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The Security Council as World Legislator?:
Theory, Practice & Consequences
of an Expanding World Power

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The Security Council as World Legislator?

Theory, practice and consequences of an expansion of powers

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Abstract:

In the 1990s the UN Security Council accreted new functions and responsibilities: to administer territories, establish tribunals to try individuals for war crimes, delineate borders, decide on questions of compensation, and determine juridically-salient facts. This paper considers the relevant resolutions, but argues that until 2001, these activities were linked directly to a territorially-specific international conflict aimed at restoring peace and order.

With SC-Resolution 1373(2001) the Security Council created general and abstract obligations in the field of counter-terrorism that, under Chapter VII of the Charter, are immediately binding on all States. While one such legislative act could be considered an aberration, the acceptance of SC-1373 by the states, and the prevailing political dynamic, has prompted the Council to engage in more of this generally-applicable non-localized law-making. Resolution 1540 (2004) on obligations of all states concerning weapons of mass destruction, has provoked much more intense reactions.

This paper analyzes the implications of these two resolutions, and argues that continuation of this trend may have significant consequences for the creation of international law. Traditionally, states have the freedom to choose whether they wish to be bound by a norm: they can choose not to sign treaties or they can persistently object to the formation of custom. The creation of international law also relies on the principle of legal equality of the states creating the norm. General legislation by the Council via Chapter VII of the Charter supersedes both these principles. This paper assesses advantages and disadvantages of such lawmaking by the Council as well as possible remedies for potential problems.

At the time, the years 2003 and 2004 did not seem kind to the United Nations. The inability of the Security Council to agree on a strategy for Iraq in 2003 frustrated those who had demanded authorization to intervene as well as those who had counted on the UN to prevent war. The terrorist attack against the UN-Mission in Baghdad traumatized the organisation and its staff. Allegations of corruption and fraud in connection with the UN's Oil-for-food program, charges of sexual misconduct of peacekeepers, the helplessness of the UN in the Darfur crisis and in regard to other emerging threats fuelled doubts as to the future effective role of the organization and resulted in a severe negative campaign by some UN-critics.¹ In an interview, Secretary General Kofi Annan designated 2004 as "*annus horribilis*" for the UN.

To the chagrin of its critics, however, the UN asserted itself in those same two years as more relevant than ever. The public debates on Iraq had brought unprecedented attention to the organization and created a new public awareness about its work. The high-level debates in the General Assembly in 2003 and 2004 demonstrated near universal support for multilateralism and the UN. The relevance of the organization was particularly evident in the relentless activity of the much maligned Security Council.² In early 2004, Secretary General Annan had to warn the Council that it was establishing so many peacekeeping missions that, by the end of the year, the UN's capacities would be severely over-extended.³ The creation of a prominent high level panel launched a serious effort to improve the UN and invigorated the debate on Council reform. Several States declared their interest in becoming permanent or semi-permanent members.⁴ Contrary to many expectations, the UN's Security Council apparently managed to gain, rather than lose, in attractiveness and relevance.

There are several reasons for this. The Iraq-crisis solidified the Security Council as the principle world stage for international political debate. Even after the negotiations broke down, the major powers remained committed to the UN and continued their cooperation in the Council. States have also noted the Council's increasing interest in addressing issues of general concern - an exercise normally deemed a function of the General Assembly. Relying on a broader analysis of the factors influencing international peace and security and the recognition of the need to address these issues, the Council initially restricted itself to general debates.⁵ Since 2001, however, it has begun using its powers to create binding obligations on the Member States to regulate general areas of international relations. In a lecture in 2003 Judge Guillaume of the International Court of Justice characterized this activity of the Security Council as follows:

“By a broadened interpretation of its mandate, it is now assuming not only powers of action but also legislative powers in the interest of international peace and security.”⁶

The creation of general international norms is not a task the Security Council was conceived for. The Council’s activism after the Cold War and its interest in assuming functions beyond its primary mandate had already generated unease in the mid-1990s. The limited membership and the decision-making procedures raised doubts whether it was an appropriate body to represent the international community in areas beyond the narrow field of peace-enforcement. Lawmaking by the Security Council raises these concerns again. The principles of legal equality and consent are vital principles in the creation of international law. A shift to lawmaking by binding decree would have considerable consequences for the current international order. Some international lawyers and States are trying to dissuade the Council from transforming this trend into regular practice. Others are prepared to accept the legislative role in principle but strive for safeguards to protect the rights and interests of States and individuals.

Faced with new global threats, such as terrorism and the proliferation of weapons of mass destruction, the international community needs to consider all reasonable options of effective reaction, including the possible advantages and disadvantages of having the Security Council assume the role of world legislator. Seeking to facilitate such a discussion this article will analyze the Council’s relevant practice and determine whether such a legislative function would be lawful and legitimate. It will attempt to establish the formal parameters of lawmaking, its potential content and limitations. The article seeks to contribute to the efforts to secure a role for the Council that is accepted and supported by the international community in order to enable it to successfully and legitimately fulfill its functions in maintaining international peace and security.

1. Points of departure

1.1. Context and methodology

The legal setting for the present analysis is the UN Charter. Irrespective of whether one regards the Charter a constitution or a multilateral treaty,⁷ the legal regime of the United Nations is a sub-system of general international law: It contains primary norms (obligations on States) and secondary norms, norms that regulate the primary norms (creation, modification, implementation, etc.).⁸ Questions regarding the existence of legislative powers of one of the organs of a sub-system must first be examined in the light of the rules of the sub-system itself.⁹ Should those not suffice, recourse may be taken in open subsystems to the rules

of interpretation of general international law to determine the organ's competences. This necessitates an analysis of the practice of the organ and the reaction thereto by the Members States.

Consequently, this article will examine the UN Charter to determine whether it can serve as the legal basis for law-making functions and competences. In the absence of such a basis in the Charter, the competences will be sought in general international law, especially in the concepts of implied powers and subsequent practice. Much attention will be given to the practice of the Security Council and to the reaction of the States. The article will not confine itself to descriptions of practice. It is believed, however, that both analysis and theory regarding the question of legislative powers of the Council would benefit from reliance on empirical evidence. The final chapter will be devoted to the possible consequences of legislative powers of the Council on international law and propose procedures or conditions to ensure the legitimacy of future lawmaking efforts.

1.2. Definitions and use of terms

Normally used in the context of rule-making processes within a State, the terms "legislation" and "legislative powers" are not directly transferable to international law, which lacks similar structures or decision-making processes. In the literature on the issue the terms "legislative" or "law-making" powers of the Security Council have been used in very different ways. Some authors who understand the UN Charter as a more or less coherent legal sub-system or "constitution" with organs acting in many ways similar to State organs accept most binding - decisions as "laws" or "norms".¹⁰ Others deduce from the political enforcement functions of the Council a general lack of powers to enact real "legislation".¹¹ A fairly wide approach is adopted by Alvarez in his analysis of the Security Council's acts from the perspective of their legal relevance for the International Court of Justice (ICJ): Legal acts that the ICJ would have to take into account in its findings are understood as "Council-generated law".¹²

This article uses a narrow definition of "legislative powers" as the powers of the Security Council to enact general, abstract norms that are directly binding on all Member States of the UN. The ensuing norms do not enforce the peace in a specific political crisis, but regulate rights and obligations of States on a wider issue with long-term or indefinite effect. This definition tries to distinguish legislative competences from "executive" or "enforcement powers" of the Council, which enable the adoption of directly binding measures to regulate a specific crisis for political reasons.¹³ Such "police actions" are short-term, usually coercive measures against a particular State in order to redress a wrong or mitigate the threat of an

impending wrong. Obviously, grey areas exist, especially when the Security Council, in addressing a specific situation, declaratorily refers to “norms” not (yet) part of international law. In this case interpretation will determine whether the Council intended to enact general rules or make a (possibly erroneous) legal determination in enforcing the peace.

2. Legal Basis

2.1. The UN-Charter

The general functions and powers of the Security Council are defined in Article 24 of the Charter. The specific powers are laid down in several provisions, predominantly in Chapters VI, VII and VIII. There is no provision conferring the right to the Council to enact general legislation or to adopt a decision that could be understood as general lawmaking.¹⁴ A provision of the Charter that could implicitly exclude legislative powers is Article 2(7). This provision prohibits the UN to intervene into matters essentially within the domestic jurisdiction of any State except for “enforcement measures under Chapter VII”. It could be argued that the creation of general binding norms by the Council does not fall under “enforcement” and would thus be prohibited. On the other hand, the term “enforcement” is not defined in the Charter and the practice of the Council would rather imply that any act legally adopted under Chapter VII can pierce the *domaine réservé* of the States irrespective of its nature.

Even if not explicitly foreseen, legislative powers could be deduced from the form and nature of the decisions that the Council may adopt.¹⁵ In the case of legislative powers a decision would have to be general, abstract, long-term and legally binding on the States. Among these elements, only the binding character of the decision helps to narrow down the search. Though there are several provisions in the Charter that enable the adoption of binding decisions, the central competence is contained in Chapter VII of the Charter.¹⁶ Article 39 requires a determination of the existence of a threat to the peace, breach of the peace or act of aggression before any act is taken. In conjunction with Article 2(4) such a determination is a legal decision.¹⁷ But it is not an act of creating law but rather one of applying the law, similar to when an executive organ determines the existence of a breach of the law before taking action. After a determination according to Article 39 the Security Council can adopt measures not involving force, such as economic sanctions, rupture of lines of communication and severance of diplomatic relations (Article 41) or measures involving force, which could include “demonstrations, blockade and other operations” by armed forces (Article 42). Though not

exhaustively enumerated, they all have the character of individual enforcement measures.¹⁸ A literal interpretation of the Charter therefore shows no evidence of a legislative function of the Security Council.¹⁹ After an extensive analysis of the *travaux préparatoires* Arangio-Ruiz comes to the conclusion that it was also not the intention of the drafters of the Charter to endow the Council with such competences.²⁰ Literal and historic interpretations, however, are not the only means to identify the competences of organs of organizations. These powers can be deduced by other means, in particular by recourse to the concepts of implied powers or subsequent practice.

2.2. Implied Powers

The concept of implied powers rests on the idea that organizations or their organs must have the powers and competences, which are necessary or essential for the execution of their functions.²¹ A high degree of necessity or essentiality are not necessary, especially since a determination as to whether this criterion is fulfilled is subjectively interpreted by the beholder.²² Nevertheless, the interpretation must be strictly based on the legal order of the sub-system. Legislative powers of the Security Council could thus arise from the need to enact legislation in order to fulfill its functions. The Charter has designated the Council as executive enforcer of peace, which makes recommendations to the parties of a conflict or adopts, under Chapter VII, binding decisions for specific situations. These tools have never been deemed inadequate for its function. Lawmaking competences do not appear necessary for the Council to fulfill its mandate. There is thus little support for the deduction of legislative powers of the Security Council based on the concept of implied powers.²³

2.3. Subsequent Practice

The concepts of “established practice of the organization” and “subsequent practice of the parties” are used to bring in line the practice of organs that act in ways not foreseen in their founding instruments. A good example is the practice of the permanent members of the Council (P5) of abstaining during votes on non-procedural matters. In respect to the clear contradiction to Article 27 (3) of the Charter the ICJ noted in the Namibia Case:

“This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by members of the United Nations and evidences a general practice of that Organization”.²⁴

Two factors are thus necessary: repetition and the acceptance by the general membership of the UN.²⁵ The first, while simple to verify, has the inherent problem that the very first such act is justified only retroactively, once a pattern has emerged. The need for acceptance depends to a large extent on the functional and institutional setting of the organ in question within the organization and its constituent treaty. In the case of the Security Council,

acceptance by the P5, who have special rights in the context of an amendment of the Charter, can be understood to be inherently included in a Council decision because it would not have been taken without the consent of the permanent member. Acceptance by the wider membership must, however, be clearly established, because the Council has limited and unequal membership and can take decisions binding on all States. Though this consent may also be given tacitly, an expansion of powers of the Council requires a clear indication of the will of the States.²⁶ Acquiescence to an *ultra vires* act of an organ does not automatically imply that the States accept the formation of a rule empowering the organ to act in that way in the future. Obviously, their reaction has to be closely examined to determine whether the act in question is approved as a singular aberration or whether they consent to both the act and the general competence to take similar acts in the future. The consequence of the recurring acceptance of the use of the powers is, as Zemanek points out, that the constituent treaty of the organization is formlessly amended to include the powers or competences.²⁷ Whether the UN Charter has been amended to give the Security Council legislative powers depends on the reaction of the States to its relevant practice.

