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Reforming the UN Security Council Membership

The illusion of representativeness

Sabine Hassler

ROUTLEDGE

Reforming the UN Security Council Membership

This book comprehensively examines the different proposals put forward for reforming the UN Security Council by analysing their objectives and exploring whether the implementation of these proposals would actually create a representative and more effective Security Council. The book places the discussion on reform of Security Council membership in the context of the Council's primary responsibility, which is at the helm of the UN collective security system. The author contends that only a Council that is adequately representative of the UN membership can claim to legitimately act on the members' behalf. This book offers an inquiry into the Council's constitutional framework and how far that framework still reflects the expectations and intentions of the founding nations, while remaining flexible enough to satisfy today's, and possibly tomorrow's, membership. Through the use of policy-oriented jurisprudence and elements of International Law/International Relations theory, this book explores how reform can best be realised.

Reforming the UN Security Council Membership will be of particular interest to scholars and students of International Law and International Relations.

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Contents

Preface

The United Nations Security Council must be reformed. This is the mantra of tireless proponents for whom the Security Council in its current form is untenable. With its release from the stasis imposed by the Cold War, increased activity and involvement was initially welcomed. However, this also highlighted inadequacies in procedure and impact, so much so that calls for reform became ever more demanding; and few issues engage as passionate an advocacy as the scramble for Security Council seats. Post-Cold War activity may have borne proof that collective action can be successful, but it also made calls for reform more urgent to incorporate states that desire greater recognition as major players. The failure to reflect the changing power realities directly affects the perception of legitimacy of Security Council decisions and actions. Increasingly, the Security Council is seen as run by, and for the benefit of, a handful of elite states.

With this in mind, I embarked on writing my thesis in 2003 always keenly aware that my efforts could at any time be overtaken by real reform events. As it turned out, I need not have worried; and, as time has passed without any progress being made, I was asked to think about publishing my thoughts on Security Council reform. Routledge welcomed my proposal and encouraged me to pursue this project. Thanks to the support from both my family and the very kind anonymous reviewers of the draft, I decided to brave the waters and turn my thesis into a monograph.

This work reflects my opinions on the topic and any errors, mistakes, points of view and misinterpretations are mine alone.

Sabine Hassler
July 2012

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Abbreviations

ASEAN	Association of Southeast Asian Nations
AU	African Union
CIS	Commonwealth of Independent States
DPRK	Democratic People's Republic of Korea
DRC	Democratic Republic of the Congo
ECOSOC	Economic and Social Council
EU	European Union
GNP	Gross National Product
GRULAC	Group of Latin America and Caribbean Countries
High Level Panel	High Level Panel on Threats, Challenges and Change
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IMF	International Monetary Fund
ISAF	International Security Assistance Force in Afghanistan
KFOR	Kosovo Force
MAD	Mutually Assured Destruction
MNC	Multinational Corporation
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
NAM	Non-Aligned Movement
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
OAS	Organization of American States
OAU	Organization of African Unity
ODA	Official Development Assistance
OIC	Organization of Islamic Conference
SFOR	Stabilization Force in Bosnia and Herzegovina
TCN	Top Contributing Nation
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
US	United States of America

WEOG	Western European and Other States Group
Working Group	Open-Ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council
WTO	World Trade Organization

Tables

Introduction

> Even if we were to create a perfect Security Council we would still have far from a perfect United Nations.[1]

Recent history has shown that the collective security system of the United Nations (UN), ostensibly under Security Council ('Council') guard, is far from working satisfactorily. Discussions on the subject received particular momentum following the events triggered by the terrorist attacks on US soil on 11 September 2001. The aftermath had a tremendous impact upon the global perception of the Council as a result of the unilateral actions taken by the United States and its allies in Iraq in 2003. The Council appeared as powerless to prevent its members from taking unilateral action in this instance as it had when it failed to intervene effectively, due to internal bickering, in the former Yugoslavia in the 1990s, or as it has failed to mediate successfully in one of the longest-lasting conflicts: the situation in the Middle East. In both Kosovo and Iraq irreconcilable splits among the five permanent members meant that military action was taken without the formal sanction of the whole body, undermining its overall legitimacy. As former US Secretary of Defence William Cohen said about Council authorization for the Kosovo intervention: 'It's desirable, not imperative.'[2] This is to be contrasted with a statement that, at one point in time, that contended that '[T]he Security Council is not a body that merely enforces agreed law: It is a law unto itself'.[3]

Although the Cold War had all but suspended effective Council activity, once freed from that stasis, the surge in post-Cold War activity, marked most notably by the reaction to Iraq's invasion of Kuwait in 1990, bore proof that collective action can, to a certain extent, be successful. Yet the increased activity of the Council highlighted its inadequacies, so much so that calls for reform became ever more demanding. In fact, a virtual consensus had emerged that a fundamentally altered climate of international relations and the growing demands on the UN required a critical examination of the composition, structure and functions of all main UN organs. This was evidenced by a surge in reform proposals, not least comprehensive submissions by UN member states, to be found in Resolution A/48/264 and Addenda as well as the successive

reports of the specialized Open-Ended Working Group.[4] A total of 81 member states submitted their views, and few issues evoked as passionate an advocacy as the scramble for Council seats. With the Council occupying the central position in terms of international peace and security, it is little wonder that membership of it is highly sought after.

