury v. Madison*, 5 US 137 (1803).

doing, particular attention will be paid to the applicability of the above elements at the international level. It is argued that the possibility of judicial review of actions of the Security Council by an independent court of law remains slim.

(i) Internal Nature of Judicial Review

As far as the internal nature of review is concerned, it appears that review of Security Council decisions by the ICJ is not problematic. In contrast with the Permanent Court of International Justice (PCIJ), which was established independently of the League of Nations, the ICJ is an internal body and principal organ of the United Nations. The UN Charter and the ICJ's Statute entitle the Court to decide any question of international law brought before it. The ICJ clarified in the *Certain Expenses of the United Nations*⁵⁶ advisory opinion that it has the competence to review actions of other principal organs of the United Nations. Nevertheless, powers of the ICJ to review Security Council actions are noticeably absent in both the Charter and the Statute of the Court. The International Court of Justice's jurisdiction is limited to passing judgement only in cases submitted by States,⁵⁷ and giving advisory opinions on legal questions if requested by the General Assembly, the Security Council, and the Specialized Agencies that have been so authorized by the General Assembly.⁵⁸

Nonetheless, the Statute of the ICJ does not provide appellate jurisdiction for the Court and its limited appellate competency is only provided for in the constitutive instruments of some IOs. For instance, judgments of the International Labor Organization's Administrative Tribunal (ILOAT) may

⁵⁶ *Certain Expenses of the United Nations*, Advisory Opinion, (1962) ICJ Rep 151 at 168 [Expenses]. Judge Lauterpacht in his separate opinion in the *Bosnia case* observed that the Court is bound to ensure respect for the rule of law within the United Nations system, and to insist on compliance by UN principal organs with the rules governing their operation. See *Application of the Convention on Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (1993) ICJ Rep 633 at para 99. Judge Skubiszewski noted in *East Timor case* that the Court is entitled to examine the Security Council's resolutions and draw appropriate conclusions if they are *ultra vires*. See, *East Timor (Portugal v. Australia)*, (1995) ICJ Rep 224 at para 86.

⁵⁷ Article 36, Statute of the International Court of Justice, 26 June 1945, Can TS 1945 No 7. See also, Hafner, *supra* note 1 at 628.

⁵⁸ Article 96, Charter of the United Nations, 26 June 1945, Can TS 1945 No 7 [Charter].

be reviewed by the ICJ on very narrow grounds through binding advisory opinions requested by the ILO Governing Body.⁵⁹

In fact, the only place the ICJ's power to review has been expressly provided for is in the 1944 *Chicago Convention on International Civil Aviation*.⁶⁰ Under this Convention, decisions of the Council of International Civil Aviation Organization regarding disputes between States relating to the interpretation or application of the Convention are subject to appeal before the ICJ.

In sum, although the ICJ meets the internal requirements regarding judicial review of Council decisions, its actual powers to exercise judicial review are "excessively limited."⁶¹ Moreover, advisory opinions sought from the Court are not a substitute for judicial review, because States are not authorized to request advisory opinions and the opinions sought by the authorized organs must be accepted by them in order to have an effect.⁶² Additionally, the ongoing scholarly discussions on judicial review of the Security Council are facing strong objections on the grounds that they undermine the powers vested in the Security Council regarding the maintenance of international peace and security.⁶³

(ii) The Hierarchical Nature of Judicial Review

At the national level, judicial review is conducted to assess the conformity of government acts with the supreme law of the State. In most States, all laws made at lower levels must be in conformity with the supreme source of law, which usually takes the form of a constitution. The role of courts in

⁵⁹ See, *The Statute of the Administrative Tribunal of International Labor Organization, Article 12*, (entered into force 9 October 1946). The Statute of the United Nations Administrative Tribunal had provided for appellate review of its judgments on wider grounds, including for error on questions of law or procedure, requested in the form of binding advisory opinions by the General Assembly. See, *Statute of the United Nations Administrative Tribunal*, Article 11, GA Res. 351 A (IV), UNGAOR, 1949. However, following the establishment of the United Nations Appeals Tribunal, in 2009, the review mechanism was abolished. The United Nations Appeals Tribunal was established in accordance with General Assembly Resolution 63/253 on 24 December 2008.

⁶⁰ *Convention on International Civil Aviation*, December 7, 1944, Doc 7300 (entered into force 4 April 1947).

⁶¹ Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures Against Wrongful Acts* (Oxford, New York: Oxford University Press, 2011) at 98.

⁶² The idea to authorize the Secretary-General with a power to request advisory opinions, once advanced, was immediately rejected, obviously for the reason that this right would endow an official with too great a power that it could use against organs such as the Security Council.

⁶³ Hafner, *supra* note 1 at 628.

performing judicial review is to consider whether the actions of government bodies have conformed to this supreme law.

Theoretically, the ICJ can review Security Council acts for their conformity with higher laws—the Charter and general international law. Though the Court has not explicitly been so empowered, it may interpret its competency in a broad manner to include judicial review. As an example, in the *Tadic* case the International Criminal Tribunal for the former Yugoslavia (ICTY) found itself competent to review the legality of Security Council resolutions.⁶⁴ As such, it is conceivable that the ICJ could incidentally undertake judicial review of Council's acts for their conformity with the superior laws, even if it is not explicitly provided for in the Charter.⁶⁵

As regards judicial review of the Council's decisions by national and regional courts, it must be pointed out that these courts operate in the framework of their respective legal orders and are bound by the hierarchy of norms that exists in each legal order. The European Court of Justice (ECJ), for instance, is bound by the hierarchy of norms that exists in the European Union (EU). Similarly, the European Court of Human Rights (ECtHR) is bound by the legal order established by the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,⁶⁶ applying the hierarchy of norms specified in this instrument.

In view of the above arguments, Tzanakopoulos contends that national courts can review the Council's actions if the courts operate “within the unitary legal order,” that is, “if they ascribe to rules of international law the position that international law ascribes to them,” and if their national legal order places international law in a higher position than national laws.⁶⁷ Nonetheless, he admits that cases where national courts conceive the international legal order to be unitary are exceptional.⁶⁸

⁶⁴ *Tadic* (IT-94-1), ICTY Appeals Chamber, case IT-94-I-AR 72, at para 72.

⁶⁵ Tzanakopoulos, *supra* note 61 at 106.

⁶⁶ See, the European Convention for the protection of Human Rights and Fundamental Freedoms (1950), Article 19. The European Court of Human Rights has been established to “ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto ...”

⁶⁷ Tzanakopoulos, *supra* note 61 at 106.

⁶⁸ The Court of First Instance and the Dutch courts are applying the hierarchy of norms established by their respective legal order—this hierarchy just happens to coincide, in part, with that established under international law, *Ibid* at 101.

Accordingly, this rules out the possibility of judicial review of Security Council resolutions by national courts. This conclusion is in line with the case study presented in Chapter Five.⁶⁹

(iii) Inherent Nature of Judicial Review

In the common law system of jurisprudence, judicial review is inherent in the judicial function unless it is explicitly excluded. This claim is supported by the fact that some constitutions expressly provide for judicial review. In some European legal systems, however, the presumption of validity generated by the doctrine of separation of powers overrides any form of judicial review except when the power of review has explicitly been conferred on the Court. Given the diverse meaning and place of judicial review in domestic legal systems, it is difficult to find a clear-cut definition for this term in international law. It cannot be argued, thus, that judicial review is intrinsic to the international legal system. Supposing that what is not prohibited is allowed, it could be presumed that at least judicial review is entrenched in the judicial function of any international tribunal when vested with the power to find and apply international law to settle disputes.⁷⁰ This argument has been confirmed by the practice of the ICJ, which was called upon to incidentally review decisions of the Security Council, in both the *Lockerbie* cases,⁷¹ as well as in the *Genocide* case.⁷² Although the Court did not find any wrongful act committed by the Council, it left the question of review of Council's decisions open-ended.

(iv) Binding Force of Judicial Review

Judicial review usually results in a binding decision. As Abi-Saab maintains, there is a fundamental substantive difference between a decision that produces a *res judicata*⁷³ effect and one that does

⁶⁹ See Chapter Five, Section VI, pp. 227-248.

⁷⁰ Tzanakopoulos, *supra* note 61 at 103.

⁷¹ See, subsection (iv) (b) (ii) of this Chapter, pp 291-296.

⁷² See, subsection (iv) (a) (i) of this Chapter, pp 284-291.

⁷³ *Res judicata* refers to a stage in judicial proceedings when a final judgment has been rendered on the case and the appeal from the judgment is no longer permitted; the matter cannot be raised again, either in the same court or in a different court. If such a case brought before a court of law, it will use *res judicata* to deny reconsideration of the matter.

not.⁷⁴ Only a judicial review that results in a binding decision is considered “judicial review proper.” It is certainly binding when it results in the annulment or invalidation of the measure challenged before a court of law.⁷⁵ Conversely, the ICJ advisory opinions that produce non-binding recommendations for requesting IOs could not be considered judicial review.

When the term “judicial review” is employed in reference to screening Security Council resolutions, it points to a process that may result in declaring a Security Council decision illegal or void. Such an outcome must have binding effect on the UN and the Council in order to constitute a judicial review. In this sense, as indicated earlier, there can be no judicial review of Council action by the ICJ.⁷⁶ The ICJ can, however, undertake this function in contentious proceedings as it did in the *Lockerbie*⁷⁷ and *Genocide*⁷⁸ cases. Most importantly, the Court of First Instance in the *Kadi* case explicitly recognized that it was engaged in an indirect review of Security Council resolutions.⁷⁹ From among these cases, only the ICJ proceedings could be considered judicial review proper as it is internal, hierarchical, and binding, at least for the specific case.

Still, there is an emerging trend to review Security Council decisions by national and regional courts, and, in a number of cases, these courts have found to be competent to review the Council’s decisions. In the *Slobodan Milosevic* case, a Dutch District Court acknowledged that under the Statute of the ICTY,⁸⁰ the Court had primary competence over national courts⁸¹ and that

⁷⁴ See, Georges Abi-Saab, “Whither the Judicial Function? Concluding Remarks” in Laurence Boisson de Chazournes, Cesare Romano & Ruth Mackenzie, eds, *International Organizations and International Dispute Settlement: Trends and Prospects*, (Leiden: Brill Nijhoff, 2002) at 241-247.

⁷⁵ *Ibid* at 103.

⁷⁶ Tzanakopoulos, *supra* note 61 at 104.

⁷⁷ *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)*, [1998] ICJ Rep at 110 [Lockerbie].

⁷⁸ Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), [2007] ICJ Rep 595.

⁷⁹ See, the Judgements of the CFI of September 21, 2005 in *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the EU and Commission of the EC* (Al Barakaat CFI Judgement), Case T-306/01, and *Yassin Abdullah Kadi v Council of the EU and the Commission of the EC* (Kadi CFI Judgement), Case T-315/01 (OJ 2005 C 281, at 17), at para 226.

⁸⁰ See, SC Res. 827, UNESCOR, (1993) 1.

⁸¹ See, Article 9 (2) of the *Statute of the International Criminal Tribunal for the former Yugoslavia*, annex to the Secretary Report S/25704, UN Doc. S/RES/827 (1993).