3. Practice of the Security Council

3.1. Practice before 2001

In 1965 the Security Council declared the Government of Rhodesia “illegal”.²⁸ The occupation of Namibia by South Africa was also determined to be “illegal” in 1970, and the acts of the occupier “illegal and invalid”.²⁹ In 1983 the Council considered the declaration of a Turkish Cypriot State legally “invalid”.³⁰ These resolutions created obligations for States not to legally recognize a certain development but they are not general abstract primary norms that go beyond an individual situation. After the end of the Cold War the Council became more active – with mixed results.³¹ Though most resolutions are clearly individual enforcement actions, some contain legal determinations, necessary for the justification of a decision or relevant for subsequent measures.³² A few instances, however, demonstrate the Council’s interest in legislative and adjudicative action and merit closer inspection.

3.1.1. SC-Res. 687 and SC-Res. 692 - Iraq 1990 / 1991

One of 13 resolutions adopted in response to the invasion of Kuwait by Iraq in 1990, SC-Res. 687³³ contains several noteworthy elements. Section A demands respect of the boundary contractually agreed upon by Iraq and Kuwait in 1963 and decides that the Security Council will “guarantee the inviolability of the boundary”. Section E determines the responsibility of

Iraq and decides to create a Compensation Commission.³⁴ It has been argued that the Council acted as a judicial organ regarding the border-settlement because it decided on the conflicting claims regarding the validity of the 1963 Agreement after a judicial analysis.³⁵ It could also be understood as having acted legislatively by determining the border and guaranteeing its inviolability. The relevant provisions could, however, also be understood as a demand that both parties refrain from violating a boundary they had previously agreed on (para. 2) and that this would be enforced (para. 4).³⁶ Even if one were to accept the act as a legal determination of a border, it would not fall under the definition of general legislative act, since it is an individual decision for a specific case. Though all States have to respect the decision, it only affects the territorial rights of the two countries parties to the conflict.

In “reaffirming” the legal consequences of the invasion, SC-Res. 687 referred to the general norms of State responsibility.³⁷ Although the Council’s interpretation of the content of Iraq’s liability may have been progressive, it did not directly create new general obligations in the field of State responsibility and liability. In fulfilling its functions it has the authority to make decisions of legal relevance, for example the determination of a breach of the peace, and to conclude that the State has the duty to make reparation. The establishment of a subsidiary body to determine the amount of compensation would seem legally justified.³⁸ Nevertheless, the creation of the Compensation Commission as a sub-organ of the Council was criticized by many authors as *ultra vires*.³⁹ Indeed, there is a significant difference between a declaratory pronouncement on the existence of an obligation to pay compensation as a consequence arising from state responsibility and the actual complex judicial process of adjudicating claims and rights of individuals and the defendant.⁴⁰ While it may be within the functions of the Security Council to determine the existence of a violation of international law and to reaffirm the general consequences of such a violation, interpretation of the Charter, even with recourse to the concept of implied powers, does not provide evidence of a function to adjudicate individual claims.⁴¹ Article 29 of the Charter stipulates that the Security Council may create only those sub-organs necessary for the performance of its functions. It can only delegate such rights to a sub-organ that it possesses itself. Lack of judicial procedural rights seems to exclude the possibility of establishing a judicial sub-organ of the Council under the Charter.

Even if the establishment of a subsidiary body with judicial competences were *ultra vires*, this does not necessarily invalidate the establishment of the Commission. Acquiescence of the States, as witnessed by the consistent cooperation of the States with the Commission, healed the illegality of the act. The establishment of a judicial body could also be seen as the first

instance of a practice, which could, if repeated in similar fashion and accepted by the States, be an indication of “subsequent practice”. This argument will be further explored under Chapter 3.1.3. below.

3.1.2. SC-Res. 748 - Libya 1992

In the course of the investigations into the crash of PanAm flight 103 in Lockerbie in 1988 and of UTA flight 772 in the Ténéré desert in 1989, France, the UK and the US had unsuccessfully demanded from Libya the extradition of nationals, official recognition of responsibility and compensation. Libya refused to comply but expressed its willingness to settle the dispute peacefully and requested arbitration under Article 14 of the 1971 Montreal Convention. Early in 1992 the Council urged Libya to immediately provide a “full and effective response to the requests so as to contribute to the elimination of terrorism”.⁴² Libya instituted proceedings against the UK and US before the ICJ, arguing *inter alia* that, under the Montreal Convention, it had the choice of *aut dedere aut iudicare*, and requested provisional measures to prevent the defendants from taking coercive measures against Libya. Shortly after the oral hearings on this request, SC-Res. 748⁴³ was adopted to force Libya to comply with the requests.

This resolution, adopted under Chapter VII, contains a number of significant legal determinations and consequences. The preamble “reaffirms” that Article 2(4) of the Charter applies to acquiescence in terrorist activities within a state’s territory and that the failure of Libya to convincingly renounce terrorism and to respond to the requests was a threat to international peace and security. Para. 1 decides that Libya must comply with the requests of France, the UK and the US. The resolution then decrees various sanctions, the termination of which depended on a Council decision.⁴⁴

The Council’s conduct resulted in much criticism. No reasons had been provided why Libya’s right to decide to try the suspects instead of extraditing them was denied or how the non-extradition and non-payment of compensation amounted to a threat or breach of the peace. Prescribing a legal duty to extradite negated not only the right of Libya under the Montreal Convention but also the customary principle that, without specific contractual obligations to that effect, national citizens do not have to be extradited. The support of the requests of the three States, each one a permanent Council member, without bothering to establish their legitimacy or even to identify the obligations, alienated not only international lawyers but also some Members of the Council.⁴⁵ The issue criticized the most, however, was the fact that SC-Res. 748 had been adopted shortly after the ICJ-hearings on the request for provisional

measures. By adopting the resolution under Chapter VII the Council confronted the Court with a determination binding on Member States and thereby influenced the further judicial proceedings.

The question whether the ICJ has or should have the powers to review acts of the Council has been thoroughly discussed in literature.⁴⁶ The Charter contains no provisions to that effect. Among legalists there is some sympathy for the scenario that the Court by way of its practice – similar to US Supreme Court in the case *Marbury v. Madison*⁴⁷ – establishes parameters of legality for Council action and, eventually, acquires review power.⁴⁸ Others refute the idea of judicial control of the Security Council.⁴⁹ An examination of the extent of the review powers of the ICJ goes well beyond the scope of this article. Here, the relevant acts were the legal determinations that Libya had no right under the Montreal Convention to try the suspects itself and was required to pay compensation as claimed by the three Council Members. Whether or not these acts were *ultra vires*, it suffices to conclude that the Security Council did not, nor intended to, enact general legislation. The resolutions contained specific obligations on one State to achieve the specific goals of extradition and compensation.

3.1.3. SC-Res. 827 and SC-Res. 955 - Yugoslavia and Rwanda 1993 / 1994

Seeking to compensate its failure to prevent the crimes committed during the conflicts in Yugoslavia and Rwanda, the Security Council established, with SC-Res. 827,⁵⁰ the International Criminal Tribunal for the former Yugoslavia (ICTY), and, with SC-Res. 955,⁵¹ the International Criminal Tribunal for Rwanda (ICTR). Some authors regard the creation of the tribunals as lawful due to the Council's competences to establish subsidiary bodies.⁵² Others rely on implied powers under Chapter VII.⁵³ A third position regards the establishment as *ultra vires*, healed by the acquiescence of the States.⁵⁴ The Trial Chamber of the ICTY found that the decision to establish the Tribunal was a political question and could not be reviewed, though it subsequently gave a number of reasons why the act was, in any event, appropriate and lawful.⁵⁵ The Appellate Chamber found itself competent to review the legality of the establishment of the Tribunal and concluded that the Security Council had the competence to create a judicial tribunal under Article 41.⁵⁶

It is hardly surprising that the Tribunal itself found that it had been legally established and the reasoning is not unconvincing. The Council certainly has the right to decide, under Chapter VII, that punishment of the gravest crimes will contribute to establishing peace. It is also correct that Article 29 gives the Council the right to freely create sub-organs “for the performance of its functions”. However, as demonstrated in connection with the establishment

of the Iraq Compensation Commission above, it may not establish sub-organs to carry out functions and rely on rights that it does not possess itself. There is no evidence in the Charter of judicial functions of the Council or of the right to decide on the criminal responsibility of individuals.⁵⁷ Urgency alone cannot confer powers on an organ. It was also not the only means to achieve the goals.⁵⁸ The subsequent examples of tribunals established for Sierra Leone and Cambodia demonstrate that the UN has alternative means of creating tribunals to try individuals for crimes.⁵⁹

After a decade of practice, the position that the Tribunals are legally invalid would, of course, be untenable. It would also be wrong, because the lack of basis in the Charter would have healed by acquiescence. Moreover, the theory of subsequent practice could indicate that the Council rightfully assumed the powers to establish judicial sub-organs. As a judicial body that decides on individual claims the Iraq-Compensation Commission is a relevant precedent. Together with the ICTY and the ICTR the requirement for repetitive practice could be fulfilled. The necessary condition of acceptance by the States is easy to document: Though there have been individual instances of States expressing doubts regarding the legality of the tribunals or not cooperating with them, the practice of the general UN-membership demonstrates an overwhelming acceptance of these bodies. This is documented not only in the resolutions of the General Assembly supporting and financing the tribunals but also in the practical cooperation between States and the Tribunals.⁶⁰

It thus seems arguable that the Security Council has attained the powers to establish specific judicial sub-organs. This is not, however, an indication of general legislative powers to enact primary norms as this article has defined. All three bodies were designed to fit a specific individual crisis. The jurisdiction of the Commission and the Tribunals is very narrowly defined with strict temporal and regional limitations. The statutes of the Tribunals, trying to reflect customary humanitarian international law, were limited specifically to the crimes committed in the two conflicts. They were not designed as indefinite generally applicable norms.⁶¹ Even if the Security Council had attained certain powers in the context of determining individual responsibility, there is no indication that it has assumed general legislative competences in a primary-law field, in particular humanitarian law.

3.1.4. SC-Res. 1209 - Arms in Africa 1998

In view of the deteriorating security situation in Africa and the apparent lack of effectiveness of specific embargoes, the Security Council chose to address one of the central causes of the conflicts by promoting national legislation prohibiting or limiting illegal arms flow. SC-Res.

1209⁶² called on African States to “enact legislation on the domestic possession and use of arms, including the establishment of national legal and judicial mechanisms for the effective implementation of such laws, and to implement effective import, export and re-export controls...”. Though the resolution clearly has the intention to initiate general, albeit regional, binding legislation, it is not, itself, of legislative nature. It is a recommendation to the States and contains no binding primary norms.