Created as one of the principal organs of the UN, the Council's permanent members represented the victors of World War II and are enshrined in Article 23(1). Even though its non-permanent membership has been enlarged once, the status quo with regard to the permanent members has remained unchanged – although not unchallenged. The Council's composition is perceived as unrepresentative and obsolete, the permanent seats as undemocratic impediments. The failure to reflect the changing power realities directly affects the perception of the legitimacy of Council decisions and actions. Increasingly, the Council is seen as being run by, and for the benefit of, a handful of states. The willingness to accept its decisions as authoritative may erode further.

In its history, the Council has projected images that have ranged from idealistic visions of a body that will ensure international peace and security and bring democracy, to the impression of a secretive society of a few powerful nations manipulating this organ to further their ends. The Cold War had highlighted the latter by rendering the Council virtually ineffective through the application of the veto power. Hence, demands for restrictions upon the use of the veto, or its complete elimination, have been made. However, none of the permanent members would benefit from such reform and therefore they are averse to any diminution of their voting powers; but then, any reform faces resistance from parties enjoying vested interests. Voting powers, and therefore the veto, also play an important role in the discussion of membership enlargement. Aspiring new permanent members expect that permanent membership includes the power of veto.

Council reform has remained in a state of 'suspended animation'[5] and attracted increased interest after the end of the Cold War. Since then, a wealth of proposals has been put forward. In fact, the UN has never lacked proposals for reform, rather the problem has always been the absence of political will on the part of those for whom change could spell a loss of status and thus privileges. The UN's fiftieth anniversary had been seen as a historic opportunity to use the lessons of the past to forge a better framework for the future.[6] However, the opportunity came and went without any progress having been made. The initial momentum elicited a plethora of proposals, which was followed, inevitably, by deadlock. Practically every nation has voiced its opinion. In addition to the UN's internal processes of criticism and quests for improvement, external influences on the discussion are as pertinent. Non-governmental organizations (NGOs) play key roles, notably the Global Policy Forum, which organizes under its umbrella conferences on international issues and thus unites many NGO leaders for discussion, and the United Nations Association.

The proposals put forward and discussed so far differ on almost every critical point, but all, more or less, agree that only constitutional reform would do. However, there is surprisingly little discussion on the practicalities and the overall desirability of reform. Although no one can seriously believe that a Council with 24 members can be more effective than one with 15, it has become politically incorrect to point this out.[7] Few therefore consider the question of whether it is reform that should be aimed for, or whether better use should be made of the Council in its present form. Moreover, while appraising the subject matter, it must not be forgotten that the Council is an acting and active organ, and, despite all calls for reform, it remains its primary responsibility to maintain international peace and security. Reform, to whatever extent and whatever form it takes, would have to accommodate that fact.

Against the above background, this research aims to offer an inquiry into the Council's constitutional set-up and how far that set-up still reflects the expectations and intentions of the founding nations, while remaining flexible enough to satisfy today's, and possibly tomorrow's, membership. However, an extensive historical analysis of the Council is not attempted, also bearing in mind the limits of this work, and the reader is referred to David L. Bosco's *Five to Rule Them All* (Oxford University Press) of 2009, which charts the Council's perilous journey from inception into the twenty-first century.

Increasing dissatisfaction with the status quo calls for an inquiry into whether issues of composition and membership, voting powers and procedures constitute fundamental weaknesses that necessitate reform through UN Charter amendment or whether adjustment in practice would be more constructive. The research will explore both possibilities: first, by questioning whether constitutional reform could leave sufficient flexibility for future changes, how extensive such reform would have to be, the processes and technicalities of UN Charter amendment, and how far such reform is desirable, practicable, and would be beneficial to the overall working and effectiveness of the Council; and second, by appraising whether the UN Charter's inherent flexibility can be maximized to adjust to the times, and how that could be accomplished to the satisfaction of all interested parties.

The main hypothesis of the reform process is that only a Council that is adequately representative of the UN membership can claim to legitimately act on the members' behalf. To attract the committed political will of the members to adhere to Council decisions, it needs to be credible. Thus, if the Council's composition were reformed and its membership made more representative, it would become once more credible and thus effective. The present work is necessarily limited in scope and will concentrate on examining different proposals made in that regard by the different stakeholders, analysing their objectives and examining whether the implementation of their proposals would actually create a representative and thus more effective Council. This research is therefore concerned with representation in the

broader perspective of representative democracy and does not engage in any depth with the emerging notion that democracy is as much about legal as political principles.

The different reports and proposals on the reform of the Council are all widely scattered and have been subject to piecemeal analyses. To the best of my knowledge, however, there is no up-to-date research on the subject. Bringing the relevant issues in the different reports and proposals together provides an important and critical reference point that facilitates a more focused academic and policy exchange on the subject. This work, to some extent, carries on from the excellent research carried out by Dimitris Bourantonis, *The History and Politics of UN Security Council Reform* (Routledge, 2005). However, his work 'only' includes the reform discussions up to 2000, which is where the present work can provide an update on some of the developments since then.