States' obligations under the resolution prevailed over other obligations.⁸² The Tribunal thus denied the plaintiff's claim of impediment to his liberty.⁸³ The ICTY in the *Tadić* case affirmed its power to review the Chapter VII measures of the Security Council, but found that the Tribunal had been established in accordance with the powers entrusted to the Security Council.⁸⁴

It must be clarified, however, that normative resolutions contain general obligations, leaving States a certain degree of liberty in their implementation. Thus, in cases arising out of national implementing measures, States, not the Security Council resolutions, will be the subject of judicial review in national and regional courts. In the *Kadi* case, for instance, the ECJ stressed that its jurisdiction was limited to the European Community's acts and was not extended to review the Security Council resolutions.⁸⁵ The Court also confirmed that Member States of the United Nations were entitled to freely decide on the ways and means of implementing the Security Council's normative resolutions.⁸⁶

(v) Systematic Nature of Judicial Review

The systematic nature of judicial review is meant to ensure unceasing availability and consistency of judicial control. As Franck notes, the basic function of judicial review is to serve as "a weapon of deterrence."⁸⁷ The review can only be effective if made available on a continuous basis. If accidentally exercised, judicial review would not have the desired deterrent effect.⁸⁸ Since judicial review of

⁸² Charter, *supra* note 58 at Article 103.

⁸³ Slobodan Milosevic brought a case before a Dutch District Court concerning his incarceration in the ICTY detention facility in The Hague. See, "The Hague District Court: Slobodan Milosevic v International Criminal Tribunal for the Former Yugoslavia (2002) 41:6 ILM at 1310-1314.

⁸⁴ "Prosecutor v Tadić, Case No. IT-94-1-AR72, Appeal on Jurisdiction" (1996) 35:32 ILM at para 39.

⁸⁵ *Kadi and Al Barakat International Foundation v. Council and Commission*, (2008) C-402 and 415/05, [2008] ECR I-6351.

⁸⁶ *Ibid* at para 288.

⁸⁷ Thomas M. Franck, "The Political and Judicial Empires: Must There be a Conflict Over Conflict Resolution?" in Najeeb M. Al-Najimi and Richard Meese, eds, *International Legal Issues Under the United Nations Decade of International Law* (The Hague: Martinus Nijhoff, 1995) at 631.

⁸⁸ *Ibid*.

Security Council resolutions by the ICJ can only occur in contentious cases brought by States before the Court, such a review would not have a deterring effect and thus is not systematic.⁸⁹

Assuming that the ICJ had the power to review the acts of other organs of the UN, such a review would not take place on a regular basis. Judicial review within the United Nations would be “sporadic and incidental in nature.”⁹⁰ The Court has not been vested with the power of compulsory jurisdiction, and as a result, questions of lawfulness of Security Council decisions have incidentally come before the Court about every 20 years in the context of specific cases between States.⁹¹ Moreover, requesting advisory opinions by the Security Council is inherently an *ad hoc* process than being systematic in nature. Since 1945, the Security Council has requested advisory opinion only in one case, turning down numerous requests for advisory opinions.⁹² Similarly, there is a slim chance that the Security Council will request an advisory opinion from the ICJ concerning lawfulness of the normative resolutions.⁹³ As Rosalyn Higgins observed, the end of the Cold War resulted in a structural shift in the United Nations in favor of the Security Council.⁹⁴ In the prevailing circumstances, it is highly unlikely that the General Assembly would challenge the authority of the Security Council by way of requesting an advisory opinion.⁹⁵

Despite reluctance on the part of the Security Council to request advisory opinions, Security Council measures have been indirectly challenged before domestic courts. In these proceedings, domestic measures implementing the Security Council measures were the subject of the proceedings rather than measures adopted by the Council.⁹⁶ Considering the fact that a domestic courts’ judgment

⁸⁹ Bjorn Elberling, “The *Ultra Vires* Character of Legislative Action by the Security Council” (2005) 2:2 IOLR 337 at 353.

⁹⁰ Tzanakopoulos, *supra* note 61 at 109.

⁹¹ *Ibid.*

⁹² *Ibid* at 107.

⁹³ Droubi, too, arrives at the same conclusion. See, Sufyan Droubi, *Resisting United Nations Security Council Resolutions* (London and New York: Routledge Taylor & Français Group, 2014) at 105.

⁹⁴ Rosalyn Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law*, Vol 2 (London, New York: Oxford University Press, 2009) at 1065.

⁹⁵ Alexander Orakhelashvili, “The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions” (2005) 16:1 EJIL 59 at 86.

⁹⁶ See, Chapter Five, Section VI, p. 245.

could hardly affect the Council's decisions, it cannot be argued that the systematic review of domestic implementing acts by domestic courts amounts to judicial review of Council action. Such a review is neither internal, hierarchical, nor a *stricto sensu* review of the Security Council's acts.

B. States' Reaction

As discussed above, judicial review of Security Council resolutions by the ICJ and other courts and tribunals is not systematic and does not serve as a viable accountability mechanism. Indeed, findings of these courts are not binding on the Security Council. Accordingly, such review does not constitute an "authoritative determination" of the United Nations' responsibility for the possible wrongful acts of the Council stemming from the Council's normative resolutions. In this situation, States have the right to react, either individually or in a coordinated manner through international institutions, to allegedly *ultra vires* resolutions of the Security Council by invoking the responsibility of the United Nations.⁹⁷ That is to say, that auto-determination is an option available to States which allows them to assess the wrongfulness of the normative resolutions.

(i) Auto-determination by States

In this subsection, it is argued that, in the prevailing decentralized international legal system, States enjoy the authority to assess the conformity of their own conduct as well as those of other States and IOs with international standards. The auto-determination by States is entrenched in Charter Article 51, which authorizes States to unilaterally decide on the existence of an armed attack and when it is necessary to use force in self-defence, until the Security Council addresses the situation.⁹⁸

The ICJ has confirmed the right of "auto-determination" by States on a number of occasions. For instance, in the *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (the "*Hostages* case"), the Court opined that the failed rescue operations by the United States

⁹⁷ Tzanakopoulos, *supra* note 61 at 111.

⁹⁸ See, Bruno Simma, *The Charter of the United Nations: A Commentary*, 2nd ed., Vol. I (London, UK: Oxford University Press, 2002), at 792.

were measures taken in response to what the United States believed to be “grave and manifest violations of international law by Iran.”⁹⁹ Similarly, in *Nicaragua v. United States*, the ICJ noted that “[w]hile the United States might form its own appraisal of the situation as to respect of human rights in Nicaragua, the use of force could not be an appropriate method to monitor or ensure such respect.”¹⁰⁰

Some scholars, however, reject auto-determination by States and suggest that UN bodies have the competence to decide the “necessity and lawfulness” of their resolutions, in the first instance. In accordance with this view, States must bring their challenges before the Security Council which has primary competence to assess any challenges to its resolutions. Nevertheless, these scholars admit that the appropriate manner of handling these challenges is that the Council requests an advisory opinion from the ICJ.¹⁰¹ Advisory opinions of the Court on the *Certain Expenses of the United Nations*¹⁰² and the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Resolution 276 (1970)* (the “Namibia case”) are cited as examples.¹⁰³ The General Assembly and the Security Council respectively, requested the ICJ to interpret the decisions of these organs in the above cases.

Notwithstanding the validity of the above arguments, these scholars agree that the review mechanism by the ICJ, either incidental in contentious cases or through advisory opinions, is

⁹⁹ Despite the understanding of the ICJ of the United States’ position, the Court expressed its “concern in regard to the United States incursion into Iran” while the proceeding before the Court was ongoing. In the view of the Court, the invasion to Iran was “a kind of calculated step to undermine the respect for judicial process.” See, [1980] ICJ Rep at 44.

¹⁰⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, and Judgment* [1986] ICJ Rep 392 at 134 [268]. [Nicaragua]

¹⁰¹ Droubi, *supra* note 93, at 13.

¹⁰² In the advisory opinion on the *Certain Expenses of the United Nations*, some Member States withheld payments of their respective shares of PKO related expenditures, as apportioned by the General Assembly. The USSR and France decided that the UN in incurring those expenditures, acted *ultra vires* and, as a result, they were not obliged to contribute to these expenses. The Court rejected their contention and opined that these expenses were those of the organization, as they are related to taking action in the performance of the purposes of the organization. Expenses, *supra* note 56 at 180.

¹⁰³ In the *Namibia* case, the Security Council sought an advisory opinion from the Court, which rejected South African attempts to determine the legal effect of the Council’s resolution, ruling that, “[W]hen the Security Council adopts a decision under Article 25 of the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its functions and powers under the Charter.” See, *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 at 116.

insufficient to provide relief for States that wish to challenge a resolution that they consider to be unlawful. On the one hand, the Security Council is as reluctant to consult the Court as the Court is reluctant to decide against the lawfulness of a resolution. On the other, if the Court abandons its traditional caution and holds a resolution unlawful, there would be no mechanism in place to enforce its decisions or guarantee that the opinion would be respected.¹⁰⁴ Hence, as discussed earlier, the major condition for an effective judicial review of the Council's resolutions does not exist.

The DARIO corroborates the power of auto-determination by States, as the injured State has the right to take “*certain urgent countermeasures*” to preserve its rights in addition to calling upon the responsible State to comply with its obligations, and to offer to negotiate with that State.¹⁰⁵ The application of this right, nevertheless is limited to particular regimes through the general saving clause on *lex specialis*.¹⁰⁶

Although the right of “auto-determination” of States is recognized in international law, it conflicts with another norm, that “no one can be judge in his own suit.”¹⁰⁷ It is noteworthy, however, that while States are entitled to auto-determination, this interpretation or determination by a party to a dispute is not binding on another party, as States do not enjoy the power to unilaterally decide on settlement of a dispute. The peaceful settlement of disputes by a competent third party is a well-established principle under the Charter¹⁰⁸ and general international law.¹⁰⁹

¹⁰⁴ Droubi, *supra* note 93, at 13. It must be recalled that the Council is responsible for enforcing ICJ decisions against non-complying party. In practice this procedure has proven to be ineffective. When the US did not comply with the ICJ ruling in the *Nicaragua* case, the Security Council failed to adopt two draft resolutions calling for “full and immediate compliance” with its decisions. See, the *draft resolution* submitted by *Congo, Ghana, Madagascar, Trinidad and Tobago and United Arab Emirates*, UN Docs. S/18250 (1986); and draft resolution contained in UN Doc S/18428 (1986) 1. Both draft resolutions had the support of 11 Member States of the Council, but were not adopted due to veto power used by the US. See UNSCOR, 2704th Mtg, UN Doc S/PV. 2704 (1986) [provisional] and UNSCOR, 2718th Mtg, UN Doc S/PV.2718 (1986) [provisional].

¹⁰⁵ Under Article 52 of DARSIIWA, before taking countermeasures, an injured State must call on the responsible State in accordance with Article 43 to comply with its obligations. The injured State is also required to notify the responsible State of the countermeasures that it intends to take and to offer to negotiate with that State. Notwithstanding this requirement, *the injured State may take certain urgent countermeasures to preserve its rights*. See, DARSIIWA, *supra* note 1 at 135.

¹⁰⁶ DARSIIWA, *supra* note 1 at 140.

¹⁰⁷ Tzanakopoulos, *supra* note 61 at 116.

¹⁰⁸ Charter, *supra* note 58 at Articles 2(3) and 33.

¹⁰⁹ See, *Declaration on Principles of International Law Concerning Friendly Relations Among States in Accordance with the Charter of the United Nations*, GA Resolution 2625 (XXV), UNGAOR, 25th Sess (1970). The principles contained in

In multilateral settings, the “interpretation or determination” by one State may coincide with those of other States or may be isolated. It should be emphasized that in the UN format, the Organization’s actions enjoy a supposition of legality, and a State opposing a decision of the Security Council is effectively confronted by the entire membership of the Organization.¹¹⁰ Therefore, an opposing State should ensure that it is in a position to make a strong case, which requires seeking support from other States and preferably acting through judicial rather than political or administrative organs.