3.1.5. SC-Res. 1267 - Afghanistan 1999

In 1999 the Security Council addressed the support of the Taliban regime in Afghanistan for suspected terrorists and the refusal to extradite Osama bin Laden. During the subsequent five years, the scope of SC-Res. 1267⁶³ was gradually expanded to establish one of the most complex sanctions regimes of the UN.⁶⁴ Today, the regime relies, in essence, on a list of persons (former Taliban dignitaries and members of Al Qaeda) and private companies or associations against whom the States must implement sanctions, such as travel restrictions, freezing of funds and arms embargos. Targeting individuals was hailed as an improvement over conventional sanctions against the State as a whole. It has, at the same time, resulted in effects that go beyond initial intentions. Under the absolute obligation to implement the resolutions, States are unable to guarantee due process and procedural rights to the individuals concerned, though some are required by international or regional conventions to respect these rights.⁶⁵ The sanctions would thus derogate the individual’s human rights. Derogation could theoretically be based on Article 103 of the Charter. However, if the rights in questions are *ius cogens*, derogation seems, at least, questionable (see Chapter 4.1.1. below).

The 1267-regime has many other problems: The possibility of “listing” persons without justification has enormous potential for misuse.⁶⁶ National authorities have difficulties enforcing an arms embargo against individuals and entities. The inflexibility of the sanctions regime prevents quick adaptation to new developments, such as the change in Al Qaeda’s financing methods to circumvent the original controls.⁶⁷ Implementation by the States has been unsatisfactory for several reasons, such as lack of political will, complexity of the Committees guidelines, lack of resources and technical capacity and coordination difficulties on a national level. International cooperation has been inadequate because States are hesitant to share confidential information on individual terrorists in a UN-sanctions committee.⁶⁸ The system also suffers from the general belief that non-compliance will not be sanctioned.

In sum, SC-Res. 1267 and the subsequent amendments are an enlightening example of how the Security Council establishes a complex legal regime. As such, the experience gives little

confidence in its abilities. The 1267-regime evolved from the original localized conflict and now contains more general obligations but it is still closely confined to the source of terrorism emanating from Al Qaeda.⁶⁹ Though not an example of general, non-specific legislation, it is a useful example for the difficulties that arise when the Council creates a regime that interferes directly into the rights of individuals.

3.1.6. Conclusions

The resolutions examined were tools to establish or enforce peace in response specific localized threats. In some instances the Security Council established the existence or the violation of a legal obligation and declared the consequences of state responsibility. In one case it recommended regional legislation. None of the resolutions were examples of general binding legislation in the sense understood in this article. They did show however, the readiness of the Council to enlarge its scope of secondary-law powers or assume new competences. It could, by means of subsequent practice accepted by the Member States, have been endowed with competences to establish judicial sub-organs. The reliance on Chapter VII requires, however, that the establishment of such an organ is preceded by a breach of the peace. There is no indication that the Council has received powers to establish judicial organs with general jurisdiction for future conflicts.⁷⁰

3.2. Practice after 2001

After the terrorist attacks in 2001 the relations among the P5, strained by the NATO-interventions in the Balkans, improved. Every permanent Member had suffered terrorism. The severity of the attack against the US showed the vulnerability of even the most powerful State. Though this harmony soon gave way to political tensions over how to proceed with Iraq, it laid the foundation for continued effective cooperation on a technical level in the field of counter-terrorism.⁷¹ The close cooperation can be seen in two resolutions, both extraordinary in scope and legal consequences.

3.2.1. SC-Res. 1373 – Terrorism 2001

Based on Chapter VII, SC-Res. 1373⁷² contains wide-ranging obligations for the States to prevent and combat terrorism.⁷³ Para. 2 obliges States *inter alia* to:

- Prevent and suppress the financing of terrorist acts.
- Criminalize the provision or collection of funds for terrorism by their nationals or in their territories; prohibit that any such act is committed and ensure that any perpetrator is brought to justice.
- Freeze funds and other financial assets or economic resources of terrorists or of persons or entities that attempt, participate in or facilitate acts of terrorism, including funds generated from property owned or controlled by them.

- Refrain from active or passive support for persons involved in terrorist acts and deny them safe haven and use of their territory for terrorist purposes.
- Prevent the movement of terrorists or terrorist groups by effective border controls and secure travel documentation.
- Take necessary steps to prevent the commission of terrorist acts including international cooperation and exchange of information, criminal investigations and proceedings.

The resolution further calls on States to intensify the exchange of information, become parties to the UN's anti-terrorism conventions and protocols, take appropriate measures to ensure that asylum seekers have not been involved in terrorism and that refugee-status is not misused (para. 3). A special subsidiary organ of the Council, the Counter-Terrorism-Committee (CTC), monitors the implementation by the Member States (para. 6).

Even a cursory examination of the resolution shows that it is fundamentally different from its predecessors. Though it contains a brief condemnation of the terrorist attacks of 11 September 2001, the resolution does not respond to any specific act of terrorism. The preamble reaffirms that "such" acts (not "these" acts), like any act of international terrorism, constitute a threat to international peace and security (para. 3). Chapter VII is thus triggered not by an individual crisis but by the general threat of international terrorism. SC-Res. 1373 also does not foresee any "sunset clause" and is therefore in effect until formally revoked. The provisions of para. 2, fundamentally different from normal language of resolutions, were taken from anti-terror conventions, especially the Convention for the Suppression of the Financing of Terrorism.⁷⁴ The resolution makes these provisions binding on all States, even though the Convention had, at that time, been ratified by merely four States.⁷⁵ The implementation of the obligations – typical for treaty provisions – requires significant domestic legislative measures. The provisions of the resolution are not directed towards (re)establishing peace in an individual crisis but abstract and general obligations designed to impose primary norms. In sum, SC-Res. 1373 is not an act of peace-enforcement but a measure to create legal obligations for the States in an area of international law.⁷⁶ The resolution thereby falls precisely under the definition of "legislative acts" proposed in this article.

Since the Charter does not foresee legislative powers for the Security Council, such an act would be *ultra vires*. It could have healed, however, if acquiesced to by the States. It could also serve as the first point of reference that the Council has received these powers under the concept of subsequent practice, if further such acts are accepted by the Member States. Indicators for acceptance are formal statements, cooperation between the States and the CTC and domestic implementation of the resolution. The rapid adoption of SC-Res. 1373 after the terrorist attacks prevented an in depth debate on the issue. Yet the statements of the Council members and the States at subsequent public debates on terrorism in the Security Council give

evidence of strong support for the resolution.⁷⁷ At the UN, declaratory support does not always result in corresponding supportive practice. In this respect, however, the 1373-regime is an exception. By the end of May 2003, every State of the UN had submitted a first implementation-report to the CTC. By August 2004, more than 500 reports had been submitted in four rounds of reporting. Though the effectiveness of the regime will depend on the Council's ability to improve its monitoring and enforcement capacity, the regime has already lead to substantial capacity building and information-sharing in the wider UN membership.⁷⁸ For this analysis, however, the relevant question is not the effectiveness of the regime but the acceptance of the legislative role of the Council by the States. In this respect, the practice proves a clear and continued acceptance of the 1373 regime. Whether this practice leads to general powers to legislate depends on additional Council practice accepted by the States.

3.2.2. SC-Res. 1540 – weapons of mass destruction 2004

In view of the success of the 1373-regime, the US initiated negotiations on a draft resolution on the non-proliferation of weapons of mass destruction in the fall of 2003 among the P5. While considerable differences of opinion on scope, definitions and monitoring mechanisms existed, the P5 agreed on the need to counter the proliferation of weapons of mass destruction, especially to non-state actors. The non-permanent members of the Council informally received a draft text on 23 December 2003 but the consultations continued strictly among the P5 until a new version of the draft was circulated at the end of March 2004. After a public debate in late April the Council adopted SC-Res. 1540⁷⁹ unanimously.

In structure, language and legal scope this resolution is similar to SC-Res. 1373. Primary focus is the non-proliferation of weapons of mass destruction to non-State actors. Member States are obliged 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 (para. 1).
- Adopt and enforce appropriate laws to prohibit any non-State actor to do the above (para. 2).
- Take and enforce effective measures to establish domestic controls to prevent the proliferation of weapons of mass destruction, including by establishing controls over related materials (para. 3).

The resolution establishes a Monitoring Committee for two years, to which the States must report (para. 4). Para. 5 contains a safeguard to ensure the continuing validity of the relevant international disarmament and non-proliferation treaties.⁸⁰

Similar to its predecessor, SC-Res. 1540 does not refer to any specific situation but relies on the general threat of the proliferation of weapons of mass destruction to non-state actors.

Though the establishment of the committee to monitor implementation is formally limited to two years, the obligations on the States are permanent. The provisions, drafted in treaty language, contain abstract legal obligations taken from existing international conventions.⁸¹ Obligations under para. 3 go beyond the problem of non-state actors; they are general non-proliferation provisions. Compliance with the resolution requires significant implementing legislation by the States. In sum, SC-Res. 1540 is no individual peace-enforcement measure but a binding legislative act establishing abstract international norms.

As a second instance of legislation after SC-Res. 1373, this development could constitute subsequent practice and establish general legislative powers of the Council if accepted by the wider UN-membership. Due to the recent adoption of the resolution, the cooperation of the States with the Committee or the extent of national implementation cannot yet be evaluated. The delegations' positions expressed before and after the adoption of the resolution will therefore serve as key indication of acceptance.

A public debate in the Council on 22 April 2004, scheduled only after significant pressure of non-members, gives a good picture of the diversity of positions on the issue. On the whole, the project was well received by the western States. Canada welcomed the Council's "leadership in addressing a new challenge".⁸² Strong support also came from Ireland speaking on behalf of the EU and its associated countries, as well as Albania, Australia, New Zealand, Singapore and Tajikistan.⁸³ Sweden, did not pursue concerns raised only a month earlier in a "non-paper" but supported the resolution.⁸⁴ General support albeit with some reservations was expressed by Jordan, Kuwait, Liechtenstein, Norway, and Thailand.⁸⁵ Some States, like Japan and the Republic of Korea, accepted the legislative role of the Council for the issue at hand but urged caution.⁸⁶ Mexico was concerned that the resolution could become a precedent. Switzerland stressed the special circumstances authorizing the Council to act:

"In 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. It is acceptable for the Security Council to assume such a legislative role only in exceptional circumstances and in response to an urgent need."⁸⁷

With some exceptions, the Members of the Non-Aligned-Movement (NAM) were critical of the legislative role of the Council.⁸⁸ Addressing the need for broad support from the UN-Membership, Nepal stated:

"To ensure such support, the Council should work within its mandate and be seen to be doing so. Therefore, it should resist the temptation of acting as a world legislature, a world administration and a world court rolled into one."⁸⁹

Some NAM-delegations based their criticism on the fact that the Council was structurally inappropriate to legislate for the UN.⁹⁰ Indonesia pointed to the need of consensual participation of the wider membership in the legislative process:

“Indeed, we are of the opinion that legal obligations can only be created and assumed on a voluntary basis. Any far-reaching assumption of authority by 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.”⁹¹

India was the most outspoken critic, rejecting a legislative role of the Council and threatening to disregard the resolution. India reiterated its concerns in a letter circulated at the adoption of the resolution:

“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 has taken note of the observation of cosponsors that the draft resolution contained in document S/2004/326 does not prescribe adherence to treaties to which a State is not party. 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 national interests or infringe on its sovereignty.”⁹²

India was the only non-member of the Council that reacted formally at the adoption of the resolution. The statement expresses concern at the legislative role of the Security Council but it does not categorically reject it. The refusal to accept “obligations arising from treaties” cannot be interpreted to mean that India refuses the provisions of the resolution containing similar obligations. The third paragraph of India’s statement, however, is a clear rejection of any decision by the Security Council containing norms and standards that India, subjectively, decides not to be in her national interest. This general statement, held in future tense, does not indicate whether it applies to SC-Res. 1540 and seems to be in contradiction to Article 25 of the Charter. It contains some ambiguous formulations and conditions. Its true meaning and consequences will have to be determined in light of the future practice. Nevertheless, the position of India certainly does not amount to “acceptance” of general legislative competences of the Council.