From the outset, it has to be remarked that the issue of Council reform is more than purely law; it occupies, rather, the agenda of international law, relations and politics. The goals of the present inquiry take account of prevailing conditions and, in particular, the perspectives of the relevant participants. Any conflicting claims are identified, as they are conditioned by the perspective of the respective claimants. Assessment of past trends in decisions helps to identify how the community has so far responded to conflicting claims, supporting the task of projecting future trends. The development, evaluation and selection of alternatives build on the previous results to arrive at a solution in the global common interest.

The following nine chapters will chart whether Council reform is on track. Chapter 1 introduces the legal framework within which the Council was mandated with the maintenance of international peace and security. Increasingly, the question is asked whether it does enough in view of its mandate and whether expectations are met. To be able to appreciate the issues that have arisen, it is imperative to take into account its origins and the limitations placed on its powers. Thus, the historical division of its composition into two membership categories is considered in Chapter 2. Some change is inevitable and it remains to be seen how far the Council will be amenable to changes in its membership structure and composition in that regard. Chapter 3 provides an overview of what reform, especially in an institutional context, implies. The UN's own efforts are slow at best and often cumbersome. Yet, with the Council's composition, and thus its membership, having come under increasingly heavy criticism, the UN finally took the step to engage in reform discussions. One of the central charges against the Council is that it is unrepresentative of the UN membership and cannot, therefore, speak on its behalf. Chapter 4 consequently deals with the central issue of representation. It is the perceived lack of 'representativeness' that undermines the legitimacy of decisions taken by the Council and risks their legitimacy in the long term. Yet, reform proponents find themselves faced with major obstacles to progress. Although they want to achieve

equitable representation, they seemingly cannot agree on a precise definition. To appreciate just how complex the question of representation is, the impact on the Council's size needs to be considered. Since 1945, the ratio of seats available to member states on the Council has steadily declined. The only solution, examined in Chapter 5, is to expand the Council. There is an assumption that enlarging the Council would be more conducive to its functioning, although opinions largely differ on the extent of a possible enlargement. Should there be more permanent members or should only the non-permanent membership be increased? If there are to be more permanent members, who would they be? Chapter 6 will explore these questions as well as why reform proposals generally do not venture beyond established parameters, although there are always a few who question the status quo. Despite general agreement that representation on the Council needs to become more equitable and balanced, the criteria for choosing candidates, irrespective of membership category, are subject to intensive discussions and often irreconcilable differences. Chapter 7 appraises some of the proposals that have been put forward. As part of the discussion, the issue of power prerogatives is addressed. In view of the possibility of new permanent members and the introduction of selection criteria, the UN member states grasped the opportunity to review the most valued prerogative of permanent member status. However, not only do preconceived notions of criteria and entitlements come under consideration, the *raison d'être* of the whole reform effort is under scrutiny revealing that, for some, Council reform is not merely about strengthening positions or gaining advantages but about supporting a security mechanism for the benefit of all. Consequently, reform needs to be considered also in terms of its long-term impact. In this regard, an attempt to break new ground is made by exploring the idea of periodic review. Despite initial momentum and almost two decades of ongoing reform proposals, there were indications that the process had stalled. In an effort to restart the process the General Assembly ('Assembly') had with decision 62/557 accepted the initiative to commence intergovernmental negotiations by March 2009. Chapter 8 reflects on the objectives of this reform effort and re-evaluates some of the positions taken, especially the likelihood of success. The efforts of the past decade had brought to light some valuable insights but also some disturbing examples of fierce protectionism and favouritism. More attention needs to be paid to what is actually needed than to what is demanded. In that regard, a proposal for a model Council will be made while asking whether formal change is really the answer. Finally, Chapter 9 links the issues raised in the previous chapters by recounting the salient arguments, the critiques advanced and what the previous analyses have revealed. Essentially, there is, despite extensive criticism, fundamental support for the Council as an organ. Yet there are also two potentially opposing rationales – representativeness and effectiveness – that may ultimately be the cause of the reform effort's failure. It seems fair to ask whether there is an international community that has, collectively, an interest in achieving a goal for the common good. To avoid the reform process becoming a victim of a

combination of overzealous proposals that want to take advantage of the rare chance to effect change and bureaucratic stalemate, it is necessary to distinguish between *want* and *need*. Reform goals will have to be redefined to take account of what an effective Council needs to be rather than what individual participants want it to be.

1 The Security Council at the helm of UN collective security

Introduction

Security is, primarily, an individual aspiration. Where individuals come together and live by a set of rules, their common security starts to reflect the core values of the community. They aspire to create a communal framework to replace the need for unilateral security measures. Therefore, security implies a common interest and a strong presumption against the unilateral use of force, with two basic requirements: the prevention of armed conflict and peaceful resolution of disputes, and the containment of conflicts to prevent them from escalating to the point where they might affect general stability. Security of a community builds on goodwill and the preparedness to proceed by consensus.[1] The success of such a communal framework inevitably also depends on whether or not the community's values are commonly accepted, adhered to and defended when necessary.