As discussed in Chapters Two and Four, the Security Council’s Chapter VII resolutions ought to be implemented by Member States. In so doing, however, a State will be required to interpret these resolutions. For instance, while Sweden froze all of the assets of Swedish nationals who were blacklisted by SC Resolution 1267 (1999), it continued to make payments of welfare benefits to these individuals.¹¹¹ Similarly, in the *Libya* case, Belgium interpreted SC Resolution 883 (1993), demanding States to freeze funds and properties of the Government of Libya,¹¹² not to include the freezing of payments necessary for the functioning of the Libyan Embassy.¹¹³ These interpretations were acts by States desiring to be in conformity with international law.¹¹⁴ Moreover, as discussed in Chapter Five, a number of States have determined not to enact any specific legislation to give effect to Security Council Resolution 1540 (2004), as the subject matter of the resolution was immaterial in their territories.¹¹⁵ Similarly, some States have interpreted SC Resolution 1373 (2001) as not requiring any legislation in addition to their counter-terrorism laws already in force in their territories.¹¹⁶

this declaration, including the principle of pacific settlement of disputes, have become customary norms of international law. See, Nicaragua, *supra* note 100 at 100 [189]

¹¹⁰ Tzanakopoulos, *supra* note 61 at 121.

¹¹¹ Finnur Magnusson, *supra* note 1 at 62.

¹¹² Under the terms of Resolution 883 (1993), the Council demanded States to freeze the funds or other financial resources which were directly or indirectly owned or controlled by the Libyan Government, public authorities, entities, wherever located or organized, or persons identified by States as acting on behalf of the Libyan Government or public authorities. See, SC Res. 883, UNESCOR, 1993, UN Doc. S/RES/883 at para 3.

¹¹³ Finnur Magnusson, *supra* note 1 at 57.

¹¹⁴ Tzanakopoulos, *supra* note 61 at 118.

¹¹⁵ See, *Report of the Committee established pursuant to Resolution 1540(2004)*, UNESCOR, 2006, UN Doc S/2006/257 at 3. See, also, Chapter Five, Section V, p. 223.

¹¹⁶ Tzanakopoulos, *supra* note 61 at 118.

(ii) Protest

As discussed earlier, passing judgment by States over the conduct of other States and international organizations has generally been accepted under international law. Protest by States or IOs is a measure through which subjects of international law express their objections to an unacceptable behavior of other actors in international law.¹¹⁷ On a daily basis, the United Nations Journal reproduces a list of letters by States or international organizations addressed to the Secretary-General or President of the Security Council, which contain *inter alia* views of States and IOs on the conduct of other subjects of international law.¹¹⁸ The Security Council Chapter VII resolutions have also been the subject of comments and opposition by Member States of the Council or Members of the United Nations. The fact that Council resolutions are adopted by the required majority votes¹¹⁹ indicate that not every resolution of the Council enjoys the support of all Members of the Council. Moreover, there are many instances in which Member States of the Organization have expressed their opposition to Security Council resolutions.¹²⁰ It is, thus, natural to infer that in cases of adoption of *ultra vires* resolutions by the Security Council, States have the right to protest.¹²¹ Evidently, protest by many States may persuade the Council to reconsider its position, take corrective measures, or refine its decisions in the future.¹²²

(iii) Non-Compliance

¹¹⁷ Orakhelashvili, *supra* note 95, at 84.

¹¹⁸ For the list of such letters, visit Journal of the United Nations, *Programme of meetings and agendas* (21 May 2006), online: <<http://www.un.org/Docs/journal/En/lateste.pdf>>.

¹¹⁹ For the adoption of Security Council resolutions nine affirmative votes is required. On non-procedural matters, however, concurring votes of the five Permanent Members of the Council is essential. Negative vote of any of the Permanent Members to a non-procedural draft resolution, will prevent it from being adopted. See, Charter, *supra* note 58 at Articles 27.

¹²⁰ See, *Letter dated 24 March 2008 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General*, UN Doc. A/62/767-S/2008/203 (2008).

¹²¹ The ICJ in its advisory opinion on *Certain Expenses of the United Nations* implicitly recognized the right of Member States to pass judgment on Security Council resolutions: "Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action." *Expenses*, *supra* note 56 at 168.

¹²² See, Chapter Five, p. 248.

Some authors suggest that an *ultra vires* decision of the Security Council does not “command any duty of compliance under Article 25,” and that States may regard it as unacceptable.¹²³ This argument is based on the text of Article 25, which provides that “Member States agree to accept and carry out the decisions of the Security Council *in accordance with the . . . Charter*.” As such, States have no obligation to comply with *ultra vires* resolutions of the Council. This argument goes on to say that non-compliance is allowed under the Charter and that it does not constitute a breach of international obligation.¹²⁴

Still, there are a number of problems with this broad interpretation of the Charter. Primarily, such interpretation would enable Member States to judge the conformity of Security Council resolutions with international law, undermining the Council’s authority to maintain international peace and security¹²⁵—the main purpose of the United Nations.¹²⁶ Moreover, in the view of other writers, the qualifier “*in accordance with the . . . Charter*” refers to the way in which States have to accept and carry out Council’s decisions. In these situations, the discussions on the legal effects of Security Council acts allegedly in violation of the Charter would not be conclusive. In fact, the ICJ has never found an act of any principal organ of the United Nations to be in violation of the Charter, and it is highly unlikely that it would ever do so. In cases where the Court found acts of other organizations in the UN system to be beyond the mandates provided in their constitutive instruments, it did not clarify the legal effects of those acts.¹²⁷ It seems that the Court is attached to the presumption of conformity of IOs’ decisions with their constitutive instrument and their validity.

¹²³ Charter, *supra* note 58 at Article 25.

¹²⁴ See, J Alvarez, “The Security Council’s War on Terrorism Resolutions: Problems and Policy Options” in Erika De Wet and André Nollkaemper, eds, *Review of the Security Council by Member States* (Oxford, New York: Intersentia 2003) at 125.

¹²⁵ Charter Article 24 stipulates that the Security Council has the primary responsibility for the maintenance of international peace and security.

¹²⁶ Charter, *supra* note 58 at Article 1(1).

¹²⁷ In its Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the Court found that requests for an Advisory Opinion by the WHO to be outside the scope of the WHO’s functions (1996) ICJ Rep at 77-81.

It must be noted, however, that there is a distinction between the validity and the legality of IOs' decisions. Though acts in violation of the "internal rules" of the Organization, including rules regarding the division of powers between its organs, are *ultra vires*, these acts may still be valid and produce binding effects.¹²⁸ Acts that are beyond the mandate of the organization are also *ultra vires*, but the Court does not define their legal consequences. Presumably, the margin of distinction is that acts that are not covered under the mandate of the organization will not produce any legal effect, despite having been passed in accordance with relevant rules of procedure.¹²⁹

Similar situations arise when Security Council Chapter VII resolutions violate international norms other than Charter provisions. In the absence of any avenue for judicial review of Security Council resolutions, these resolutions will remain valid despite violating norms of international law.¹³⁰ Still, if States in the exercise of their right to "auto-interpretation" find a Security Council resolution in breach of international law, they may react by non-compliance with that resolution. Yet before doing so, a State must ensure that such non-compliance would not constitute an internationally wrongful act on its own part and that the international responsibility of any reacting States would not be invoked.¹³¹ To this end, two doctrines developed by scholars are discussed in subsections (iv) and (v).

(iv) Resisting Security Council *Ultra Vires* Decisions

¹²⁸ See, Expenses, *supra* note 56 at 168.

¹²⁹ Tzanakopoulos, *supra* note 61 at 169.

¹³⁰ A distinction has been made in the literature between "validity" and "legality" of decisions of IOs. Though the acts in violation of "internal rules" of the Organization, including rules regarding the division of powers between its organs, are *ultra vires*, they may still be valid and produce binding effects. The acts that are beyond the mandate of the organization are also *ultra vires*, but the Court does not define their legal consequences. Presumably, the margin of distinction is that the acts that are not covered under the purposes of the organization will not produce any legal effect, despite having been passed in accordance with relevant rules of procedure. See, Tzanakopoulos, *supra* note 61 at 164.

¹³¹ *Ibid* at 174.

Droubi suggests that in circumstances where effective judicial means of challenging Security Council resolutions does not exist, resistance¹³² by States is a “necessary mechanism to fill this vacuum.”¹³³ Referring to the right of resistance which is recognized in constitutions of many States, Droubi notes that the UN Charter, as the constitution of the organization, fails to recognize such a right. He, therefore, concludes that the Charter has left enough room for States to resist resolutions adopted by UN organs, notably the Security Council, that are incompatible with the Charter. He further emphasizes that while the Charter is the constitution of the United Nations, it also stands along with peremptory norms as norms of fundamental importance to the UN and the international community.¹³⁴

Droubi defines resistance as a natural behaviour of States that complements non-compliance, which includes actions such as statements, protests, non-cooperation, resorting to General Assembly and regional organizations, and submitting disputes to judicial organs. Under this definition of resistance, a resisting State may enter into dialogue with the resisted authority and propose alternative directives.¹³⁵

For this scheme to be successful, a number of conditions must be met. The resistance must be conducted in a political non-violent manner. It must be undertaken against a resolution that has not been adopted in conformity with the Council’s procedure, or violates the purposes and principles of the Charter, or contravenes peremptory norms of international law. The resisting State must endeavour to persuade other States to join resisting unlawful resolutions. If a resisting State fails to persuade a significant number of States to support its position, the resistance may lose the chances of being lawful opposition.¹³⁶

¹³² Droubi bases his argument on the work of Ginsburg, who demonstrates that many domestic constitutions provide for a right to resist, whose bearer is the individual acting alone or in a group. There are 38 constitutions that explicitly provide for the right to resist. See, Tom Ginsburg, Daniel Lansberg-Rodriguez & Mila Versteeg, "When to Overthrow your Government: The Right to Resist in the World's Constitutions" (2013) 60 UCLA Law Review 1184.

¹³³ Droubi, *supra* note 93 at 14.

¹³⁴ Droubi, *supra* note 93 at 27-49.

¹³⁵ The notion of resistance was developed and applied in the context of Indian independence. Under this strategy, Gandhi not only resisted, but kept dialogue open with the British authorities with a view to establish new foundations to substitute for the resisted British institutions. See, Droubi, *supra* note 93 at 18.

¹³⁶ Droubi, *supra* note 93 at 14.

Unlike Tzakonopoulous, Droubi downgrades the role of “auto-interpretation” and underlines the “command of shared interpretation.” As such, he suggests that the “lawfulness” of the resolution at stake should not be questioned, because it would undermine the authority of the Council to function as the guardian of international peace and security. Instead, the emphasis should be placed on non-enforceability of *ultra vires* resolutions. Resisting States must also enter into dialogue with the Council with a view to change its decision.¹³⁷

Inspired by the doctrine of resistance, three relevant cases are discussed below to show that resisting Security Council resolutions can be successful in practice if a resisting State develops persuasive arguments and approaches other States and IOs to support its position.

(a) Bosnia and Herzegovina’s Challenge to the Arms Embargo

In an attempt to control the conflict in Balkans, the Security Council imposed a comprehensive arms embargo against the Federal Socialist Republic of Yugoslavia in 1991.¹³⁸ Following its dissolution in 1992, the Security Council continued to apply the embargo against all new States emerging from the disintegration of Federal Socialist Republic of Yugoslavia.¹³⁹ Unlike Serbia, Bosnia and Herzegovina (“BH”) had not inherited a strong military and weaponry to defend itself. It, therefore, claimed that the United Nations had deprived BH of its right of self-defence by equally applying the arms embargo against the two countries. Bosnia also argued that in the prevailing circumstances it was unable to protect its population from the commission of genocide by Bosnian Serbs. With the support of the General Assembly and the Organization of Islamic Cooperation (OIC), BH demanded that the Council exempt it from the arms embargo.

¹³⁷ Droubi, *supra* note 93 at 20.

¹³⁸ SC Resolution 713 (1991) called upon all States to “immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia.” Its expressed purpose was to restore peace and dialogue in that country. See, SC Res. 713, UNESCOR, 1991 at 6.