Considering the intense discussion of the Security Council’s powers in the public debate, it is surprising that Council Members hardly addressed the issue at the adoption of the resolution on 28 April 2004. The unanimous vote made clear that all Members accepted the legal competence to adopt the resolution. Only Pakistan had reservations:

“Pakistan shares the general view expressed in the Council’s open debate that the Security Council cannot legislate for the world. The sponsors have assured the Council that this resolution is designed to address a gap in international law to address the risk of terrorists and non-State actors acquiring or developing weapons of mass destruction, and that it does not seek to prescribe specific legislation, which is left to national action by States. ... Pakistan 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.”⁹³

Pakistan could accept the resolution only as an exceptional measure with precise conditions: there existed an urgent threat, a legal *lacuna* and participation of the wider UN-membership in elaborating the norms. Pakistan made clear that it would not accept general legislative powers of the Security Council without conditions.

3.2.3. Conclusions

The resolutions discussed in this chapter are significantly different in form and function from the examples before 2001. Though SC-Res. 1373 has obvious roots in the terrorist attacks on 11 September 2001, it does not exclusively regulate that specific event. SC-Res. 1540 is directed at all States without any individually identifiable and locatable breach or threat to the peace. Both resolutions contain provisions that are clearly designed to be general legislation.

The concept of subsequent practice could enable the Security Council to acquire general legislative competences, if there is evidence of recurrence of similar acts and acceptance by the wider membership. The fact that SC-Res. 1540 followed closely the example of its predecessor in form and function implies recurrence. The temporal element is further substantiated by the fact that the regimes both aim at continuity without time limits. SC-Res. 1373 was thus not a unique aberration, an *ultra vires* act remedied by acquiescence, but the beginning of a continuing practice.

Since the Security Council is an executive organ in which not all UN-Members are represented and whose members have different legal rights, the condition of acceptance by the wider membership is particularly relevant. In the case of SC-Res. 1373 the examination of practice has provided substantial evidence of support for the measure and the procedure. Every single UN-member State cooperated with the CTC in the implementation of the resolution. No State considered the Council incompetent to adopt the resolution. The practice in respect to SC-Res. 1373 must be considered as evidence of acceptance not only of the resolution in question but also of the competence to enact such wide, binding rules, at least in the field of terrorism.

The States' reaction to SC-Res. 1540 was very different. While there was general support for both the appraisal of the threat of proliferation of nuclear weapons to non-state actors and, in general, for the Security Council taking action to counter this threat, many delegations proclaimed their dissatisfaction with the Council's assumption of legislative powers. This criticism could imply lack of acceptance. Close reading of the statements shows, on the other hand, that the reservations were mainly raised either in regard to those situations, in which the area targeted by the Council is already regulated by existing treaties, or in cases when the wider membership does not participate in the elaboration of the norms, a condition that, it could be argued, was fulfilled by enabling all States to express their views at the public debate. It is essential, moreover, not to overlook that the interventions at the public debate are not the definite reactions of the States to SC-Res. 1540. The public debate took place almost a week before the resolution was adopted. It was understood and used by the States to present their positions in general or on specific issues of the proposed resolution. As is the practice at the UN, States used the opportunity of a public debate to convey a political message in strong terms, especially if they hoped that a clear message would influence the final deliberations on the resolution. But the interventions in the public debate are not and were not intended to be formal declarations of acceptance or refusal of the resolution or the Council's action.

Valid indications are, however, the statements made at and after the adoption of the resolution. Obviously, the unanimous adoption of the resolution is a clear indication that the Council Members considered the resolution *intra vires*. Pakistan voiced opposition to unrestricted general legislative powers but accepted them under certain conditions. As regards the wider membership, it is surprising that of all the critical voices at the public debate only India formally reiterated its reservations at the adoption of the resolution. It could be argued, that all States – with the sole exception of India – did, in the end, accept the resolution and that the wider Membership has thereby accepted the Council's legislative role for exceptional circumstances. At the time of writing, however, the 1540-regime has only been in force for a few months. It is possible that States use future public debates to elucidate their position. As in the case of the 1373-regime, the most important indication for the acceptance or non-acceptance will be the States' readiness to cooperate with the Committee and to implement the obligations domestically. A final conclusion thus requires further evaluation of State practice.

The practice of the Security Council, on the other hand, shows the increasing determination, especially among the P5, to use the unique powers under Chapter VII to prescribe general and abstract norms for those areas for which they can identify a common interest to establish such

norms with immediate and universally binding effect.⁹⁴ In October 2004, the Security Council, acting under Chapter VII “recalled” an abstract definition of terrorist acts and instructed States to apply this definition.⁹⁵ It is highly likely that the Security Council will make increasing use of its legislative powers in the future. Practice indicates that the P5 are particularly inclined to use this new tool to address “new threats”. Terrorism and weapons of mass destruction are just two of these. Similar threats, such as organized crime, trafficking of drugs and arms, etc., could be taken up next. It seems appropriate to therefore examine the scope of the powers the Council would rely on and the consequences of its law-making on the UN and international law.

4. A new world order?

4.1. Legislative Powers of the Security Council

4.1.1. Content and scope

The practice of the Security Council gives limited information on the form, structure and restrictions of its abstract legislative powers. The norms are abstract and formulated in typical treaty language (SC-Res. 1540 even contains definitions), precise but subject to (mis)interpretation. They apply to a general field of international relations, not to a localized crisis. They are legally binding for all States; they are not retroactive. There is no indication of substantive limits. Before the adoption of SC-Res. 1540 many States stressed the need for a “gap” in treaty-law as a condition for its lawfulness.⁹⁶ Though the notion of a “gap” is in itself problematic (there could be different opinions whether it is an omission or a deliberate non-regulation), the underlying concerns regarding the relevance of international law, the UN Charter or *ius cogens* for the Security Council are certainly valid. Kelsen’s understanding of Article 24 and its reference to Article 1 results in almost unlimited freedom to act under Chapter VII.⁹⁷ Others have rejected this interpretation.⁹⁸ Kelsen is correct inasmuch as the sub-system gives the Council powers to authorize acts that would otherwise be violations of the Charter and international law.⁹⁹ But this is a systemic exception. The States’ acceptance of the 1267-regime could be interpreted as an indication that, under Chapter VII, the Council is also not bound by essential human rights law, possibly even *ius cogens*.

On the other hand, the justification for special powers to deviate from existing norms has usually been seen in the exceptional and temporary nature of police enforcement measures. This reasoning does not apply to a legislator creating indefinite law. Here, the rules for creating law by treaties could be a guideline. Violations of *ius cogens* would thus be

prohibited. Furthermore, an organ of the sub-system creating new norms indefinitely applicable in the sub-system should, in principle, act within the legal parameters of its legal basis or constitution.¹⁰⁰ Both the UN Charter and *ius cogens* are also recognized by some as hierarchically superior to general international law and particularly worthy of protection because of their importance and universal scope and recognition.¹⁰¹ It would thus seem arguable that the Security Council has to respect these norms in lawmaking. Regarding regular treaties or customary rules of general international law, however, the alleged requirement for a “gap” as a prerequisite for lawmaking by the Council is not convincing. These rights are neither hierarchically superior nor in need of special protection.¹⁰² Should the legislative functions of the Council be accepted, there is no reason why its norms should not be able to supervene existing general international law by means of the *lex specialis* and *lex posterior* rules or by virtue of Article 103. This is supported by practice: Resolutions 1373 and 1540 created rules irrespective of the existence of treaty norms regulating the same issues. Neither resolution relied on the premise that it served only to fill a *lacuna*. At the adoption of SC-Res. 1373 it was underlined that language of the Terrorist Financing Convention was used to assuage fears of legislative inexperience. The fact that the Convention was not yet in force would seem to support the gap-theory. However, the resolution continued to be valid after the Convention entered into force in 2002 and contains provisions found in other terrorism conventions already in force in 2001.¹⁰³ Though SC-Res. 1540 refers to the existing validity of the relevant non-proliferation treaties and introduces the new element of non-state actors in its first two paragraphs, para. 3 contains non-proliferation obligations also found in existing conventions.

4.1.2. Procedure

As regards procedural limitations and conditions, the central requirement for the Council’s lawmaking is exceptionality. Both legislative resolutions were not adopted merely for the sake of regulating international relations but to address a general threat. At the public debate on non-proliferation Algeria, a Council Member in 2004, emphasized that the Security Council

“... is acting in an exceptional manner, since, clearly, the Charter does not give it a mandate to legislate on behalf of the international community, but simply gives it the principle responsibility for the maintenance of international peace and security.”¹⁰⁴

The position does not explain how the “exceptional situation” could give the Council this authority. Indeed, the condition of a threat merely arises from its reliance on Chapter VII. It thereby limits, however, the powers to exceptional situations of general crisis. It is true that the Security Council is very free in determining the existence of a threat or breach.¹⁰⁵ Yet, the use of abstract legislation not limited in time implies that the threat must be significant, international and of indefinite duration.

A central question in the public debate was the necessity of participation of the wider membership of the UN. Iran stated:

“The United Nations Charter entrusts the Security Council with the huge responsibility to maintain international peace and security, but it does not confer authority on the Council to act as a global legislature imposing obligations on States without their participation in the process.”¹⁰⁶

The elected Members of the Council, some of which shared these sentiments, were much more cautious. The Spanish delegation presented its position carefully phrased:

“We believe that, since the Council is legislating for the entire international community, this draft resolution should preferably, although not necessarily, be adopted by consensus and after consultation with non-members of the Council.”¹⁰⁷

Practice corroborates the lack of a requirement to involve the wider membership. In the case of SC-Res. 1373, the non-permanent Members were informed late and had hardly any influence. The non-participation of the wider membership was not criticized. Until late March 2003 the negotiations on SC-Res. 1540 took place almost exclusively within the P5. The elected Council Members had little influence on the text. The public debate a few days before the adoption of the resolution was perceived as an occasion to vent off steam in the face of an impending and unalterable decision.

The two resolutions may be inadequate sources from which one can derive final predicaments on an issue with significant consequences. The evolutionary nature of subsequent practice can lead to the development of a more refined system of checks and balances to limit negative effects. Current practice, however, indicates merely the following requirements for legislation: The Council must identify a significant, international and indefinite threat under Chapter VII, prescribe precise, legal obligations with a wide and general field of application and legally bind the States for the future without time-limit. Though neither resolution directly involved questions of *ius cogens* or the UN Charter, it appears consistent with the law-making functions of the Council that it does not have the competences to derogate peremptory norms or the Charter. Existing regulation by treaties or custom, however, is irrelevant. Participation of wider membership in the elaboration of the norms is not required.

4.2. Consequences

Should the Security Council have assumed, additionally to its executive functions, the powers of legislation, consequences will arise not only for the UN-system but also for international law. Traditionally, the creation of international law is understood to be based on consent.¹⁰⁸ The main traditional sources are custom, in which a State can opt out by being a persistent objector, and treaties, which a State has the freedom to join or to abstain. Under the scenario

of a world legislator, bound by hardly any limitations, States would lose that freedom. In becoming members of the UN, States had accepted the competence of the Council to bind them in peace enforcement exercises. They are now confronted with an evolution that threatens their freedom of lawmaking.

Equally significant is the impact on the principle of equal rights of States, embodied in Article 1 of the Charter. States accepted permanent membership and the veto-right of five States in the Council for the sake of exceptional peace enforcement. A general legislative role, however, transfers the inequality into a much larger domain. Practice shows that the inequality goes far beyond permanent membership and veto-right. The P5 effectively control the Council.¹⁰⁹ Should the recent trend of targeting individuals by means of sanctions be taken up in legislation, the inequality could extend to the creation of rights and obligations of the States' nationals.¹¹⁰ The practice of equipping the primary norms with special monitoring mechanisms, as evidenced in both legislative resolutions, could threaten to extend the inequality further from norm creation to the monitoring phase and into enforcement. The scenario of an unrestrained Security Council with supreme legislative, executive and judicial powers would surpass the most dire predictions of an impending autocratic world order.¹¹¹

It is important to stress that the Council's current practice provides no evidence that it is moving in this direction or that this would be the intention of the P5. Certainly, the P5 have the most incentive to promote further Council legislation. Their influence enables them to determine the content and scope of the norms and to control enforcement. At the same time, the P5 realize that measures going beyond recognized police enforcement might entail States to reject them and, if that proved inadequate to protect their rights, to leave the sub-system.¹¹² Since it is doubtful – at least for some of the permanent members – that any new international organized system would give them comparable rights, influence and power, it is in their highest interest to maintain and protect the *status quo*. The P5 have been careful to accompany the expansion of Council powers since 2001 with measures aimed at making its work more accessible and transparent.¹¹³ The permanent members therefore would take every precaution to prevent a development that creates the impression of the emergence of an absolutist regime.