The United Nations was created as an expression of the desire for global security. After the devastating effects of two world wars, the international community's main interest concentrated on the containment of inter-state conflicts. The goal was not to rebuild the League of Nations, predecessor to the UN, in a fashion that achieved an ideal system of collective security, but rather to take seriously the conditions necessary for ensuring peace and security. Consequently, UN collective security is primarily based on a positive pledge of affirmative assistance rather than a negative commitment to refrain from the use of force against fellow states.[2] The immensity of this effort, however, meant that the system was founded on rather rigid terms.

As the UN's executive organ, the Council was placed at the centre to police and enforce the UN collective security system. With this, the Council acts in a politically sensitive field which not only makes the task of interpreting its powers and competences extremely delicate but also complicates the question of who sits on the Council at any relevant point in time. In view of limitations such as procedural constraints and diverging opinions on whether to act, and to what extent and whether the participants in the decision were in fact honest brokers, it is remarkable that the Council has been able to act at all.

Before looking at the origins of the Council to set the context for the reform discussion, it is worthwhile outlining the context in which the Council currently acts. This will, I hope, shine a light on how the Council has on occasion managed to free itself from narrow definitions and has started to make the best of what is available, which includes making the rules work for it.

From individual to collective security

As John Locke stated in his *Second Treatise on Government* (1690), a system of collective security comes into being when entities organize themselves into a community to establish a regime that favours and promotes peace and security while affording mutual protection against aggression. Central is a binding obligation on a clearly defined community, nearing the ideal of universality of membership which, however, need not necessarily mean the universal global community. Rather, the essential point is universality of membership for the region involved.[3] The underlying assumption is that all members of this community share a primary interest in the maintenance of peace and security and that any threat is to be treated as the concern of all members of the community, who agree in advance to react through a collective response. This guarantee of a combined automatic and reliable response[4] assures protection and is intended to constrain a potential lawbreaker from any hostile attempt. Membership in such a community consequently entails the associative obligation to abide by the norms which define that community, including the – impliedly assumed – obligation to respect legal commitments.[5]

Systems of collective security

The significance of the concept lies in the institutionalization of the use of force and in making self-defence, while not unnecessary, subject to stringent requirements. Collective security is, if nothing else, all about balancing and the aggregation of military force against threats to the community's peace and security.[6] Ideally, such a regime should seek to ensure that any change is peaceful and that force is used only to repel an attack; yet experience indicates a tendency towards a regime that resolves to defend a particular status quo against forceful change,[7] although the 'political utility of trying to freeze the status quo'[8] indefinitely seems ultimately counterproductive.

Essentially, collective security transcends the particular interests of the individual and seeks to expand the realm of private interest so that even those whose security is not immediately threatened have a stake in preventing aggression.[9] Ideally, the aggression by one against another is to be resisted by the combined action of all others. Taken in the international context, collective security is the commitment by sovereign entities to resolve disputes irrespective of nationalistic concerns. Harry S. Truman, then President of the United States, noted in his Address at the Closing Session of the United Nations Conference in San Francisco on 26 June 1945 that 'we all have to

recognize – no matter how great our strength – that we must deny ourselves the licence to do always as we please';[10] although, admittedly, this is quite contrary to international experience.

Peace, accordingly, is more than the mere absence of war. A certain price will have to be paid. That price is the organization into a community and the willingness of each member to contribute his share of effort and, if need be, of blood to uphold the law of the community.[11] A collective security regime is fully aware of the war-causing features of the system within which it operates and therefore seeks to provide a more effective mechanism for dealing with aggressors when they emerge, as well as to make aggression less likely by balancing the competitive nature of international relations. In effect, when it works, it confronts aggressors with preponderant as opposed to merely equal force.[12] In summary, collective security is 'the expectation of reciprocity, the fear of reprisal and the recognition that in the common interest of saving the community one cannot have one's way on every issue'.[13]

There are essentially three systems that can be classified as collective security.[14] Whereas the first two seem almost diametrically opposed, the third can be seen as the compromise. First, security through the reduction of arms as well as measures of confidence-building and reciprocal control; second, security through military alliances like NATO and, at one point its counterpart, the Warsaw Pact. Such arrangements are based on the principle that defence is the only legitimate basis for the use of force. However, there are quite differing views about whether NATO is an independent collective defence system or a regional arrangement in the sense of Article 52 of Chapter VIII of the UN Charter.[15] And finally, collective security of the type the UN promotes. With the end of World War II a new era of collective security based on the concept of multilateralism was intended to replace unilateralism, recognized as detrimental to a global community. It is thus that the UN was instituted as the pre-eminent institution of a multilateral community.[16]

UN collective security

Remarkably, the term 'collective security' is not found in the UN Charter. Rather, the Preamble speaks of the 'maintenance of international peace and security', which is based on the effort

> . . . to unite our strength to maintain peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, *save in the common interest* . . . [emphasis added]

This underlines the importance of maintaining international peace and the aim to advance the security of the community through substantive commitments and procedural rules, but also the readiness to use force to combat aggression and to prevent threats to the peace from materializing into breaches

of the peace or acts of aggression. With this, the founders of the UN clearly acknowledged the possibility that there may be individual states that place themselves outside the legal order of the community by either violating peace and security or, at least, endangering it. Thus, although the prime objective is cast in pacific terms and encourages the resolution of disputes through peaceful means, it is sometimes necessary to resort to more forceful means to either prevent the escalation of a situation or limit its effects.