¹³⁹ After the dissolution of FSRY, the Council unanimously adopted Resolution 727, extending the embargo to “all areas that have been part of Yugoslavia.” See, SC Res. 727, UNESCOR, UN Doc. S/Res/727, 1992 at para 6.

The General Assembly's role in promoting BH's position was prominent. From 1992 to 1994, the Assembly adopted four resolutions on the situation in BH, calling on the Security Council to consider lifting the embargo against this country,¹⁴⁰ and urging Member States to assist BH under the umbrella of Article 51 of the Charter.¹⁴¹ GA Resolution 47/121 urged the Council to authorize UN members, in cooperation with BH, to use "all necessary means to uphold and restore the sovereignty, political independence, territorial integrity and unity of BH and exempt the latter from arms embargo."¹⁴²

The OIC also reacted to the Security Council's sanctions by adopting a number of resolutions,¹⁴³ declaring that the embargo was unlawful with respect to BH and that members of the OIC did not consider themselves bound by the embargo. It demanded the Security Council to lift the embargo with respect to BH.¹⁴⁴

The Non-Aligned Movement (NAM) also added its voice of support to BH's position, in particular by presenting a draft resolution to the Council seeking to exempt BH from the arms embargo with a view to enable it to "exercise its inherent right of self-defence."¹⁴⁵ However, the draft was not adopted as it received only six votes in favour and nine abstentions.¹⁴⁶

Despite the failure of the NAM draft resolution in the Security Council, several States aligned themselves with the position taken by the NAM and OIC and ignored the embargo with respect to BH, which received the necessary support from a considerable number of States that

¹⁴⁰ GA Res. 47/121, UNGAOR, UN Doc. A/Res/47/121 (1992) at para 7 [47/121]; (b); *The Situation in Bosnia and Herzegovina*, GA Res. 48/88, UNGAOR, UN Doc. A/Res/48/88 (1993) at para 17 [48/88]; and 49/10 *The Situation in Bosnia Herzegovina*, GA Res. 49/10 UNGAOR, UN Doc. A/Res/49/10 (1994) at para 21 [49/10].

¹⁴¹ See, 47/121, *supra* note 140 at para 7 (a); 48/88, *supra* note 140 at para 18; and 49/10, *supra* note 140 at para 23.

¹⁴² 47/121, *supra* note 140 at para 7.

¹⁴³ Droubi, *supra* note 93 at 6.

¹⁴⁴ [T]he arms embargo imposed on the Republic of BH was unjust, illegal and constituted a major factor impeding the exercise of the right of self-defence; OIC countries ... do not consider themselves "*de jure*" obliged to respect the illegal and unjust arms embargo imposed against the Republic of BH, a member of the UN, which is the victim of Serbian aggression and genocide. See, OIC Resolution 6/23-P, preamble and operative paragraph 14.

¹⁴⁵ S/25997, 29 June 1993.

¹⁴⁶ UNSCOR, 3247th Mtg, UN Doc. S/PV. 3247 (1993) [provisional] at 148.

enabled it to exercise its right to self-defence.¹⁴⁷ The Security Council overlooked this non-compliance as it did not take any measures against the States that did not enforce the embargo.

i) Resort to the ICJ

In March 1993, BH instituted proceedings before the ICJ, alleging that Serbia and Montenegro violated its obligations under the 1948 Genocide Convention. The applicant argued that the arms embargo prevented it from protecting its people from acts of genocide being carried out by Bosnian Serbs. Accordingly, it requested the Court to adjudicate and declare that SC Resolution 713 (1991) and other resolutions that affirmed it “must be construed in a manner that shall not impair the inherent right of individual or collective self-defence”¹⁴⁸ of BH under Charter Article 51 and customary international law; that the same resolution “must not be construed to impose an arms embargo” upon BH; that BH had the right under Article 51 to request and obtain military support from third States; and that third States are entitled to assist, upon request, BH in self-defence, including by providing military forces and equipment.¹⁴⁹

¹⁴⁷ Droubi, *supra* note 93 at 107-109.

¹⁴⁸ Scholars generally agree that the right of individual or collective self-defence under Charter Article 51 is only suspended “if the measures taken by the Security Council are effective or render the use of armed forces by the victim States unnecessary.” See, Droubi, *supra* note 93 at 111. Emphasizing the effectiveness of the Security Council enforcement measures as a requisite for suspension of self-defence, and inspired by the ICJ advisory opinion on the *Legality of Threat and Use of Nuclear Weapons*, Schweigman proposes that if survival of the victim State were at risk, noncompliance with the SC resolution would be lawful. David Schweigman, *The Authority of the Security Council Under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (The Hague, Boston: Kluwer, 2001) at 210. But the question remains, who decides whether the measures adopted by the SC are effective or that the survival of the State is at risk? De Wet rejects the “auto-interpretation” by States because it undermines the collective security system of the United Nations. She underlines Security Council’s competence to clarify the question in the first place. Nevertheless, she acknowledges the right for States to oppose the Security Council’s resolutions in exceptional circumstances, when the Purposes and Principles of the Charter and norms of *jus cogens* character are at stake. See, Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (London: Hart Publications, 2004) at 250. In the view of De Wet regarding Bosnia, the embargo violated two *jus cogens* norms—self-defence and prohibition of genocide.¹⁴⁸ She concludes that a refusal to implement this embargo would therefore have been justified until the Security Council took effective action. Gill opines that the ultimate decision on the effectiveness of the enforcement measures remains with the international community of States. He emphasizes that widespread noncompliance by UN members can persuade the Security Council to modify its *ultra vires* decisions. Nevertheless, he clarifies the point that such a course of action would “severely undermine the Council’s authority and prestige.” See, T. D. Gill, “Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers Under Chapter VII of the Charter (1995) 26:1 NYIL 33 at 100.

¹⁴⁹ *Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Order of 8 April 1993, [1993] ICJ Rep 3 at 6.

Though the ICJ rejected BH's request to interpret Resolution 713 (1991) to exempt it from the embargo, it indicated the following provisional measures of protection: the Court ordered, *inter alia*, that Serbia and Montenegro should immediately "take all measures within its power to prevent the commission of the crime of genocide," it should "ensure that any military, paramilitary or irregular armed units which may be directed or supported by it . . . do not commit any acts of genocide, of conspiracy to commit genocide . . . " against Muslims or any other peoples.¹⁵⁰

BH filed a second application in the same year, requesting again the indication of provisional measures of protection and repeating its request for the interpretation of Resolution 713 that would exempt it from the embargo.¹⁵¹ It also requested the Court to declare that BH must have the means at its disposal to prevent the commission of genocide under the Genocide Convention and customary international law; that all contracting parties to the Convention were under the obligation to prevent the commission of Genocide against the people of BH; that it must be able to obtain military forces, weapons, equipment and supplies, and that other parties to the Convention should be able to provide to BH such forces and materials.¹⁵²

This time, the Court rejected the request for indication of provisional measures on the grounds that the Court would address States and entities that were not parties to the proceedings. Nevertheless, it reaffirmed its previous provisional measures.¹⁵³

In his separate opinion, Judge Lauterpacht opined that the Security Council was bound by Article 1(3) of the Charter and *jus cogens* norms, concerning respect for human rights. He elaborated by indicating that it is highly unlikely that the Security Council would deliberately make decisions

¹⁵⁰ *Ibid* at 24.

¹⁵¹ *Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Order of 13 September 1993, [1993] ICJ Rep 323 at 328.

¹⁵² *Ibid* at 330.

¹⁵³ *Ibid* at 349-350.

violating *jus cogens* norms. However, some Security Council resolutions may produce the same effect “inadvertently” or “in an unforeseen manner.”¹⁵⁴

Rejecting the order of the Court, he argued that BH’s ability “to fight back against the Serbs and effectively to prevent the implementation of the Serbian policy of ethnic cleansing” is partly “attributable to the fact that BH’s access to weapons and equipment has been severely limited by the embargo.” Viewed in this light, “the Security Council resolution can be seen as having in effect called on Members of the United Nations . . . to become . . . supporters of the genocidal activity of the Serbs and in this manner and to that extent to act contrary to a rule of *jus cogens*.”¹⁵⁵

Lauterpacht drew two conclusions from the above argument: first, “when the operation of paragraph 6 of Security Council resolution 713 (1991) began to make Members of the United Nations accessories to genocide, it ceased to be valid and binding in its operation against Bosnia and Herzegovina; and that Members of the United Nations then became free to disregard it.”¹⁵⁶ Second, “the arms embargo has led to the imbalance in the possession of arms by the two sides and that imbalance has contributed in greater or lesser degree to genocidal activity such as ethnic cleansing; and elements of law, such as that genocide is *jus cogens* and that a resolution which becomes violative of *jus cogens* must then become void and legally ineffective.”¹⁵⁷

Four years after the fall of Srebrenica,¹⁵⁸ Kofi Annan, the United Nations Secretary-General, acknowledged that the arms embargo froze the military imbalance between the parties to the conflict, giving the Serbs overwhelming dominance, and depriving BH of its right of self-defence under the Charter of the United Nations.¹⁵⁹

¹⁵⁴ *Ibid* at 441.

¹⁵⁵ *Ibid*.

¹⁵⁶ *Ibid* at para 103.

¹⁵⁷ *Ibid* at para 104.

¹⁵⁸ The Srebrenica massacre took place in July 1995, in which more than 8,000 Bosnian Muslim were massacred by the Serbs in and around the town of Srebrenica.

¹⁵⁹ *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, UNGAOR, UN Doc. A/54/549 (1999) at para 49.

Eventually, on 14 December 1995, the *General Framework Agreement for Peace in Bosnia and Herzegovina* entered into force. Immediately after the signing of the agreement, the Security Council adopted Resolution 1031 (1995), providing for the replacement of the United Nations Protection Force (UNPROFOR) with the Multinational Implementation Force (IFOR), which was mandated to assist in the implementation of the Peace Agreement. Resolutions 1021 (1995) and 1074 (1995) provided for the lifting of the arms embargo and of economic sanctions against BH and Bosnian Serbs, respectively.

Bosnia and Herzegovina's case is a clear example of successful resistance *vis-à-vis* the Security Council's *ultra vires* actions. It succeeded because it developed valid arguments which persuaded a considerable number of members of the international community to support its position. In addition, the resisting States did not try to undermine the authority of the Security Council; instead, they proposed alternative solutions and demanded more robust action on the part of the Security Council.

(b) Libya's Challenge to the Security Council's Extradition Demand of Libyan

Nationals

In this sub-section, it is argued that Libya succeeded in resisting the Security Council's decisions by explaining its position in Security Council meetings, instituting proceedings before the ICJ, obtaining endorsements from a number of regional organizations, and persuading the Security Council to change the venue from Scotland to The Hague for the trials of two Libyan nationals.

Following the Pan Am Flight 103¹⁶⁰ and UTA Flight 772 incidents,¹⁶¹ the US and the UK issued a joint statement demanding Libya surrender all those who were charged with the crime, disclose all information in Libyan possession, provide judicial assistance in the investigation, and pay

¹⁶⁰ Pan Am Flight 103 exploded over Lockerbie, Scotland, in 1988.