The Security Council developing into an unrestrained tyrant is one extreme scenario. Legislative powers of the Council could also significantly benefit the UN and international law. A Council enacting binding universal norms could be an efficient instrument in a global world and strengthen the UN considerably in an area where its current structures do not

enable quick and decisive action.¹¹⁴ Replacing the tedious and imperfect multilateral norm-creating process by a single binding decision would be welcomed by some, especially practitioners.¹¹⁵ In practice, however, caution and concern regarding the misuse of the Council's legislative powers will likely outweigh any interest in improving international norm-creation. States will focus on instances of perceived bias, arrogance, ineptitude, double standards and hypocrisy in the past practice of the Council. Lack of confidence in the institution will lead many States to defy and resist any expansion of its functions. However, the current reform process at the UN, aiming *inter alia* at increasing legitimacy of its organs, is a window of opportunity for an alternative constructive approach. The potential advantages for the UN and the international community as a whole make an examination worthwhile, whether conditions could be devised to adequately reduce the risk to the legal equality of States and the freedom of consent in the creation of international law.

4.3. Quest for legitimacy

In order to protect the rights of the States and to enhance the legitimacy of the Security Council acting as world legislator various conditions and limitations could be introduced. They could focus on content or procedure.

4.3.1. Content

While limitations of substance primarily come to mind in connection with the competence to create norms that prevail over existing law (chapter 4.1.1. above), some authors have focused on the need to protect States from excessive content of the obligations. Kirgis emphasizes the need to respect the "proportionality principle", by which the interference into the rights of the States must not be excessively disproportional to the aims pursued.¹¹⁶ Macdonald stresses that the Security Council must comply with standards of procedural fairness and may not interfere into rights that may be temporarily suspended by a decision under Chapter VII but that cannot be extinguished, such as the determination of boundaries, human rights and rights concerning extradition examined in the Lockerbie case.¹¹⁷ For Szasz the legal basis in Chapter VII limits the substance amenable for legislation to issues relevant for the maintenance of peace, such as terrorism, violations of the obligation to maintain friendly relations, disarmament and arms-control, extreme violations of human rights or humanitarian law, or massive assaults on the international environments.¹¹⁸ Since almost all areas of international law could constitute the setting for a threat to international peace, this restriction is of little practical effect.

One limitation of substance seems advisable in view of the experience with SC-Res. 1267. This sanctions regime demonstrates the limited capacity of the Council to ensure adequate

respect for human rights and appropriate treatment of individuals. Though there is currently no indication of any legislative projects directly affecting individuals, the tendency to target private persons and entities in sanctions regimes and the lack of adequate safeguard mechanisms advises caution.¹¹⁹ In view of the criticism by States and international and non-governmental organizations that the Council had to endure in respect to the 1267-regime, it would also seem to be in its own interest that the legislative powers are understood not to include the right to create norms of private law, especially inter-personal law, directly affecting the rights of nationals of the Member States.

4.3.2. Procedure

Protection of the principle of consent in the creation of international norms does not require changes of substantive law but of procedure. At first glance, the attempt to reconcile the principle of consent with the mandatory system under Chapter VII seems impossible. It is precisely the unique binding nature of lawmaking under Chapter VII that would be the main incentive to develop the legislative role of the Council. Nevertheless, with some imagination procedures could be devised to enable States to protect their sovereign rights without undermining the authority of the Council. A procedure could be developed to enable States to request exemption from the application of the resolution as a whole or in part, for instance, by determining in advance the content and scope of such requests. This would be in accordance with Article 48(1) of the Charter. Though the binding character of the resolution would not be affected, the formal procedure enabling States to request exemption could help maintain an element of free consent.

A realistic accommodation of the concerns about inequality of States and individuals is more difficult, although in a time, when the principles of equality of human beings, freedom and democracy are postulated as supreme values, it would seem appropriate that all lawmakers and subjects of the law have equal rights. A simple, though unrealistic solution would be for the P5 to relinquish their right of veto in all legislative acts. An alternative solution would be an understanding that legislative acts require consensus. This would correspond to the practice so far. However, it is doubtful whether an “understanding” on procedure would be accepted as an adequate safeguard by the wider membership. Many States also believe that the current composition of the Council de-legitimizes its decisions even if they are adopted unanimously. Most importantly, however, the inequality in the Council is not only present at the time of adoption of the decisions but especially influential during the preparatory consultations.¹²⁰ A satisfactory safeguard of equal rights of States would thus necessitate participation of the wider membership.

Some possibilities of interaction between the Council and the wider membership are foreseen in the Charter, such as public debates or submission of annual reports, but none enable true cooperation.¹²¹ Some authors have developed institutional power-sharing solutions. Reisman proposed the formation of a “Chapter VII Consultation Committee” of the General Assembly that would be consulted whenever the Security Council plans to act under Chapter VII.¹²² Though not conceived for legislative decisions, such a mechanism would be adaptable. In practice the Council scrupulously protects its independence from the other UN-organs but instances of power-sharing exist that even concern such sensitive issues as the use of the veto. The General Assembly established a catalogue of “procedural decisions” for Article 27(2) that exclude the applicability of the veto, which has, so far, been complied with.¹²³ The General Assembly could take the initiative of adopting a resolution laying out the parameters and conditions of legislative action.¹²⁴

If an inter-organ solution is too ambitious, the recent practice of opening the Council meetings to non-members could be the basis for alternative procedures. In this respect SC-Res. 1540 is a deterrent example. At the time of the public debate, the P5 had been consulting for half a year and the project had reached the stage of near finality. The adjustments in the draft resolution after the debate were less motivated by the intention to accommodate the concerns raised by the wider membership but rather to enable all Council Members to join consensus. Effective participation of all States would require a public debate at the beginning of the deliberations and a procedure that gives them confidence that their contributions are truly registered and be taken into consideration.¹²⁵ Regular information about the negotiating process (briefings by the Security Council President) would be appropriate. Proposals submitted in writing should receive a substantive response. The different opinions expressed could be reflected in a report of the President before the adoption of the resolution. Essentially, from the many possibilities to include the wider membership in the legislative process, those creating the subjective impression on the part of the States that attention was devoted to their concerns and that their proposals were seriously considered will be successful in enhancing the legitimacy of the Council’s decisions.

4.4. Conclusion

Since the end of the Cold War the Security Council has been increasingly active and has assumed functions beyond those enumerated in the Charter. With SC-Res. 1373 and SC-Res. 1540 it adopted the role of a world legislator, enacting binding general legal norms to address

issues of urgent concern. Should the Council have been endowed with the powers to make law, which could be argued on the basis of the concept of subsequent practice, its competences would be greatly enhanced, - especially since practice indicates there are few limitations of content or procedure. Perhaps, such powers are useful or even necessary to deal with the de-localized “new threats” of our time.¹²⁶ In view of the potential effects on international law and the UN system, however, the States and the international legal community will have to devise means to ensure that the legislative powers of the Security Council are not seen as a threat in itself, a threat for a stable, equal and legitimate international order.

The evolutionary nature of subsequent practice facilitates revision of an organ’s competences. This article has examined limitations and conditions of content and procedure destined to minimize negative effects of Security Council legislation. Since they curtail the Council in its freedom of action or contain work- and time-consuming procedures, it is uncertain whether the gain in legitimacy would be an adequate trade-off to convince the Council Members, especially the P5, to provide the necessary support. An important factor would be the interest of the Council in the effectiveness of its decisions. If States believe a resolution is not legitimate, compliance with the obligations and cooperation with the Council will be limited. The debate preceding the adoption of SC-Res. 1540 showed serious reservations on the part of the wider membership regarding unrestricted legislative powers. Legislative acts not deemed legitimate face the risk of unsatisfactory implementation. To ensure effectiveness, the Council is well advised to adopt measures that indicate an honest commitment to abide by strict limitations and conditions in lawmaking. The extent of safeguards and limitations, however, will essentially depend on the determination of the States, civil society and scholarship to continue striving for more legitimacy of Council action.

Should a process emerge that enables the Security Council to use its legislative powers effectively with the approval and support of the States, the benefits for the UN organization and for the international community could be substantial. Lawmaking by the Council may become the international community’s method of choice to counter decentralized international threats, such as terrorism, non-proliferation or trafficking of arms, drugs or persons. The combination of legitimate legislative powers and enforcement competences under Chapter VII could become a powerful stimulus for the UN. In appraising SC-Res. 1373 Szasz wrote in 2002:

“Now that this door has been opened, however, it seems likely to constitute a precedent for further legislative activities. If used prudently, this new tool will enhance the United Nations and benefit the world community, whose ability to create international law

through traditional processes has lagged behind the urgent requirements of the new millennium.”¹²⁷

Not even two years later, SC-Res. 1540 proved Szasz correct as regards his prediction of the 1373-regime becoming a precedent for further legislative acts of the Council. It remains to be seen whether his optimism regarding the enhancement of the UN and the benefit for the world community will also prove prophetic.

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¹ Rosett, *The UN Needs Regime Change*, *The Wall Street Journal Europe*, 29 December 2004, A/7. Some believed the time had come to celebrate the demise of the United Nations; see Perle, *Thank God for the Death of the UN*, *The Guardian*, 21 March 2003, 1/26; *The Wall Street Journal* (editorial), *Au Revoir, Security Council*, *The Wall Street Journal*, 21 March 2003, A/14. For a more nuanced analysis see Glennon, *Why the Security Council Failed*, *Foreign Affairs* 82 (2003), Number 3 (May/June), 16.

² Each year the Council adopted more resolutions than, for instance, in 2000 or 2001.

³ Statement of the Secretary General at the 4970th meeting of the Security Council on 17 May 2004; UN-Doc. S/PV.4970 at 4; see also Powers, *Business as usual at the UN*, *Foreign Policy* 144 (2004), (September/October), 38.

⁴ Interest in the non-permanent category also rose dramatically. Candidatures for elected membership have been announced for terms almost 30 years in the future. Oman, for example, has announced its candidature for a non-permanent seat of the Asian Group for the period 2030-2031.

⁵ See the examples listed in Wallensteen and Johansson, *Security Council Decisions in Perspective*, in Malone (ed.), *The UN Security Council – From the Cold War to the 21st Century* (2004), 17 at 29.

⁶ Guillaume, *Terrorism and International Law*, Grotius Lecture at the British Institute of International and Comparative Law, held on 13 November 2003, 8.

⁷ Regarding this distinction see Macdonald, *Fundamental Norms in Contemporary International Law*, *CYIL* 25 (1987), 115 at 119 – 128. With emphasis on socialist literature: Macdonald, *The United Nations Charter: Constitution or Contract*, in Macdonald and Johnston, (eds.) *The Structure and Process of International Law* (1983), 889.

⁸ To the distinction between primary and secondary norms, proposed by Hart, *The Concept of Law* (1961), 92, and to sub-systems in international law see Zemanek, *The Legal Foundations of the International System*, Offprint from the *Recueil des Cours* 266 (1997), 63 and 233-36; Marschik, *Too much Order – The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System*, in *EJIL* 9 (1998), 212.