The UN Charter is about keeping the peace, not about pacifism, with the emphasis on the peaceful settlement of disputes as exemplified in Articles 2(3) and 34. The commitment to peaceful co-existence is enshrined in Article 2(4), the ban on aggressive use of force:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

This ban is cast in terms of an obligation binding only upon UN member states, but the International Court of Justice (ICJ) has recognized it as stating a principle that has become part of customary international law, a rule of *jus cogens*, binding on all states.[17] Although the UN Charter is theoretically 'an elegant, carefully drafted instrument' that makes war illegal and unnecessary,[18] it has to be pointed out that Article 2(4) has been the subject of extensive judicial scrutiny and many learned analyses. Its interpretation, therefore, is still not 'devoid of all ambiguities'. Not only is the scope of the prohibition not entirely clear, it is also 'not easy to capture in precise legal rules'[19] – a point that is picked up again below.

The institutionalization of the use of force in the UN context hence does not imply an automatic collective effort whenever a breach of the peace occurs pursuant to a legal commitment by all to defend each other. The ultimate goal is, rather, the maintenance of international peace and security within a tightly regulated enforcement system. It is evident that the founders of the UN were less interested in creating an ideal collective security system and focused more on 'the practical problem of managing post-war relationships more systematically than alliance systems had done in the past'.[20] While the Covenant of the League of Nations had emphasized a legal approach to the prevention of war by placing specific obligations on all its members, the UN Charter anticipated more proactive, pragmatic and political strategies,[21] and thus simply reflected the art of the possible at the time.[22]

In 1945 this may, indeed, have been the pinnacle of the achievable. Increasingly, however, it may be asked whether the art of the possible cannot be improved upon, considering that the world today is markedly different. Change is undoubtedly in the air and calls for reform are becoming ever more pervasive; and where better to start than with the centre of the UN's collective security administration.

The Security Council's mandate

Collective security can only succeed if it operates in a context of alternatives. The UN Charter provides two routes of action: Chapter VI, which provides for the 'Pacific Settlement of Disputes', and Chapter VII, which provides for 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression'. In order to administer the system, the founders acknowledged early on the necessity of a central authority to channel efforts and to act swiftly on behalf of the entire membership. This was clearly manifested by the proposals that emerged at Dumbarton Oaks[23] and so the exercise and maintenance of the UN's collective security system was conferred onto a central executive organ, the Security Council. Articles 24 to 26 indicate the Council's mission, for which it has been given specific powers as laid down in Chapters VI, VII, VIII and XII, with Article 24 vesting the Council with primary responsibility to maintain international peace and security. To ensure that this is done promptly and effectively, the members 'agree that in carrying out its duties under this responsibility the Security Council *acts on their behalf*'.[24]

Primary responsibility – power without limits?

The primary responsibility is recognized as mainly a political rather than a legal task,[25] although as part of its mandate the Council may impose obligations on states. The extent of Council involvement and decision-making power depends on whether a matter is considered under Chapter VI or Chapter VII. Although the route for peaceful settlement under Chapter VI should no doubt be the preferable alternative, the Council's ambit of action is somewhat limited as it is only given a recommendatory role and is further restrained by Article 2(7) and the principle of non-intervention in the domestic affairs of a sovereign member state. Chapter VII, on the other hand, goes beyond these limitations and lists enforcement measures at the Council's disposal, including the authorization to use force – a clear exception to the prohibition in Article 2(4).

While the Charter has given 'substantial latitude' to the Council for the performance of its functions, especially when acting under Chapter VII, it is not above the law.[26] As the UN's constituent treaty, the Charter is the foundation and, at the same time, the limit of Council competences. Accordingly, in exercising its primary responsibility the Council is to confine itself to questions that are concerned with the maintenance of international peace and security. The scope of what affects international peace and security, however, fluctuates and is not easily defined. Council action thus cannot be predetermined or, indeed, predicted. This uncertainty alone makes the Council a target, raising issues of selectivity and double standards and allegations of protectionism.

Although these issues are unlikely to have troubled the founders, in the effort to institutionalize the UN collective security system and to ensure

universal adherence and application, the Council's decisions were made binding upon all member states under Article 25 of the UN Charter. Indeed, it is 'positively clear that decisions taken under Chapter VII, which are not couched in terms of a recommendation . . . [are] binding under Article 25'.[27] This contrasts with the Council of the League of Nations, which under Articles 10 and 16 of the League Covenant was to give advice and make recommendations, but without the attendant obligation on the part of the League members to carry them out. Indeed, the machinery of the League was essentially intended to operate in conformity with the usual type of international organization on a contractual basis. The machinery under the UN system, however, goes beyond this by approaching the national type with the Council almost having the character of a governmental body.[28] Effectively, subject to Article 25, the UN members are subordinated to this organ which, considering the statement in Article 24 that the Council acts on their behalf, skews the relationship somewhat.[29]