¹⁶¹ Union de Transports Aériens Flight 772 crashed in Niger airspace in 1989.

appropriate compensation to the victims.¹⁶² The Security Council endorsed these demands and asked Libya to comply with them.¹⁶³ When Libya failed to comply with these demands, the Security Council imposed flight bans¹⁶⁴ and an arms embargo¹⁶⁵ against Libya and demanded States to lower the level of their diplomatic relations with the country.¹⁶⁶ Subsequently, the Council expanded the sanctions to include freezing the funds and financial resources under direct or indirect control of the Libyan Government or Libyan undertaking, except in respect of the sale and supply of petroleum, petroleum products, and agricultural products and commodities.¹⁶⁷ These sanctions remained in effect until lifted by the Security Council in 1998.¹⁶⁸

i) Libya's Position Toward the Security Council Resolutions

In the course of adopting Security Council Resolutions 731 (1991) and 748 (1992), Libya expressed its opposition to the Security Council's demands on the four grounds: firstly, Libya was not permitted under its domestic law to surrender its nationals for trial outside of the country. It had taken the required measures to prepare for the trials of the suspects in its domestic courts and had requested the USA and the UK to provide the Libyan judiciary with evidence relating to the crime.¹⁶⁹ Libya also argued that public opinion in the requesting countries had already determined the guilt of the alleged individuals and they would not receive a fair trial.¹⁷⁰

Second, Libya argued that its dispute with the USA and the UK concerning the interpretation and application of the *Convention for the Suppression of Unlawful Acts against the Safety of Civil*

¹⁶² See, *Letter dated 20 December 1991 from the Permanent Representative of the United States to the Secretary-General of the United Nations*, UN Doc. A/46/827 and S/23308, dated 31 December 1991.

¹⁶³ See, SC Res. 731, UNESCOR, UN Doc. S/Res/731 (1992), para 3.

¹⁶⁴ SC Res. 748, UNESCOR, UN Doc. S/Res/748 (1992) at para 4 [748]

¹⁶⁵ *Ibid* at para 5.

¹⁶⁶ *Ibid* at para 6.

¹⁶⁷ See, SC Res. 883, UNESCOR, UN Doc. S/Res/883 (1993) at para 3.

¹⁶⁸ See, SC Res. 1192, UNESCOR, UN Doc. S/Res/1192 (1998) at para 2.

¹⁶⁹ See, *Attacks on Aircraft*, UNSCOR, 3033d Mtg., UN Doc. S/PV. 3033 (1992) [provisional] at 9-10.

¹⁷⁰ *Ibid* at 8. Judge Shahaboddeen in a separate opinion was particularly concerned about the feasibility of an impartial trial in the event of the two accused being surrendered to either UK or US, for two reasons. First, by requesting prompt and full compliance with the demand for the payment of compensation, both States had determined, without involving their courts, the guilt of the suspects. Second, the suspects would be tried by a jury of individuals who are "more likely to be swayed by prejudicial matter than a judge." See, *Lockerbie*, *supra* note 77 at 1992, Separate Opinion of Judge Shahaboddeen, pp. 11 and 31.

Aviation (the “Montreal Convention”) was a legal question and should be settled either by a third party or the ICJ, as provided for in the Convention.¹⁷¹ The UK and the US opposed this argument, indicating that the situation was political in nature—the fight against international terrorism—requiring a collective political response from States.¹⁷²

Third, by adopting resolution 731 (1991), the Security Council violated Charter Article 27(3) which provides that parties to a dispute before the Council should abstain from voting. Despite the clarity of the appropriate procedure, the USA and UK, both Permanent Members of the Council, participated in the voting process of Resolution 731 (1991),¹⁷³ thus violating the Council’s rules of procedure.

Fourth, in opposing SC resolution 748 (1992), Libya maintained that the Security Council had lost its required objectivity under the influence of some of its Permanent Members. By repeating its demands contained in its earlier resolution, the Security Council disregarded Charter Article 36(2), which provides that the Council should take into consideration any procedures for the settlement of disputes which had already been adopted by the parties. Also, the Council had disregarded the provision contained in Charter Article 36(3) which States that legal disputes as a matter of principle should be referred by its parties to the ICJ.¹⁷⁴ Further, Libya accused the Security Council that, due to pressure from some Permanent Members, it had jumped from Chapter VI measures to imposing

¹⁷¹ *Ibid* at 11.

¹⁷² This argument was later repeated by the UK and the US in the ICJ but rejected by the Court in its judgment on the preliminary objections, as it had done in the *Nicaragua* case. In the *Nicaragua* Case, the US argued that the question before the Court was a matter of collective security, falling under the exclusive jurisdiction of the Council. The Court rejected this argument and opined that “the Charter ... does not confer exclusive responsibility upon the Security Council for the purpose. . . . The 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 event.” See, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, and Judgment* [1984], at 434-435 [95].

¹⁷³ UNSCOR, 3063d Mtg., UN Doc. S/PV. 3063 (1992) [provisional] at 8 [3063]. In the course of proceedings before the ICJ, judges were divided regarding the placement of the resolution. Some argued that the Security Council is not obliged to indicate under which Article or Chapter it adopts its resolutions, and in their view, Resolution 731 (1991) falls under Chapter VII. Other Judges, by contrast, opined that the resolution had been adopted under Chapter VI, and parties to the dispute should have abstained in the voting. See, *Lockerbie* case, *Provisional Measures*, 1992, 137. In its ruling in 1998, the ICJ affirmed the view that the resolution lacked mandatory nature. See, *Lockerbie*, *supra* note 77, 1998 Judgement, at 131 [43].

¹⁷⁴ UNSCOR 3063, *supra* note 173 at 18.

sanctions under Chapter VII , without determining the existence of a threat to peace or breach of peace under Article 39, a necessary requirement for imposing sanctions under Charter Article 41.¹⁷⁵

ii) Instituting Proceedings Before the ICJ

Following the adoption of Security Council Resolution 731 (1991), Libya initiated proceedings before the ICJ against each of the US and the UK, and requested the adoption of provisional measures by the Court to preserve Libya's rights. Under these cases, Libya claimed, *inter alia*, that it had the right to prosecute the suspects—its nationals—in its domestic courts, instead of surrendering them for trial outside the country; that the suspects would not receive a fair trial either in Scotland or the United States; and that Libya should not be forced to pay compensation unless it was found responsible for the incidents by an impartial third party. Libya also urged the Court to declare that the US and the UK were “under a legal obligation immediately to cease and desist . . . from the use of any and all force or threat against Libya.”¹⁷⁶ By way of requesting an indication of provisional measures, Libya asked the Court to order both States to refrain from “taking any action against Libya calculated to coerce or compel Libya to surrender the accused individuals to any jurisdiction outside of Libya” and “ensure that no steps are taken that would prejudice in any way the rights of Libya with respect to the legal proceedings that are the subject” of application.¹⁷⁷

Three days after the Court heard the request for provisional measures, the Security Council adopted, under Chapter VII, Resolution 748 (1992), which reaffirmed its Resolution 731 (1991) and imposed sanctions on Libya. Consequently, in its order of April 1992, the ICJ affirmed that Libya, the US and the UK, were bound by provisions of the Resolution, which prevailed over their obligations under the Montreal Convention.¹⁷⁸ Moreover, the Court opined that “an indication of provisional measures requested by Libya would be likely to impair the rights which are *prima facie* to be enjoyed”

¹⁷⁵ UNSCOR 3063, *supra* note 173 at 19-20.

¹⁷⁶ Lockerbie, *supra* note 77, *Provisional Measures*, [1992] ICJ Reports at 114-118.

¹⁷⁷ *Ibid* at 119.

¹⁷⁸ *Ibid* at 126.

by the respondents by virtue of that Resolution.¹⁷⁹ Finally, the Court found that “the circumstances of the case were not such as to require the exercise of its powers under Article 41 of the ICJ Statute to indicate provisional measures.”¹⁸⁰

iii) Resort to Regional Organizations

The League of Arab States (LAS) lent its strong support to Libya’s position in resisting the Security Council’s decision and demanded peaceful resolution of the dispute in accordance with international law, including respecting Libya’s sovereignty.¹⁸¹ At a later stage, the LAS submitted a number of alternative proposals, including trial of the suspects in a neutral country, either by Scottish judges or by a special court in The Hague.¹⁸²

It is noteworthy that by adopting several resolutions from 1992 to 1998, the OIC expressed its solidarity with the position taken by the LAS, and called upon the Security Council to review its Resolutions 731 (1992), 748 (1992) and 883 (1993). In particular, it called upon the parties to settle the dispute by peaceful means as provided for in Article 33 of the Charter. The OIC also endorsed the LAS proposal regarding trial of the suspects by Scottish judges in accordance with Scottish law at the seat of the International Court of Justice in The Hague.”¹⁸³

The NAM, too, added its voice of support to those of the LAS and OIC endorsing Libya’s position. In its 12th Summit Conference, the NAM expressed its “regret that it has taken so long” for the US and the UK to accept the proposal for trial in The Hague.”¹⁸⁴

This international pressure was not practically effective until 1998, when the Organization of African Unity (OAU) categorically refused to comply with Security Council Resolutions 748 (1992) and 883 (1993). The OAU declared that the Resolutions had been adopted in violation of the Charter

¹⁷⁹ *Ibid* at 127.

¹⁸⁰ *Ibid*.

¹⁸¹ See, Droubi, *supra* note 93 at footnote 120 and 121.

¹⁸² See, Council of League of Arab States’ Resolution 5653 (1997).

¹⁸³ See, Droubi, *supra* note 93 at footnote 125.

¹⁸⁴ See, *The Non-Aligned Movement: The Final Document of the XIIth Summit* (1998) at paras 211-214.

and that sanctions had caused “considerable human and economic losses suffered by Libya and a number of other African peoples.”¹⁸⁵

Sanctions were ultimately suspended in 1998 when an agreement concluded between Libya, the UK and the US.¹⁸⁶ In implementing the agreement, the suspects were transferred to the Scottish High Court of the Judiciary at Camp Zeist, Netherlands. It is clear that OAU’s position threatening not to comply with the sanctions eventually persuaded the US and the UK to compromise regarding the venue of the trials.¹⁸⁷ This process can be described as “political non-cooperation” which pressured the Council to reconsider the resolution at stake. It should be noted that the organizations concerned did not isolate the Council, instead they pleaded that the Council revise the resolutions and adopt the alternative policies proposed by them.¹⁸⁸

(c) Iran’s Challenge to the Security Council’s Decisions to Suspend its Peaceful Nuclear Program

It is submitted that Iran, by way of not complying with the Security Council’s demand to stop all nuclear energy activities, succeeded in persuading the Security Council to change its earlier decisions and terminate the sanctions that it had imposed against Iran. Obviously, Iran paid a high price both in terms of economic loss and diplomatic isolation for its non-compliance, as it was unable to garner strong support for its position. Although Iran received some support from the Non-Aligned Movement, secondary sanctions imposed by the United States thwarted all of its efforts at the international level, virtually leading to Iran’s complete economic isolation. Nevertheless, the “Iran Deal”, which prepared the groundwork for removal of the sanctions, was considered a win-win settlement by both parties.

¹⁸⁵ Assembly of Heads of State and Government of the Organization of African Unity, 34th Ordinary Session, Res. AHG/DEC.127 (XXXIV), (1998) at para 2.

¹⁸⁶ See, SC Resolution 1192, *supra* note 168, at para 8.

¹⁸⁷ Droubi, *supra* note 93 at 129.

¹⁸⁸ Droubi, *supra* note 93 at 130.

Reacting to the report of the International Atomic Energy Agency (IAEA),¹⁸⁹ in 2006 the Security Council called upon Iran “to take steps required by the IAEA . . . to build confidence in the exclusively peaceful purpose of its nuclear program and to resolve outstanding questions.”¹⁹⁰ In particular, the Council demanded that Iran suspend *all* “enrichment-related and reprocessing activities, including research and development,”¹⁹¹ and “work on all heavy water-related projects, including the construction of a research reactor moderated by heavy water.”¹⁹² It also demanded that Iran promptly ratify the Additional Protocol.¹⁹³ These demands were reaffirmed by the Council under several resolutions that it adopted in subsequent years.¹⁹⁴

Iran refused to comply with these requests and argued, *inter alia*, that under the *Treaty on the Non-Proliferation of Nuclear Weapons* (NPT) it had the right to develop nuclear energy for peaceful purposes,¹⁹⁵ that Iran had complied with its NPT obligations and IAEA standards,¹⁹⁶ that it had not carried out any unlawful activities,¹⁹⁷ that the involvement of the Security Council in this matter was in “contravention with the organizational, Statutory and safeguard requirements of the IAEA’s

¹⁸⁹ In 2006, the IAEA requested the Security Council to call upon Iran to “act positively” and “take several steps so as to build confidence that its nuclear program was peaceful.” The Agency called upon Iran, *inter alia*, to re-establish full and sustained suspension of all enrichment-related and reprocessing activities, including research and development, to be verified by the agency,” and to implement the Additional Protocol to the *Agreement Between Iran and the IAEA for the Application of Safeguards in Connection With the NPT*. See, IAEA Board of Governors, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, GOV/2006/14 (Vienna: International Atomic Energy Agency, 2006).