⁹ The ICJ stated in the advisory opinion on the admission of new members: “The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgement. To ascertain whether an organ has the freedom of choice for its decisions, reference must be made to the terms of its constitution.”; *Admission of a State to the United Nations* (Advisory Opinion of 28 May 1948), ICJ Reports (1948) 64.

¹⁰ Franck, *The “Powers of Appreciation”: Who is the Ultimate Guardian of UN Legality*, *AJIL* 86 (1992), 519 at 520; Kirgis, *The Security Council’s first Fifty Years*, *AJIL* 89 (1995), 506 at 520. Some authors focus predominantly on the effect of the decision-making process by the Council on the rights of the Member States to determine whether the underlying powers are legislative or executive in nature; Arangio-Ruiz, *On the Security Council’s Law-Making*, *Rivista di Diritto Internazionale* 83 (2000), 609 at 610. Harper also regards the determination by the Council that the possession of certain chemicals is a threat to the peace in SC-Res. 687 as a legislative act; Harper, *Does the United Nations Security Council have the competence to act as Court and Legislature?* *New York University Journal of International Law and Politics* 27 (1994) 103 at 128.

¹¹ Perrin de Brichambaut, *The Role of the United Nations Security Council in the International Legal System*, in Byers (ed.) *The Role of Law in International Politics* (2000), 269 at 272, 275; Bowett, *Judicial and Political Functions of the Security Council and the International Court of Justice*, in Fox (ed.) *The Changing Constitution of the United Nations* (1997), 73 at 79-80, 82.

¹² This includes the determination of a breach of international law, its attribution and consequences, the existence and content of *ius cogens*, the status and interpretation of humanitarian law and its application for personnel of UN-authorized missions, the status of terrorism as an international crime, the scope and limits of immunity and

extradition, etc; Alvarez, Judging the Security Council AJIL 90 (1996), 1 at 20 – 22, with many further examples. While it is true that all these instances are relevant for international law, in many cases they rather seem to be examples of the Council applying and interpreting international law, as executive organs do in the exercise of their functions.

¹³ See Szasz, The Security Council Starts Legislating, AJIL 96 (2002), 901. A similar distinction is used by Wood, The Interpretation of Security Council Resolutions, Max Planck Yearbook of United Nations Law 2 (1998), at 77.

¹⁴ The Charter contains no reference to the legal form and nature of the acts of its organs. Articles 25 and 27 indicate that the Security Council shall make “decisions”. Chapters VI and VII envisage “recommendations” and “decisions”, Articles 34 and 39 foresee the possibility of making a “determination”. Article 83 envisages the Council “performing functions”. The rules contained in the Security Council’s Provisional Rules of Procedure refer to “resolutions” (e.g. Rule 31), “decisions” (Rules 37, 48, 51, 59) and “recommendations” (Rule 60). Though the procedure is clearly set out (Article 27), neither the Charter nor the Provisional Rules of Procedure determine the legal form and nature of the decisions. This is not rare for international organizations; see Zemanek, The Legal Foundations of the International System, Offprint from the Recueil des Cours 266 (1997), 201.

¹⁵ Article 34, for instance, gives the right to determine whether a crisis is likely to endanger the maintenance of international peace and security. In connection with Article 33 such a determination must be a decision devoted exclusively to the individual crisis under investigation; Delbrück, Article 25, in Simma (ed.), The Charter of the United Nations (2nd edition; 2002), 457-8.

¹⁶ There are other provisions in the Charter pursuant to which the Council can decree binding obligations on the States, such as Articles 34, 94(2) or Chapter VIII. However, none of these are suitable for creating general, abstract rules. Article 34 foresees investigations into a dispute to determine whether it could endanger international peace. Relying on Article 94(2) the Council decides on measures to implement a judgement of the ICJ. Chapter VIII deals with the role of regional arrangements in the maintenance of peace and security. Kelsen also understood recommendations as binding as long as they were accompanied with a threat of sanctions in case of non-compliance; Kelsen, The Law of the United Nations (1951), 96 and 293. This view, based on the theory that obligations equipped with adequate enforcement mechanisms can be subsumed under the category of binding legal obligations, fails to take into account that the enforcement action by the Council is a separate decision adopted under Chapter VII. The recommendation itself is not binding.

¹⁷ Graefrath explains: “Since peace is the law, such a decision necessarily includes a determination that a State has violated a basic international norm”; Graefrath, International Crimes and Collective Security, in Wellens (ed), International Law: Theory and Practice, 237 at 242.

¹⁸ Frowein/Krisch, Chapter VII in Simma (ed.), The Charter of the United Nations (2nd edition; 2002), 705. Harper initially seems to conclude from the lack of an explicit exclusion of legislative powers that the Council has these powers; Harper, Does the United Nations Security Council have the competence to act as Court and Legislature? New York University Journal of International Law and Politics 27 (1994) 103 at 149. He later claims, however, that the “framers of the Charter” did not intend the Council to use Chapter VII in a legislative sense; at 153.

¹⁹ Nolte, The Limits of the Security Council’s Powers and its Functions in the International Legal System: Some Reflections, in Byers (ed.) The Role of Law in International Politics (2000), 315 at 320-321.

²⁰ Arangio-Ruiz, On the Security Council’s Law-Making, Rivista di Diritto Internazionale 83 (2000) 609 at 628, 643, 660-682, 688. Though a proposal for an amendment submitted by Ecuador that the “Security Council shall not establish or modify principles or rules of law” was rejected, the argument *e contrario* that the founders therefore did not want to exclude that option would go too far. The Ecuadorian proposal is quoted in Bedjaoui, The New World Order and the Security Council – Testing the Legality of its Acts (1994), 30.

²¹ The ICJ stated: “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.”; Reparations for Injuries, 1949 ICJ, 182.

²² Skubiszewski, Implied Powers of International Organizations, in Dinstein (ed.), International Law at a Time of Perplexity (1989), 855 at 861.

²³ Arangio-Ruiz, On the Security Council’s Law-Making, Rivista di Diritto Internazionale 83 (2000) 609 at 689. See however Kirgis, The Security Council’s first Fifty Years, AJIL 89 (1995), 506 at 522-524.

²⁴ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 ICJ 16, 22.

²⁵ Herdegen, referring to the modification of Article 27(3) of the Charter correctly to the affinity to the creation of customary international law; Herdegen, The “Constitutionalization” of the UN Security System, Vanderbilt Journal of Transnational Law 27 (1994), 135 at 155.

²⁶ Buehler, State Succession and Membership in International Organizations – Legal Theories versus Political Pragmatism (2001), 294.

²⁷ Zemanek, The Legal Foundations of the International System, Offprint from the Recueil des Cours 266 (1997), 96.

²⁸ SC-Res. 216 (1965) of 12 November 1965.

²⁹ SC-Res. 276 (1970) of 30 January 1970.

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- ³⁰ SC-Res. 541 (1983) of 18 November 1983; reaffirmed by SC-Res. 550 (1984) of 11 May 1984.
- ³¹ See Freudenschuss, Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council, *Austrian Journal of Public and International Law* 46 (1993), 1; Higgins, Peace and Security – Achievement and Failures, *EJIL* 6 (1995), 445.
- ³² SC-Res. 1054 (1996) of 26 April 1996 adopted sanctions against Sudan to enforce extradition of three suspects. All States had to reduce the number and level of the staff at Sudanese diplomatic missions and restrict or control the movement of the remaining staff, without doubt a restriction of the freedom envisaged in the Vienna Convention on Diplomatic Relations.
- ³³ SC-Res. 687 (1991) of 3 April 1991.
- ³⁴ The Commission was formally established by SC-Res. 692 (1991) of 20 May 1991.
- ³⁵ Harper, Does the United Nations Security Council have the competence to act as Court and Legislature? *New York University Journal of International Law and Politics* 27 (1994) 103 at 115-118.
- ³⁶ The resolution does not indicate that Security Council intended to delimit the border for all eternity and would prevent any future agreement between the two States on a different border. See in this regard Sur, *Sécurité collective et rétablissement de la paix: la résolution 687 (3 avril 1991) dans l’Affaire du Golfe*, in Dupuy (ed), *The Development of the Role of the Security Council*, Workshop 21-23 July 1992 (1993), 19 at 26.
- ³⁷ Wood, *The Interpretation of Security Council Resolutions*, *Max Planck Yearbook of United Nations Law* 2 (1998), at 77. Kirgis understands this as a “quasi-judicial” determination; Kirgis, *The Security Council’s first Fifty Years*, *AJIL* 89 (1995), 506 at 529. Alvarez writes: “Making law, both in interpreting the Charter and in developing the doctrine of state responsibility, has always been part of the Council’s job.”; Alvarez, *Judging the Security Council* *AJIL* 90 (1996), 1 at 22.
- ³⁸ Some derive this from inherent powers of the Council, Gattini, *The UN Compensation Commission: Old Rules, New Procedures on War Reparation*, *EJIL* 13 (2002), 161 at 165.
- ³⁹ Graefrath, *International Crimes and Collective Security*, in Wellens (ed), *International Law: Theory and Practice*, 237 at 245. See also Zemanek, *Is the Security Council the Judge of its own Legality?* In Yapko, Bouredra (ed), *Liber Amicorum Mohammed Bedjaoui* (1999), 629 at 630.
- ⁴⁰ In his report the Secretary General remarked that the major part of the work of the Commission would not be judicial in nature; Report of the Secretary General, UN Doc. S/2259 (1991) 8-9. This is convincingly disputed by Kirgis, *The Security Council’s first Fifty Years*, *AJIL* 89 (1995), 506 at 525.
- ⁴¹ Arangio-Ruiz, *On the Security Council’s Law-Making*, *Rivista di Diritto Internazionale* 83 (2000) 609 at 691; Graefrath, *International Crimes and Collective Security*, in Wellens (ed), *International Law: Theory and Practice*, 237 at 245.
- ⁴² SC-Res. 731 (1992) of 21 January 1992.
- ⁴³ SC-Res. 748 (1992) of 31 March 1992.
- ⁴⁴ This decision was taken in September 2003, after the extradition and prosecution of two Libyan suspects by a special court, the payment of compensation and confidential negotiations between Libya, the UK and US on weapons of mass destruction had improved bilateral relations. The sanctions had included an air-traffic embargo, arms-embargo, prohibition of military assistance, reduction of Libyan diplomatic personnel, etc. They had been suspended in 1998 after the extradition of two suspects and were formally lifted with SC-Res. 1506 (2003) of 12 September 2003.
- ⁴⁵ The resolution was adopted with only 10 votes, 5 States abstained (Cape Verde, China, India, Morocco and Zimbabwe).
- ⁴⁶ See Macdonald, *Changing Relations between the International Court of Justice and the Security Council of the United Nations*, *CYIL* 31 (1993), 3; Martenczuk, *The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?*, *EJIL* 10 (1999), 517 at 525-528; Alvarez, *Judging the Security Council* *AJIL* 90 (1996), 1, with many further references.
- ⁴⁷ 5 US (1 Cransh) 137 (1803).
- ⁴⁸ Franck, *The “Powers of Appreciation”: Who is the Ultimate Guardian of UN Legality*, *AJIL* 86 (1992), 519 at 523. Alvarez points out that, irrespective of legal consequences, the effects of the Court order and the arguments presented in the separate and dissenting opinions in the Lockerbie case constitute a clear political warning to the Council to take the “cues” of the Court and its members seriously for any future action; Alvarez, *Judging the Security Council* *AJIL* 90 (1996), 1 at 30.
- ⁴⁹ Reisman, *The Constitutional Crisis in the United Nations*, *AJIL* 87 (1993), 83 at 87, 95.
- ⁵⁰ SC-Res. 827 (1993) of 25 May 1993.
- ⁵¹ SC-Res. 955 (1994) of 8 November 1994.
- ⁵² Pellet, *Le Tribunal criminel international pour l’ex-Yougoslavie*, *Revue Générale du droit international public* 98 (1994), 7:at 28-29.
- ⁵³ Kirgis, *The Security Council’s first Fifty Years*, *AJIL* 89 (1995), 506 at 520.
- ⁵⁴ Arangio-Ruiz, *On the Security Council’s Law-Making*, *Rivista di Diritto Internazionale* 83 (2000), 609 at 724.
- ⁵⁵ *Prosecutor v. Tadic*, Decision of 10 August 1995, Case IT-94-1-T.
- ⁵⁶ *Prosecutor v. Tadic*, Decision of 2 October 1995, Case IT-94-1-AR72, paras 28-38.
- ⁵⁷ Zemanek, *The Legal Foundations of the International System*, Offprint from the *Recueil des Cours* 266 (1997), 204-209. Lamb believes that the SC did not delegate its own functions but the powers that the tribunals needed; Lamb, *Legal Limits to United Nations Security Council Powers*, in Goodwin-Gill / Talmon eds, *The*

Reality of International Law: Essays in Honour of Ian Brownlie (1999), 361 at 376-377. She does not explain, however, how the Council could legally transfer functions or rights that it did not possess.