Article 103 completes the system by declaring that obligations under the UN Charter prevail over obligations contained in other international agreements. The requirement that all member states comply with Council decisions, notwithstanding any contrary obligations under treaties, means that the Council has the authority to make legally binding decisions with which states must comply in all circumstances. This 'extraordinary power, unique among executive bodies of any international organization, gives the Council the ability to alter the international legal landscape instantaneously',[30] although this can only be an unintentional and incidental, albeit relevant, effect of Council action.[31]

Peaceful settlement or enforcement action

Peaceful settlement is to be sought in preference over forceful means. Only once the Council determines that a situation has deteriorated and is beyond the ambit of Chapter VI does the focus shift to Chapter VII. This distinction between the chapters was to emphasize the priority accorded to the preservation of peace and the degree of authority awarded to the Council to achieve this.[32] In fact, since the UN Charter gives priority to the peaceful settlement of disputes rather than to the coercive enforcement of peace and security, Chapter VII enforcement authority was meant to be limited and to be applied only in cases where peaceful means had failed. Consequently, the Council's enforcement authority was to constitute the exception rather than the rule.

Over time, the lines between the chapters have become blurred, however. Measures have evolved to adapt to situations and processes which were not specifically foreseen in the UN Charter, notably peacekeeping, although the peaceful settlement of disputes rarely receives the attention due to it before the decision is taken to resort to more forceful measures. For instance, during the deliberations on the use of armed force in Iraq in 2003 there was a noticeable lack of articles and broadcasts that 'called attention to the obligation to

settle disputes peacefully and the prohibition on the use of force in international relations contained in Article 2 of the UN Charter'.[33]

Chapter VII itself is not simply an enforcement tool, however. Rather, it depicts a 'sanctions ladder'[34] from which the Council chooses a range of provisional (Article 40) or economic and other non-forcible measures (Article 41). Notably, Article 41 does not list the full range of measures that the Council may take. It does, however, 'explicitly refer to one of the most common such measures: "complete or partial interruption of economic relations", i.e. the imposition of sanctions'.[35]

The imposition of sanctions pursuant to Article 41 was seen as an intermediate step between diplomacy and the use of armed force, providing an emphatic statement of the position of the international community, denying access to vital resources to states that threaten the peace, and exerting pressure on such states to alter their behaviour.[36] Prior to 1990 the Council had imposed economic sanctions only twice, which proved largely ineffective. In 1966, the Council had imposed economic sanctions on the racist regime of Ian Smith in Southern Rhodesia,[37] and in 1977 the Council adopted a mandatory arms embargo against South Africa.[38] The most extensive sanctions regime imposed on an individual state, however, came after Iraq invaded Kuwait in August 1990; its efficacy remains largely contested[39] and has been described by some as genocidal.[40] There is little conclusive evidence that sanctions are indeed effective and the debate has been opened as to may not whether sanctions only be better targeted but also whether the Council could react more decisively and swiftly. More recently, the Council has used Article 41 more creatively, going beyond the merely indicative list of examples that the provision contains.[41] Thus the Council 'adopted forward-looking resolutions that are prescriptive in nature', exercising its 'developing role as proactive risk manager'.[42]

Should the measures as provided for in Article 41 either prove 'inadequate or have proved to be inadequate', the Council may resort to authorize enforcement action under Article 42. Notably, as US Secretary of State Stettinius in his *Report to the President on the Results of the San Francisco Conference* pointed out, 'The sequence of Articles 41 and 42 does not mean that the Council must in all cases resort to non-military measures in the first instance.'[43] This clearly envisaged situations in which military action is a matter of urgency and could, by extension, justify emergency action in humanitarian crises; although, viewed strictly, the founding fathers did not have an abstract notion of peace in mind with the catalogue of valid measures applicable to concrete situations only.[44] Indeed, much of the language of Chapter VII seems to contemplate action by the Council in the context of a specific dispute or situation; yet the key provisions – Articles 39, 41 and 42 – are not so limited. They apply whenever the Council determines the existence of any threat to, or breach of, the peace – whether specific or generic in character. The authority of Chapter VII is consequently also available to address threats to the peace from any source, whether action by states or by non-state actors.[45]

Determining a 'threat to' or 'breach of' the peace

Before the Council can adopt any enforcement measure, it must first 'determine the existence of any threat to the peace, breach of the peace or act of aggression' under Article 39 of the UN Charter. Article 39 establishes a normative 'trip wire' that triggers the authority of the Council to intervene.[46] This is the key to the collective security system.[47]

Effectively, the Council provides an authoritative statement regarding the seriousness of an event. According to the ICJ, the Council has the final decision as to what constitutes a threat to or breach of the peace.[48] This discretion furnishes the Council with immense power to affect the outcome of a situation as the Council, under Article 39, effectively legislates what constitutes a threat to international peace and security.[49] Although the Council is not a legislature, it combines quasi-legislative authority in security emergencies with (discretionary) power for rapid executive action.[50]

It should come as little surprise that not every violation of the peace produces an automatic response from the Council. This, however, does not preclude relief as the UN Charter contains one further exception to Article 2(4): the 'inherent right of individual or collective self-defence' of all members 'if an armed attack occurs'. The right to self-defence, initially not foreseen to be part of the UN Charter, was eventually included in Article 51. National security was thus not to be taken completely from the sovereign state. This inherent right, however, is limited in scope and time as it is restricted to the extent that it only, in theory, applies until the Council 'has taken measures necessary to maintain international peace and security'. Once the Council has seized the matter, the sovereign right to self-defence is suspended. This does not specify a time frame and assumes that the Council will indeed take measures. With this in mind, the interim nature of those measures was quickly lost to sight, and states have continued to make such provision for their own security as lies in their power,[51] thereby showing their lack of faith in prompt and effective Council action.