¹⁹⁰ See, *The Situation Concerning Iran Non-Proliferation*, SC Resolution 1696, UNESCOR, UN. Doc S/Res/1696 (2006) at para 1.

¹⁹¹ *Ibid* at para 2.

¹⁹² See, SC Res. 1737, UNESCOR, 5612th Mtg, UN Doc. S/Res/1737 (2006) at O.P. 2 (b).

¹⁹³ *Ibid* at O.P. 8.

¹⁹⁴ See, *Ibid* at O.P. 2 (a); SC Res. 1747, UNESCOR, 5647th Mtg, UN Doc. S/Res/1747 (2007) at O.P. 2 [1747]; SC Res. 1803, UNESCOR, 5848th Mtg, UN Doc. S/Res/1803 (2008) at O.P. 1 [1803]; SC Res. 1929, UNESCOR, 6335th Mtg, UN Doc. S/Res/1929 (2010) at O. P. 6 [1929].

¹⁹⁵ The Iranian argument is based on Article IV of the NPT, which provides that “[n]othing in this Treaty shall be interpreted as affecting the inalienable right of all Parties to the Treaty to develop, research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Article I and II of this Treaty.”

¹⁹⁶ Iran, as a member of the IAEA since 1958, has been a party to the NPT since 1968. It concluded a Safeguard Agreement with the IAEA that entered into force in 1974. Iran also signed the Additional Protocol on 18 December 2003, but did not ratify it. However, Iran applied the Protocol on a provisional basis for two and a half years.

¹⁹⁷ In this regards, Javad Zarif, the Minister for Foreign Affairs of Iran wrote “[s]ober strategic calculations . . . have firmly distanced Iran from this calamity, and these calculations have been put to the test. Even under attack by weapons of mass destruction by Saddam Hussein in the 1980s, Iran did not respond in kind.” See, Javad Zarif, “A Nuclear Deal, Then A Choice to Co-operate on Extremism”, *The Financial Times* (8 July 2015).

practices and procedures,” that the Council had not determined under Charter Article 39 that Iran’s activities constituted a threat to peace,¹⁹⁸ and that the sanctions were “unwarranted and unlawful.”¹⁹⁹

Reacting to Iran’s non-compliance, the Security Council imposed a series of sanctions against Iran, including an embargo of “all items, materials, equipment, goods and technology which could contribute to Iran’s enrichment-related, reprocessing or heavy water-related activities, or to the development of nuclear weapon delivery systems.”²⁰⁰ These sanctions were broadened at a later stage to include an arms embargo and sweeping economic sanctions.²⁰¹ The Council also strengthened the monitoring of financial institutions with a view to prevent the flow of resources from these institutions that may contribute “to the proliferation of sensitive nuclear activities” by Iran.²⁰² Moreover, these resolutions established a blacklist of individuals and entities subject to surveillance and embargo.²⁰³

Iran argued that the sanctions were “unjust and illegal,” as they were the most indiscriminate sanctions “imposed on any nation in human history.” Nevertheless, the sanctions were unsuccessful in stopping Iranian endeavors to develop nuclear energy for peaceful purposes. Pressure and sanctions, in the view of Iran, were counterproductive and hardened Iranian positions, both in the election of a fundamentalist as its president in 2005 and the subsequent expansion of Iran’s peaceful nuclear activities. The Iranian Foreign Minister, M Javad Zarif, argued on several occasions that, prior to the imposition of sanctions, Iran had less than 200 centrifuges, but it had increased the number of centrifuges to 20,000 while the sanctions were in force.²⁰⁴ Also, in the same period, Iran had enhanced

¹⁹⁸ In adopting its resolutions on Iran, the Council acted either under Charter Article 39 (SC Resolution 1696) or Article 41 (SC Resolutions 1737, 1747, 1803 and 1929), but did not make a determination under Charter Article 41 that Iran’s behaviour constituted a threat to international peace and security.

¹⁹⁹ See, Letter dated 24 March 2008 from the Permanent Representative of the Islamic Republic of Iran addressed to the Secretary-General, reproduced as UN Doc. A/62/767-S/2008/203.

²⁰⁰ See, 1737, *supra* note 192 at O. P. 3.

²⁰¹ See, 1929, *supra* note 194 at O.P. 8 and 10.

²⁰² See, 1803, *supra* note 194 at O.P. 10.

²⁰³ See, 1747, *supra* note 194 at O. P. 2 and 4; 1803, *supra* note 194 at O.P. 3-6; and 1929, *supra* note 194 at O. P. 10.

²⁰⁴ *Ibid.*

its enrichment capacity from 3.5 to 20 percent and nearly completed the construction of the Arak heavy-water reactor—to produce weapons grade plutonium.²⁰⁵

Iran acknowledged that it had paid a high price for its unfettered nuclear policy but branded the sanctions as “unjust . . . that far exceeded those imposed on countries that have developed a bomb.”²⁰⁶ Nevertheless, it maintained that its persistent policies of defying Western pressure and its technological achievements brought the five Permanent Members of the Security Council and Germany (the “P5+1”) to the negotiating table. By contrast, the negotiating Western countries argued that the sweeping economic sanctions persuaded Iran to return to the negotiations table and adopt a compromising stance.

It is submitted that several factors were involved in bringing parties to the dispute to the negotiating table. Undoubtedly, sanctions played a role in modifying Iran’s uncompromising position. It must be noted, however, that not all of the sanctions against Iran were imposed by the Security Council. The United States, seemingly in the implementation of the Council’s mandatory decisions, adopted and enforced widespread secondary sanctions by putting pressure on its allies around the world to enforce the sanctions or pay penalties. The United States, thus, was under increasing pressure from those countries that had lost economic ties with Iran to find a diplomatic solution to the Iranian nuclear program.

Following the election of Iranian President Rohani and within a new political environment, the stalled negotiations between Iran, on the one hand, and the P5+1, on the other, resumed and resulted in the *Joint Comprehensive Plan of Action* (JCPOA) on 14 July 2015.²⁰⁷ The Security Council terminated the sanctions against Iran following the conclusion of the JCPOA, which provided for a

²⁰⁵ M. Javad Zarif, “Iran is Committed to a Peaceful Nuclear Program,” *The Washington Post* (13 July 2015).

²⁰⁶ *Ibid.*

²⁰⁷ See, *Letter dated 16 July 2015 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, UN Doc. S/2015/544 (2015).

comprehensive, long-term, and proper solution to the Iranian nuclear issue.²⁰⁸ In addition, the Security Council decided to remove from its agenda “the Iranian nuclear issue” ten years after the JCPOA adoption day.²⁰⁹

Both sides had reasons to believe that the agreement was a balanced deal. The United States reasoned that the deal provided the best opportunity to “prevent Iran from having a nuclear weapon.” In its view, the deal was the only durable and viable solution to the Iranian nuclear program, which enjoyed “the unified support of the world’s leading powers.” Specifically, “the deal blocked each of Iran’s possible pathways to producing fissile material for a nuclear weapon, based on verification, not trust.” Before obtaining significant relief from economic sanctions, Iran must roll back its enrichment, its research and development and its stockpile of enriched uranium.²¹⁰

Iran, on its part, considered Security Council Resolution 2231 an “important development” as it began to reverse the “unfair conduct of the Security Council in the past” and terminate the sanctions against Iran. The President of Iran insisted that his country had never intended to produce nuclear weapons and branded the sanctions imposed against Iran as “unjust and illegal.” In his view, the Security Council’s sanctions and unilateral embargo imposed by some States were based on “illusive and baseless allegations.” Though the sanctions created “difficult conditions” for the Iranian people, they did not affect Iran’s approach to policy or negotiations.²¹¹

The positive outcome of the negotiations overshadowed the fact that Iran’s persistence in confronting the “unjust and illegal” sanctions led to the sanctions being lifted without the Security Council resolutions’ objectives being fully materialized. As specified above, the Security Council had

²⁰⁸ See, SC Res. 2231, UNESCOR, 7488th Mtg, UN Doc. S/Res/2231 (2015) at O.P. 7. Under operative paragraph 6 of the resolution, the termination of sanctions was subject to the conclusion by the Director General of the IAEA that all nuclear material in Iran remained in “peaceful activities.” The Director General of the IAEA submitted a report confirming this conclusion to the IAEA Board of Governors and in parallel to the Security Council on 16 January 2016, concluding that “the Agency has verified that Iran has taken the actions specified in paragraphs 15.1–15.11 of Annex V of the JCPOA.” See, IAEA Doc. GOV/INF/1, dated 16 January 2016.

²⁰⁹ *Ibid* at O. P. 8. The removal of “the Iranian nuclear issue” from the agenda of the Security Council is conditional to non-reinstatement of sanctions under O. P. 12 of the resolution.

²¹⁰ John F. Kerry & Ernest Moniz, “The Case for the Nuclear Deal with Iran”, *The Washington Post* (July 22 2016).

²¹¹ See, Statement by President Hassan Rohani, Seventieth Session of the General Assembly, 28 September 2015.

initially demanded that Iran suspend *all* enrichment and reprocessing activities, related R&D, and any work on heavy water projects.”²¹² Under the nuclear deal, however, not all of these demands are met. Iran will keep its limited enrichment capacity along with several thousand centrifuges. Thus, *Iran successfully resisted the Security Council’s demands to abandon its entire nuclear energy program.* Although a high economic and political price was paid for its resistance, Iran successfully defended its rights under the NPT and its name was added to the list of States who have successfully defied the Security Council resolutions.

(v) Disobeying as a Countermeasure

In this subsection, it is argued that in the absence of a mandatory dispute settlement procedure which has binding effects, States have the right to use countermeasures against the Security Council to challenge its wrongful acts. In view of the enormous power vested in the Security Council and the generally perceived legality of its decisions, “disobeying” Security Council decisions remains one of the most viable and effective option for States.²¹³ Although disobedience of a binding Security Council resolution would be a violation of UN Charter Article 25, the only possible justification is that it “is a wrongful act in response to the Council’s wrongful conduct, and thus a countermeasure.”²¹⁴

A countermeasure is a measure taken by a subject of international law in reaction to a breach of an international norm by another subject, with a view to inducing the recalcitrant subject to comply with its international obligations.²¹⁵ As a matter of fact, countermeasures evolved in a bilateral context, with one international actor taking measures against another actor because of some violation of its rights by the latter.²¹⁶

While it may seem somewhat unusual that a State which has contributed to the creation of an international organization would take countermeasures against it, IOs have an “international legal

²¹² 1737, *supra* note 192 at O.P. 2(b).

²¹³ The term used by Tzanakopoulos, *supra* note 61.

²¹⁴ Tzanakopoulos, *supra* note 61 at 191.

²¹⁵ See, DARSIWA, *supra* note 1 at 129 and DARIO, *supra* note 1 at 22, and commentaries thereto.