⁵⁸ The Council could have recommended the establishment of the tribunals by means of a GA-resolution or requested a regional organisation under Chapter VIII to set up such a body, though it would have had to relinquish effective control.

⁵⁹ Indeed, the fact that they were not established as subsidiary bodies suggests some unease among Council Members as to legality of the establishment of the ICTY and ICTR. See the doubts expressed by Brazil, China and Venezuela on the legality of the establishment of the ICTY, UN Doc. S/PV.3175 (25.02.93) and S/PV.3217 (25.05.93). At the adoption of SC-Res. 955 China abstained and Rwanda voted against (though for political reasons).

⁶⁰ As to the practice of the European States see Marschik, *The Politics of Prosecution: European National Approaches to War Crimes*, in McCormack and Simpson (eds.), *The Law of War Crimes* (1997), 65 at 93.

⁶¹ Report of the Secretary General UN Doc 25704 (1993), 8.

⁶² SC-Res. 1209 (1998) of 19 November 1998.

⁶³ SC-Res. 1267 (1999) of 15 October 1999.

⁶⁴ The most important resolutions are: SC-Res. 1333 (2000) of 19 December 2000, SC-Res. 1363 (2001) of 30 July 2001, SC-Res. 1390 (2002) of 16 January 2002, SC-Res. 1452 (2002) of 20 December 2002, SC-Res. 1455 (2003) of 17 January 2003, SC-Res. 1526 (2004) of 30 January 2004, SC-Res. 1535 (2004) of 26 March 2004.

⁶⁵ To address this problem, the 1267-committee adopted a “de-listing procedure” in 2002. States can request review of the listing of a citizen or resident. Ideally the State should submit a joint request together with the State that had requested the listing of the individual, but it can also submit a request alone. The Committee decides by consensus or refers the case to the Council. Though an improvement, the de-listing procedure does not solve the problem of persons whose rights a State – for whatever reason – chooses not to protect.

⁶⁶ States can request the placement of any individual on the list. Dissidents or the political opposition could be tempting targets. If the Council agrees (practice shows that requests for listing are rarely questioned), the individuals are included in the list without any realistic chance for legal recourse.

⁶⁷ The travel restrictions demand border controls between States, yet they are almost impossible to implement due to a lack of required identifiers.

⁶⁸ One problem that has been partly solved arose from the duty to freeze all financial assets of the individuals on the list. States that grant assistance to citizens in need had the domestic obligation to assist those persons whose financial assets they had frozen. Aiding persons on the list, however, is prohibited by the 1267-regime. SC-Res. 1452 (2002) of 20 December 2002 enabled States to request for permission to give social aid.

⁶⁹ Laval, *A novel, if awkward, exercise in international law-making: Security Council Resolution 1540 (2004)*, NILR 51 (2004), 411 at 414.

⁷⁰ The Council would thus not have the competences to create its own general “Criminal Court” as competition to the International Criminal Court established by the Statute of Rome.

⁷¹ In early May 2003 US Ambassador Negroponte stated: “Clearly, with resolution 1373 (2001) the Security Council got something right.”; 4752nd Meeting of the SC on 6 May 2003; S/PV.4752, provisional, 5.

⁷² SC-Res. 1373 (2001) of 28 September 2001.

⁷³ See to content, scope and consequences of the resolution Rosand, *Security Council Resolution 1373, The Counter-Terrorism Committee, and the Fight against Terrorism*, AJIL 97 (2003), 333.

⁷⁴ The Convention had been adopted by the General Assembly and was opened for signature in December 1999; GA-Res. 54/109 of 9 December 1999.

⁷⁵ Botswana, Sri Lanka, the UK and Uzbekistan. SC-Res. 1373 urged States to ratify the Convention. It entered into force in 2002.

⁷⁶ Laval, *A novel, if awkward, exercise in international law-making: Security Council Resolution 1540 (2004)*, NILR 51 (2004), 411 at 416; Szasz, *The Security Council Starts Legislating*, AJIL 96 (2002), 901 at 904-905. The insinuation that the Council Members were unaware of the pioneering nature of the resolution is unfounded. Though delegations might not have considered all potential consequences of the resolution, the debriefings outside the Council Chamber during the consultations and after the adoption of the resolution made clear that the delegations were fully aware that SC-Res. 1373 was a radically new type of Council action with considerable consequences.

⁷⁷ See for example the open debate on 15 April 2002, S/PV.4512 (provisional). At the adoption of SC-Res. 1377 of 12 November 2001 France said in regard to the UN role in combating terrorism: “It must, first, provide the international community with strengthened legal instruments enabling it to fight terrorism, including by depriving terrorists of all financing and by ensuring that they can nowhere find support or refuge. The Security Council responded to that urgent need by unanimously adopting resolution 1373 (2001).”; Statement by Mr. Védrine (France) at the 4413th meeting of the Security Council on 12 November 2003, UN Doc S/PV.4413 at 7. In early 2002, before the cooperation was demonstrated in the States’ reporting, Szasz found the reception of SC-Res. 1373 by the General Assembly “tepid” because it had referred only once to the resolution in its annual resolution on terrorism; Szasz, *The Security Council Starts Legislating*, AJIL 96 (2002), 901 at 903. The hesitancy in the General Assembly was, however, mainly due to the concern that the activity of the Security Council in the field of terrorism would reduce the interest of some States to finalize the comprehensive convention on terrorism in the Sixth Committee – a project that still awaits completion three years later.

⁷⁸ The Council has tried to improve the CTC's monitoring capabilities by means of SC-Res. 1535 of 26 March 2004. The operational work of the CTC is now the responsibility of the CTC Executive Directorate (CTED). The reform will *inter alia*. enable CTED to "visit" (i.e. inspect) States, albeit with their consent, to discuss implementation.

⁷⁹ SC-Res. 1540 (2004) of 28 April 2004.

⁸⁰ States are further called upon to strengthen and implement the existing treaty regimes and to cooperate, especially within the framework of the relevant multilateral regimes, i.e. the International Atomic Energy Agency, the Organization for the Prohibition of Chemical Weapons and the Biological and Toxin Weapons Convention (para. 8).

⁸¹ Though co-sponsors declared their intention not to alter rights and obligations of existing non-proliferation treaties, para. 5 decides that the provisions shall merely not be *interpreted* so as to conflict with these treaties.

⁸² Statement of Mr Laurin (Canada) at the 4950th meeting of the Security Council on 22 April 2004; UN-Doc. S/PV.4950 at 19.

⁸³ Australia asserted: "It is entirely appropriate that the Council should do so now, consistent with its mandate to maintain international peace and security."; Statement of Mr Dauth (Australia) at the 4950th meeting of the Security Council on 22 April 2004; UN-Doc. S/PV.4950 (Resumption 1) at 7.

⁸⁴ Sweden "warmly welcomed" the Council's active involvement and considered the resolution a "most welcome step in fulfilling the responsibility of the Council"; Statement of Mr Schori (Sweden) at the 4950th meeting of the Security Council on 22 April 2004; UN-Doc. S/PV.4950 at 27. The non-paper (on file with the author) had pointed to the danger of an evolving practice in which the Council drafts "new horizontal national legislation for global application". This development was regarded as possibly undermining the legitimacy of the Security Council.

⁸⁵ Kuwait associated itself with the NAM-statement but went on to lend its "moral and political support to the resolution". The resolution was seen as an interim solution: "We agree that a gap exists within the international treaty regime, which does not address the nexus between weapons of mass destruction and non-State actors. This draft resolution could be an interim solution until that gap is addressed fully at a later stage. We also believe that the nature of this draft resolution, as well as possible future actions, should be based on a broad consensus in the international community."; Statement of Ms Al-Mulla (Kuwait) at the 4950th meeting of the Security Council on 22 April 2004; UN-Doc. S/PV.4950 (Resumption 1) at 17.

⁸⁶ Japan stated: "In adopting a binding Security Council resolution under Chapter VII of the United Nations Charter, the Security Council assumes a lawmaking function. The Security Council should, therefore, be cautious not to undermine the stability of the international legal framework."; Statement of Mr Hamaguchi (Japan) at the 4950th meeting of the Security Council on 22 April 2004; UN-Doc. S/PV.4950 at 28.

⁸⁷ Statement of Mr Staehelin (Switzerland) at the 4950th meeting of the Security Council on 22 April 2004; UN-Doc. S/PV.4950 at 28.

⁸⁸ Egypt stated: "We note a growing trend towards granting the Security Council additional legislative powers. Here, we wish to make it very clear that membership of the United Nations and the common desire to strengthen its role places a number of responsibilities on our shoulders in conformity with the provisions of the Charter as drafted by the founding Members. Thus, in defining the role of the Security Council in terms of the maintenance of international peace and security and of guaranteeing compliance by Member States with international law, the Charter does not give the Council legislative authority; it gives it the authority to safeguard the Charter and to monitor compliance with its provisions."; Statement of Mr Aboul Gheit (Egypt) at the 4950th meeting of the Security Council on 22 April 2004; UN-Doc. S/PV.4950 (Resumption 1) at 3.

⁸⁹ Statement of Mr Sharma (Nepal) at the 4950th meeting of the Security Council on 22 April 2004; UN-Doc. S/PV.4950 (Resumption 1) at 14.

⁹⁰ Cuba remarked: "The Cuban delegation is also concerned that the Security Council, recognized to be of limited composition, and in which some members have the right of veto, has taken the initiative to prepare a draft resolution on a subject which should continue to be considered in the framework of the traditional multilateral disarmament machinery, where the appropriate space exists to negotiate a legally binding instrument. In this connection, we believe that international legal obligations, including those that relate to the field of disarmament, weapons control and non-proliferation, must not be imposed upon Member States without their participation and their sovereign acceptance, through the signing and ratification of the corresponding treaties and agreements that have been negotiated multilaterally."; Statement of Mr Requeijo Gual (Cuba) at the 4950th meeting of the Security Council on 22 April 2004; UN-Doc. S/PV.4950 at 30.

⁹¹ Statement of Mr Jenie (Indonesia) at the 4950th meeting of the Security Council on 22 April 2004; UN-Doc. S/PV.4950 at 31.

⁹² Letter dated 27 April 2004 from the Permanent Representative of India to the United Nations addressed to the President of the Security Council; UN-Doc. S/2004/329 of 28 April 2004.

⁹³ Statement of Mr Akram (Pakistan) at the 4956th meeting of the Security Council on 28 April 2004; UN-Doc. S/PV.4956 at 3.