Especially, the question whether an armed attack has to occur before the party attacked may respond has been cast into doubt. The US *National Security Strategy*, in the immediate aftermath of the attacks of 11 September 2001, clearly saw an evolved right to pre-empt a potential imminent threat to attack.[52] Article 51's major vulnerability is consequently the ability to exploit it for 'self-serving auto-interpretation'.[53] Although anticipatory self-defence may have some validity in an age when military power can be matched and almost every state has some nuclear capacity, it does undermine the notion of collective security when states feel free to determine on their own when such anticipatory action is warranted and what constitutes a permissible response. The Council may have been meant to be the linchpin to effectively and efficiently administer matters that could affect stability, but its record is rather patchy and questions have been asked as to the arbitrary nature of the exercise of its discretion.

Moreover, the determination of a 'threat to the peace, breach of the peace or act of aggression' is controversial because their individual meaning has never been defined with any great authority, although the nature of what constitutes a threat has, without question, evolved from a narrow sense of military threat to a broader context. For most of the period known as the Cold War the role of the Council had been strongly circumscribed not only by divisions within it, which are explored in more detail in Chapter 2, but also by the narrowness of the members' definition of threats to international peace and security.[54]

As a rule, the Council retains the right to examine all the relevant circumstances, including the gravity of the incident. Most Council actions have been based on a finding of a 'threat to the peace' rather than on a 'breach of the peace' or an 'act of aggression'. This reflects, in part, a desire to avoid characterizing a situation prematurely, which may be counterproductive or give the impression of taking sides in the conflict.[55] Despite a (tentative) definition of aggression by the Assembly in 1974,[56] the Council has been rather reluctant to declare that an 'act of aggression' has been committed and has done so only with regard to Israel,[57] Rhodesia[58] and South Africa.[59] It would appear that 'threat to the peace' is broad enough to constitute a safety net when the conditions for neither breach of the peace nor act of aggression are met.[60] Within these limits, the Council started to increase the field of its activities and tackled some of the challenges of international security. Most notably, Council action extended to cover internal situations that would normally have been protected by Article 2(7).

Breaking new ground – a 'global legislator'?

Only with the end of the Cold War did the Council start to extend its activities further by interpreting its powers to intervene more broadly. Resolution 688 (5 April 1991) is often cited as 'a milestone in the Council's practice with respect to humanitarian crises, given its interpretation of what constituted a threat to international stability'.[61] Resolutions in relation to Yugoslavia,[62] Somalia[63] and Rwanda[64] are also referred to as establishing humanitarian concerns as a 'threat to the peace'. Somalia, for instance, had not been a threat to international peace and security. Rather, the Council 'exploited the underspecification of what such threats were in order to override Article 2.7's protection of domestic jurisdiction for essentially humanitarian reasons'.[65]

A dramatic move in Council practice had come with Resolution 808 (22 February 1993) to establish an international criminal tribunal 'for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991'. The adoption of this proposal by a decision of the Council on the basis of Chapter VII has considerably extended both the concept of a 'threat to the peace', by including violations of humanitarian law in civil strife, including acts of individuals, and the range of remedies available to the Council.[66]

Despite some concerns, it is remarkable how the notion of 'threat to the peace' has continually been expanded. An important development in Council practice has been its willingness to address threats to the peace that are not restricted to a particular conflict or crisis and to adopt generic measures, thereby shifting the notion of threat to a more abstract plane.[67] This includes such milestones as: Resolution 841 (16 June 1993) in relation to the situation in Haiti, in which the Council determined that a disputed government and resulting fights, which aggravate the humanitarian situation, may constitute a threat to the peace; Resolution 1308 (17 July 2000), which deals with the impact of HIV/AIDS on peacekeeping; and Resolution 1325 (31 October 2000), which highlights the impact of armed conflict on women and children. One of the more recent developments in the Council's interpretation of its mandate is in the fight against global terrorism, where the Council is said to behave as a 'global legislator'.[68]

Two resolutions, in particular, show where the Council broke new ground by using its Chapter VII powers: Resolution 1373 (28 September 2001) on acts of international terrorism and Resolution 1540 (28 April 2004) on the proliferation of weapons of mass destruction. With Resolution 1373, the Council came to the conclusion that an *abstract* phenomenon could be a threat to international peace and security, and Resolution 1540 'imposes stringent controls on trade in nuclear goods and services in all states'.[69] With the latter in particular, the Council acts as a quasi-legislator in obliging states to take and enforce a number of measures. Thus, under paragraph 4, states have to report on the implementation of this resolution, which adds to existing instruments and creates obligations in this area for states that are not parties to relevant instruments.[70]