²¹⁶ Tzanakopoulos, *supra* note 61 at 154.

personality” that entitles them to rights but also creates obligations at the international level. When an IO breaches its obligations, countermeasures remain at the disposal of States to be employed against it—as confirmed by DARIO.²¹⁷ The United Nations’ practice demonstrates that it has been the target of both protests and international claims, and it is thus susceptible to countermeasures.²¹⁸

Tzanakopoulos argues that any *ultra vires* decision of the Security Council that cannot be challenged through an established procedure may be challenged by way of States taking appropriate countermeasures. In his view, “disobeying” is the most appropriate countermeasure to challenge a Security Council resolution that violates international law, because Member States, as the creators of the United Nations, have a “vertical relationship” with the organization. Also, as subjects of international law, States and the United Nations maintain a horizontal relationship with each other and, like States, the United Nations is bound by international obligations either under its Charter or under general international law. Accordingly, States are in a position to determine that the Organization has violated its international obligations by producing normative resolutions. States by invoking the responsibility of the United Nations can trigger the procedure outlined in DARIO that includes the obligation of cessation and reparation on the part of the Organization.²¹⁹ It is argued that States’ disobedience should be qualified as a countermeasure; otherwise, it would run the risk of being branded as a violation of Charter Article 25 obligations. Labeling States’ reaction to the Security Council’s wrongful conduct as a “countermeasure” would also effectively render irrelevant the discussion regarding the interpretation of the phrase, “in accordance with the . . . Charter” in Article 25.²²⁰ The countermeasures can be taken by victim States against the United Nations for violations of Charter provisions or general international law.

²¹⁷ Article 51(1) of DARIO provides that “[a]n injured State or an injured international organization may . . . take countermeasures against an international organization which is responsible for an internationally wrongful act in order to induce that organization to comply with its obligations” under certain circumstances as specified in part III of the *Draft Articles*.

²¹⁸ See, Giorgio Gaja, *Sixth Report on Responsibility of International Organizations*, ILC, 2008, UN Doc. A/CN.4/597 at 17-18.

²¹⁹ DARIO, *supra* note 1 at 176.

²²⁰ DARIO, *supra* note 1 at 177.

(a) Countermeasures by a Victim State or All Member States

It is generally understood that only victims of an international wrongful act can take countermeasures against an insubordinate subject of international law.²²¹ It should be clarified, however, which States are considered to have been injured as a result of the Security Council action under Charter Article 41. The answer to this question will vary depending on which obligations have been violated—Charter obligations or obligations under general international law.²²²

(b) Violation of UN Charter Obligations

The fact that the UN Charter establishes international obligations binding upon the Organization has been confirmed by both the ICJ and the ILC.²²³ The United Nations is bound by its constitutive instrument, the Charter, which establishes binding obligations upon it and provides corresponding rights for its creators—the Member States. Breaches of a Charter provision by one of the UN’s organs entitles an injured party to resort to the means of redress provided for in the treaty itself,²²⁴ but it also does not exclude the right to countermeasures in response to said breach.²²⁵

Although breaches of Charter obligations do not “automatically and necessarily” injure all Member States of the Organization, these obligations are owed to the entire membership of the Organization. In cases of breach, only the injured States may invoke the responsibility of the Organization. For example, although the imposition of disproportionate sanctions against one Member State will injure that State, “as a matter of fact,” the wrongful determination constitutes a violation towards all Member States of the Organization, as a matter of law, and this entitles them to invoke the responsibility of the Organization as “States other than [the] injured States.”²²⁶

²²¹ See, DARSIIWA, *supra* note 1 at 130 and 328; DARIO, *supra* note 1 at 149.

²²² *Ibid* at 179.

²²³ See, Chapter Four, Section IV, p. 185.

²²⁴ Charter Article 33 provides the following modes of settlement of disputes: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement of disputes and resort to regional arrangements and agencies.

²²⁵ As the ILC stated in its commentary to Draft Article 57 on the Law of Treaties, a “violation of a treaty obligation, as of any other obligation, may give rise to a right in the other party to take non-forcible reprisals, and these reprisals may properly relate to the defaulting party’s rights under the treaty.” See, 1966 Yearbook of the ILC, II, 243-4 [1].

²²⁶ Tzanakopoulos, *supra* note 61 at 182.

(c) Violation of General International Law Obligations

The Security Council, while acting under Charter Article 41, might breach its obligations under general international law. As discussed in Chapter Four, the obligations that come into play in the present discussion are those under peremptory norms or customary laws pertaining to the protection of fundamental human rights. As the ICJ has observed, these obligations are *erga omnes*—owed to the international community as a whole.²²⁷ Consequently, any State directly affected by a breach of the United Nations has standing as the “injured State” and can invoke the responsibility of the Organization and resort to countermeasures.²²⁸ All other States have standing as a State other than the injured State and would also be in a position to resort to similar measures.²²⁹

V. Accountability for Human Rights Violations

Individuals have few judicial means at their disposal to protect their rights against the activities of IOs, even when these activities negatively affect the individuals’ rights.²³⁰ One reason for this is that legal acts adopted by international organizations are not normally directly implemented and cannot be challenged by the affected individuals before domestic, regional or international courts. Moreover, when individuals do have the rare opportunity to institute proceedings against an IO in domestic courts, the IO is often granted immunity for any claims.

As discussed in section I, accountability is a broader concept than responsibility. Evidently, the accountability comprises the responsibility of IOs at the international level, but it is in no way

²²⁷ See, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, [1970] ICJ Rep 3 at paras 33-34.

²²⁸ Tzanakopoulos, *supra* note 61 at 186.

²²⁹ In the *Libya* case, the 53 Member States of the (then) OAU condemned the unjust imposition of sanctions against this State and repeatedly called for reconsideration, before eventually deciding to disobey them.

²³⁰ Apart from the general obligations under the Charter referred in Chapter Four, the UN Commission on Human Rights in its report entitled “the Adverse Consequences of Economic Sanctions,” known as “Bossuyt Report,” even subjects States to certain human rights obligations emanating from UDHR, such as the right to life (Art. 3), the right to freedom from inhumane or degrading treatment (Art. 5), and the right to an adequate standard of living, including food, clothing, housing and medical care (Art. 25). See, UN Doc. E/CN.4/Sub.2/2000/33, dated 21 June 2000, para 30. Likewise, in the imposition and application of sanctions, due attention has to be paid to the two *International Covenants on Human Rights*, particularly the *International Covenant on Economic, Social and Cultural Rights* concerning the right to an adequate standard of living (Art. 11); the Right to health (Art. 12); and the right to education (Art. 13), the *International Covenant on Civil and Political Rights* concerning the right to life (Art. 16). See, UN Doc. E/CN.4/Sub.2/2000/33, dated 21 June 2000, para. 31.

confined to the responsibility of subjects of international law, as regulated by DARIO and DARSIWA. Accountability also means that power wielders should be held accountable to those who are affected by their decisions.²³¹ In the context of normative resolutions, individuals, entities, and States, are affected but unlike the latter, individuals and other entities are at the mercy of their respective governments to invoke the responsibility of the United Nations. In any event, State action may or may not result in remedying the injury caused to individuals because of the State implementing the normative resolution.

In cases where the Security Council's normative resolutions violate human rights, it is expected that States will react with all measures at their disposal as enunciated in DARIO, as these rights are *erga omnes*. Although certain measures are available, States may decide not to act for various reasons. Primarily, non-compliance with a Security Council resolution may result in being singled out in the international community as a recalcitrant State, and a defiant State may face sanctions for not implementing the normative resolution. Further, countermeasures adopted by States may not remedy the harm incurred by individuals and entities because of implementing the normative resolution. Therefore, individuals and entities need to resort to other procedures to remedy their suffering. However, under prevailing circumstances, the options available to individuals and entities that have been targeted by unjustifiable sanctions are limited. In addition to initiating the delisting procedure,²³² two possible approaches come to mind. First, an individual may file a lawsuit against the United Nations in a national or regional court. Second, an individual or entity could challenge the enforcement measures of individual Member States in domestic courts.²³³

Filing a lawsuit against the United Nations before a national court is an ineffective option for a listed individual or entity, due to the fact that under Articles 25 and 103 of the UN Charter, Member

²³¹ Under Mureinik's understanding of the culture of justification, governors should be accountable to those "governed by their decisions." Under this assumption the Security Council would be accountable to the entire global community, including individuals, as all the members of this community are affected by Security Council decisions.

²³² See, Chapter Two, Section IV (D) (iii), p. 91.

²³³ Finnur Magnusson, *supra* note 1 at 78.

States are under treaty obligation to comply with Security Council Chapter VII resolutions. If, under exceptional circumstances, a domestic court takes up a petition filed before it, Article 105(1) of the Charter could be invoked. The Article accords the United Nations such privileges and immunities that are necessary for the fulfilment of the Organization's mandate. This has been further elaborated in the *General Convention on the Privileges and Immunities of the United Nations*, which stipulates that the Organization shall enjoy absolute immunity from every form of legal proceedings before national courts and authorities.²³⁴ While some scholars have argued that this situation amounts to a denial of justice for the individuals and entities concerned,²³⁵ others have gone further and argued that national courts cannot grant the United Nations immunity due to the fact that such practice would amount a violation of the principles embedded in the *Universal Declaration of Human Rights*,²³⁶ which are *erga omnes* norms and the international community as whole is interested in their proper application. Furthermore, it is argued that fundamental rights are protected by national constitutional provisions and therefore no impediment on their application at the national level is permitted.²³⁷ Nonetheless, there is no court practice affirming the views of these scholars. As such, filing a lawsuit against the United Nations to challenge the normative resolutions would likely be a futile exercise.

An alternative solution would be to initiate proceedings against the State that takes measures to implement the normative resolutions and consequently breaches its human rights obligations. There have been many challenges to the enforcement measures of Member States—both in domestic and regional courts—on the grounds of human rights violations. These court cases vary in nature. In some, individuals complained about being listed by the 1267 Committee or directly about the sanctions

²³⁴ See, *Privileges and Immunities of the United Nations*, UNGAOR, 31st Plen Mtg, Annex to GA Resolution 22 (I) A (1946), Article II, Section 2.

²³⁵ C. Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press, 2003) at 90; Karel Wellens, *Remedies against International Organizations* (Katholieke Universiteit Nijmegen, 2007) at 89.

²³⁶ The *Universal Declaration on Human Rights* was approved by the general Assembly on 10 December 1948, GA Resolution 217 (III) A. As the ICJ has opined, the provisions of this declaration have become customary international law, which are binding to all States

²³⁷ M. Gerstner and D. Rotenberg, "Commentary on Article 105 of the UN Charter," in Bruno Simma, ed, *The Charter of the United Nations—A Commentary*, vol. II (Oxford: Oxford University Press, 2002) at 1314-1324.

themselves. In others, the national designation²³⁸ was challenged or the court was asked to compel the State to initiate the de-listing procedure.²³⁹

VI. Conclusion

There is increasing demand to hold the Security Council accountable for the wrongful acts emanating from its normative resolutions, in particular for violations of human rights law. Nevertheless, judicial review of Security Council resolutions will not be realized in the foreseeable future due to the absence of a compulsory jurisdiction procedure. Additionally, the immunity of the United Nations would impede any proceeding before national and regional courts. In these situations, States may opt for non-compliance with the Security Council's *ultra vires* resolutions—an option with unavoidable consequences. Such a position, if supported by a considerable number of States, will likely persuade the Security Council to modify its position. Conversely, in cases where non-compliance does not garner sufficient support from other States, the disobeying State may be branded a “recalcitrant State” and face countermeasures taken in the form of sanctions by the Security Council. Hence, there is no guarantee that States will take countermeasures against the Security Council. Even in cases where countermeasures are adopted, it is far from clear that these measures will remedy the injuries incurred by individuals because of unjustifiable sanctions.