⁹⁴ Considering the intensity of the debate on the legislative authority of the Council, the steadfastness of the permanent Members in ignoring the issue was, if not unexpected, at least remarkable. In the public debate the representative from the UK merely stated: "My delegation believes that, in such circumstances, not only is it appropriate for the Security Council to act, it is imperative that it do so."; Statement of Mr Thomson (UK) at the

4950th meeting of the Security Council on 22 April 2004; UN-Doc. S/PV.4950 at 11. Russia made at similar point, cf. Statement of Mr Gatilov (Russian Federation) at the 4950th meeting of the Security Council on 22 April 2004; UN-Doc. S/PV.4950 at 16. At the adoption of the resolution France observed: “With regard to proliferation, the Security Council draws its legitimacy to act from the Charter of the United Nations.”; Statement of Mr De La Sablière (France) at the 4956th meeting of the Security Council on 28 April 2004; UN-Doc. S/PV.4956 at 2.

⁹⁵ SC-Res. 1566 of 8 October 2004.

⁹⁶ Cf. the statement of Pakistan quoted above. At the public debate the Philippines, a SC-Member at the time, stated: “This resolution deviates from time-tested modes of creating multilateral obligations but my delegation essentially regards it as an exceptional measure to address a new and urgent potential threat not covered by existing treaty regimes.”; Statement of Mr Baja (Philippines) at the 4950th meeting of the Security Council on 22 April 2004; UN-Doc. S/PV.4950 at 3.

⁹⁷ The restricting referral to the “principles of international law” foreseen in Article 24 only applies to “peaceful means” envisaged under Chapter VI; Kelsen, *The Law of the United Nations* (1951), 96, 275 and 295.

⁹⁸ See Bedjaoui, *The New World Order and the Security Council – Testing the Legality of its Acts* (1994), 32-36; Gowland-Debbas, *The Functions of the United Nations Security Council in the International Legal Order*, in Byers (ed.) *The Role of Law in International Politics* (2000), 277; Lamb, *Legal Limits to United Nations Security Council Powers*, in Goodwin-Gill / Talmon eds., *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999), 361 at 370-374.

⁹⁹ Such as, for instance, military sanctions, which would otherwise constitute violations of Article 2(4) and the customary principle of the non-use of force. Similar Macdonald, *Changing Relations between the International Court of Justice and the Security Council of the United Nations*, *CYIL* 31 (1993), 3 at 18. Writing before the Council adopted its two legislative resolutions Nolte stressed limits arising from the preliminary and situation-specific enforcement function of the Council; Nolte, *The Limits of the Security Council’s Powers and its Functions in the International Legal System: Some Reflections*, in Byers (ed.) *The Role of Law in International Politics* (2000), 315 at 321.

¹⁰⁰ Franck, *Fairness in the International Legal and Institutional System*, *Recueil des Cours* 240 (1993), 190.

¹⁰¹ Macdonald, *Fundamental Norms in Contemporary International Law*, *CYIL* 25 (1987), 115 at:128, 134; Pellet, *La formation du droit international dans le cadre des Nations Unies*, *EJIL* 6 (1995), 401:at 423-424. The question whether the Council is bound by peremptory norms is dealt with by Frowein/Krisch, Chapter VII in Simma (ed.), *The Charter of the United Nations* (2nd edition; 2002), 705 at 711, with further references.

¹⁰² Martenczuk, *The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?*, *EJIL* 10 (1999), 517 at 544-546. However, he does not believe the Council is bound by *ius cogens* when acting under Chapter VII. Schweigman believes that the Security Council is bound to respect the Vienna Convention of the Law of Treaties because it is a treaty organ and, whenever it exercises its “quasi-judicial” authority, customary international law; Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter* (2001), 203.

¹⁰³ Guillaume stated in reference to the adoption of SC-Res. 1373: “In so acting, the Council rendered certain purely treaty rules binding on all Member States of the United Nations and thus assumed the role of a true international legislator.”; Guillaume, *Terrorism and International Law*, Grotius Lecture at the British Institute of International and Comparative Law, held on 13 November 2003, 8.

¹⁰⁴ Statement of Mr Baali (Algeria) at the 4950th meeting of the Security Council on 22 April 2004; UN-Doc. S/PV.4950 at 5.

¹⁰⁵ According to Combacau the determination by the Security Council itself actually constitutes the existence of a threat; Combacau, *Le Chapitre VII de la Charte des Nations Unies: Résurrection ou Métamorphose ?*, in Ben Achour, Laghmani (eds.), *Les nouveaux aspects du droit international*, Colloque des 14,15 et 16 Avril 1994 (1994), 139 at 45 and 47. The main limitation is self-constraint out of concern for the Council’s credibility; Brownlie, *International Law at the Fiftieth Anniversary of the United Nations*, *Recueil des Cours* (1995), 9 at 226. The veto serves as a procedural tool to prevent abuse of powers; Herdegen, *The “Constitutionalization” of the UN Security System*, *Vanderbilt Journal of Transnational Law* 27 (1994), 135 at 152-153.

¹⁰⁶ Statement of Mr Danesh-Yazdi (Islamic Republic of Iran) at the 4950th meeting of the Security Council on 22 April 2004; UN-Doc. S/PV.4950 at 32. Cf. also the statement of Indonesia quoted above.

¹⁰⁷ Statement of Mr Arias (Spain) at the 4950th meeting of the Security Council on 22 April 2004; UN-Doc. S/PV.4950 at 7.

¹⁰⁸ Henkin, *International Law: Politics, Values and Functions*, *Recueil des Cours* 216 (1989), 46. See also the judgment of the Permanent Court of International Justice in the Lotus Case (France v. Turkey), *PCIJ Series A Number 10* (1927), 18.

¹⁰⁹ Pellet, *La formation du droit international dans le cadre des Nations Unies*, *EJIL* 6 (1995), 401at:418-419. The recent practice is described by Mahhubani, *The Permanent and Elected Council Members*, in Malone (ed.), *The UN Security Council – From the Cold War to the 21st Century* (2004), 253.

¹¹⁰ The Security Council could attempt to create norms that benefit nationals that the permanent members want to reward, such as their own, more than other nationals.

¹¹¹ See, generally, to the potentially negative consequences of increasing powers of the Security Council Koskenniemi, *The Police in the Temple – Order, Justice and the UN: A Dialectical View*, *EJIL* 6 (1995), 325 at

338-339, 341 – 348; Arangio-Ruiz, *On the Security Council's Law-Making*, *Rivista di Diritto Internazionale* 83 (2000), 609 at 630, 686-688, 700. In 1950 Kelsen wrote: "The veto right of the five permanent members of the Security Council, which places the privileged powers above the law of the United Nations, establishes their legal hegemony over all the other members of the Organisation and thus stamps on it the mark of an autocratic or aristocratic regime."; Kelsen, *The Law of the United Nations* (1951), 276.

¹¹² Though rare, States will oppose Council decisions: The Organization of African States decided in 1998 not to implement the flight ban against Libya. See also the reaction of India to SC-Res. 1540 discussed above.

¹¹³ The P5 have, over the past years, supported measures to increase transparency and the participation of the wider membership in Council activity. Briefings of Special Representatives of the Secretary General are now regularly held in open meetings to enable the passive participation of the wider membership. See also Hulton, *Council Working Methods and Procedure*, in Malone (ed.), *The UN Security Council – From the Cold War to the 21st Century* (2004), 237 at 242-243.

¹¹⁴ In rejecting the pessimistic appraisals of the Security Council as a danger to the international rule of law and the independence of States Fassbender writes: "At the end of the twentieth century, the world clearly requires an exercise of more, not less authority on a global level; and international lawyers, this reviewer believes, should encourage this development rather than warn against it. For the alternative is either inertia or unilateral action taken by a State or group of States without assuring the target State and the general membership of the international community of that minimum of participation and procedural justice which is characteristic of the decision-making process of the Security Council."; Fassbender, *Quis iudicabit? The Security Council, Its Power and Its Legal Control*, *EJIL* 11 (2000), 219 at 220.

¹¹⁵ Szasz, *The Security Council Starts Legislating*, *AJIL* 96 (2002), 901. Though not comparable to the creation of international law for States, the experience in localized UN-administrations like those in Kosovo and East Timor shows that the UN is, in principle, capable of enacting legislation. See von Carlowitz, *Crossing the Boundary from the International to the Domestic Realm: UNMIK Lawmaking and Property Rights in Kosovo*, *Global Governance* 10 (2004), 307.

¹¹⁶ Kirgis, *The Security Council's first Fifty Years*, *AJIL* 89 (1995), 506 at 517. This applies also to norms that demand States to sacrifice their existence; Herdegen, *The "Constitutionalization" of the UN Security System*, *Vanderbilt Journal of Transnational Law* 27 (1994), 135 at 156.

¹¹⁷ Macdonald, *Changing Relations between the International Court of Justice and the Security Council of the United Nations*, *CYIL* 31 (1993), 3 at 31.

¹¹⁸ Szasz, *The Security Council Starts Legislating*, *AJIL* 96 (2002), 901 at 904.

¹¹⁹ Article 2(7) serves as the principle safeguard protecting the domestic jurisdiction of the States. However, it is not applicable under Chapter VII-enforcement. As explained above, the term "enforcement" is not defined in the Charter and, if legislation is possible under Chapter VII, it could also be applied to all fields of the law.

¹²⁰ Pellet, *La formation du droit international dans le cadre des Nations Unies*, *EJIL* 6 (1995), 401at:420. Zemanek writes: "It seems that, since the Council started working properly after 1989, its permanent members, once they come to an understanding among themselves, feel not really constrained in their decision-making by provisions of the Charter or by rules of international law if it suits their combined interests; and they are apparently able to persuade other Council members to fall into line."; Zemanek, *The Legal Foundations of the International System*, *Offprint from the Recueil des Cours* 266 (1997), 93.

¹²¹ See to the Charter provisions Fassbender, *Uncertain Steps into a Post-Cold War World: The Role and Functioning of the UN Security Council after a Decade of Measures against Iraq*, *EJIL* 13 (2002) 273 at 288-292.

¹²² The Council would notify the Committee, share information on which the deliberations were based and solicit the Committee's views; Reisman, *The Constitutional Crisis in the United Nations*, *AJIL* 87 (1993), 83 at 99. Franck suggested a power-sharing arrangement between the organs before the establishment of peace-keeping operations; Franck, *The United Nations as Guarantor of International Peace and Security* in Tomuschat (ed.), *The United Nations at Fifty – A Legal Perspective* (1995), 25 at 36. An advisory role could also be foreseen for the International Law Commission, a body that assists the General Assembly in the creation of international law, but its working methods are hardly compatible with the urgency required under Chapter VII.

¹²³ GA-Res. 267 (III) of 14 April 1949.

¹²⁴ Most proposals focus on the General Assembly not only because it is the only organ comprising all Member States of the UN but also because Article 13(a) gives it the competence in the field of progressive development of international law. Another UN-organ that could serve as guardian of the equal rights of the States in the creation of international norms is the ICJ. The difficult relationship between the executive and the judicial organ of the UN has been dealt with in detail in literature, especially after the Lockerbie incident. The main concern is that review of the ICJ would undermine the authority by the Council; Alvarez, *Judging the Security Council* *AJIL* 90 (1996), 1, with many further references. Currently, any inter-institutional procedure or review-function is entirely unrealistic. With adequate imaginative spirit two possible functions come to mind: The ICJ could assist the Council by means of an advisory opinion on the legal implications of the legislative project before the decision is taken; or the resolution could provide a mechanism by which an Advisory Opinion is requested whenever a dispute concerning the scope, content and, possibly, even the applicability of the norms arises. The Court would thus assist the Council in interpreting the norms but would not interfere in questions of

enforcement. The States would be reassured that a body mandated to ensure respect for international law would be available to protect their interests.

¹²⁵ The experience of Ambassadors, who wait for hours to declare their States' vital concerns to a gradually diminishing group of visibly bored Third Secretaries seated around the Council table, increases the level of frustration of Non-Council Members with every public debate.

¹²⁶ Hume, *The Security Council in the Twenty-First Century*, in Malone (ed.), *The UN Security Council – From the Cold War to the 21st Century* (2004), 607 at 613.

¹²⁷ Szasz, *The Security Council Starts Legislating*, *AJIL* 96 (2002), 901 at 905.