Thus, as the International Criminal Tribunal for the Former Yugoslavia (ICTY) has suggested, the Council does possess (some) normative capacity in the development of its functions, although that does not absolve it from supplying legal bases for its actions.[71] Moreover, it needs to be borne in mind that it is – according to Article 13(1)(a) of the UN Charter – the Assembly that induces the codification and progressive development of international law. Indeed, the substantive rules that the Council imposed on all states were not suddenly invented by the Council but were based, albeit somewhat loosely, on prior resolutions by the Assembly. Reference can be made to the 1994 Declaration on Measures to Eliminate International Terrorism[72] and the 1996 Declaration to Supplement the 1994 Declaration.[73]

The Council 'acts' – authorizing the use of force

With regard to questions of competence and legitimate actions, the Council, as a political body, is subject to the legal limitations laid down in the UN Charter as well as its own *(Provisional) Rules of Procedure*.[74] During the drafting of the UN Charter, it was agreed that each organ of the UN would itself be responsible for interpreting those parts of the UN Charter that apply

to its particular functions. This was subsequently confirmed by the ICJ.[75] Consequently, the Council remains free to make a political choice as long as its actions fall within 'a possible interpretation' of the UN Charter[76] and may devise such means as are necessary to accomplish the purpose.[77]

In terms of collective enforcement action under Chapter VII, the UN Charter had originally provided that, once the Council determined that action under Article 42 had become inevitable, member states were to conclude agreements with the Council under Article 43 to make available armed forces, assistance and facilities to create a UN corps to act in the name of the Council to suppress threats to, or breaches of, the peace or acts of aggression. Consequently, Article 46 provides that plans for the application of armed force 'shall be made by the Security Council with the assistance of the Military Staff Committee'. According to Article 47, the Committee, consisting of the Chiefs of Staff of the five permanent members, was to advise and assist the Council on military requirements and to carry the responsibility for the strategic direction of the armed forces placed at the Council's disposal. Yet, owing to disputes among the permanent members in particular, agreements subject to Article 43 have never been signed and the Article remains ineffective.[78]

To nevertheless be able to act under Article 42, the Council, through a process of innovative interpretation, has reconfigured the regime. As Article 42 does not mention Article 43 it is possible to conclude that the latter is merely one way to make such forces available. Notably, the ICJ had rejected the argument that the mechanism in Articles 43 to 47 was the exclusive means by which the Council could authorize the deployment of forces:

> [I]t cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded.[79]

Increasingly, the Council made use of resolutions which authorized member states to use force in particular cases. This model of 'delegated enforcement action' is not explicitly mentioned in the UN Charter as one of the instruments available to the Council, such as enforcement action by regional arrangements or agencies under Article 53(1). Instead, Article 42 can be taken together with the often neglected Article 48(1):

> The action required to carry out the decisions of the Security Council for the maintenance of international peace and security is to be taken by all the Members or by some of them *as the Security Council may determine*. [emphasis added]

This does not foreclose a mode of operation through selected groups of members at the behest of the Council,[80] although it does cast doubt on the motives of those so enabled to act.

Without a standing force at its disposal, the Council clearly had to improvise to make its pronouncements credible. This, however, required states to enforce decisions of the Council using their own judgement as to means and methods. By approving military action under the command of a UN-independent force, the Council, although conferring legitimacy upon the action, has no means of controlling the when, how or degree of the measures applied. Instances of military force to restore international peace and security can thus, in fact, not be properly called UN military operations but are coordinated and undertaken by major powers with Council assent. As such, they are evidence of the willingness of these powers to use force only if they themselves are in control of the forces and operate within their own rules of engagement.[81]

A prime example of such action was Korea (1950).[82] By providing the necessary authorization and putting the forces under US command, the Council remained only nominally in command. This action did not strictly fall within the definition of collective security, but has rather been a police action under the auspices of the UN.[83] Thus, the

> . . . collective security character of the UN action in Korea was heavily qualified. In essence, the US responded to communist North Korean invasion and the UN responded to the immediate US reaction.[84]

The United States had effectively persuaded the Council to join it in the kind of action it would have taken anyway. It was, to all intents and purposes, an extension of US foreign policy that coincided with other nations' foreign policies.[85] Ironically, from the American perspective the war in Korea was not a great success, particularly since 'South Korea was not within our strategic ambit'.[86]

This experience may have revealed the 'lack of teeth' in the UN collective security system that necessitated conferring powers onto forces not under UN command. At the same time, it demonstrated the 'adaptive capacity'[87] of the UN system, since only Council authorization conferred legality upon the actions taken. Although a somewhat overly pessimistic Kagan (*inter alia*, a senior fellow in Foreign Policy at Brookings and member of the US Foreign Affairs Policy Board) submitted that since its founding the Council has never succeeded in establishing itself as the final authority bestowing legitimacy on military action,[88] the concept of enforcement action under the leadership of an individual state but with express authorization of the Council, given pursuant to Chapter VII, has become an acceptable *modus operandi.* This was shown in Resolutions 660 (2 August 1990), 678 (29 November 1990) and, controversially, 1441 (8 November 2002). It is arguable that, as in Korea, these instances were not collective Council measures but thinly veneered instances of individual or collective self-defence by sovereign states acting under Article 51.[89] Council authorization was still seen as a necessary element to confer legitimacy on the actions taken.