Irrespective of measures that may be taken by States, the question of compensation for individuals who have unjustifiably suffered because of Security Council sanctions must be addressed. Even though the Security Council remains immune from prosecution in national and regional courts, for the time being, some individual victims in the fight against terrorism have succeeded in filing suit in national and regional courts, either directly challenging the sanctions or their implementation. Despite the rulings of some courts invalidating the measures taken to implement the normative

²³⁸ There are two different regimes for the designation of individuals and entities for inclusions in the blacklist. Whereas under the 1267 regime the Security Council decides on the designation, under the 1373 regime States make the designation.

²³⁹ See, Chapter Five, Section VI, pp. 227-248.

resolutions, the question of compensation for harm incurred by individuals has yet to be addressed. Indeed, further research is required to address the accountability of the Council for the impact of its resolutions on the human rights of individuals.

General Conclusions

The purpose of this thesis was to determine whether the Security Council has opened a new avenue for law-making at the international level, by adopting normative resolutions under Chapter VII of the Charter of the United Nations. The focus on various aspects of this question in the preceding chapters illustrates that despite some incremental success in promoting international standards in the fight against terrorism, the Security Council has failed to introduce an acceptable new form of law-making. The Security Council's authority to exercise such a function is now under serious doubt and its legitimacy questioned, as its normative resolutions were initiated and implemented under the influence of a Permanent Member, depriving other UN members of the right to contribute to the process as it is usual in law-making processes. Furthermore, the Security Council's intervention in areas that are already highly regulated runs the risk of contributing to the fragmentation of international law. Currently, the Council's normative resolutions are facing serious challenges at the implementation stage and several proceedings before national and regional courts have indirectly challenged the resolutions, compelling the Security Council to make revisions. The Council is under continued pressure to further revise its practice or face additional challenges, though indirectly, before national, regional, and even international courts. The Security Council has been sensitive to these challenges, as it has not exercised law-making function recently and has suspended the substantive reporting by relevant monitoring bodies, since 2011, for a five years' term. Thus, in these circumstances, it is unlikely that the Security Council would repeat its use of normative resolutions as a means for law-making in the future.

The detailed analysis of the Security Council's normative resolutions in Chapter Two illustrates that they suffer from some general shortcomings. The analysis demonstrate that the normative resolutions are omnibus texts, containing, *inter alia*, executive, cooperative and normative provisions. They are not prepared in a uniform format and produce different types of obligations for

either the Member States of the United Nations or all States of the international community. Some of these resolutions contain provisions that directly bind States. Others reproduce provisions extracted from existing international instruments—with the aim of binding States that are not parties to the instruments in question. Further still, another type of normative resolutions sets law-making goals to be fulfilled by States through the enactment of national legislation. The Security Council's normative resolutions often employ abstract language and lack the necessary clarity and precision required of articulate law-making instruments. Worse still, this abstract language is interpreted differently by the producing organ and the Member States, to whom it applies.

The Security Council's law-making is an incoherent practice and has resulted in the inconsistent implementation of its normative resolutions. For instance, not all of the law-making goals set by its normative resolutions have been fully satisfied. States have adopted different implementing measures, impeding the thorough realization of the Security Council's goals. Some States have enacted a single and all-inclusive piece of counterterrorism legislation while others have relied on modified or unmodified national criminal codes. Still, a third group of States has simply relied on their implementing legislation of other relevant international instruments and have taken no further action.

Repeated calls by the Security Council for all States to ratify international instruments in the areas covered by this thesis, especially counterterrorism and the non-proliferation of weapons of mass destruction (WMDs), raised the important issue of the relevance and continued validity of Security Council resolutions after all States had adhered to the instruments in question. Moreover, it is unclear which instrument would prevail over the other in cases of discrepancy between the normative resolutions and the treaties in questions. It seems that the prevalence of Charter obligations over any other international obligation is not relevant because such an assumption makes irrelevant the repeated calls for ratification of international instruments.

The complexity of the regimes established pursuant to the normative resolutions, together with the many subsequent revisions, generates practical difficulties for many States that do not have

terrorism-related problems but are still under pressure to implement the resolutions. This is why technical assistance to needy States has become so important for the success of the Security Council's new approach, and has been emphasized in almost all of its resolutions on the topics under discussion.

In addition to the general problems of the Council's sanctions regimes, each one of these regimes suffers from its own complications. For example, despite fifteen years of intensive work by the UN's Counter-Terrorism Committee, the question of the financing of terrorism has become more serious than it was during the adoption of Resolution 1373 in 2001. The resurgence of terrorist organizations in the Middle East is a clear sign of the failure of the 1373 regime in preventing the financing of terrorist organizations. The Al-Qaida network has spread its activities from Afghanistan to several other countries in the region and, moreover, the Islamic State of Iraq and Syria and Jabhat al-Nusrah have become the main beneficiaries of financing which flows from several countries in the region and beyond.

The regime established pursuant to Resolution 1540 suffers from two major deficiencies. First, the Security Council's law-making in the area of non-proliferation of WMDs is an unbalanced approach *vis-à-vis* the actual threat posed by weapons of mass-destruction. Nuclear disarmament and non-proliferation are inter-related issues and should be treated in an inter-related way. While the Security Council has failed in fulfilling its mandate in accordance with express language of the Charter to formulate plans for the establishment of "a system for the regulation of armament,"¹ it has focused on non-proliferation issues, without paying due attention to the nuclear disarmament. In this manner, the nuclear weapon States continue to hold their weapons and further develop them whereas some non-nuclear weapon States are placed under severe sanctions for developing nuclear energy technology. This unequal treatment of the two inter-related aspects of the matter is biased.

Second, the establishment of the 1540 Committee has widely been criticized on the basis that each one of the non-proliferation regimes covered in Resolution 1540 has its own monitoring

¹ See, the Charter of the United Nations (1945) Article 26

mechanism, and interference by the Security Council in such monitoring activities is counter-productive and unjustified. Both the International Atomic Energy Agency (IAEA) and the Organization for the Protection of Chemical Weapons (OPCW) are expert bodies, employing the services of experts in the field. Certainly, the 1540 Committee, consisting of members of the Security Council, does not have in its possession the necessary expertise on these subjects and relies mainly on the proficiency of the international bodies mentioned. Thus, it seems that there is little added value in entrusting the 1540 Committee with monitoring capacity in areas already covered by other expert international bodies.

Moving on, the major problem with the 1267 regime is its lack of due process in designating individuals for inclusion in the Security Council's sanctions list. Individuals are included in the list based on intelligence information gathered by States, and targeted persons are not allowed to be heard or mount a defence prior to their designations. A number of proposals to remedy this problem have been overlooked by the Security Council. Though the Security Council has, on a few occasions, revised its listing and delisting procedures and established the Office of the Ombudsman, such measures have fallen far short of what is necessary to ensure that Council's decisions are not taken arbitrarily and the human rights of individuals are not violated.

The deficiencies of the normative resolutions aside, it is submitted that in the absence of a central authority, law-making at the international level remains the prerogative of sovereign States. Although some international organizations have been authorized in accordance with their constitutive instruments to establish international norms in specified areas, the norms so developed have limited application—they bind the States that are parties to instruments in question, and not others. No international organization has yet been authorized to conduct a general law-making function. Even the General Assembly, which is the widest representative Organ of the United Nations, does not have general law-making authority. Its mandate in this regard is limited to carrying out studies and making recommendations concerning the progressive development of international law and its codification.

Recommendations of the General Assembly regarding law-making must be approved by the United Nations's Member States and any treaty that is negotiated must be ratified and must be entered into force in accordance with the procedure provided for in each instrument.

A priori, the Security Council, with its limited membership, is not designed to make international legal norms of general application. The absence of express language in the UN Charter confirms this viewpoint. Even Chapter VII of the Charter does not provide a license for the Council to bypass the sovereign will of States in their law-making function. Chapter VII authorizes the Security Council to take enforcement measures in cases of threats to peace, breaches of the peace, or acts of aggression. Undoubtedly, terrorism constitutes a threat to peace. But, in confronting such threat, the Security Council has the discretion to take enforcement measures short of use of force, or decide to use or authorize the use of force. The Council is not empowered to introduce new norms of international law or bring into force a new international instrument not yet in force, as these are prerogatives of sovereign States. By extracting some provisions from international instruments not yet in force and making them binding on all States under the normative resolutions, the Security Council is misusing its powers under Chapter VII.

Furthermore, as a subject of international law, the Security Council is bound by international norms and principles, in particular the purposes and principles of the UN Charter, the peremptory norms of international law, and international human rights and humanitarian law. Though the Security Council has endorsed the need for respect of international human rights and humanitarian law during the fight against terrorism, its practice in imposing sanctions against individuals without due process contradicts the principles that it has endorsed in the very same resolutions. Several national and regional courts have directly or indirectly challenged the normative resolutions in their rulings, denouncing the implementing measures as a violation of international human rights law and the principle of due process. Although the Security Council has not yet been directly challenged before a court of law for violating any of these categories of international norms, examples provided by

scholars indicate that these discussions are not purely academic in nature and that it is highly likely that the Security Council may directly or indirectly be implicated in court proceedings, as its action or inaction might have contributed to the violation of certain *jus cogens* norms.

The rulings of national and regional courts were among the factors which persuaded the Security Council to revise its procedures relating to the listing and delisting of individuals and entities on the UN's sanctions list. Despite several revisions made by the Security Council of its procedures, it has so far resisted establishing an independent body to hear grievances of those individuals who are affected by these sanctions. The establishment of the Office of the Ombudsman to hear and convey grievances of affected individuals to the Security Council is in no way comparable to proceedings of an independent judicial institution. This and other attempts by the Security Council are intended to improve the internal accountability of the organization, but they do not address the accountability of the Council vis-a-vis the international community, including individuals.

Analyzing the normative resolutions of the Security Council from a wider perspective of legitimacy, some mainstream lawyers share many of the concerns expressed by the Third World Approaches to International Law (TWAIL) scholars, who question the legitimacy of the Security Council on several grounds. The limited membership and growing powers of the Security Council have been the main concern of TWAIL scholars for decades. However, with the Council's law-making activities in recent decades, mainstream lawyers have added their voice to those of TWAIL scholars in calling for a comprehensive reform of the Security Council, encompassing both its composition and rules of procedure. Lack of transparency in the drafting of Security Council resolutions is a cause of concern for both mainstream lawyers and TWAIL scholars. Both TWAIL and mainstream lawyers complain about the use of the Security Council to legitimize hegemonic foreign policies of some of its Permanent Members. Mainstream lawyers have gone the extra mile in suggesting that States have the right to pass judgment on the Security Council's normative resolutions, react by expressing their protests, and by refusing to carry out the resolutions that in their view are *ultra vires*.

Clearly, the International Law Commission's *Draft Articles on the Responsibility of International Organizations* (DARIO) applies to the potentially wrongful acts emanating from the Council's normative resolutions. DARIO regulates the procedure to be followed in cases where the Security Council commits a wrongful act. However, as previously discussed in Chapter Six of this thesis, in the absence of a compulsory judicial procedure, review of Security Council resolutions will not be realized in the foreseeable future. Additionally, the United Nations' immunity would impede proceedings before national courts. In these situations, States may opt for non-compliance with the Security Council's *ultra vires* resolutions, an option with unavoidable consequences. Such a stance, if supported by a considerable number of States, might persuade the Security Council to modify its position. Conversely, if non-compliance is not supported by other States, a disobedient State may be branded as "recalcitrant" and face countermeasures in the form of Security Council sanctions.

Lastly, international standards do not cover the accountability of the Security Council *vis-à-vis* individuals, leaving them at the mercy and responsibility of States when an injury occurs as a result of Security Council's wrongful acts. States may or may not respond to the Security Council's decisions mainly due to political considerations. Therefore, the question of accountability of international organizations with respect to individuals needs to be addressed in an appropriate manner—a question that requires additional research beyond the scope of the present thesis.

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